

STATE COURT Docket Watch®

NEW JERSEY DEMANDS MORE FROM EYEWITNESSES

*STATE V. HENDERSON*¹

by Shyler Engel

On November 2, 2011, the Supreme Court of the United States heard arguments in *Perry v. New Hampshire*, where it will determine whether a court is required to exclude eyewitness identification evidence whenever the identification was made under circumstances that make the identification unreliable because they tended to suggest that the defendant was responsible for the crime, or only when the police are responsible for the circumstances that make the identification unreliable.

Court watchers need look no further than the New Jersey Supreme Court for hints on where eyewitness jurisprudence is headed. In *State v. Henderson*, New Jersey's highest court unanimously revised its thirty-four-year-old legal standard for assessing eyewitness identification evidence, citing a disconnect between eyewitness jurisprudence and modern scientific studies and empirical research.² The court concluded that the old standard, the *Manson/Madison* test, did not offer an adequate measure of reliability, did not sufficiently deter inappropriate police conduct, and relied too heavily on the jury's ability to evaluate

identification evidence.³

The decision involved the murder of Rodney Harper on January 1, 2003. Mr. Harper and James Womble had been drinking champagne and smoking crack cocaine before two men forcibly entered the apartment. Womble knew one of the intruders as George Clark, but the other man was a stranger. While Harper and Clark went to a different room, the stranger pointed a gun at Womble and told him not to move. Meanwhile, Womble overheard Clark and Harper argue and eventually heard a gunshot. As he left, Clark warned Womble that if he were to talk to the police there would be repercussions. Harper would die from the gunshot wound to his chest ten days later. Fearing retaliation, Womble fabricated the details of the evening in his first interview with investigators. After the investigators pressed Womble further, he led the investigators to Clark, who would identify his accomplice as Larry Henderson.

Thirteen days after the incident, investigators had Womble sit down to perform an identification through a

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DUTIES TO THE UNBORN: ALABAMA SUPREME COURT DEEMS VIABILITY IRRELEVANT TO FETAL WRONGFUL-DEATH ACTIONS

by Jonathan Berry

April Mack sued to recover for the wrongful death of her unborn child, who miscarried after a car accident. The Alabama Supreme Court ultimately vindicated her right to recovery, despite her having miscarried her child before the point of viability. In order to do so, the court found that viability made no sense as a prerequisite to wrongful-death recovery, holding an unborn child's gestational age irrelevant as a matter of law. Conspicuously, the court never saw fit to even mention

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19 NCGSA § 160A-351.

20 *Hare v. Butler*, 394 S.E.2d 231, 395 (N.C. Ct. App. 1990) (emphasis added).

21 *Compare Glenn*, 98 S.E.2d at 919 (proprietary), with *Rich*, 192 S.E.2d at 827 (governmental).

22 *Estate of Williams v. Pasquotank County Parks & Recreation Dep't*, 711 S.E.2d 450, 453 (N.C. Ct. App. 2011).

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 454.

28 *Id.*

29 *Id.*

30 *Id.*

31 Supreme Court of North Carolina, Docket Sheet, *Estate of Erik Dominic Williams v Pasquotank County Parks & Recreation Department, et al*, No. 231PA11-1 (Nov. 14, 2011), available at <http://appellate.nccourts.org/dockets.php?court=1?court=1&docket=1-2011-0231-001&pdf=1&a=0&dev=1>.

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photographic array. A non-lead investigator showed Womble eight photos one at a time of headshots of African-American men between the ages of twenty-eight and thirty-five, with short hair, goatees, and similar facial features. Womble quickly eliminated five of the photos. He then reviewed the remaining three, discounted one more, and said he wasn't sure of the final two pictures. At this time two investigators came into the room and accused Womble of holding back as he had before based on fear of retaliation. Another investigator advised Womble that any protection that Womble needed would be provided by the police department. The first investigator advised Womble to just do what he was there to do. After the two investigators left the room, Womble quickly identified the photo of Larry Henderson.

The trial court applied the *Manson/Madison* test to determine whether the eyewitness evidence could be used against the defendant at trial. The test requires that a determination be made whether the identification procedure was impermissibly suggestive, and if so, whether the procedure was so suggestive as to result in a very substantial likelihood of irreparable misidentification.⁴ The second prong requires consideration of five factors: (1) the opportunity of the witness to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the suspect; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.⁵

The trial court determined that Womble's identification could be presented to a jury. The case went to trial, and the evidence of the identification was presented to a jury along with the facts that Womble had ingested crack cocaine and alcohol on the night of the shooting and smoked about two bags of crack cocaine each day after the shooting until police contacted him ten days later. Furthermore, Womble told the jury that he spent most of the time during the incident in a dark hallway looking at the gun pointed into his chest. As for the photo array, he told the jury that he did not see anyone he recognized when he first looked at the photo array, but was sure of his identification and identified the defendant from the stand. As neither Clark nor the defendant Henderson testified at trial and no guns or other physical evidence were introduced linking the defendant to the crime scene, the primary evidence

against the defendant at trial was Womble's identification. The jury convicted Henderson of reckless manslaughter, aggravated assault, and three weapons charges, and the court sentenced him to an aggregate eleven-year term of imprisonment.

Henderson appealed. Contrary to the determination of the trial court, the appellate division presumed that the identification procedure in this case was impermissibly suggestive under the first prong of the *Manson/Madison* test.⁶ The appellate court reversed and remanded for a new *Wade* hearing to determine whether the identification was nonetheless reliable under the test's second prong.⁷ At this point, the State sought review by the New Jersey Supreme Court. The Supreme Court of New Jersey granted the State's petition for certification and also granted leave to appear as *amicus curiae* to the Association of Criminal Defense Lawyers of New Jersey and the Innocence Project. In their briefs and at oral argument, the parties and amici raised questions about possible shortcomings in the *Manson/Madison* test in light of recent scientific research. In response, the court remanded the matter summarily to the trial court for a plenary hearing to consider and decide whether the assumptions and other factors reflected in the two-part *Manson/Madison* test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence. The parties and amici collectively produced more than 360 exhibits, which included more than 200 published scientific studies on human memory and eyewitness identification. During the ten-day remand hearing, the special master heard expert witness testimony from the defendant's law professors and psychology professors and the State's career investigator and trainer of law enforcement.

The New Jersey Supreme Court began by laying an empirical foundation for its decision by citing many studies that credit eyewitness misidentification as one of the greatest causes of wrongful convictions in the United States and other countries.⁸ The court considered psychology and medical journals and studies and reports pertaining to DNA exonerations, police lineups, and even social science field experiments of many different variations generally involving an unassuming clerk or counter attendant.⁹ The court then considered the research and special master's findings on system variables (factors which the state can control) and estimator variables (factors which are generally out of the state's control but related to the individual or event) that influence the reliability of eyewitness identifications. While it did not

rely on one study or one article as an absolute authority, the court held that "[w]hen social scientific experiments in the field of eyewitness identification produce an impressive consistency in results, those results can constitute adequate data on which to base a ruling."¹⁰

The court found many faults with the *Manson/Madison* test. For instance, it found that defendants must show that police procedures were "impermissibly suggestive" before courts can consider estimator variables that also bear on reliability, and that in the case of impermissibly suggestive identification procedures, there may be a greater chance eyewitnesses will seem confident and report better viewing conditions, and thus courts in turn are encouraged to admit such identifications, despite the fact that the confidence was due to police action.¹¹ The court concluded that the *Manson/Madison* test needed to be revised because it rested on three invalid assumptions that caused it not to meet the goals of the *Manson* Court's two-part test: (1) that it would adequately measure the reliability of eyewitness testimony; (2) that the test's focus on suggestive police procedure would deter improper practices; and (3) that jurors would recognize and discount untrustworthy eyewitness testimony.¹² Instead, the court concluded that the *Manson/Madison* test did not offer an adequate measure of reliability, did not sufficiently deter inappropriate police conduct, and relied too heavily on the jury's ability to evaluate identification evidence.¹³

In replacing the *Manson/Madison* test, the court provided that the replacement test should allow all relevant system and estimator variables at a pretrial hearing when there is evidence of suggestiveness, and courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence, in order to guarantee fair trials to defendants, who must have the tools necessary to defend themselves, and to protect the state's interest in presenting critical evidence at trial.¹⁴ Among the many system variables, often citing intuition or common sense among the numerous and voluminous journals, articles, reports, and studies, the court found that:

1. the failure to perform blind lineup procedures can increase the likelihood of misidentification,
2. the failure to give proper pre-lineup instructions can increase the risk of misidentification,
3. courts should consider whether a lineup is poorly constructed when evaluating the admissibility of an identification,
4. feedback as to an identification affects the reliability

of an identification in that it can distort memory, create a false sense of confidence, and alter a witness's report of how he or she viewed an event, and

5. both mugshot exposure and mugshot commitment can affect the reliability of the witness' ultimate identification and create a greater risk of misidentification.¹⁵

Of the many estimator variables, again, often citing intuition or common sense among the numerous and voluminous journals, articles, reports, and studies, the court found that:

1. high levels of stress are likely to affect the reliability of eyewitness identifications;
2. when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness's description of the perpetrator;
3. the amount of time an eyewitness has to observe an event may affect the reliability of an identification;
4. a greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification;
5. characteristics like age and level of intoxication can affect reliability;
6. disguises and changes in facial features can affect a witness's ability to remember and identify a perpetrator; and
7. there is a greater possibility that a witness's memory of the perpetrator will weaken as time passes, and the witness may have more difficulty making a cross-racial identification.¹⁶

The court then provided that in order to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence, generally tied to a system variable, of suggestiveness that could lead to a mistaken identification.¹⁷ The State must then offer proof to show that the proffered eyewitness identification is reliable, generally tied to accounting for system and estimator variables.¹⁸ And if after weighing the evidence presented a court finds from the totality of the circumstances, or more appropriately stated, from the non-exhaustive list of system variables, that the defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence.¹⁹ The court stated that the factors that both judges and juries will consider are not etched in stone, as the scientific research underlying them will continue to evolve.²⁰ The

court reinforced that the ultimate burden still remains on the defendant to prove a very substantial likelihood of irreparable misidentification.²¹ If the evidence is admitted, the court should provide appropriate, tailored jury instructions.²² For instance, if at trial evidence of heightened stress emerges during important testimony, a party may ask the court to instruct the jury midtrial about that variable and its effect on memory.²³

The New Jersey Supreme Court remanded the case to the trial court to determine whether the identification would have been admitted under the new standard, and if the identification would have been admitted, Henderson's conviction will be affirmed.

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Endnotes

1 WL 3715028 (2011).

2 *Id.* at 43.

3 *Id.* at 2.

4 *Manson v. Brathwaite*, 432 U.S. 98 (1977).

5 *State v. Madison*, 109 N.J. 223, 239-240 (1988).

6 *State v. Henderson*, 397 N.J. Super. 398 (N.J. Super. Ct. App. Div. 2008).

7 *Id.* at 400, 414-15.

8 *New Jersey v. Henderson*, WL 3715028, at 9-36.

9 *Id.*

10 *Id.* at 43.

11 *Id.* at 44.

12 *Id.*

13 *Id.* at 2.

14 *Id.* at 45.

15 *Id.* 20-28.

16 *Id.* 28-35.

17 *Id.* at 48.

18 *Id.*

19 *Id.*

20 *Id.* at 2.

21 *Id.* at 45.

22 *Id.* at 51.

23 *Id.* at 50.