

Eyewitness Identification: Tools for Litigating the Identification Case

Kathryn M. Kase
TEXAS DEFENDER SERVICE

Presented at:
TCDLA 7th Annual Forensics Seminar
October 23, 2009
Houston

Contents:

- 1) Texas Public Information Act request letter for police procedures regarding eyewitness identification
- 2) Defendant's Motion for Discovery of Identification Evidence and proposed Order
- 3) Defendant's *Brady* Demand for Exculpatory and Mitigating Evidence Related to Eyewitness Identification and proposed Order
- 4) Motion for Appointment of Eyewitness Identification Expert
- 5) Subpoena *duces tecum* schedule for production of police procedures regarding eyewitness identification
- 6) Subpoena *duces tecum* schedule for production of eyewitness identification evidence in the case at bar
- 7) Motion to Suppress Out of Court Identifications and to Preclude In Court Identifications
- 8) Voir Dire – Questions for jury questionnaire in identification case
- 9) Voir Dire – Questions for jury selection in identification case

This Texas Public Information Act letter should be sent to every law enforcement agency involved in the apprehension of your client. It should be sent as early as possible in the case as the documents sought here can assist you in litigating out-of-court identifications arranged by the police.

[Date]

[Name of Law Enforcement Agency]

ATTN: PIA Officer

[Address]

[City], TX [ZIP]

Re: Public Information Act Request

Dear Officer for Public Records:

This request is made under the Texas Public Information Act, which is set out in Chapter 552 of the Texas Government Code and which guarantees the public's access to information in the custody of governmental agencies. I respectfully request copies of the following information:

- (1) Any documents (e.g., statements of policy, staff manuals or guidelines, handbooks, and/or training or instructional materials) dealing with the collection of eyewitness evidence. This includes but is not limited to any documents regarding:
 - (a) interview techniques for eyewitnesses,
 - (b) construction of photo arrays, lineups, and showups,
 - (c) the method of display to the eyewitness -- simultaneous or sequential presentation of the suspect and fillers,
 - (d) instructions given to witnesses viewing photo arrays and lineups,
 - (e) the setting in which identification procedures are held,
 - (f) whether the officer(s) conducting the identification procedure are "blind" (i.e., whether the officer

**DEFENDANT'S MOTION FOR
DISCOVERY OF IDENTIFICATION EVIDENCE**

The Defendant, by and through Counsel and pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the UNITED STATES CONSTITUTION and Article 1, Sections 9, 10, 13 & 19 of the TEXAS CONSTITUTION and in support of his right to a full and fair hearing under both the state and federal constitutions, files this Motion for Discovery of Identification Evidence and in support would show that the Defendant requests discovery and preservation as follows:

I.

The Defendant would show that certain evidence exists that is crucial to the defense of the instant case. The State of Texas is in possession of evidence showing that [name law enforcement agency] engaged in certain identification procedures, including [specify whether showup, lineup and/or photo spread].

Accordingly, the Defendant seeks the following:

- (1) All police reports, 911 recordings and/or transcripts, transcripts of witness testimony from hearings or any other documents or recordings containing an account of the verbal description(s) given by witnesses of the suspected perpetrator(s), their opportunity to view the event, the viewing conditions, and descriptions of the event(s) that caused them to associate individuals with the event(s);
- (2) The identities of all law enforcement officers, agency employees, and others from related officers (including the prosecuting agency) who participated in each identification procedure. This request includes, but is not limited to seeking, the every officer and non-officer one who spoke with the witness before, during or after the identification procedure;
- (3) All recordings, written statements, sworn testimony or notes by observers regarding field identifications (also known as showups);
- (4) All documents, recordings or computerized records detailing whether the purported eyewitness(es) participated in constructing composites, artists drawings or viewed other images (surveillance tapes, etc.) intended to represent the appearance of the perpetrator;

- (5) Where purported eyewitnesses participated in constructing composites, artists drawings or viewed other images intended to represent the appearance of the perpetrator, a high-quality copy of the image constructed is sought;
- (6) All recordings and/or documentation memorializing the instructions or other commentary given to the witness(s) by law enforcement prior to the identification procedure about the nature of the identification task and particularly whether or not the police thought they had the criminal in custody;
- (7) All instructions given to the witness during the identification procedure, as recalled/documented by the administering officer and, independently, by the witness;
- (8) All recordings and/or documentation regarding the conditions under which the identification procedure was administered (separation of witnesses prior to the procedure, separation of the lineup members from witnesses, etc.), as described by the administering officer and, independently, by the witness;
- (9) All recordings and/or documentation about the exact questions asked of the eyewitness during the identification (“Do you recognize anyone?”, or “Is the person who [did the crime] present, and if so, which one is s/he?”) and the exact wording of the witness’s actual identification statement, whether there was a form signed and what the alternative responses were;
- (10) All recordings and/or documentation about the comments of the officers to the witness(es) following the identification procedure, as described by the administering officer and, independently, by the witness(es);
- (11) All media statements, social network postings, and associated photographs or videos distributed by the law enforcement agency or any other agency working with law enforcement regarding the effort to find the perpetrator or regarding any arrests;
- (12) All documents and/or recordings providing information about the

witness' statements of confidence in the accuracy of his/her identification;

- (13) A copy of the policy and procedure manual regarding the general principles and specific procedures related to construction of lineups, instructions to witnesses, administration of identification procedures, and record keeping with respect to the witness' identification statement, statements of confidence in the identification, and related materials;
- (14) A high quality, high-resolution copy of the photo lineup (also known as a photo spreadsheet) shown to the witness(es) in this case. If administered by computer, a copy of the materials displayed including instructions, the lineup, and the witness's responses, also are sought.

II.

Mistaken identification is the leading cause of some 223 wrongful convictions uncovered through post-conviction DNA testing. These exonerations, coupled with the last 30 years of extensive scientific research on the delicacy of memory as it relates to eyewitness identifications, demonstrate that identification evidence, while extraordinarily persuasive to juries, is often unreliable. *See, e.g.,* Elizabeth F. Loftus, EYEWITNESS TESTIMONY 9 (1979) (“[j]urors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence”).

In response to the scourge of wrongful convictions caused by mistaken identifications, in 1999, the Department of Justice (DOJ), following its 1996 analysis of twenty-eight wrongful convictions in which it highlighted the “need in the legal system for improved criteria for evaluating the reliability of eyewitness identification,” issued Guidelines recommending better eyewitness identification procedures. *See* U.S. Dep’t of Justice, CONVICTED BY JURIES, EXONERATED BY SCIENCE_24 (1996), available at www.ncjrs.gov/pdffiles/dnaevid.pdf (regarding need for improved criteria); *see also* U.S. Dep’t of Justice, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at www.ncjrs.gov/pdffiles1/nij/178240.pdf; U.S. Dep’t of Justice, EYEWITNESS EVIDENCE: A TRAINER’S MANUAL FOR LAW ENFORCEMENT 42 (2003), available at www.ncjrs.gov/nij/eyewitness/188678.pdf.

As critical as the GUIDELINES are to “ensur[ing] that the criminal justice system will fairly and effectively elicit accurate and reliable eyewitness evidence,” the fact remains that individual trial courts have the responsibility, in the first instance, of determining whether a particular identification procedure was within constitutional limits.¹ That determination cannot be made here unless the defense has full, fair and complete access to all evidence regarding the identification in issue here. Without this access, the defense will be unable to litigate the constitutionality of the identification procedure that led to [CLIENT NAME]’s arrest and prosecution.

Accordingly, the information sought in this Motion is necessary to the defense to determine whether the identification performed by the authorities was unduly suggestive and, therefore, inadmissible. This information is material and relevant to the defense of the instant case.

III.

In support of this Motion, the Defendant would show the Court as follows:

a. The items requested are in the exclusive possession, custody and control of the State of Texas by and through its agents, the police and the prosecuting attorney's office, and the Defendant has no other means of ascertaining

¹ The law holds that any due process challenge to the admissibility of identification evidence requires a two-prong inquiry. First, the court must determine whether the procedures utilized to obtain the identification were impermissibly suggestive. *Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988), *cert. denied*, 491 U.S. 910 (1989); *Williams v. State*, 675 S.W.2d 754, 757 (Tex. Crim. App. 1984). This analysis hinges on the objective characteristics of the identification procedure itself and failure to meet this prong renders further examination of the identification procedures unnecessary. *Webb*, 760 S.W.2d at 269. For example, a one-man showup, where a witness is shown a single suspect and asked if that suspect is the perpetrator, is “so unnecessarily suggestive and conducive to irreparable mistaken identification that it constitute[s] a denial of due process.” *Manson v. Brathwaite*, 432 U.S. 98, 104 (1977).

The second prong requires analysis of whether the suggestive procedures gave rise to a substantial likelihood of irreparable misidentification. *Manson*, 432 U.S. at 114-17; *Neil v. Biggers*, 409 U.S. 188, 199-201 (1972); *Herrera v. Collins*, 904 F.2d 944, 946-48 (5th Cir. 1990), *cert. denied*, 498 U.S. 925 (1990). The factors to be considered in making this determination are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and, (5) the time between the crime and the confrontation. *Manson*, 432 U.S. at 114.

the disclosures requested.

b. The items requested are not privileged.

c. The items and information are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause.

d. The Defendant cannot safely go to trial without such information and inspection, nor can the Defendant adequately prepare the defense to the charges against him.

e. That absent such discovery, the Defendant's rights under Art. 39.14, *Tex. Code Crim. Pro.*, Art. I, Sec. 10 of the *Texas Constitution*, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the *United States Constitution* will be violated, to his irreparable injury and thus deprive the Defendant of a fair trial herein.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will grant the Defendant's Motion for Discovery and Preservation of Specific Evidence in all things; or in the alternative, that this Court schedule this matter for a hearing prior to trial on the merits and that at such hearing this Motion will be in all things granted.

DISCOVERY ORDER

CAME ON TO BE HEARD this _____ day of _____ 2009, Defendant's Motion for Discovery of Identification Evidence. The Court, having read the motion and having heard the arguments of the parties, is of the opinion that the information sought is relevant and material to the defense and that the Motion should be, in all things, GRANTED.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that the State of Texas must give the Defendant access to the following information:

- (1) All police reports, 911 recordings and/or transcripts, transcripts of witness testimony from hearings or any other documents or recordings containing an account of the verbal description(s) given by witnesses of the suspected perpetrator(s), their opportunity to view the event, the viewing conditions, and descriptions of the event(s) that caused them to associate individuals with the event(s);
- (2) The identities of all law enforcement officers, agency employees, and others from related officers (including the prosecuting agency) who participated in each identification procedure. This request includes, but is not limited to seeking, the every officer and non-officer one who spoke with the witness before, during or after the identification procedure;
- (3) All recordings, written statements, sworn testimony or notes by observers regarding field identifications (also known as showups);
- (4) All documents, recordings or computerized records detailing whether the purported eyewitness(es) participated in constructing composites, artists drawings or viewed other images (surveillance tapes, etc.) intended to represent the appearance of the perpetrator;
- (5) Where purported eyewitnesses participated in constructing composites, artists drawings or viewed other images intended to represent the appearance of the perpetrator, a high-quality copy of the image constructed is sought;
- (6) All recordings and/or documentation memorializing the instructions

or other commentary given to the witness(s) by law enforcement prior to the identification procedure about the nature of the identification task and particularly whether or not the police thought they had the criminal in custody;

- (7) All instructions given to the witness during the identification procedure, as recalled/documentated by the administering officer and, independently, by the witness;
- (8) All recordings and/or documentation regarding the conditions under which the identification procedure was administered (separation of witnesses prior to the procedure, separation of the lineup members from witnesses, etc.), as described by the administering officer and, independently, by the witness;
- (9) All recordings and/or documentation about the exact questions asked of the eyewitness during the identification (“Do you recognize anyone?”, or “Is the person who [did the crime] present, and if so, which one is s/he?”) and the exact wording of the witness’s actual identification statement, whether there was a form signed and what the alternative responses were;
- (10) All recordings and/or documentation about the comments of the officers to the witness(es) following the identification procedure, as described by the administering officer and, independently, by the witness(es);
- (11) All media statements by the law enforcement agency or any other agency working with law enforcement regarding arrests;
- (12) All documents and/or recordings providing information about the witness’ statements of confidence in the accuracy of his/her identification;
- (13) A copy of the policy and procedure manual regarding the general principles and specific procedures related to construction of lineups, instructions to witnesses, administration of identification procedures, and record keeping with respect to the witness’ identification statement, statements of confidence in the identification, and related materials;

- (14) A high quality, high-resolution copy of the photo lineup (also known as a photo spreadsheet) shown to the witness(es) in this case. If administered by computer, a copy of the materials displayed including instructions, the lineup, and the witness's responses, also are sought.

The Court further ORDERS that the discovery granted herein shall be produced to the Defendant for inspection, copying and or photographing as necessary on or before the below date and time and place specified:

Date: _____

Time: _____

Place: _____

SIGNED on this the ___ day of _____, 200__.

JUDGE PRESIDING

BRADY DEMAND FOR EXCULPATORY AND MITIGATING EVIDENCE RELATED TO EYEWITNESS IDENTIFICATION

COMES NOW, the Defendant, [CLIENT NAME], by and through Counsel and pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the UNITED STATES CONSTITUTION and Article 1, Sections 9, 10, 13 & 19 of the TEXAS CONSTITUTION and in support of his right to a full and fair hearing under both the state and federal constitutions, and files this Motion for Exculpatory and Mitigating Evidence (Brady Material); and in support thereof would show that the Defendant requests discovery as follows:

I.

In a criminal case, the Defendant is entitled to have the State disclose to him any evidence that may be exculpatory on the issue of guilt or mitigating on the issue of punishment, including all impeaching material. *Brady v. Maryland*, 373 U.S. 83 (1963). Furthermore, the Defendant is entitled to have the State make inquiry into the existence of any exculpatory or mitigating material. *Kyles v. Whitley*, 514 U.S. 419 (1995).

This is a case that involves the purported identification of the Defendant by a purported eyewitness. A great deal of scientific research by psychologists in the area of eyewitness identification has yielded a number of findings as to factors that correlate positively and negatively with accurate eyewitness identification. The requests for information are based on this research and therefore are material in the preparation of the Defendant's defense and potentially defense-favorable evidence that must be turned over as *Brady*.

The State has the obligation to search in and/or inquire of all the sources of your evidence to determine if information and evidence favorable to the defense exists. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (prosecution "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police,"); *see also Strickler v. Greene*, 527 U.S. 263, 275, n. 12 (1999) (prosecutor has constructive knowledge of all favorable evidence known to those acting on the government's behalf, even if no actual knowledge of materials, and even if materials are in the file of another jurisdiction's prosecutor); *United States v. Safavian*, 233 F.R.D. 205, 207 (D.D.C. 2006) (prosecutor has a duty to

search and disclose *Brady* evidence, within reason, in the possession of all Executive Branch agencies and departments, rather than solely the agencies “closely aligned” with the prosecution.).

II.

Although there is an affirmative duty on the State to provide exculpatory and mitigating evidence to the Defendant, the Defendant asks this Honorable Court to formally order the State to make inquiry and provide all such material in a timely manner so that the Defendant can effectively prepare for trial in this case.

III.

The Defendant’s request for disclosure of exculpatory and mitigating evidence includes, but is not limited to, the following evidence regarding any witnesses the State intends to call for the purpose of providing eyewitness identification in this case:

- 1) Condition of Eyewitness at time of viewing subject of identification
 - a) Any problems with sight? Needs corrective lens? History of vision problems?
 - b) Any problems with mental functioning? Memory? Attention? Mental disorders?
 - c) Age of the eyewitness?
 - d) Under the influence of alcohol or any drug at the time of the incident?
 - e) Any limitations in verbal ability and ability to describe?
 - f) Is witness of a different race or ethnic group from subject identified?
 - g) Is witness of a different gender from subject identified?
 - h) Was witness stressed or aroused at time of viewing? If so, from what causes and to what extent?
 - i) Was the witness familiar with the subject from contact or interaction before the incident? If there is information about the history of contact between eyewitness and subject, what is the source of that information and has it been corroborated?
- 2) Opportunity to view subject of identification
 - a) What was the length of time eyewitness was able to view subject of

identification?

- i) If there is information as to the length of viewing time, what is the source of that information – the eyewitness, another witness, or another source?
- b) During duration of eyewitness viewing subject, were there any visual obstructions between witness and subject?
- c) What were the lighting conditions at the time of the incident?
- d) During period of viewing, did any events or circumstances distract witness?
- e) Specifically, did the incident involve any weapons or violent acts?

3) Post-incident Circumstances

- a) What was the length of time between the incident and the witness' first identification of subject?
- b) How many identifications were made? At what times and under what circumstances were these identifications made?
- c) Were there attempts at identification that did not result in positive identifications? If so, how many and under what circumstances?
- d) After the incident, did the eyewitness have any association with other witnesses to the incident?
- e) At any time after the incident, did the witness indicate any level of confidence or lack of confidence in his/her ability to make an identification?
- f) What description, if any, was given by the eyewitness of the subject? Facial characteristics? Clothing? Height and weight? Age? Race or ethnicity? Gender? Distinctive characteristics?
- g) What questions were asked of the eyewitness to prompt a description of the subject?
- h) What information did police or others give to the eyewitness concerning the incident or any suspect *before* the eyewitness made an identification?
- i) What comments did the police or others make or information did police or others give to the eyewitness concerning the incident or any suspect *after* the eyewitness made an identification?

4) Identification Procedures

- a) If the eyewitness initially identified a subject during a show-up procedure, please provide all details of how police conducted the

show-up, including but not limited to:

- i) Where was the eyewitness when the subject was presented?
 - ii) Was more than one subject presented? Simultaneously or sequentially?
 - iii) What were the viewing conditions, including distance from the subject and any obstructions between eyewitness and subject?
 - iv) Were any other witnesses present during or immediately before or after the procedure?
 - v) What, if anything, was said to the eyewitness before the subject was presented?
 - vi) What, if anything, was said to the eyewitness *after* the subject was presented?
 - (1) Did the eyewitness comment on any other subject involved in the show-up?
 - (2) Did the eyewitness identify any other subject involved?
 - vii) What, if anything, did the eyewitness say before the identification procedure? After the identification procedure or at any time during contact with police or prosecutors concerning this case?
 - viii) Was the subject in handcuffs when presented to the eyewitness?
 - ix) Was any police officer conducting the procedure familiar with the case?
- b) If the eyewitness initially identified the subject when presented with a photographic array, please provide all details of how police conducted the photographic array procedure, including but not limited to:
- i) How many photos in the array?
 - ii) How were these photos selected?
 - iii) How many arrays did the eyewitness view?
 - iv) Were these photos presented to the eyewitness sequentially or simultaneously?
 - v) Was the police official who created the array familiar with the case?
 - vi) Was any police officer involved in the identification procedure familiar with the case?
 - vii) Were any other witnesses present during or immediately before or after the procedure?
 - viii) What instructions were given to the eyewitness before the array was presented?
 - ix) What, if anything, was said to the eyewitness after the array was

presented?

(1) Did the eyewitness comment on any of the other photos in the array?

(2) Did the eyewitness identify any other subject from the photo array or arrays?

x) What, if anything, did the eyewitness say before the identification procedure? After the identification procedure or at any time during contact with police or prosecutors concerning this case?

c) If the eyewitness initially identified the subject when presented with an actual line-up, please provide all details of how police conducted the line-up procedure, including but not limited to:

i) How many individuals in the line-up?

ii) How were these individuals selected?

iii) Were these individuals selected by an officer familiar with the case or not familiar with the case?

iv) Was any police officer involved in the identification procedure familiar with the case?

v) Was an attempt made to select individuals for the line-up whose physical characteristics matched descriptions given of the suspect by eyewitnesses?

vi) How many line-ups did the eyewitness view?

vii) Were any other witnesses present during or immediately before or after the procedure?

viii) What instructions were given to the eyewitness before the line-up was conducted?

ix) What, if anything, was said to the eyewitness after the line-up was conducted?

(1) Did the eyewitness comment on any of the individuals in the line-up?

(2) Did the eyewitness identify any other individual from the line-up or line-ups?

x) What, if anything, did the eyewitness say before the identification procedure? After the identification procedure or at any time during contact with police or prosecutors concerning this case?

xi) Was any document given to the eyewitness either before or after the procedure to be read or to be marked on? If so, be sure to provide these documents.

IV.

In support of this Motion, the Defendant would show the Court as follows:

a. The items requested are in the exclusive possession, custody and control of the State of Texas or the United States Government by and through its agents, the police and the prosecuting attorney's office, and the Defendant has no other means of ascertaining the disclosures requested.

b. The items requested are not privileged.

c. The items and information are material to this cause and the issues of guilt or innocence and punishment to be determined in this cause.

d. The Defendant cannot safely go to trial without such information and inspection, nor can the Defendant adequately prepare the defense to the charges against him.

e. That absent such discovery, the Defendant's rights under TEX. CODE CRIM. PRO. Art. 39.14, Art. I, Sec. 10 of the TEXAS CONSTITUTION, and the Fourth, Fifth, Sixth and Fourteenth Amendments to the UNITED STATES CONSTITUTION will be violated, to his irreparable injury and thus deprive the Defendant of a fair trial.

V.

The Defendant further requests that this Honorable Court order the State to deliver a copy of its entire file, in this case (including all work product), to the Court for an *in camera* inspection so that the Court can determine if the file contains any exculpatory or mitigating evidence that the State has not provided to the Defendant herein. After the Court has inspected the file *in camera*, the Defendant would request that the Court provide to the Defendant any material that is deemed exculpatory or mitigating on the issue of guilt or punishment in the instant case. The Defendant requests that the file delivered by the State to the Court be sealed and made part of the record, in this case, for possible appellate review.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will grant the Defendant's Motion for Exculpatory and Mitigating Evidence Related to Eyewitness Identification in all things; or in the alternative, that this Court schedule this matter for a hearing prior to trial on the merits and that at such hearing this Motion will be in all things granted.

Respectfully submitted

DATED: [DATE]
[CITY], Texas

[ATTORNEY BLOCK]

Counsel to [CLIENT NAME]

CERTIFICATE OF SERVICE

I hereby certify that on the [DATE], I caused a true and correct copy of the foregoing motion to be served by hand delivery upon:

[NAME AND ADDRESS OF PROSECUTOR]

[NAME OF ATTORNEY]

ORDER

CAME ON TO BE HEARD this _____ day of _____ 2009, Defendant's Motion for Exculpatory and Mitigating Evidence Related to Eyewitness Identification. The Court, having read the motion and having heard the arguments of the parties, is of the opinion that the information sought is relevant and material to the defense and that the Motion should be, in all things, GRANTED.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that the State of Texas shall provide the Defendant with the following information regarding every identification witness the State intends to call at hearing or at trial:

- 1) Condition of Eyewitness at time of viewing subject of identification
 - a) Any problems with sight? Needs corrective lens? History of vision problems?
 - b) Any problems with mental functioning? Memory? Attention? Mental disorders?
 - c) Age of the eyewitness?
 - d) Under the influence of alcohol or any drug at the time of the incident?
 - e) Any limitations in verbal ability and ability to describe?
 - f) Is witness of a different race or ethnic group from subject identified?
 - g) Is witness of a different gender from subject identified?
 - h) Was witness stressed or aroused at time of viewing? If so, from what causes and to what extent?
 - i) Was the witness familiar with the subject from contact or interaction before the incident? If there is information about the history of contact between eyewitness and subject, what is the source of that information and has it been corroborated?

- 2) Opportunity to view subject of identification
 - a) What was the length of time eyewitness was able to view subject of identification?
 - i) If there is information as to the length of viewing time, what is the source of that information – the eyewitness, another witness, or another source?
 - b) During duration of eyewitness viewing subject, were there any visual

- obstructions between witness and subject?
- c) What were the lighting conditions at the time of the incident?
 - d) During period of viewing, did any events or circumstances distract witness?
 - e) Specifically, did the incident involve any weapons or violent acts?

3) Post-incident Circumstances

- a) What was the length of time between the incident and the witness' first identification of subject?
- b) How many identifications were made? At what times and under what circumstances were these identifications made?
- c) Were there attempts at identification that did not result in positive identifications? If so, how many and under what circumstances?
- d) After the incident, did the eyewitness have any association with other witnesses to the incident?
- e) At any time after the incident, did the witness indicate any level of confidence or lack of confidence in his/her ability to make an identification?
- f) What description, if any, was given by the eyewitness of the subject? Facial characteristics? Clothing? Height and weight? Age? Race or ethnicity? Gender? Distinctive characteristics?
- g) What questions were asked of the eyewitness to prompt a description of the subject?
- h) What information did police or others give to the eyewitness concerning the incident or any suspect *before* the eyewitness made an identification?
- i) What comments did the police or others make or information did police or others give to the eyewitness concerning the incident or any suspect *after* the eyewitness made an identification?

4) Identification Procedures

- a) If the eyewitness initially identified a subject during a show-up procedure, please provide all details of how police conducted the show-up, including but not limited to:
 - i) Where was the eyewitness when the subject was presented?
 - ii) Was more than one subject presented? Simultaneously or sequentially?
 - iii) What were the viewing conditions, including distance from the

- subject and any obstructions between eyewitness and subject?
 - iv) Were any other witnesses present during or immediately before or after the procedure?
 - v) What, if anything, was said to the eyewitness before the subject was presented?
 - vi) What, if anything, was said to the eyewitness *after* the subject was presented?
 - (1) Did the eyewitness comment on any other subject involved in the show-up?
 - (2) Did the eyewitness identify any other subject involved?
 - vii) What, if anything, did the eyewitness say before the identification procedure? After the identification procedure or at any time during contact with police or prosecutors concerning this case?
 - viii) Was the subject in handcuffs when presented to the eyewitness?
 - ix) Was any police officer conducting the procedure familiar with the case?
- b) If the eyewitness initially identified the subject when presented with a photographic array, please provide all details of how police conducted the photographic array procedure, including but not limited to:
- i) How many photos in the array?
 - ii) How were these photos selected?
 - iii) How many arrays did the eyewitness view?
 - iv) Were these photos presented to the eyewitness sequentially or simultaneously?
 - v) Was the police official who created the array familiar with the case?
 - vi) Was any police officer involved in the identification procedure familiar with the case?
 - vii) Were any other witnesses present during or immediately before or after the procedure?
 - viii) What instructions were given to the eyewitness before the array was presented?
 - ix) What, if anything, was said to the eyewitness after the array was presented?
 - (1) Did the eyewitness comment on any of the other photos in the array?
 - (2) Did the eyewitness identify any other subject from the photo array or arrays?

- x) What, if anything, did the eyewitness say before the identification procedure? After the identification procedure or at any time during contact with police or prosecutors concerning this case?

- c) If the eyewitness initially identified the subject when presented with an actual line-up, please provide all details of how police conducted the line-up procedure, including but not limited to:
 - i) How many individuals in the line-up?
 - ii) How were these individuals selected?
 - iii) Were these individuals selected by an officer familiar with the case or not familiar with the case?
 - iv) Was any police officer involved in the identification procedure familiar with the case?
 - v) Was an attempt made to select individuals for the line-up whose physical characteristics matched descriptions given of the suspect by eyewitnesses?
 - vi) How many line-ups did the eyewitness view?
 - vii) Were any other witnesses present during or immediately before or after the procedure?
 - viii) What instructions were given to the eyewitness before the line-up was conducted?
 - ix) What, if anything, was said to the eyewitness after the line-up was conducted?
 - (1) Did the eyewitness comment on any of the individuals in the line-up?
 - (2) Did the eyewitness identify any other individual from the line-up or line-ups?
 - x) What, if anything, did the eyewitness say before the identification procedure? After the identification procedure or at any time during contact with police or prosecutors concerning this case?
 - xi) Was any document given to the eyewitness either before or after the procedure to be read or to be marked on? If so, be sure to provide these documents.

The Court further ORDERS that the discovery granted herein shall be produced to the Defendant for inspection, copying and or photographing as necessary on or before the below date and time and place specified:

Date: _____

Time: _____

Place: _____

SIGNED on this the ____ day of _____, 200__.

JUDGE PRESIDING

Ex Parte, Verified and Confidential Motion No. 1:
(for Eyewitness Identification Expert)

Defendant, by counsel and pursuant to Tex. Code Crim. Proc. Art. 26.05(a) and the 5th, 6th, 8th, and 14th Amendments to the United States Constitution and Sections 10, 13, & 19 of Article I of the Texas Constitution, and other authority cited here, respectfully requests prepayment of expenses so that he may retain the services of an eyewitness identification expert who would assess whether appropriate procedures were followed here in obtaining the identification in issue and who would assist the defense in litigation this issue at trial. In support, Defendant would show:

I.
Background

Defendant has been charged with the felony crime of _____ and the proof of his involvement rests upon eyewitness identification evidence.

This Court previously has determined that the Defendant is indigent and unable to retain any expert assistance due to his indigent status. Defendant's status as an indigent has not changed. He has remained in jail since that prior determination and has not acquired any assets since then.

Expert assistance is necessary here to assist the defense in litigating the eyewitness identification that is at the core of this case. Expert assistance that assists in determining whether a defense is available satisfies the constitutional requirement that the assistance be relevant to a significant factor at trial. *Ake v. Okla.*, 470 U.S. 68 (1985). Here, because this case rests upon an eyewitness identification, the requested expert will assist the defense in determining whether the identification was obtained through suggestive means and, if so, will assist the defense in determining how to present its evidence to the jury at trial. Consequently, the request made here satisfies *Ake*'s requirements and should be granted.

II.
Discussion

Over the past 30 years, scientific researchers have made substantial strides in understanding the workings and limitations of human memory. Such discoveries frequently are relevant to criminal trials, for example:

- Accuracy-Confidence Correlation: an eyewitness' stated confidence is not a good predictor of identification accuracy;
- Stress Effects: highly stressful situations may make an experience seem especially vivid, but such stressors can reduce the ability to recall details about a person's face;
- Time Estimates: eyewitnesses typically overestimate how long an event took to unfold;
- Cross-race Bias: eyewitnesses are more accurate at identifying members of their own race than members of other races;
- Postevent Information: eyewitness testimony about an event often reflects not only what a person actually saw, but also information learned later on that unconsciously becomes part of the memory;
- Presentation Format: witnesses are more likely to misidentify someone when they view all the suspects simultaneously in a group rather than one at a time, in sequence.

See Brian L. Cutler, *EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESS* (2002); Brian L. Cutler & Steven D. Penrod, *MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY AND THE LAW* (1995); Elizabeth F. Loftus, *EYEWITNESS TESTIMONY* (1996).

Yet, despite this research, mistaken identification is the leading cause of some 223 wrongful convictions uncovered through post-conviction DNA testing. These exonerations, coupled with the last 30 years of extensive scientific research on the delicacy of memory as it relates to eyewitness identifications, demonstrate that identification evidence, while extraordinarily persuasive to juries, is often unreliable. *See, e.g.*, Elizabeth F. Loftus, *EYEWITNESS TESTIMONY* 9 (1979) (“[j]urors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence”).

A recent survey of potential jurors in the District of Columbia was designed to investigate whether jurors understand, as a matter of common sense, what makes some eyewitness identifications more or less reliable than others. The survey

results presented above demonstrate that jurors misunderstand how memory generally works and how particular factors, such as the effects of stress or the use of a weapon, affect the accuracy of eyewitness testimony. Jurors also misunderstand how eyewitnesses' stated levels of certainty correspond with accuracy. Richard S. Schmechel, Timothy P. O'Toole, Catharine Easterly, and Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177–214 (2006). These findings demonstrate that there is much critical scientific information about eyewitness identification that jurors simply do not understand and do not bring to the courtroom as a matter of course.

The research therefore strongly suggests that defense counsel must educate himself and, ultimately, the jurors, about the perils of eyewitness identification if he wishes to effectively represent the Defendant. This is part and parcel of his duty to conduct an independent investigation of the facts and circumstances of the case. *See, e.g., Ex parte Harris*, 596 S.W.2d 893 (Tex. Crim. App. 1980); *Ex parte Ybarra*, 629 S.W.2d 943 (Tex. Crim. App. 1982); *Ex parte Lilly*, 656 S.W.2d 490 (Tex. Crim. App. 1983). Eyewitness identification is one of the circumstances present here.

Defense counsel has no specialized training or experience in the science regarding eyewitness identification. It is for that reason, too, that counsel seeks expert assistance on the topic of eyewitness identification and the implications in this case of the scientific research.

III. Funds Sought

Defendant asks the court to approve the prepayment of funds for him to retain the services of _____, who is affiliated with _____ as _____. His resume is attached as Exhibit A.

_____ charges \$_____ per hour for his services and estimates he will require _____ hours of work to serve as an expert in this case. He expects to expend the following hours on the following activities:

Description of Proposed Activity	Time	Fee (\$_____/hour)

TOTAL		

Therefore, Defendant seeks prepayment from this Court of \$ _____ to obtain _____'s expert services, with leave to seek additional funds for his services, should it be determined that additional examination is required.

IV. Conclusion

This motion is made *ex parte*. If the undersigned counsel were retained by the accused, there would be no requirement that the State be notified of the retention of expert assistance. Accordingly, counsel moves that the Court's Order, finding that a threshold showing of necessity has been made, also contain the following language:

THIS ORDER AND THE DEFENDANT'S *EX PARTE* MOTION FOR FUNDING, SHALL BE SEALED IN THE RECORD AND PLACED IN AN ENVELOPE IN THE RECORD AND SHALL BE SEEN BY AND DISTRIBUTED TO DEFENSE COUNSEL AND THIS COURT ONLY.

WHEREFORE PREMISES CONSIDERED, Defendant prays that upon evidentiary hearing, this Court:

- (1) Find that a threshold showing has been made for appointment of an eyewitness identification expert as an essential tool in the presentation in defense of this case;
- (2) Approve initial funding in the amount of \$ _____ for ___ hours of work by _____;
- (3) Order that this motion and the Court's Order be sealed as prayed for here; and
- (4) Find that Defendant shall have such other and further relief as he may show himself to be justly entitled.

A proposed Order is attached for the Court's consideration.

Dated: September 11, 2009
Houston, TX

Respectfully submitted,

[ATTORNEY SIGNATURE BLOCK]

VERIFICATION

BEFORE ME, the undersigned authority, _____, personally appeared after having been duly sworn by me, upon oath deposes and says that she is counsel for the defendant in the above-entitled and numbered criminal action, and that the facts alleged in this *Ex Parte* Confidential and Verified Motion are true and correct to the best of my knowledge and belief.

SWORN TO AND SUBSCRIBED before me by _____ on this
the ___ day of _____, 2009.

Notary Public in and for the State of Texas

My Commission Expires: _____

CERTIFICATE OF NON SERVICE

I certify that this motion has been presented, *ex parte*, to the Court. A copy has not been furnished to counsel for the State.

Where your Texas Public Information Act request letter doesn't yield the documents you need, or the agency refuses to respond, you can subpoena the documents. Caveat: This will expose your strategy to the prosecution, which is why it is preferable to send the PIA letter to obtain these documents.

**ATTACHMENT "A"
to Subpoena Duces Tecum**

The Custodian of Records is requested to produce copies of the following documents:

- (1) Any documents (e.g., statements of policy, staff manuals or guidelines, handbooks, and/or training or instructional materials) dealing with the collection of eyewitness evidence. This includes but is not limited to any documents regarding:
 - (a) interview techniques for eyewitnesses,
 - (b) construction of photo arrays, lineups, and showups,
 - (c) the method of display to the eyewitness -- simultaneous or sequential presentation of the suspect and fillers,
 - (d) instructions given to witnesses viewing photo arrays and lineups,
 - (e) the setting in which identification procedures are held,
 - (f) whether the officer(s) conducting the identification procedure are "blind" (i.e., whether the officer conducting the identification procedure can identify the suspect in the photo array or lineup),
 - (g) documentation of eyewitness identification procedures -- in writing or by audio or videotape,

- (h) the elicitation of statements from the eyewitness about his/her confidence in her identification of a suspect,
 - (i) the number of times in one case that a witness may be asked to make an identification,
 - (j) the calculation whether to approach a witness to make an identification, and whether to ask that witness to make an identification from a photo array, lineup, showup, composite picture or whether to ask the witness to make an in-court identification.
- (2) Any documents confirming the *[Name of Law Enforcement Agency]*'s knowledge of, receipt of, or possession the National Institute of Justice' 1999 publication: "Eyewitness Evidence: A Guide for Law Enforcement" (National Criminal Justice Reference Service # 178240). *See* <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.
- (3) Any documents confirming the *[Name of Law Enforcement Agency]*'s knowledge of, receipt of, or possession of the National Institute of Justice' 2003 of "Eyewitness Evidence: A Trainer's Manual for Law Enforcement" (National Criminal Justice Reference Service # 188678). *See* <http://www.ncjrs.gov/nij/eyewitness/188678.pdf>.
- (4) Any documents confirming the *[Name of Law Enforcement Agency]*'s knowledge of, receipt of, or possession of the American Bar Association's 2004 Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures. *See* www.abanet.org/crimjust/policy/am04111c.doc

Depending on the practices in the jurisdiction where you are litigating, you may first want to seek the information set out here via discovery motion.

**ATTACHMENT “A”
to Subpoena Duces Tecum**

The Custodian of Records is requested to produce copies of the following:

- (1) All police reports, 911 recordings and/or transcripts, transcripts of witness testimony from hearings or any other documents or recordings containing an account of the verbal description(s) given by witnesses of the suspected perpetrator(s), their opportunity to view the event, the viewing conditions, and descriptions of the event(s) that caused them to associate individuals with the event(s);
- (2) The identities of all law enforcement officers, agency employees, and others from related officers (including the prosecuting agency) who participated in each identification procedure. This request includes, but is not limited to seeking, the every officer and non-officer one who spoke with the witness before, during or after the identification procedure;
- (3) All recordings, written statements, sworn testimony or notes by observers regarding field identifications (also known as showups);
- (4) All documents, recordings or computerized records detailing whether the purported eyewitness(es) participated in constructing composites, artists drawings or viewed other images (surveillance tapes, etc.) intended to represent the appearance of the perpetrator;
- (5) Where purported eyewitnesses participated in constructing composites, artists drawings or viewed other images intended to represent the appearance of the perpetrator, a high-quality copy of the image constructed is sought;

- (6) All recordings and/or documentation memorializing the instructions or other commentary given to the witness(s) by law enforcement prior to the identification procedure about the nature of the identification task and particularly whether or not the police thought they had the criminal in custody;
- (7) All instructions given to the witness during the identification procedure, as recalled/documented by the administering officer and, independently, by the witness;
- (8) All recordings and/or documentation regarding the conditions under which the identification procedure was administered (separation of witnesses prior to the procedure, separation of the lineup members from witnesses, etc.), as described by the administering officer and, independently, by the witness;
- (9) All recordings and/or documentation about the exact questions asked of the eyewitness during the identification (“Do you recognize anyone?”, or “Is the person who [did the crime] present, and if so, which one is s/he?”) and the exact wording of the witness’s actual identification statement, whether there was a form signed and what the alternative responses were;
- (10) All recordings and/or documentation about the comments of the officers to the witness(es) following the identification procedure, as described by the administering officer and, independently, by the witness(es);
- (11) All media statements, social network postings, and associated photographs or videos distributed by the law enforcement agency or any other agency working with law enforcement regarding the effort to find the perpetrator or regarding any arrests;
- (12) All documents and/or recordings providing information about the witness’ statements of confidence in the accuracy of his/her identification;

- (13) A copy of the policy and procedure manual regarding the general principles and specific procedures related to construction of lineups, instructions to witnesses, administration of identification procedures, and record keeping with respect to the witness' identification statement, statements of confidence in the identification, and related materials;
- (14) A high quality, high-resolution copy of the photo lineup (also known as a photo spreadsheet) shown to the witness(es) in this case. If administered by computer, a copy of the materials displayed including instructions, the lineup, and the witness's responses, also are sought.

**MOTION TO SUPPRESS OUT-OF-COURT IDENTIFICATIONS
AND TO PRECLUDE IN-COURT IDENTIFICATIONS**

COMES NOW, the Accused, [CLIENT NAME], by and through Counsel and pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the UNITED STATES CONSTITUTION and Article 1, Sections 9, 10, 13 & 19 of the TEXAS CONSTITUTION and in support of his right to a full and fair hearing under both the state and federal constitutions, moves this Court in support of suppression of all out-of-court identifications of him by any prosecution witness and, correspondingly, to preclude any in-court identification of [CLIENT NAME] by any witness for the State. In support, [CLIENT NAME] would show:

**I.
FACTUAL BACKGROUND**

[CLIENT NAME] has been indicted for the offense of capital murder and the State is seeking the death penalty. The Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a noncapital case. *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

[SET OUT FACTS OF IDENTIFICATION]

[E.g.: On the night of January 17, 2009, Wilma Witness stood in front the apartment building where she lives with her daughter and grandchildren on the corner of Main Street and Sunset Boulevard. Ms. Witness was smoking a cigarette and talking on her cellular phone. She was standing. Three of the four streetlights on that block were burned out. On that same block, William Eyewitness was checking his car's engine.

Between 11:15 and 11:30 p.m., Ms. Witness heard what she thought was a gunshot. Soon after hearing the sound, Ms. Witness claims to have seen an individual run out of an apartment building on the other side of Sunset Boulevard, about 75 feet from where Ms. Witness stood. The individual turned and ran down Main Street and out of Ms. Witness's view. Mr. Eyewitness claims that he looked up from under the raised hood of his automobile and saw an individual running from the building.

Ms. Witness went inside her daughter's apartment to call the police. About

30 minutes later, the police arrived at the corner. By the time police arrived, Mr. Eyewitness had fixed his vehicle and left the scene.

Ms. Witness told police that she saw a tall "dark-skinned" male run out of the building wearing a dark hooded sweatshirt and blue jeans. The police entered the building and found the body of Vernon Victim in apartment 3.

Police initiated a search for a suspect matching the description provided by Ms. Witness. Approximately 30 minutes later, a police cruiser pulled up in front of Ms. Witness's apartment building. Mr. Accused was sitting handcuffed in the back seat. He wore a black leather jacket, a cap and blue jeans. The police asked Ms. Witness to come outside to identify the suspect.

An officer shined a flashlight through the window of the police cruiser in which Mr. Accused was seated. The Officer asked Ms. Witness if Mr. Accused was the individual she saw running from the building. She was uncertain. After several minutes, Ms. Witness positively identified Mr. Accused as the individual she saw fleeing the scene of the crime.

Mr. Accused was subsequently arrested and charged with murder of Mr. Victim. After being arraigned and indicted, Mr. Accused requested and was appointed legal counsel on January 23, 2009.

On February 16, 2009, while incarcerated in the county jail, Mr. Accused was brought in for a lineup.

That day police asked Mr. Eyewitness to come to the police station to identify the individual he saw flee the building where Mr. Victim was found. Mr. Eyewitness complied and was placed in front of a one-way mirror, which allowed him to see the five men gathered for the lineup.

While the men in the lineup bore some similarities, Mr. Accused was the only man taller than six feet. Mr. Accused is 6'3". Mr. Accused wore a white t-shirt and no jacket during the lineup procedure.

Mr. Eyewitness selected Mr. Accused by identifying him as "the tall one."]

As a result of this history, [CLIENT NAME] has reason to believe that the

State will seek to place testimony before the jury that he was identified outside the courtroom by these witnesses. Moreover, [CLIENT NAME] believes that the State will seek to have these witnesses engage in an in-court identification. It is for these reasons that [CLIENT NAME] brings this motion to suppress evidence of the alleged out-of-court identifications and to preclude any in-court identification sought by the State.

II. MOTION AND LAW IN SUPPORT

I. THE STATE MUST BE PRECLUDED FROM INTRODUCING AT TRIAL EVIDENCE THAT MR. EYEWITNESS POSITIVELY IDENTIFIED [CLIENT NAME] IN A POSTINDICTMENT LINEUP BECAUSE [CLIENT NAME] WAS UNCONSTITUTIONALLY DENIED COUNSEL.

The Sixth Amendment right to counsel attaches when formal legal proceedings are initiated, ensuring to “an accused who faces incarceration the right to counsel at all critical stages of the criminal process.” *Iowa v. Tovar*, 124 S. Ct. 1379, 1383 (2004). Postindictment lineups are a “critical stage” because of the “grave potential for prejudice, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial.” *United States v. Wade*, 388 U.S. 218, 236 (1967). Any postindictment identification procedure that requires the accused’s presence cannot be conducted without notifying counsel. *Id.* at 238. Counsel’s presence at a lineup is required unless it is waived. *Id.*

[CLIENT NAME] was not apprised of his right to have an attorney present at the lineup. Likewise, defense counsel did not receive notice that a lineup was taking place. It was impossible for [CLIENT NAME] to waive his Sixth Amendment right to have counsel present. Accordingly, Mr. Eyewitness must not be permitted to testify that he positively identified [CLIENT NAME] during a lineup.

II. THE STATE MUST BE PRECLUDED FROM INTRODUCING AT TRIAL EVIDENCE THAT [MR. EYEWITNESS] AND [MS. WITNESS] POSITIVELY IDENTIFIED [CLIENT NAME] BECAUSE THE IDENTIFICATION PROCEDURES

VIOLATED PRINCIPLES OF DUE PROCESS.

A. The Out-Of-Court Identifications Should be Excluded Because They Were Impermissibly Suggestive and, as a Result, are Unreliable.

A due process challenge to the admissibility of identification evidence requires a two-prong inquiry. First, the court must determine whether the procedures utilized to obtain the identification were impermissibly suggestive. *Webb v. State*, 760 S.W.2d 263, 269 (Tex. Crim. App. 1988), *cert. denied*, 491 U.S. 910 (1989); *Williams v. State*, 675 S.W.2d 754, 757 (Tex. Crim. App. 1984). This analysis hinges on the objective characteristics of the identification procedure itself and failure to meet this prong renders further examination of the identification procedures unnecessary. *Webb*, 760 S.W.2d at 269. For example, a one-man showup, where a witness is shown a single suspect and asked if that suspect is the perpetrator, is “so unnecessarily suggestive and conducive to irreparable mistaken identification that it constitute[s] a denial of due process.” *Manson v. Brathwaite*, 432 U.S. 98, 104 (1977).

The second prong requires analysis of whether the suggestive procedures gave rise to a substantial likelihood of irreparable misidentification. *Manson*, 432 U.S. at 114-17; *Neil v. Biggers*, 409 U.S. 188, 199-201 (1972); *Herrera v. Collins*, 904 F.2d 944, 946-48 (5th Cir. 1990), *cert. denied*, 498 U.S. 925 (1990). The factors to be considered in making this determination are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and, (5) the time between the crime and the confrontation. *Manson*, 432 U.S. at 114.

[DETAIL THE SUGGESTIVE PROCEDURES UTILIZED]

[E.g.: Ms. Witness’s identification is based on a one-man show-up, an inherently dangerous procedure that tends to increase the likelihood of a false identification. She only haltingly identify [CLIENT NAME], despite being shown no other suspects and viewing [CLIENT NAME] while he was handcuffed in the back of a police car. This identification procedure was unnecessarily suggestive.

Moreover, the showup was unduly conducive. Ms. Witness had only a split

second to view the alleged perpetrator as he ran from the building. She viewed the individual from a distance of 75 feet, from across the street, at night, with minimal street lighting. Ms. Witness gave only a cursory description of the individual as being tall and dark-skinned and wearing jeans and a sweatshirt. The description provided no specific or unique characteristics and could have matched any number of people.

Critically, the description did not match [CLIENT NAME]'s appearance that night. He was wearing a leather jacket a cap – not a hooded sweatshirt. Ms. Witness observed [CLIENT NAME] sitting in the backseat of a police car so she could not determine his height. Viewing [CLIENT NAME] handcuffed in a police car unduly accentuated Ms. Witness's inclination to positively identify [CLIENT NAME] as the perpetrator. Even so, she was not immediately certain that [CLIENT NAME] was the right person. Taken together, these factors demonstrate that the showup was unnecessarily suggestive and render Ms. Witness's ID unreliable and inadmissible.

Mr. Eyewitness's identification likewise was marked by suggestiveness and unreliability. As discussed above, [CLIENT NAME] was denied counsel during the lineup. Moreover, [CLIENT NAME] was put in a lineup with four individuals who were significantly shorter than him. Given that the individual fleeing the scene of the crime was described as "tall," drawing attention to [CLIENT NAME]'s above-average height was unnecessarily and unfairly suggestive.

Mr. Eyewitness's identification is even more unreliable than that of Ms. Witness. At the time the individual fled from Mr. Victim's apartment building, Mr. Eyewitness was leaning over the engine of his car and only saw the person from under the raised hood of his car. Mr. Eyewitness did not speak to the police immediately after the incident because he left the scene before the police arrived. Mr. Eyewitness did not identify [CLIENT NAME] until almost one month later.]

All of these factors taken together suggest that purported eyewitness identifications of [CLIENT NAME] are unreliable and should be excluded.

B. [MR. EYEWITNESS] and [MS. WITNESS] Should be Precluded from Making an In-Court Identification of [CLIENT NAME].

In-court identifications should be excluded when they are the “fruit of a suspect pretrial identification.” *Wade*, 388 U.S. at 235; *see also Dispensa v. Lynaugh*, 847 F.2d 211 (5th Cir. 1988); *Hollway v. State*, 691 S.W.2d 608, 615 (Tex. Crim. App. 1984), *cert. denied*, 475 U.S. 1105 (1986). The State bears the burden of proving, by clear and convincing evidence, that any in-court identification was based on a source independent of the unfair pretrial confrontation. *Wade*, 388 U.S. at 239-40; *Thompson v. State*, 480 S.W.2d 624, 626-27 (Tex. Crim. App. 1982). If the State cannot carry this burden, the trial court must exclude the identification evidence. *Martinez v. State*, 437 S.W.2d 842, 849 (Tex. Crim. App. 1969).

[MR. EYEWITNESS] and [MS. WITNESS] must be precluded from making an in-court identification of [CLIENT NAME] because their testimony would be based exclusively on unconstitutional out-of-court identifications. As the Supreme Court has noted, “once a witness [is] picked out [by] the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may . . . for all practical purposes be determined” at the time of the initial identification and in the absence of defense counsel. *Wade*, 388 U.S. at 229. The unconstitutionally-obtained identifications cannot be allowed to color the testimony of [MR. EYEWITNESS] and [MS. WITNESS]. Without reference to their previous identifications, neither [MR. EYEWITNESS] and [MS. WITNESS] could reliably identify [CLIENT NAME] in court. Since principles of due process prohibit any introduction of the prior identifications, the witnesses should likewise not be allowed to rely on those earlier efforts to make an in-court identification.

Because this is a capital case, this Court must apply special considerations to ensure that it is fair. “The fundamental respect for humanity underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special “need for reliability in the determination that death is the appropriate punishment’ in any capital case.” *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (quoting *Gardner v. Florida*, 430 U.S. 349 (1977) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (White, J., concurring))).

If the unreliable identifications of [CLIENT NAME] are not suppressed, he will be deprived of his right to due process, the equal protection of the laws, his right to counsel, and his right to a fair trial and reliable sentencing as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the UNITED STATES

CONSTITUTION and concurrent provisions of the TEXAS CONSTITUTION.

CONCLUSION

WHEREFORE, [CLIENT NAME] respectfully requests that this Court:

(a) allow him to present evidence and argument on this motion at a hearing outside the presence of the jury;

(b) grant his motion to prevent the State from introducing unconstitutionally-obtained identification evidence;

(c) for such other and further relief to which he may be entitled, in law or in equity.

Respectfully submitted

DATED: [DATE]
[CITY], Texas

[ATTORNEY BLOCK]

Counsel to [CLIENT NAME]

CERTIFICATE OF SERVICE

I hereby certify that on the [DATE], I caused a true and correct copy of the foregoing motion to be served by hand delivery upon:

[NAME AND ADDRESS OF PROSECUTOR]

[NAME OF ATTORNEY]

This document by Greg Velasquez, an assistant public defender in El Paso, contains questions for a jury questionnaire in cases involving eyewitness identification.

Eyewitness Identification

- 1. Have you ever been mistaken as to a person's identity?
Yes
No
Maybe

- 2. Do you think that eyewitness identification is a reliable type of evidence?
Yes
No
Maybe

- 3. Have you ever been mistaken for another person?
Yes
No

Eyewitness testimony -- Strongest Evidence - Scale

PLEASE RANK IN ORDER OF HOW MUCH YOU AGREE OR DISAGREE WITH THE FOLLOWING STATEMENT:

- 1. Eyewitness testimony is the strongest evidence that could be offered to prove who committed a crime.

Strongly Agree 1 2 3 4 5 6 7 10 Strongly Disagree

2. Most eyewitnesses to violent crimes are generally reliable in their recollections of the facts?

Strongly Agree 1 2 3 4 5 6 7 10 **Strongly Disagree**

PLEASE RANK IN ORDER ON HOW RELIABLE AN EYEWITNESS IDENTIFICATION IS:

Absolutely reliable 1 2 3 4 5 6 7 **Not reliable**

This document was created by Greg Velasquez, an assistant public defender in El Paso, for defense lawyer use in preparing for jury selection in cases involving eyewitness identification.

Educating the Jurors on Aspects of Eyewitness Testimony

Some scientifically demonstrated propositions that are generally accepted as true by experts but not by many laypersons include:

(1) When a person experiences extreme stress as the victim of a crime, he or she will have reduced ability to notice and remember the details of the event;

Do you know whether extreme stress reduces or enhances one's ability to notice and remember the details of an event?

(2) Both men and women will remember the details of a nonviolent crime better than the details of a violent crime;

Do you know whether people generally remember the details of a violent event better than the details of a nonviolent one?

(3) The victim of an armed robbery will focus on the weapon, which will interfere with his or her ability to remember the robber's face;

Do you know whether people during an armed robbery generally focus on the weapon and whether focusing on the weapon will interfere with his or her ability to remember the robber's face?

(4) An eyewitness to a crime who is asked to estimate the length of time it took for the crime to take place, probably will overestimate the duration of the crime;

Do you know whether people that are eyewitness to a crime tend to overestimate the duration of the crime

(5) White women find it more difficult to identify black men than to identify white men;

Do you have an opinion about whether white women generally find it more difficult to identify black men than to identify white men?"

(6) Police officers are no more accurate in making identifications than are civilians;

Do you know that studies say that police officers are no more accurate in making identifications than are civilians?

(7) After a period of several months, a face seen only once becomes indistinguishable from faces never seen before;

Do you know that studies say that after a period of several months, a face seen only once becomes indistinguishable from faces never seen before

(8) Guilty or not, if the person identified previously in a photograph is present in a lineup, he or she is likely to be identified in the lineup as well;

Do you know that studies say that if the person identified previously in a photograph is present in a lineup, he or she is likely to be identified in the lineup as well even if he is guilty or not?

(9) A witness who is absolutely positive about his or her ability to identify the perpetrator of a criminal assault committed under poor lighting conditions is no more likely to be correct than a witness who is not absolutely positive;

Do you have an opinion about whether a witness who is absolutely positive about his or her ability to identify the perpetrator of a criminal assault committed under poor lighting conditions is no more likely to be correct than a witness who is not absolutely positive

(10) The manner in which a question is worded can affect an eyewitness' memory of an event;

Do you have an opinion about whether the manner in which a question is worded can affect an eyewitness' memory of an event

(11) It is unlikely that an elderly eyewitness to a crime will be as accurate in describing what occurred as a younger person would be; and

Do you have an opinion about whether it is unlikely that an elderly eyewitness to a crime will be as accurate in describing what occurred as a younger person would be?

(12) A question propounded to a child witness is likely to elicit the answer which the child believes the questioner to want

Do you have an opinion about whether a question propounded to a child witness is likely to elicit the answer which the child believes the questioner to want?

Do you think that eyewitness identification is a reliable type of evidence?

14. Have you ever had the experience of seeing someone you thought you knew only to find out either when you got closer or at a later time that you were mistaken about that person's identity?

15. Have you ever had the experience of someone mistaking you for someone else? If so, please explain the circumstances.

16. Have you ever been introduced to someone and later failed to recognize that person when you met later? If so, please explain.

17. Have you ever deliberately avoided talking to someone you thought you knew because you were not sure it was the person you thought?

18. Have you ever been told that you look like someone else's double or have you ever seen someone who looked like the double of someone you know?

Do you consider yourself good at remembering faces?

Have you ever had the experience of approaching someone on the street and greeting him or her, only to realize that the person you greeted was not the person you thought he or she was?

Have you ever had anyone come up to you on the street or at a party and act as if he or she knew you, when in fact you did not know each other?

Have you ever deliberately avoided someone on the street, or at a party, or in a store because the person looked like someone you knew but you were not sure whether that was the person?

Have you ever been introduced to someone at a party, or in business, and later failed to recognize the person when you met him or her at some later date?

Have you ever had the experience in a restaurant of being served a whole meal by a waiter or waitress and then, when it came time to ask for the check, not knowing for sure who your waiter or waitress was?

Okay. Now have you ever told a friend or a business acquaintance that you saw him or her somewhere, only to find out that the person had never been at that place—at a ballgame or something, for instance?

Have you ever been greeted by mistake by someone who thought you were another person?

Have you ever had the experience of being told by the second person that you look like someone else's double?

Have you ever had the experience of then later meeting your supposed double and failing to notice much more than just a general similarity?

Would agree that honestly mistaken eyewitness identifications can occur even where exact doubles are not involved, right?

If after examining the opinions of the state's eyewitnesses you have a reasonable doubt about the accuracy of their identifications, how will you find the defendant, guilty or not guilty?

1. Have you ever had the experience of approaching someone and greeting him only to realize that the person you greeted was not the person you thought he was? [The gender of the salutee should match that of the venireman.]
2. Have you ever deliberately avoided someone on the street, or at a party, or in a store because the person looked like someone you knew but you were not sure?
3. Have you ever been introduced to someone at a party or in business and then failed to recognize the person at a later time?
4. Have you ever seen someone who looked like the double of someone you know?

5. Have you ever been told that you look like someone else's double?
6. Have you ever been greeted by mistake by someone who thought you were another person?
7. Have you ever had the experience of being served a whole meal by a waiter or waitress and then not being able to tell, when it came time to ask for the check, which waiter or waitress had served you?
8. Have you ever told a friend you saw him or her somewhere only to find out the person had never been there?
9. Have you ever seen a close play at a baseball game where the members and fans of one team were sure a runner was safe and the members and fans of the opposing team were equally sure he was out?

In reaching your verdict, will you take into consideration how long or short a time the witnesses had to observe the person who took their purses?

Will you take into account lighting conditions?

Before accepting the witnesses' opinions, will you take into account whether their observations were made during a fast-moving, chaotic, threatening event?

Will you wait for cross-examination to see if the witness was improperly influenced by someone or some event so as to suggest to her that the defendant was the person?

If you suspect that one or both of the witnesses was just accepting the opinion of another person, you wouldn't give the witnesses' testimony much credit, would you?

Will you also consider the factors bearing on the reliability of the identification, including the length of time that elapsed between the occurrence of the crime and the next opportunity that the witness had to make an identification?