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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. MONTAE DERRYL JONES, Defendant.	Case No.: CR20143102-001 **MOTION TO SUPPRESS PRETRIAL AND TRIAL IDENTIFICATION OF DEFENDANT AND REQUEST FOR <u>DESSUREAULT</u> HEARING** Honorable Carmine Cornelio Division 23

COMES NOW the Defendant, Montae Jones, (Jones) by and through the Pima County Public Defender's Officer, counsel undersigned, and hereby requests the Honorable Court to conduct a Dessureault hearing to determine the admissibility of the pretrial and in-court identifications of Defendant by State witness, pursuant to State v. Dessureault, 104 Ariz. 380, 453 P.2d 951 (1969), cert denied, 397 U.S. 965, 90 S.Ct. 1000 (1970), the Due Process clause of the United States Constitution, Arizona Rule of Evidence 403, the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article II, Sec. 10 of the Arizona State Constitution and Rule 16 of the Arizona Rules of Criminal Procedure.

I. FACTS

On July 17, 2014, police responded a 911 call in reference to man with gun at Margarita Bay Bar, located at 7415 E 22nd Street. Police interviewed several bar patrons, including Amy Fellows (Amy). She stated to Office Stewart that the suspect attempted to offer drugs to a bar patron, Trevor Zimmerman, and was asked to leave. When leaving, Amy saw a handgun in suspect's possession. Tammy Daley (Tammy) called 911. Officer Dragon was patrolling the area and saw a black male, Defendant, within proximity of an apartment complex located at 7420 E 22nd Street. Jones was placed in handcuffs immediately thereafter. Officer Ruiz transported Amy

to the Defendant's location for a show up. Amy identified Defendant as the person at the bar with a gun.

II. LEGAL ARGUMENT

1) Request for Dessureault hearing

Defendant moves this Court to preclude in-court identification pursuant to State v. Dessureault, 104 Ariz. 380 (1969), the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article 2, Section 10 of the Arizona Constitution, and Rule 16 of the Arizona Rules of Criminal Procedure. Any proffered in-court identification will be impermissibly tainted as the fruit of the unduly suggestive out-of-court identification procedure.

An accused has a due-process right to a fair identification procedure, State v. McCall, 139 Ariz. 147, 154 (1983); United State v. Wade, 388 U.S. 218, 235 (1967). "First ... the trial judge must immediately hold a hearing ... to determine from clear and convincing evidence whether it [the pre-trial and in-court identification] contained unduly suggestive circumstances." Dessureault, at 384. The Court must determine whether pre-trial identification procedures were unnecessarily suggestive, and if so, then it must examine the totality of the circumstances surrounding the identification in order to determine its reliability. State v. Rodriguez, 145 Ariz. 157, (Ariz.App. Div.1 1984); McCall, 139 Ariz. 147 (1983).

If the trial judge concludes that the circumstances with a pre-trial identification were unduly suggestive or that the prosecution has failed to establish by clear and convincing evidence that they were not, then it is the prosecution's burden to satisfy the trial judge be clear and convincing evidence that the proposed in-court identification is not tainted by prior identification. Dessureault, at 384.

2) Factors to Determine Admissibility

Even if unduly suggestive, a pre-trial identification is nonetheless admissible if shown to be reliable. See State v. Hooper, 145 Ariz. 538, 544 (1985). The central concern with identifications is that they be "reliable." Manson v. Brathwaite, 432 U.S. 981 (1987). Reliability is the linchpin in determining the fairness and admissibility of identification testimony. Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

Studies have shown that "it is extremely difficult, if not impossible, for courts to distinguish between identifications that [are] reliable and identifications that [are] unreliable." State v. Dubose, 285 Wis. 2d at 164. Because of the severity of this problem, some states, on the basis of the due

process rights of their state constitutions, have created a per se exclusionary rule for identifications based on unnecessarily suggestive procedures. See, Commonwealth v. Johnson, 420 Mass. 458, 465 (Mass. 1995); People v. Adams, 53 N.Y.2d 241, 250-51 (N.Y. 1981).

The State of Arizona has long since recognized these principles articulated by the United States Supreme Court and delineated the trial procedure to evaluate a pre-trial and proposed in-court identification permissibility. See, generally, State v. Dessureault, 104 Ariz. 380 (1969). The procedure to determine admissibility of a pre-trial or in-court identification of a defendant, involves the evaluation of five factors. These factors are:

1. The opportunity for the witness to view the perpetrator at the time of the offense;
2. The witness' "degree of attention";
3. The "accuracy of the witness'" prior description of the perpetrator;
4. "The level of certainty demonstrated by the witness at the confrontation"; and
5. The length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, at 199 (1972); See, also, State v. Williams, 113 Ariz. 14 (1976) and State v. Strickland, 113 Ariz. 445 (1976).

All of these factors can be elicited from a witness using "cognitive interview techniques," that preserves fragile evidence, a witness memory. Cognitive interview techniques were initially reported in 1992 by Ronald Fisher, Ph.D, and Edward Geiselman, Ph.D[1]. Cognitive interviewing stresses actual psychological techniques of questioning, rapport between the officer and witness is seen as critical, the officer will not lead, but facilitate the conversation, the officer will encourage concentration, convey needs and assist with techniques to open memory retrieval pathways[2]. In contrast, current witness interviewing often includes little formal training, rapport is not considered critical, the officer only wants the facts in a clear articulable manner, witness concentration is not a high priority and officers can be seen as manipulative in the order of their questioning.

At the police academy, law enforcement officers are often taught to interview with the ideas of who, what, where, when, why, and how as primary questions to focus on with a witness.

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[1] Fisher, R. P., Geiselman, & R. E., Memory-Enhancing Techniques for Investigative Interviewing, The Cognitive Interview. Charles C. Thomas Publishing, (1992).

[2] Fisher, R. P., Mello, E., McCauley, M. L., Are Jurors' Perception of Eyewitness Credibility Affected by the Cognitive Interview? Psychology, Crime & Law V, 167-176 (1999).

However, these basic 5 W's and how questions often leave many details unrecorded and ignores the reality that every individual's mind does not remember events or descriptions in any set or predetermined order. As such, cognitive interviewing techniques have been developed by memory specialists as a tool for officers to use in order to obtain more accurate information without more false information.

A further study by Fisher and Geiselman discovered that when implementing cognitive interviewing techniques as opposed to traditional police questioning, the actual increase in correct information obtained from victims and witnesses was between 35% and 75%[3]. Within the study, observations were made that untrained officers asked too many closed ended questions that limit the amount or scope of information a witness can provide and asked too few open ended questions that allow for an unlimited response (i.e. tell me in your words what happened?). It was also observed that investigators would frequently interrupt the witness in the middle of a response and, in the researcher's opinion, the questions were asked in a predetermined, inflexible order. The resulting consequence of the standard interviewing techniques may be incomplete or faulty information and the interview can become dominated by the law enforcement officer, not the witness. Only with training of cognitive interviewing techniques, officers will be able to compensate for the reality that every person's mind does not remember events or descriptions in any set or predetermined order and acquire all relevant memories from a witness.

TPD officers are not trained to implement cognitive interviewing techniques. Neither is Officer Ruiz. He didn't tape-record her statement and didn't even ask the bare minimum. Officer Ruiz failed to ask Amy about her degree of attention, opportunity to view the suspect, or even what was his physical description. Officer Ruiz briefly questioned Amy at the bar about what she saw. Nowhere in his report did Officer Ruiz document that he asked Amy about the five factors listed above. Later on, Officer Stewart tape-interviewed Amy. However, this interview was conducted telephonically and after the show up and not before.

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[3] Fisher, R. P. & McCauley, M. L., Information Retrieval: Interviewing Witnesses., Psychology & Policing, (1995).

3) Pre-trial identification of Defendant was unnecessarily suggestive based on Officer Ruiz's failure to implement sequential and double-blind line-up identification procedures

Confronted with conclusions reached with publications "Convicted by Juries, Exonerated by Science," Janet Reno, Attorney General at that time, tasked the National Institute of Justice to rectify the problems with identification procedures and develop new techniques to avoid wrongful convictions based on mistaken identification. A panel of experts drawn from all over the U.S. incorporated the current research and the studies on eyewitness identification producing "Eyewitness Evidence, A Trainer Manual for Law Enforcement,"[4] which was supposed to be a model for law enforcement agencies all over the US. Only few adopted new protocols.[5]

A 2010-2011 study on simultaneous versus sequential lineups was conducted by the American Judicature Society and came to the same conclusion as NIJ regarding the higher accuracy of sequential procedures[6]. Notably, Tucson Police Department was one of the four test cities used to produce the data in this study[7]. TPD has recognized the unreliability of simultaneous line-ups and since 2011, TPD was trying to implement changes and switch to the simultaneous and double blind line-ups. Initially, TPD trained a hand-full of detectives, participated in the study, to conduct new identification procedure of sequential lineups. However, in 2013, TPD trained other officers in sequential lineups. Not only TPD's officers are familiar with new identification procedure, TPD itself adopted new protocols.

Here, Officer Ruiz implemented neither the simultaneous nor double blind line-ups. Additionally, he failed to provide proper instructions before identification took place. By

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[4] available at: http://www.ncjrs.gov/nij/eyewitness/188678.pdf

[5] The following agencies adopted "Eyewitness Evidence, A Trainer Manual for Law Enforcement": Colorado Police Department, Chicago Police Department, Northampton Police Department (Massachusetts), Hillsborough County Sherriff's Department (Riverview, Florida), New York Sity Police Department, Suffolk County police departments (Massachusetts), and others.

[6] Wells, G. L., Steblay, N. K.,& Dysart, J. E. A Test of the Simultaneous vs. Sequential Lineup Methods. The American Judicature Society, 2011, available at: //www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf

[7]Roberto Villasenor (Chief of Police), Richard Miranda(Chief of Police, retired), Kermit Miller (Chief of Police, retired), Sharon Allen (Deputy Chief), John Stamatopoulos (Captain *Specialized* Response Division), Barbara Lawall and Kathleen Mayer (Pima County Attorney), John Evans (Attorney General Office), Lisa Judge (Tucson City Prosecutor's Office) and Robert J. Hirsh (Pima County Public Defender) were all acknowledged and recognized for providing support and advice during the development and implementation of this study.

disregarding newly implemented procedures and conducting a show-up, he tainted Defendant identification making it unduly suggestive.

a) Sequential Line-up

The sequential lineup[8] is more reliable compared to the simultaneous (six pack) line-up as well as a show up. Having not yet seen the remaining photos, the eyewitness is not in a position to make a relative judgment.[9] Although the eyewitness could compare the person being viewed to those viewed previously, he/she cannot be sure that the next person to be viewed will not be an even better likeness to the culprit. Hence, the eye witness must rely more on an absolute judgment process.

The sequential lineup was first tested in lab studies in 1985 and was predicted to be superior to the simultaneous method based on an emerging theory that eyewitnesses have a tendency to use relative judgments in making eyewitness identification decisions.[10] Scientific support that sequential procedures prevent relative judgment is impressive. Data show that a witnesses' sensitivity to the presence versus absence of the suspect in the lineup is far greater with the sequential procedure than with the simultaneous procedure[11]. Additional studies[12] have shown that eyewitnesses' who describe their decision process as one of elimination (relative judgment) were more likely to have made a false identification than were those who reported that the face "just popped out at me." Another study[13] indicated that when an eyewitness viewed a crime and then used a relative-judgment process to identify the suspect, they were more likely to

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[8] In a sequential viewing procedure, an eyewitness views only one photo at a time and makes a decision regarding each person before viewing another.

[9] A relative judgment is one in which witnesses compare lineup members to one another and try to decide which one looks most like their memory of the perpetrator. The problem with relative judgment is that someone will always look more like the perpetrator than the other members of the lineup, even when the lineup does not contain the perpetrator.

[10] Wells, G. L. (1984). The psychology of lineup identifications. Journal ofApplied Social Psychology, 14, 89-103.

[11] See Sporer, S. L., Eyewitness Identification Accuracy, Confidence, and Decision Times n Simultaneous and Sequential Lineups. Journal of Applied Psychology, 78, 22-33 (1993). See Also Cutler, B. L., Penrod, S. D., & Stuve, T. E., Jury Decision Making in Eyewitness Identification Cases. Law and Human Behavior, 12, 41-56 (1988).

[12] Dunning, D., & Stern, L. B., Distinguishing Accurate from Inaccurate Identifications Via Inquiries About Decision Processes. Journal of Personality and Social Psychology, 67, 818-835 (1994).

[13] Lindsay, R. C. L., Lea, J. A., Nosworthy, G. J., Fulford, J. A., Hector, J., LeVan, V., & Seabrook, C., Biased Lineups: Sequential Presentation Reduces the Problem. Journal of Applied Psychology, 76, 796-802 (1991).

have made a false identification than the identifications where an absolute judgment process was used by the witness.

Here, Officer Ruiz transported Amy to the apartment complex. Amy was aware that someone was already apprehended. Defendant was the only one there; she did not have an ability to compare his physical characteristics to someone else. He was handcuffed and in police custody further indicating that he is the culprit. This show up was nothing less than suggestive.

b) Double Blind

The logic supporting double blind[14] administration revolves around preventing any potential cues an investigator may provide to a witness without even knowing it and to avoid the needless problem of witness bolstering. If the test administrator is not familiar with the facts or circumstances surrounding a case, it is all but impossible for any undue influence by an officer. Importantly, it is not necessary to assume that a lineup administrator's influence is conscious or deliberate in order to see the value of a double-blind administration. If the test administrator knows where the suspect appears in the lineup, this interpersonal interaction during the administration of the exam creates the possibility for an investigator to provide inadvertent cues about the location of the suspect. Research on *experimenter-expectancy effects* indicates the presence of the interpersonal communication between a line-up administer and a witness. The interpersonal process is based on a short distance between them and presents itself due to eye contact, visible facial expressions, body language, and verbal exchanges[15]. Moreover, with the absence of video recording of the interview, it is difficult or impossible to know what role, if any, the interpersonal interactions may have had in influencing the witness identification or a particular lineup suspect. The simple use of administration procedures where the investigator is unaware of the "correct" answer is an effective, cheap, and easy to apply prevention technique to avoid any inadvertent visual clues or witness bolstering. Finally, double blind administration of

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[14] Double blind line-up administration includes the officer presenting a lineup to a witness. The officer does not know which number the suspect is, he does not know what the suspect looks like, and is not actively involved in the investigation.

[15] Harris, M.J., & Rosenthal, R., Mediation of Interpersonal Expectancy Effects: 31 meta-analyses. Psychological Bulletin, Volume 97, 363-386 (1985).

exams is recommended procedure by the Department of Justice Guidelines for Law Enforcement[16].

Here, double-blind line-up was not implemented. Officer Ruiz was aware that Defendant was arrested. He also was aware that a gun was found within his proximity. Amy's identification of Defendant was not recorded. It is impossible to say what exactly was told to her before the procedure, how he told her, and what inadvertent cues Amy picked up from Officer Ruiz.

c) Proper Instructions for Witnesses Prior to Identification

The proper instructions to witnesses are extremely important to maintain untainted identification process. The instruction to *the person who committed the crime may or may not have been included in the lineup* is critical to the integrity of the lineup procedure. Extensive research has shown that it is essential to disabuse witnesses of the assumption that the perpetrator is in the lineup.[17] This instruction is explicitly recommended by the National Institute of Justice Guide for Law Enforcement on the collection and preservation of eyewitness evidence.[18] The instruction to *the person that regardless of whether an identification is made, the police will continue to investigate the incident*, was added the National Institute of Justice Guide for Law Enforcement with the purpose to relieve the pressure that a witness feels to make an identification, even if they are not positive.[19]

In case at hand, it's unclear what instructions Officer Ruiz gave to Amy. He neither documented them in his report nor tape recorded the identification.

3) The Court should preclude in-court identification of Defendant, pursuant to State v. Strickland, 113 Ariz. 445 (1976)

The State has the burden to prove by clear and convincing evidence that the witness' in-court identification of Defendant would not be unduly tainted by the out-of-court identification. If this Court finds that the pre-trial or at-the-scene identification of Defendant is inadmissible,

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[16]Eyewitness Evidence, A Guide for Law Enforcement, U.S. Department of Justice, National Institute of Justice, 2003, available at: http://www.ncjrs.gov/nij/eyewitness/188678.pdf

[17] Malpass, R. S., & Devine, P. G. (1981). Eyewitness identification: Lineup instructions and the absence of the offender. Journal of Applied Psychology, 66, 482-489; Steblay, N. M. (1997). Social influence in eyewitness recall: A meta-analytic review of lineup instruction effects. Law and Human Behavior, 21, 283-298. (Study revealing that the use of this one instruction and the possible absence of the actual offender reduces the frequency of picking a filler by up to 42% when the actual offender is not present).

[18] Technical Working Group for Eyewitness Evidence (1999). Eyewitness evidence: A guide for law enforcement. Washington, DC: United States Department of Justice, Office of Justice Programs.

[19] Eyewitness Evidence, a Guide for Law Enforcement, page 32.

then the State must prove that an attempt at in-court identification will not be unduly tainted and therefore inadmissible.

In previous court hearings, Amy was not present and did not view Defendant. If Defense assumption is correct, any in-court identification by Amy will occur when Defendant is seated next to his counsel at the defense table during trial. Certainly this type of procedure identifying Defendant as the perpetrator of an offense is unduly suggestive in itself and impermissible. State v. Strickland, 113 Ariz. 445 (1976). In Strickland, the Court found that the eyewitness's identification at a preliminary hearing of the defendant was the product of an unduly suggestive procedure. The Defendant was dressed in jail clothing and was the only person seated next to Defense Counsel at the defense table during a preliminary hearing in the matter for which that witness was subpoenaed to testify. This atmosphere amounted to an undue suggestion that Defendant must be the person who perpetrated the offense. Strickland, 113 Ariz., at 448. Strickland makes it clear that suggestive circumstances in-court create the same "high likelihood of irreparable misidentification and concurrent denial of due process of law" as a suggestive police line-up. 113 Ariz. at 447. The same is true in the instant case. The only time Amy will see Defendant is in Court next to the Defense attorney.

II. CONCLUSION

WHEREFORE, Defendant respectfully requests this Court to preclude any in-court identifications of Defendant by Rebecca Estrada, Delilah Cruz, Jose Nido, and Amber Caldwell.

RESPECTFULLY SUBMITTED this 27th day of January, 2015.

LORI LEFFERTS
PIMA COUNTY PUBLIC DEFENDER

By_____
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Copies of the foregoing delivered this 27th day of January, 2015, to:

Honorable Carmine Cornelio — DELIVERED
Division 23

Rona Kreamer — DELIVERED
Deputy County Attorney