

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division -- Felony Branch**

UNITED STATES OF AMERICA	:	
	:	Criminal Case No. F-5147-03
	:	
v.	:	Judge Bayly
	:	
	:	Trial: December 8, 2004
RALPH JOHNSON	:	

**SUPPLMENTAL MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF A MOTION TO SUPPRESS IDENTIFICATION EVIDENCE
AND TO COMPEL DISCLOSURE OF EXCULPATORY INFORMATION**

In his motion to suppress filed on October 1, 2004, Mr. Ralph Johnson, through counsel, focused on the flawed and suggestive line-up identification procedures that prompted one of the government’s two eyewitnesses¹ to “identify” Mr. Johnson nine months after the charged shooting, even though this same eyewitness, Witness 2, had been unable to identify Mr. Johnson shortly after the incident. Now it appears that the procedural problems with the identifications in this case extend well beyond the line-up conducted for Witness 2, to all the identification procedures conducted for this investigation, including the photo array conducted for the government’s other key eyewitness, Witness 1. Among other things, Mr. Johnson has since learned and/or developed a good faith basis to believe that

- The identification procedure in which Witness 1 purported to identify Mr. Johnson as the gunman in this case was conducted by Detective Don Juan Monroe, a police officer, who has a documented history, known to the United States Attorneys Office, of investigative misconduct;

¹ Thus far, the government has disclosed the existence of three eyewitnesses to Mr. Johnson: Witness 1, who identified Mr. Johnson in what undersigned counsel now believes was an impermissibly suggestive photo identification, Witness 2, who as discussed above and in Mr. Johnson’s initial Motion to Suppress, identified Mr. Johnson as the result of an unduly suggestive lineup, and Witness 3, who failed to identify Mr. Johnson.

- The ability of Witness 2 to identify Mr. Johnson in a lineup, nine months after failing to identify him in a photo array, appears to be linked not only to a faulty lineup but also to Witness 2's conversation with Witness 1 about the identity of the shooter, a conversation which the government never should have permitted to take place; and
- Both identifications by Witness 1 and Witness 2 appear to be the products of obsolete procedures – last formally revised in 1976 – which do not reflect the current best practices that have been developed by forensic psychologists, law enforcement officers and attorneys to reduce the likelihood of mistaken identifications.

In his initial Motion, Mr. Johnson also discussed the ultimate unreliability of Witness 2's identification as a result of the suggestive lineup procedure. But now, especially in light of the revelations about the improprieties with respect to Witness 1's identification of Mr. Johnson, there is much more to be said about the general unreliability under a "totality of the circumstances" analysis of any identification of Mr. Johnson by either Witness 1 or Witness 2. And, on this subject too, new information has come to light: the government has recently disclosed that Witness 2 not only failed to identify Mr. Johnson soon after the shooting in question, but also candidly admitted that she had no value whatsoever as an identifying witness because she had not seen "enough of [the gunman's] face to pick anyone" in an identification procedure. See App. Q (Letter from AUSA Blanche Bruce to Chris McKee and Vida Johnson, dated October 13, 2004) (W-2 photo viewing sheet enclosure).

Based on the new, partial disclosures by the government, Mr. Johnson now moves under the District of Columbia Rules of Criminal Procedure 12 and 47-I to suppress all identifications by Witness 1 and Witness 2 – both before and during trial – on the grounds that the government's reliance on such defective evidence would violate the Due Process Clause of the Fifth Amendment to the United States Constitution and that this flawed evidence is inadmissible in any event because its minimal probity is far outweighed by its prejudicial

effect on the jury. In order to provide the Court with full information about the basic unreliability of these identifications and the inadequacy of the police procedures used in this case to obtain them, Mr. Johnson renews his request for an evidentiary hearing. Mr. Johnson also moves to compel the disclosure of all the information previously requested regarding the circumstances of the defective identification procedures in this case and the identifying and non-identifying witnesses. Mr. Johnson is entitled to this critical exculpatory information as a matter of Due Process, and by continuing to withhold this information, the government is violating its duty under Brady v. Maryland, 373 U.S. 383 (1963) to “assist the defense in making its case.” United States v. Bagley, 473 U.S. 667, 675 & n.6 (1985).² Finally, although not requested by the government, Mr. Johnson voluntarily provides notice, pursuant to Rule 16(b)(1)(C) of the District of Columbia Rules of Criminal Procedure, that he intends to call at an evidentiary hearing on his motion to suppress (and at trial if necessary) an expert to testify about the factors that can compromise eyewitnesses’ perception and memory, and current best practices in identification procedures.

POINT I

EVEN BASED ON THE INCOMPLETE INFORMATION DISCLOSED BY THE GOVERNMENT TO DATE, SUPPRESSION OF ANY AND ALL “IDENTIFICATIONS” BY WITNESS 1 AND WITNESS 2 OF MR. JOHNSON – EITHER PRIOR TO OR AT TRIAL – IS WARRANTED.

A. It appears that the “identifications” of Ralph Johnson by both Witness 1 and Witness 2 were the product of suggestive police procedures and improper communication between the witnesses – not actual recognition.

The identification procedures in this case – revealed as flawed in Mr. Johnson’s initial Motion to Suppress – have gone from bad to worse. Since Mr. Johnson filed his motion the

² Mr. Johnson has simultaneously filed a motion for a status hearing on these matters on November 5, 2004. See Motion for Status Hearing, dated October 29, 2004.

government has disclosed two critical facts about the circumstances of the identification procedures in this case. First, the government has revealed that Detective Don Juan Monroe, a police officer with a known history of investigative misconduct, conducted the photo array in which Witness 1 purportedly identified Mr. Johnson as the gunman.³ Specifically, Detective Monroe is known to have advised a witness to lie in an attempt to explain away the witness' failure to make an identification; Detective Monroe is also known to have given the United States Attorneys Office for the District of Columbia "false or misleading statements about whether he had done certain work in connection with pending investigations." See App. G (Letter from Clifford T. Keenan, Chief Superior Court Division, United States Attorneys Office for the District of Columbia, to James Klein, Samia Fam, and Timothy P. O'Toole, dated September 9, 2003). It appears that Detective Monroe was still being investigated by the United States Attorneys' Office at the time he was conducting the identification procedures in this case. In light of this contemporaneous pattern of misconduct, the government's reliance on Detective Monroe to collect identification evidence in this case calls into question the validity of the identification procedures that he conducted as well as the government's commitment to follow the appropriate protocols in collecting eyewitness identification evidence to ensure that such evidence is not modified or corrupted.

Second, the government has also recently revealed that Witness 1 and Witness 2 "may have discussed the identity" of the gunman at some point in time – presumably in the nine month interim after Witness 1 had positively identified Mr. Johnson but before Witness 2 had done so. App. Q (Letter from AUSA Blanche Bruce to Chris McKee and Vida Johnson, dated October 13,

³ There is ample reason to believe that Witness 1, like Witness 2 and Witness 3, did not have an adequate opportunity to view the gunman and that, as noted in Mr. Johnson's initial Motion, that his ability to perceive the features of the gunman was further compromised because he/she was under the influence of alcohol at the time of the incident. See Point I.B. infra.

2004). This disclosure provides further confirmation that the procedures employed by the government to obtain identification evidence in this case were impermissibly and unduly suggestive. The danger of cross-contamination of witnesses' memories is well documented. When a witness is provided with new, post-event information, this information may not only improperly supplement the witness' "memory" it may actually alter or transform that "memory." Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil and Criminal §3-4 (3d. ed. 1997). Accordingly, best practices require that an eyewitnesses be instructed not to discuss the details of the incident viewed with other potential witnesses, that they not be permitted to make joint identifications, and that, after participating in an identification procedure, they be strictly admonished not to speak to anyone about the identification procedure or its results. See, e.g., App. F (Eyewitness Evidence, A Guide for Law Enforcement, Department of Justice, October 1999) (hereinafter "DOJ Guide") at 23, 33-37; App. C (ABA Best Practices) at 9; North Carolina Actual Innocence Commission Recommendations for Eyewitness Identification III.1(a) ("Witness should not be allowed to confer with one another before, during or after the [identification] procedure.").⁴

These new revelations by the government underscore a more basic problem – namely, the government's disregard of best practices, not only in the acquisition of identification evidence from Witness 2 (as discussed in Mr. Johnson's initial motion), but, apparently, in all the identification procedures conducted in this case. Indeed, Mr. Johnson has reason to believe that to the extent that the government was following any formal protocols at all, its sole guide was an obsolete MPD General Order that was last revised on September 13, 1976. See App. H

⁴ Available at www.innocenceproject.org/docs/NC_Innocence_Commission_Identification.html.

(Metropolitan Police Department General Order 304.7) (hereinafter “General Order 304.7”).⁵

These antiquated procedures – relics from an era before the weaknesses in eyewitness identification evidence had been fully explored – are “unnecessarily suggestive and conducive to irreparable mistaken identification.” Stovall v. Denno, 388 U.S. 293, 302 (1967).

As explained in Mr. Johnson’s initial motion, the vast body of knowledge acquired as a result of decades of eyewitness identification research has led the Department of Justice, the ABA and multiple states and localities to adopt best practices for how law enforcement should conduct identification procedures. See App. C (America Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures, August 2004) (hereinafter “ABA Best Practices”) at 3 (“The State of the research into the causes of and cures for, eyewitness error is luckily sufficiently advanced that there is widespread agreement on some ways that we can do better now”); App. F (DOJ Guide) at 3 (acknowledging “that eyewitness evidence, in general, can be improved and made more reliable through the application of currently accepted scientific principles and practices”). These best practices recommend and/or mandate, among other things, (1) that cautionary instructions be provided to the eyewitness that the culprit may not be in the lineup and that the police will continue to investigate the case even if no identification is made, so as to minimize natural inclination to guess or to be guided by suggestion simply because the witness believes that the police suspect must be in the lineup or photo array, see App. C. (ABA Best Practices) at 3, 8-9; App. F (DOJ Guide) at 31-33, (2) that

⁵ Mr. Johnson has asked the government to confirm or deny that this is the most recent General Order addressing eyewitness identification procedures. See App. O (Letter from Chris McKee and Vida Johnson to AUSA Blanche Bruce, dated October 27, 2004). Mr. Johnson has not yet received a response to this request (although one has been promised by November 5, 2004, see App. R (Letter from AUSA Blanche Bruce to Chris McKee and Vida Johnson, dated October 28, 2004)). Undersigned counsel has been informed, however, through other channels, that General Order 304.7 is, in fact, the most current, MPD directive on this subject.

witnesses be specifically admonished not to confer about their memories or identifications to prevent cross-contamination of evidence, App. F (DOJ Guide) at 23, 33-37; (3) that the police officer conducting the lineup or photo array not know the identity of the suspect and that the witness be told that the officer does not know, to prevent deliberate or inadvertent cues or body signals, App. C (ABA Best Practices) at 3, 6, 8-9; and (4) that the lineup or photo array be conducted sequentially instead of serially to minimize the opportunity for relative judgments – i.e., guessing which person looks most like the culprit. App. C (ABA Best Practices) at 6-7; App. F (DOJ Guide) at 34-36. As one might expect, however, General Order 304.7, now 28 years-old, simply does not reflect the current understanding of how best to collect eyewitness identification evidence, and incorporates none of these modern best practices. Indeed, in some instances, it mandates procedures that are now known to compromise the reliability of identification procedures. App. H (General Order 304.7(I)(6)) (requirement that “the officer handling the case in court shall be present and shall be responsible for having the witnesses present for all court-ordered lineups”).

In light of the advances in the scientific study of eyewitness evidence, the government’s failure to update its protocols for gathering eyewitness identification evidence is both disturbing and irresponsible. See Clemons v. United States, 408 F.2d 1230, 1237 (D.C. Cir. 1968) (en banc) (“Any well-run department will presumably prepare and enforce careful regulations in . . . regard [to identification procedures] for the guidance of its personnel”). It is especially so given Mr. Johnson’s understanding that DOJ sent out to every law enforcement agency in the country copies of its guide for best practices eyewitness identification procedures after those procedures were published by the National Institute of Justice five years ago. See App F. (National Institute of Justice Guide at iii, 1-3) (Noting that it is “absolutely essential that eyewitness

evidence be accurate and reliable” and explaining that the guide of best practices was created precisely to advance that objective).⁶

In sum, there is substantial evidence currently before the Court – which Mr. Johnson only expects to grow as the government makes more disclosures – that the procedures employed in this case were flawed and suggestive and that the only reason Witness 1 and Witness 2 selected Mr. Johnson out of a photo array and lineup, respectively, was because they were guided in some way to do so – not because they actually recognized Mr. Johnson as the gunman in this case.

B. The totality of the circumstances confirms that the observations of Witness 1 and Witness 2 – which were fragmented and incomplete thus rendering these eyewitnesses more susceptible to the influence of suggestion and post-event information – are wholly unreliable.

Given the nature of the event at issue – a startling, violent shooting that apparently lasted seconds – the eyewitness observations in this case were, from the outset, less likely to be reliable and these witnesses were more likely to be susceptible to the influence of suggestion and post-event information. One of the foundational and undisputed findings of forensic psychologists researching eyewitness identifications over the past three decades is that human memory does not operate like a video recorder. Instead, the act of remembering is reconstructive – more akin to putting puzzle pieces together than retrieving a video recording.⁷ To complicate matters, various factors can impede perception and recording of the information available to an eyewitness – or to follow through with the analogy, the

⁶ Mr. Johnson has asked the government to confirm receipt of the DOJ’s Guide to Eyewitness Evidence but, again, has yet to receive a response. See App. R (Letter from AUSA Blanche Bruce to Chris McKee and Vida Johnson, dated October 28, 2004).

⁷ Edward Arnolds et al., Eyewitness Testimony: Strategies and Tactics 14-15 (1984); Haberlandt, K., Human Memory: Exploration and Application 4 (Boston, 1999) (defining and describing reconstructive memory); Loftus & Doyle, Eyewitness Testimony: Civil and Criminal §2-2; Gary L. Wells, Eyewitness Behavior 4 *Law & Hum. Behav.* 237 (1980).

creation and retention of these puzzle pieces – leaving the eyewitness with an incomplete memories of the details of an event. As noted in the original Motion to Suppress, a number of these factors are present in this case, and must be considered in assessing the reliability of any “identification” of Mr. Johnson by Witness 1 or Witness 2.⁸ See Motion to Suppress at 14-15 (discussing the analysis for suppression under Manson v. Braithwaite, 432 U.S. 98 (1977)). Indeed, the government’s new, partial disclosures bolster these points substantially.

First, the shooting in this case was unquestionably a stressful, violent event. According to the government, Witness 1 and Witness 2 were standing quite close by when the gunman ran up to the decedent and shot him six times – three shots to the head and three shots to the body. See App. E (Tr. 9/11/03 at 10-12, 19, 21-22, 26-27); App. I (Autopsy Report of Andre Smith). Indeed, Witness 1 was standing “right next to [the] decedent” at the time of the shooting. Social science studies have demonstrated that a person’s ability to recall events is significantly worse if a witness is exposed to violence and high stress.⁹ A recent study carried out on over 500 military personnel who were subjected to mock prisoner of war interrogations powerfully demonstrates this phenomenon.¹⁰ The subjects experienced both low stress and high stress, 40-minute interrogations by different interrogators; the high stress interrogation included the threat of physical violence. Twenty-four hours after these sessions,

⁸ Of course, a more complete disclosure of information by the government, see Point II infra, may reveal other factors of which Mr. Johnson is currently unaware.

⁹ “Perceptual abilities actually decrease in a highly stressful situation, and the person under stress is less reliable than he or she would be otherwise. Such a witness becomes less capable of remembering details, less accurate in reading dials, and less certain in detecting signals.” Major Thomas J. Feeney, Expert Psychological Testimony on Credibility Issues, 115 Mil. L. Rev. 121, 146; see also Loftus & Doyle, Eyewitness Testimony: Civil and Criminal §2-9.

¹⁰ Charles A. Morgan, et. al., Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, Int. Journal of Law & Psychiatry, 27(3), 265-79 (2004).

only a third of the soldier/prisoners subjected to the high stress interrogations were able to identify their “interrogators” and “guards.”

Second, Witness 1 and Witness 2 were clearly focused on the weapon used to shoot the decedent. Indeed, according to the government, both witnesses specifically noted the type of weapon that was used and described it as a black handgun. App. E (Tr. 9/11/03 at 13, 22, 25-26). This phenomenon is referred to as “weapon focus.”¹¹ Forensic psychologists have documented that when a weapon is visible during the commission of a crime, the attention of eyewitnesses is drawn to the weapon and away from the culprit’s facial and physical characteristics. For example,¹² experiments have been conducted involving videotaped robberies with some of the culprits brandishing a handgun and others concealing the gun. These studies repeatedly demonstrated that the accuracy of eyewitness identifications was much better when the gun was concealed than when the gun was brandished.

¹¹ See, e.g., Elizabeth F. Loftus et al., Some Facts About ‘Weapon Focus’, 11 Law & Hum. Behav. 55 (1987); Loftus and Doyle, Eyewitness Testimony: Civil and Criminal, § 2.10; Anne Maass & Gunther Kohnken, Eyewitness Identification: Simulating The “Weapon Effect,” 13 Law & Hum. Behav. 397 (1989).

¹² An archival study of actual police cases demonstrated that the presence of a weapon “did not reduce the quantity of descriptive information the witness was subsequently able to provide to police about the culprit, but it did impair witnesses’ subsequent ability to recognize the culprit.” Donald P. Judges, Two Cheers for the Department of Justice’s Eyewitness Evidence: A Guide for Law Enforcement, 53 Ark. L. Rev. 231, n.37 (2000), citing Patricia A. Tollestrup et al., Actual Victims and Witnesses to Robbery and Fraud: An Archival Analysis, in Adult Eyewitness Testimony: Current Trends and Developments 158 (David F. Ross et al., eds., 1994); see also Nancy Mehrkens Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413 (1992). Loftus et al., Some Facts About ‘Weapon Focus’, 11 Law & Hum. Behav. 55, 57-61 (1987); Brian L. Cutler et al., The Reliability of Eyewitness Identification, 11 L. & Hum. Behav. 233, 240, 244 (1987) (weapon visibility significantly lowered identification accuracy); Experiments in which eye movements are monitored while subjects witness a scene where a weapon is involved also demonstrate the existence of the phenomenon of “weapon focus.” Loftus & Doyle, Eyewitness Testimony: Civil and Criminal §2-10.

Third, the opportunity to view the gunman in this case was quite brief. According to the government's evidence at the preliminary hearing, Witness 1 told the police that the gunman ran up and shot the decedent and then ran away, at which point Witness 1 "lost visual contact." This same witness told the police that his/her opportunity to view the gunman lasted "a matter of seconds." App. E (Tr. 9/11/03 at 12). Although common sense tells us that the longer a witness views a subject, the better his memory of that subject will be, scientific findings demonstrate that eyewitnesses overwhelmingly tend to overestimate the duration of stressful events.¹³ Thus, it is likely that even Witness 1's conservative estimate that he/she had "seconds" to view the gunman is an overstatement.

Finally, one factor particular to Witness 1 – that fact that Witness 1 was under the influence of alcohol at the time of the shooting see App. E (Tr. 9/11/03 at 9-10) – further increases the likelihood that Witness 1's perception of the gunman was impaired. According to the government, Witness 1 self-reported that he/she "had been drinking" but was "not intoxicated." Id. At this point, it is far from clear whether Witness 1's self-assessment that he/she was not drunk should be credited, but, in any event, scientific studies demonstrate that ingestion of even moderate amounts of alcohol can significantly impede memory acquisition. Loftus & Doyle, Eyewitness Testimony: Civil and Criminal §2-16(a) ("results of several experiments indicate that two to three drinks interfere with the formation of new memories (or the acquisition of new information into memory)"); see also John C. Yuille & Patricia

¹³ See, e.g., Elizabeth F. Loftus et al., Time Went by So Slowly: Overestimation of Event Duration by Males and Females, 1 Appl. Cogn. Psychol. 1 (1987); Loftus & Doyle, Eyewitness Testimony: Civil and Criminal §226-27 (1987) (explaining that a witness tends to overestimate the duration of an especially stressful or violent event); James Marshall, Law and Psychology In Conflict 41-81 (1966) (On average, viewers estimated that a 42 second film in which man rocks a baby carriage and then flees when a woman approaches lasted a minute and a half).

Tollestrup, Some Effects of Alcohol on Eyewitness Memory, 75 J. Applied Psychol. 268 (1990).

All of these factors – the stress of exposure to violence, the weapon focus, the brevity of the exposure duration, and, for Witness 1, the influence of alcohol – increased the likelihood in this case that the eyewitnesses to this shooting imperfectly perceived the gunman and thus had a reduced ability to describe or identify him with any accuracy. Moreover, there is strong evidence even on this incomplete record that the ability of these eyewitnesses to perceive and record accurately the features of the shooter was, in fact, compromised, even before these witnesses were exposed to flawed and suggestive identification procedures that likely altered or corrupted their fragmented memories. Specifically, neither Witness 1 or Witness 2 was able to give a detailed description of the shooter. See App. E. (Tr. 9/11/03 at 23, 27-28); App. J (Complaint and Affidavit in Support of Arrest Warrant). For example, these witnesses could not specify the age, weight, eye color, or hairstyle of the shooter. The most that they could say was that the gunman was a black male, 5’9” tall, wearing blue jeans and a white shirt, id. – hardly a distinguishing description in the District of Columbia.¹⁴ In addition, when Witness 2 tried to select the gunman from a photo array within days of the shooting, she candidly admitted that she hadn’t “see[n] enough [of the gunman’s] face to pick anyone” in an identification procedure. See App. Q (Letter from AUSA Blanche Bruce to

¹⁴ Curiously, this clothing description matches the clothing that the decedent was wearing – see App. I (Autopsy Report of Andre Smith) – thus not only demonstrating that this description, if correct, was not terribly distinctive, but also giving rise to the possibility that these eyewitnesses had unwittingly mixed up their memories of the gunman’s clothing with the decedent’s clothing – a phenomenon called unconscious transference. Loftus & Doyle, Eyewitness Testimony: Civil and Criminal §4-10.

Chris McKee and Vida Johnson, dated October 13, 2004) (W-2 photo viewing sheet enclosure).

C. Suppression of all identifications by Witnesses 1 and 2 is required as a matter of Due Process and simple rules of evidence.

Based on these facts and facts Mr. Johnson expects to develop at an evidentiary hearing, suppression of any and all identifications made by Witness 1 and Witness 2 of Mr. Johnson – made prior to or at trial – is required both as a matter of Due Process, see Manson v. Braithwaite, 432 U.S. 98 (1968), and as a function of evidentiary rules which preclude the admission of evidence when its prejudicial effect outweighs its probative value. See Rule 403 of the Federal Rules of Evidence; Johnson v. United States, 683 A.2d 1087, 1099 (D.C. 1996) (endorsing FRE 403).

As explained in Mr. Johnson’s initial motion, under Manson, where unduly and impermissibly suggestive procedures are employed to obtain identifications, the question is whether there is sufficient evidence of reliability, based on the totality of the circumstances, to justify the admission of those identifications. See Motion to Suppress at 12 (citing Manson, 432 U.S. at 114). Mr. Johnson further explained that a determination of reliability could not be founded on present assurances by witnesses about their original opportunity to view the culprit or their certainty with respect to their identification of the defendant, because research demonstrates that these self-reports are likely to be corrupted by the suggestive procedures that prompted the reliability inquiry. See Motion to Suppress at 12-13. It is now clear that suggestive procedures were used to obtain “identifications” from both Witness 1 and Witness 2 and that there is simply no evidence of reliability – independent of and untainted by the suggestive identification procedures employed by the police – of either witness’ identification of Mr. Johnson. To the contrary, not only is there every indication that these witnesses imperfectly perceived the

gunman and incompletely recorded his features because of the brief, stressful and violent nature of this incident see Point I.B. supra, but also the government has now disclosed conclusive evidence that Witness 1 did not, in fact, see “enough of [the gunman’s] face,” App. Q (W-2 photo viewing sheet enclosure), in order to make a reliable identification. Cf. App. C (ABA Guide) at 5 (noting that “careful record keeping” allows “for later accurate reporting of the witness’s memory as it existed at the time of the contact with the police”) (emphasis in original). For these reasons the pre-trial “identifications” of Witness 1 and Witness 2 must be suppressed under Manson, and for the same reasons, these witnesses cannot be permitted to identify Mr. Johnson in Court. Again, the evidence demonstrates that these witnesses simply have no independent and uncorrupted basis to make such an identification.

Separate and apart from the due process inquiry under Manson, suppression of all identifications by Witness 1 and Witness 2 is also required under the rules of evidence. Identification evidence, like any other type of evidence, must be excluded where its prejudicial effect outweighs any potential probative value. See Sheffield v. United States, 397 A.2d 963, 967 (D.C. 1979) (“A defendant may challenge the admission of [identification] testimony by raising a timely objection to its admissibility at trial on the ground that under the law of evidence testimony is so inherently weak or unreliable as to lack probative value”); see also Beatty v. United States, 544 A.2d 699, 703 n.6 (D.C. 1988). This is unquestionably the case here.

As demonstrated above, the probative value of the identifications that have been made or could be made in the future by Witness 1 and Witness 2 is quite low. Again, there is every indication that these two witnesses were precluded from accurately perceiving and memorializing the features of the gunman given the stressful and violent nature of this brief incident; and, indeed, Witness 2 candidly admitted in the most contemporaneous record of her

ability to perceive the gunman that Witness 2 had not seen “enough of [the gunman’s] face” to make an identification. See App. Q (Letter from AUSA Blanche Bruce to Chris McKee and Vida Johnson, dated October 13, 2004) (W-2 photo viewing sheet enclosure). These witnesses were then subjected to suggestive procedures that likely corrupted any fragments of memory they had retained from the shooting.

By contrast, the unfair prejudice that would flow from the admission of this, at most, minimally probative identification evidence would be substantial. Researchers and legal scholars alike have found that “evidence of identification, however untrustworthy, is taken by the average jur[or] as absolute proof.” Brigham, John C. & Bothwell, Robert K., The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications, 7 Law & Hum. Behav. 19, 20 (1983) (internal quotation and citation omitted); Loftus & Doyle, Eyewitness Testimony: Civil and Criminal §§ 1-2 through 1-6; Watkins v. Souders, 449 U.S. 341, 352 (1982) (Brennan, J. dissenting) (There is “nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”). Indeed, according to a survey of potential District of Columbia jurors conducted by the Public Defender Service in December, 2003, eyewitness identification evidence is one of the most persuasive types of evidence along with DNA, fingerprints and taped confessions. App. K (Survey conducted by Lake Snell Perry & Associates, Inc., December 2003) pp. 2-3. The problem is that the average lay person is simply unaware of the potential sources of error in eyewitness testimony. See Wells, Gary, et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603, 624 (1998); Loftus & Doyle, Eyewitness Testimony: Civil and Criminal § 1-6; Handberg, Roger B., Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013 (1995); Brian L. Cutler, et al.,

Juror Sensitivity to Eyewitness Identification Evidence, 14 Law & Hum. Behav. 185 (1990). D.C. jurors are no exception. Again, recent polling data demonstrates that jurors simply do not understand how to analyze eyewitness identification evidence, and – presumably for that reason – that an overwhelming majority of jurors (4 out of 5 or 83%) generally believe eyewitness identification is reliable. App. L (Survey conducted by Peter D. Hart Research Associates, February 2004).

In short, suppression of all identifications by Witness 1 and Witness 2 is required both as a matter of Due Process and as a function of simple evidentiary rules which preclude the submission of evidence to the jury that is more prejudicial than probative.

POINT II

THE GOVERNMENT MUST DISCLOSE ADDITIONAL INFORMATION IN RESPONSE TO MR. JOHNSON'S MULTIPLE REQUESTS, PRIOR TO THE EVIDENTIARY HEARING ON MR. JOHNSON'S MOTION TO SUPPRESS.

Mr. Johnson has clearly defined the outlines of the impermissibly and unduly suggestive identification procedures that took place in this case, but there is still much that the government must disclose in order to allow Mr. Johnson to litigate his motion and present his defense of misidentification at trial properly. The government has had much of this information since the inception of this case, and there is no justification for continued strategic withholding. Although some of this information may come to light at the evidentiary hearing, Mr. Johnson is entitled to a more complete disclosure before that time, and certainly before the commencement of trial. See Brady v. Maryland, 373 U.S. 383 (1963).

Mr. Johnson has now made five written requests to the government in an effort to obtain information that he needs to litigate the instant motion and to support his defense at trial of

misidentification. See App. M1 (Initial Discovery Requests, dated August 25, 2003); App. M2 (Letter from Chris McKee and Vida Johnson to AUSA Blanche Bruce, dated March 8, 2004); App. M3 (Letter from Chris McKee and Vida Johnson to AUSA Blanche Bruce, dated August 19, 2004); App. N (Letter from Chris McKee and Vida Johnson to AUSA Blanche Bruce, dated October 14, 2004); App. O (Letter from Chris McKee and Vida Johnson to AUSA Blanche Bruce, dated October 27, 2004). Specifically, Mr. Johnson has repeatedly sought to obtain more specific information about (1) the witnesses who attempted identifications in this case, and (2) the manner in which the government conducted all the identification procedures in this case. Without this information, Mr. Johnson cannot investigate how it was that he was misidentified as the gunman in this case. For example, without the names and addresses of Witness 2 and Witness 3, the two eyewitnesses in this case who failed to make identifications, Mr. Johnson will be unable to probe what these witnesses saw on the day of the shooting, what their contacts with the police were, and why it was that Witness 2 “identified” Mr. Johnson nine months after the fact but Witness 3 never made a positive identification of Mr. Johnson – all information that is directly relevant to this motion. Equally important, without the requested information, Mr. Johnson will be hindered in his preparation for the hearing – in particular, his preparation with his expert witness regarding the identification of the relevant scientific principles applicable to this case.

Although much of this information has been in the government’s possession for over fourteen months – since the inception of this case – the government has yet to provide a meaningful response to Mr. Johnson’s letters. See App. P (Letter from AUSA Blanche Bruce to Chris McKee and Vida Johnson, dated October 8, 2004); App. Q (Letter from AUSA Blanche Bruce to Chris McKee and Vida Johnson, dated October 13, 2004); App. R (Letter from AUSA

Blanche Bruce to Chris McKee and Vida Johnson, dated October 28, 2004). With respect Mr. Johnson's request for the names and addresses of Witnesses 2 and 3, the government has mistakenly taken the position that Mr. Johnson is not entitled to this information (citing Johnson v. United States, 544 A.2d 270, 275 (D.C. 1988)).¹⁵ But for the most part it has simply ignored Mr. Johnson's specific inquiries, or provided skeletal information in response to a comprehensive request. See App. Q (Letter from AUSA Blanche Bruce to Chris McKee and Vida Johnson, dated October 8, 2004).

The government's strategic withholding of this critical information cannot be permitted to continue. Obviously, Mr. Johnson has a right to this information so that he can fully prepare for and litigate the instant motion to suppress. See Clemons, 408 F.2d at 1237 (“[T]he defense is entitled to know, through disclosure by the prosecution or by evidentiary hearing outside the presence of the jury,” the circumstances of any pre-trial identification”); See also, In Re F.G., 576 A.2d 724 (D.C. 1990) (information regarding identification procedures is “discoverable as of right”).¹⁶ Moreover, pursuant to Brady v. Maryland, Mr. Johnson is entitled to any information that the government has that tends to undermine the identifications in this case – the sole evidence in this case against Mr. Johnson. 373 U.S. at 87 (defense entitled to any information that is “favorable to the accused” and “material either to guilt or punishment”); see also Giglio v.

¹⁵ The dicta in Johnson upon which the government relies does not reflect the mandate of Brady as interpreted by the Supreme Court, see Bagley, 473 U.S. at 675 & n.6 (prosecutor has a duty “to assist the defense in making its case” “to ensure that a miscarriage of justice does not occur”), or the current Court of Appeals. See Jackson v. United States, 650 A.2d 659, 661 n.4 (D.C. 1994), (government's refusal to disclose the identity of a potentially exculpatory witness – a witness who had failed to make an identification when shown a photo array that included the defendant's photograph – “violated both the letter and the spirit of Brady”).

¹⁶ The government's conduct in this case cannot be reconciled with the government's assertion in In re F.G., that its practice is to provide the defense through informal discovery with “information necessary to prepare . . . a suppression motion.” 576 A.2d at 727.

United States, 405 U.S. 150, 154 (1972) (defense is entitled to impeachment information under Brady).¹⁷

With less than six weeks left before trial, Mr. Johnson is entitled to this Brady information now. The objectives of Due Process mandate production of Brady information “at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case.” Edelen v. United States, 627 A.2d 968, 970 (D.C. 1993) (emphasis added; internal citations and quotations omitted). The Court of Appeals has noted that the importance of timely disclosure “cannot be overemphasized . . . [because] delay may imperil a defendant’s right to a fair trial.” Curry v. United States, 658 A.2d 193, 197-98 (D.C. 1995) (internal quotations and citations omitted; emphasis added); see also id. (“Delay . . . may therefore render the belated disclosure ineffectual”). Accordingly, it has repeatedly “disapproved [of] and discouraged” “the practice of delayed production,” and cautioned that “a conscientious prosecutor will not countenance it.” Id.¹⁸

¹⁷ The prosecution’s duty under Brady is not limited to turning over favorable admissible evidence, but rather encompasses the duty to disclose favorable information that might lead to admissible evidence. United States v. Sudikoff, 36 F. Supp.2d 1196 (C.D. Cal. 1999); See also Leka v. Portuondo, 257 F.2d 89, 100, 102 (2d Cir. 2001) (“The longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use”); Edelen v. United States, 627 A.2d 968, 971 (D.C. 1993) (affirming the importance of disclosing Brady information “as such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case”) (internal quotations and citations omitted).

¹⁸ In addition to the government’s constitutional obligation to disclose Brady information to Mr. Johnson in a timely fashion, Rule 3.8 of the District of Columbia Rules of Professional Conduct provides that “[t]he prosecutor in a criminal case shall not . . . [i]ntentionally fail to disclose to the defense upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense.” The obligation of all government attorneys (including AUSAs) to comply with local ethical rules is mandated by federal law. See 28 U.S.C. § 530B (“The McDade-Murtha Amendment”); 28 C.F.R. §77.4(a); see also New York State Bar Ass’n v. F.T.C., 276 F. Supp. 2d 110, 131-33 (D.D.C. 2003) (recounting history of Department of Justice efforts to exempt its attorneys from local ethical rules and noting that McDade-Murtha

As discussed in Mr. Johnson’s initial motion, faulty eyewitness identification evidence is one of the leading causes of wrongful convictions. In order “to ensure that a miscarriage of justice does not occur,” the government has a duty “to assist the defense in making its case” – a duty which includes the disclosure of information that undermines or calls into question the identification evidence central to the government’s case. United States v. Bagley, 473 U.S. 667, 675 & n.6 (1985)); Curry, 658 A.2d at 197 (duty to disclose exculpatory information is “a rule of fairness and minimum prosecutorial obligation [that] is necessary to ensure the effective administration of the criminal justice system”). Accordingly, the government must provide comprehensive responses to all Mr. Johnson’s requests to date for information and disclose all the information to which Mr. Johnson is entitled under Brady.

CONCLUSION

For all of the reasons stated above and for the reasons set forth in his initial motion, Mr. Johnson respectfully requests that this Court GRANT his request for an evidentiary hearing and grant this Motion to suppress and/or preclude the eyewitness identification in this case, under the D.C. common law and the Fifth Amendment to the United States Constitution.

Respectfully submitted,

J. Christopher McKee
Vida B. Johnson
Public Defender Service
633 Indiana Ave. NW
Washington, DC 20004
(202) 628-1200

“reflects the respect Congress has for the right of the states to regulate the ethical conduct of lawyers who practice law in their jurisdictions”).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Supplemental Memorandum of Points and Authorities in Support of a Motion to Suppress Identification Evidence and to Compel Disclosure of Exculpatory Information has been hand-delivered to the Felony Section of the Office of the United States Attorney, Assistant United States Attorney, Blanche Bruce, 555 Fourth Street, N.W., Washington, D.C., 20530, on this the 29th day of October, 2004.

J. Christopher McKee