

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

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

**MOTION TO SUPPRESS IDENTIFICATION TESTIMONY AND  
REQUEST FOR PRE-TRIAL HEARING IN ADVANCE OF TRIAL**

Mr. Ralph Johnson, through counsel, respectfully moves this Honorable Court to suppress identification testimony pursuant to Superior Court Rules of Criminal Procedure 12 and 47-I, the Fifth Amendment to the United States Constitution, and the law of the District of Columbia. A hearing well in advance of trial is requested on this Motion due to its comprehensive and critical nature to the case.<sup>1</sup> Counsel requests the right to supplement this Motion upon disclosures of additional information by the government.<sup>2</sup>

In support of this Motion and upon information and belief, counsel states the following:

1. Ralph Johnson is charged with one count of premeditated murder and related charges. The offense allegedly occurred on August 8, 2003. Trial is scheduled to begin on December 8, 2004.
2. According to information provided by the United States Attorney through the discovery process and from testimony obtained at the preventive detention hearing conducted in this case, there are three eyewitnesses to the alleged murder on August 8, 2003.

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<sup>1</sup> Mr. Johnson has invoked his right to a speedy trial in this case. Mr. Johnson has been detained since August 24<sup>th</sup>, 2003. The Government took nine months to indict the case and the first available trial date once indicted was the present date of December 8<sup>th</sup>, 2004. Due to the holiday schedule of the Courts, defense counsel is concerned that a lengthy hearing on the motion to suppress would risk a delay of the case that might interfere with the holiday plans of prospective jurors or the Superior Court holiday schedule for available jurors.

<sup>2</sup> Blanche Bruce, the assigned Assistant United States Attorney, has no objection to this defense request since discovery requests are outstanding on this matter. Ms. Bruce has indicated that all additional information will be disclosed within two weeks of the filing of this motion.

3. In fact, eyewitness testimony is the central component of the Government's case since there is no physical evidence that links Mr. Johnson to this offense or the scene. No weapon has been recovered. There are no fingerprints that link Mr. Johnson to the scene. There is no biological material (DNA) that links Mr. Johnson to the offense or scene.

4. According to the current state of discovery, within several days of the shooting, three eyewitnesses came forward. These witnesses were each shown photographs of Mr. Johnson.

5. One witness who claimed to know Mr. Johnson prior to the incident date identified him as the shooter. This individual was under the influence of mood-altering substances at the time of the incident.

6. The two other witnesses could not identify any individual as the shooter from the photo-array that was presented that included Mr. Johnson's picture.

7. On April 28, 2004, nearly nine months from the date of the incident and initial identification procedures, one of the witnesses who was previously unable to identify Mr. Johnson from the photograph was called to participate in a Grand Jury directed line-up.

8. Defense counsel was present at the April 28, 2004 line-up and before the identification procedure was conducted with the witness, defense counsel stated lengthy objections to the composition and procedures of the line-up.<sup>3</sup>

9. The objections generally addressed the fact that Mr. Johnson was clearly the youngest individual in the line-up. A clear difference in age was apparent from not only his size but also the fact that all of the fillers had facial hair unlike the seventeen-year-old Mr. Johnson. Mr. Johnson was also the darkest in complexion. The stark differences in appearance of the fillers from Mr. Johnson caused Mr. Johnson to stand out.

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<sup>3</sup> Attached to this motion is Appendix A, a copy of the videotaped line-up procedure complete with memorialized objections. Appendix B is a color photocopy of the line-up. When a transcript of the videotaped proceeding is available it will be provided to the Court.

10. In addition, prior to the commencement of the identification procedure, the defense objected to the instructions given to the witness before lineup. The instructional video shown to the witness used a number of different phrases that strongly suggested a suspect was in the lineup and, by directing the witness' attention to the presence of defense attorneys, suggested that an accused suspect was in the group. The instructional video said nothing about the witness' obligation to exculpate the innocence and similarly failed to inform the witness that the culprit may not be in the lineup.

11. At the time of the line-up, Mr. Johnson was the only person in the live line-up who had also appeared in the August 2003 photographic array that was previously shown to this witness.

12. Since the identification procedure conducted in this case with the witness who appeared at the April 28, 2004 line-up was so fundamentally flawed and suggestive as to cause a substantial likelihood of misidentification, the Fifth Amendment requires suppression of any out-of-court and in-court identification of Mr. Johnson by the eyewitness.

13. The totality of circumstances surrounding this identification procedure demonstrates that the alleged identification is unreliable, and therefore violative of due process and applicable rules of evidence. As a result, the Court should exclude all testimony relating to out-of-court and in-court identifications from the line-up witness in Mr. Johnson's trial pursuant to the United States Constitution and pursuant to the law of evidence in the District of Columbia.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF DEFENDANT'S MOTION TO SUPPRESS IDENTIFICATION TESTIMONY**

Faulty eyewitness identifications are a well known problem in the American criminal justice system. Exonerations based on DNA evidence, many involving death row prisoners, have

highlighted the fact that our criminal justice system is fallible. The reason for many system errors has been faulty eyewitness identifications. The Innocence Project estimates that 60 of the first 70 exonerated death row prisoners were convicted based in part on mistaken eyewitness identification testimony. See [www.innocenceproject.org](http://www.innocenceproject.org) (click on “causes and remedies”) as of October 1, 2004. The Department of Justice (DOJ) issued a report in June 1996 entitled “Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial,” profiling 28 DNA exoneration cases; in almost all of them, the wrongful conviction was based on eyewitness identification testimony. Id. at 15. The Report of the Illinois Commission on Capital Punishment, released in 2002, also cites unreliable eyewitness identification as a contributing factor in that state’s famously broken system. See Report of the Illinois Commission on Capital Punishment at 127-31 (April 2002).

The District of Columbia is not exempt from these nation-wide problems. Mr. Edward Green, a Public Defender Service client, represented by The Honorable Neal Kravitz when he was a trial attorney, originally was accused of two sexual assaults. According to the Innocence Project web site, he was identified by two victims, one who made an identification from a photo-array and one who made an identification from a line-up. Convicted of a number of counts at trial, he was exonerated through DNA evidence in a Motion for New Trial that was granted in 1990. See [www.innocenceproject.org/case](http://www.innocenceproject.org/case) (click on “browse by name” and “Green, Edward”) as of October 1, 2004.

The mistakes caused by faulty eyewitness identification have caused personal anguish as well as public debate. The harm to the wrongly convicted – who spend months or years incarcerated for a crime that they did not commit – is clear. Less obvious is the toll on honest, sincere eyewitnesses, themselves often the victims of violent crimes, who must live with the

knowledge that they have made terrible mistakes, through no conscious fault of their own that cause others to suffer. Jennifer Thompson, whose mistaken eyewitness identification caused Ronald Cotton to be incarcerated for 11 years for a sexual assault that he did not commit, has written and spoken movingly about her experience. See Jennifer Thompson, “I Was Certain, but I Was Wrong,” New York Times, June 18, 2000.

Indeed, other jurisdictions have changed their approach to eyewitness identification procedures to avoid some of these injustices. The state of North Carolina and the state of New Jersey, counties in California, Illinois, Minnesota, Massachusetts and New York, have all moved away from simultaneous to sequential lineups.<sup>4</sup> Reforming Eyewitness Identification: Convicting the Guilty, Protecting the Innocent Conference, Panel at the Benjamin N. Cardozo School of Law at Yeshiva University (September 13, 2004). These jurisdictions have also started conducting “double-blind” identification procedures where even the officers conducting the identification procedures do not know who the suspect is. Id.<sup>5</sup> The American Bar Association has made similar recommendations of “best practices” to law enforcement. American Bar Association Statement of Best Practices For Promoting the Accuracy of Eyewitness Identification Procedures, August 2004.<sup>6</sup>

Mr. Johnson’s case presents a number of factors that have been identified as greatly increasing the risk of wrongful conviction based on eyewitness identification testimony. The case involves a stranger identification. The incident lasted only a very short period of time and involved a weapon. The crime involved a startling and terrifying event – the eyewitness apparently was alerted by gun fire. To counsels’ knowledge, there is no corroborating evidence for the eyewitness’ sole identification: no murder weapon was ever recovered, and there is no scientific evidence

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<sup>4</sup> A “sequential” lineup means that the person choosing from the lineup views only one lineup participant at a time and states his or her opinion that the person is or is not the suspect.

<sup>5</sup> A “double blind” lineup is where the person conducting the lineup is not aware of whether any member of the live lineup is the actual suspect and the witness is told the suspect might not be in the lineup.

<sup>6</sup> Appendix C – ABA document.

connecting Mr. Johnson to the crime. In other words, this is precisely the type of case in which a well-intentioned and sincere eyewitness' mistake could convict an innocent man.

The leading Supreme Court cases governing challenges to eyewitness identifications under the Fifth Amendment to the United States Constitution are Neil v. Biggers, 409 U.S. 188 (1972) and Manson v. Brathwaite, 432 U.S. 98 (1977). Those cases focused on when suggestive identification procedures could undermine the reliability of an identification, and made clear that the “central question” is “whether under the totality of the circumstances the identification procedure was reliable” despite the use of suggestive procedures. Manson, 432 U.S. at 106. Neither Neil nor Manson, however, purported to freeze in time the factors used to determine whether an identification is unreliable, and neither case determined that, once a court has made a determination that a particular police procedure was unnecessarily suggestive, that that determination should be ignored in the reliability calculus. The two inquiries mandated by Neil and Manson are not independent of one another. Rather, each case made clear that “It is a likelihood of misidentification which violates a defendant’s right to due process, and that “suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.” Neil v. Biggers, 409 U.S. at 198. Stated more simply, suggestivity has always been an important factor in determining reliability, and the law requires that it be considered in assessing the “totality of the circumstances.”

Although the relationship between suggestivity and unreliability was clear in 1977 when Manson was decided, it has become even more so in the past 30 years. Since 1977, social scientists have conducted controlled experiments concerning the factors that make a particular identification unreliable. Repeatedly, those experiments have demonstrated that certain suggestive procedures –

namely, lineup composition, the failure to give proper instructions prior to viewing, the existence of prior viewings of the suspect through identification procedures, and influence by police investigators – all dramatically decrease the reliability of eyewitness evidence.

We also now know that these scientific experiments have been validated by real world experience. Although the Supreme Court knew, even in 1967, that “the annals of criminal law are rife with instances of mistaken identification,” United States v. Wade, 388 U.S. 218, 228 (1967), we now have a much better idea why these mistaken identifications are occurring: The DNA exonerations have provided a dramatic demonstration of how errors by honest but mistaken eyewitnesses, often directly attributable to suggestive police procedures, are a leading cause of wrongful convictions. It is incumbent upon this Court to prevent such a risk by excluding identifications that have been rendered demonstrably unreliable through the use of suggestive police procedures, particularly where (as here) the “totality” of other factors further undermine the reliability of the identification.

Mr. Johnson calls upon this Court to exclude or suppress the lineup identification in his case, based on D.C. common law, the law of evidence, and the Fifth Amendment to the U.S. Constitution. He requests a hearing on this Motion.

**I. The Identification Procedures Employed Were Unnecessarily and Impermissibly Suggestive.**

The identification procedure used in this case was so unnecessarily and impermissibly suggestive as to require its suppression under the due process clause of the Fifth Amendment. Under the controlling law, Manson v. Braithwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 192 (1972), this Court must address two core questions in resolving a motion to suppress an identification based on a suggestive pre-trial procedure: (1) whether the identification procedure itself was unnecessarily and impermissibly suggestive; and (2) “whether under the totality of the

circumstances the identification was reliable even though the confrontation procedure was suggestive.” Neil v. Biggers, 409 U.S. at 198-99.

There can be no question but that the lineup in this case was impermissibly suggestive – all of the factors point in this direction, including the lineup composition, the absence of proper instructions, the existence of prior viewings of the suspect through identification procedures, and influence by police investigators. The Supreme Court has long recognized that “a major factor contributing to the high miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.” United States v. Wade, 388 U.S. at 228. As the Court has explained, moreover, these procedures can “take the form of a lineup . . . or show up” but “it is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification.” Id. at 229-30. And, as the Court has noted, “it is a matter of common experience that, once a witness has picked out 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 (in the absence of other relevant evidence) may for all practical purposes be determined then and there, before the trial.” Id. at 228.

The Supreme Court itself has condemned as “suggestive” a lineup procedure in which the suspect was substantially taller than the others. See Neil v. Biggers, 409 U.S. at 197, citing Foster v. California, 394 U.S. 440, 442 (1969) (“suggestive” lineup conducted before suggestive showup). This lineup involved similar suggestivity: Mr. Johnson, at seventeen, is particularly young looking. When the line-up was assembled in this case Mr. Johnson was clearly the youngest looking person in the lineup. All of the fillers used in the lineup were all police officers, and at least one of them was over thirty years of age. At least one clearly had a receding hairline. See Chatmon v. United States, 801 A.2d 92, n 12 (D.C. 2002) (photo array with one pre-teen and four men who were

significantly older than suspects in late teens was suggestive). Because of his age, Mr. Johnson did not have any facial hair. A number of the fillers used in Mr. Johnson's line-up however did have facial hair. United States v. Downs, 230 F.3d 272, 275 (7th Cir. 2000) (lineup ruled impermissibly suggestive because defendant was only participant without facial hair). Similarly, Mr. Johnson stands out as the smallest person in the group. Also, quite troubling is that Mr. Johnson has the darkest complexion among all of the others in the lineup. See Henderson v. United States, 527 A.2d 1262 (D.C. 1987) (holding that photo array where defendant had substantially lighter skin than others as well as being the only one with receding hairline was unduly suggestive). These differences were so pronounced, that the Assistant United States Attorney, Blanche Bruce, rearranged the fillers after objections were made to the first line-up configuration in an unsuccessful effort to ameliorate the blatant disparities. A simple re-shuffling was an inadequate solution because if it was necessary to move certain fillers away from Mr. Johnson, it is clear that those fillers should not have been included in the lineup at all because of their lack of similarity in appearance to Mr. Johnson.

Apart from the composition of the lineup, another serious problem with the lineup is that Mr. Johnson was the only person in the lineup that the witness had already seen a prior photograph in August 2003.<sup>7</sup> That photo-array was composed using photographs of other young people, apparently juvenile arrestees. However, as previously mentioned, the lineup was composed of Metropolitan Police Officers. So Mr. Johnson was the only "repeater"- the only person in the live lineup that the witness had seen before. This greatly adds to the suggestivity of the lineup in that it creates a high probability of a scenario where the witness could be identifying Mr. Johnson not because she recognizes him as the shooter but because she recognizes him from a photograph she had seen of him previously. Jennifer D. Dysart, et al., Mug Shot Exposure Prior to Lineup

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<sup>7</sup> A color copy of the photo array shown to the witness is attached as Appendix B-2.

Identification: Interference, Transference, and Commitment Effects, *Journal of Applied Psychology*, Vol. 86, No. 6 1280-1284 (2001), See also Cossell v. Miller, 229 F.3d 649, 656 (7th Cir. 2000) (identification 3 years after crime unreliable where witness had twice failed to identify defendant in previous police presentations).

In addition to the problems with the composition of the lineup itself, the procedures used by the government were also highly suggestive. In 1999, after considerable deliberation by the Attorney General's Technical Working Group for Eyewitness Evidence, the United States Department of Justice published a guide for law enforcement investigators conducting eyewitness identification procedures. See Eyewitness Evidence, A Guide For Law Enforcement, United States Department of Justice (October 1999) (Attached as Appendix F). That report contains a series of best practices for how law enforcement officials should compose the lineup, instruct the witnesses prior to viewing the lineup, and how to conduct and record the procedure.

Investigators followed virtually none of the recommended procedures here. Particularly noteworthy on this subject was the instructional video shown to the witness before the procedure.<sup>8</sup> The Department of Justice Report directs law enforcement authorities conducting lineups to instruct witnesses that (1) "it is just as important to clear innocent persons from suspicion as to identify guilty parties;" (2) the person who committed the crime may or may not be present in the group of individuals;" (3) "regardless of whether an identification is made, the police will continue to investigate the incident." Appendix F at p. 32. The MPD instruction video, however, failed to provide any reassurance to the witness that one of the purposes of the procedure was to exculpate the innocent, contained no warning that the culprit might be absent from the lineup, and failed to caution the witness a failure to make an identification would not prevent continued investigation.

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<sup>8</sup> Appendix D is a transcript of the instructional video that was used in this identification. It is the understanding of the defense that this identification was the first one to use the video that had been only recently produced.

Instead, the video also strongly suggested that a suspect *was* in fact in the lineup both by expressly telling the witness that police could not reveal if she had selected the “right” suspect, and by informing the witness of the likely presence of a defense attorney (who could only be representing the suspect). The instructional video seemed designed to encourage witness fear and to prompt the witness to take risks to improve the city’s safety by telling them things like:

Many people believe that they have to be one hundred percent positive about their identification, but that is not true. If you view the line and you see someone that looks familiar as being involved in the offense, let us know that before you leave this room. Even if you are less than one hundred percent positive, but one of the subjects looks familiar to you as having been involved in the offense, please state that into the microphone.

In addition to encouraging this sort of witness speculation, the procedures also failed to take precautions to ensure that police did not provide conscious or unconscious cues as to their suspect.

Gary L. Wells, et al., Distorted Retrospective Eyewitness Reports as Functions of Feedback and Delay, *Journal of Experiential Psychology*, Vol. 9, No. 1, 42-52 (2003). Indeed, police failed to instruct the witness not to discuss the identification procedure or the case with other witnesses, instead informing them that they could speak “with whomever you wish” about the procedure, and providing specific directions about where to meet with other witnesses. As the evidence presented at a hearing will demonstrate, moreover, law enforcement authorities also met with the witness before and after the lineup procedure. This was especially problematic, given that these investigators, as well as the specific law enforcement officer conducting the lineup, knew who the suspect was, contrary to best law enforcement practices, and thus were in the position to provide both verbal and non-verbal clues (whether consciously or unconsciously) as to which member of the lineup was suspected by police, as well as confirmatory feedback. Gary L. Wells and Elizabeth A. Olson, Eyewitness Testimony, *Annual Review Psychology* 54:277-95 (2002).

## **II. The Identification of Mr. Johnson is Unreliable**

Where an identification is shown to be suggestive it must be examined for reliability.

"Reliability is the linchpin in determining the admissibility of identification testimony." Manson v. Braithwaite, 432 U.S. 98, 114 (1968). On this score, it is important to remember that suggestivity and reliability are inherently related: "suggestive confrontations are disapproved because they increase the likelihood of misidentification." Neil v. Biggers, 409 U.S. at 198. Apart from suggestivity, factors relevant to the determination of reliability include the opportunity of the witness to view the defendant at the time of the crime, the accuracy of any prior description, the level of certainty of the witness and the length of time between the crime and the identification. Neil v. Biggers, 409 U.S. 188, 199-200 (1972). The identification of Mr. Johnson is unreliable because not only is it the result of suggestive procedures, the totality of the circumstances demonstrates it is unreliable for a number of other reasons as well.

In considering these factors, it is important to scrutinize with care any self-reports by the eyewitness about the circumstances of their identification. In the 30 years since Manson, social science research has demonstrated witness self-reports about the attention they paid to the suspect, the extent of their opportunity to view the suspect, and the duration of the event, are notoriously unreliable. Nisbett, R.E. Wilson, T.D., Telling More Than We Can Know Verbal Reports On Mental Processes, 84 *Psychological Review* 231-59 (1977); Wells, G.L. Murray, D.M., What can psychology say about the Neil v. Biggers Criteria for Judging Eyewitness Identification Accuracy, 68 *Journal of Applied Psychology* 347-62 (1983); Elizabeth F. Loftus et al., Time Went by So Slowly: Overestimation of Event Duration by Males and Females, 1 *Appl. Cogn. Psychol.* 1 (1987); Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil and Criminal 26-27 (1987) (explaining that a witness tends to overestimate the duration of an especially stressful or violent

event).<sup>9</sup> In addition, research has now demonstrated that witness confidence statements are only weakly correlated with witness accuracy, if there is any correlation at all. Gary L. Wells, et al., “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,” 22 (6) *Law & Human Behavior* 15-16 & 18 (1998); See, e.g. 60 *Alb. L. Rev.* 389, 418; 79 *Ky. L.J.* 259, 276, citing Cutler, Penrod & Martens, The Reliability of Eyewitness Identification, 11 *L. & HUM. BEHAV.* 233, 234 (1987); Deffenbacher, Eyewitness Accuracy and Confidence, 4 *L. & HUM. BEHAV.* 243, 258 (1980). And most importantly, suggestive police procedures themselves can skew all of the factors set forth in Manson: Research has shown that witness statements concerning their own level of certainty, their opportunity to view the suspect, the detail of the description, and their attention level all can be inflated through the use of suggestive procedures. Bradfield, Wells & Olson, The Damaging Effect Of Confirming Feedback on the Relation Between Eyewitness Certainty And Identification Accuracy, 87 *Journal Of Applied Psychology* 112 (2002); Wells, G.L. & Bradfield, A.L., “Good, You Identified the Suspect:” Feedback To Eyewitnesses Distorts Their Reports Of The Witnessing Experience, 83 *Journal of Applied Psychology* 360-76 (1998); Wells, G.L. & Bradfield, A.L., Distortions In Eyewitnesses’ Recollections: Can the Post-Identification Feedback Effect Be Moderated?, 10 *Psychological Science* 138-44 (1999). In short, in assessing the Manson reliability factors, this Court must be ever mindful of the ability of suggestive procedures to influence those factors.

The suggestive lineup here thus substantially undermined the reliability of the identification, and an analysis of the *Manson* reliability factors only confirms this result. First, with respect to the

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<sup>9</sup> In a survey of over 100 experimental psychologists, potential jurors, judges, law students, and lawyers conducted by Daniel Yarmey and Hazel P. Tressillian Jones, ninety-five percent of the experts agreed that witnesses generally overestimate the duration of crimes, whereas fewer than half of the potential jurors did so. A. Daniel Yarmey & Hazel P. Tressillian Jones, Is the Psychology of Eyewitness Identification a Matter of Common Sense?, in Evaluating Witness Evidence: Research and New Perspectives 33 (Sally M. Lloyd-Bostock & Brian R. Clifford eds., 1983) .

opportunity to view at the time of the incident, the identification is unreliable because the shooting only took “a matter of seconds.” Detention Hearing Transcript at 12.<sup>10</sup> Second, regarding the accuracy of the prior description of the perpetrator, the description is so vague that it fits thousands of African American men in the District- black male, 5’9 in height, wearing blue jeans and a white shirt.<sup>11</sup> In addition to the description being vague, it did not match Mr. Johnson - Mr. Johnson was at least 6 feet tall in August of 2003. Third, the length of time between the incident and identification is very troubling as the lineup was conducted almost nine months after the incident. See U.S. v. Rogers, 126 F3d 655, 659 (5th Cir. 1997) (identification almost 10 months after crime raises concerns about accuracy of witness memory).

Both Neil v. Biggers and Manson v. Braithwaite emphasize “the totality of the circumstances” and note that the factors listed in evaluating reliability are merely illustrative. See Manson v. Braithwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 192 (1972). And there are other issues that effect reliability that are at play in this case. Some research suggests that stressful and startling events also can undermine the reliability of an eyewitness identification. One study has suggested that memory can be impaired at both extremely high and extremely low stress levels (i.e., inattention if the witness does not realize that he or she is witnessing a crime). Gary L. Wells & Elizabeth Olson, “Eyewitness Identification,” forthcoming, *Annual Review of Psychology* (2002) (discussing K. Deffenbacher, “The Influence of Arousal on Reliability of Testimony,” in S.M.A. Lloyd-Bostock & B.R. Clifford (eds.), *Evaluating Witness Evidence: Recent Psychological Research and New Perspectives* 235-51 (1983)). Another more recent study has confirmed how stress substantially decreases the ability to make a reliable identification demonstrating that less

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<sup>10</sup> Appendix E is a copy of the Detention hearing transcript.

<sup>11</sup> The description may have also included information that the perpetrator had a slim build. This depends on whether the person who made the identification at the lineup is Witness 2 or Witness 3 according to the arrest warrant and Gerstein. A direct request for this information has been made to AUSA Bruce and the defense is still awaiting her response.

than half of the 500 soldiers subjected to 40 minutes of stressful interrogation could not identify their interrogators soon after the process. 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). That the perpetrator had a weapon can also seriously call into question the reliability of an identification in that the attention of the witness may be focused on the weapon rather than the person committing the crime. 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 (2d Ed. 1992); Anne Maass & Gunther Kohnken, Eyewitness Identification: Simulating The "Weapon Effect," 13 Law & Hum. Behav. 397 (1989).

### **CONCLUSION**

In 1967, the U.S. Supreme Court stated, “[a] conviction which rests on a mistaken identification is a gross miscarriage of justice.” Stovall v. Denno, 388 U.S. 293, 295 (1967). Addressing the questions presented to it, the Supreme Court in Manson fashioned rules designed to guard against the type of unreliability that it knew about at that time. Now, over thirty years later, social science and our national experience have demonstrated new threats to the integrity of our criminal justice system. To fail to respond to these challenges undermines public confidence and leaves D.C. citizens vulnerable to wrongful conviction. For all of these reasons, Mr. Johnson respectfully requests that this Court GRANT this Motion and exclude or suppress the eyewitness identification in this case, under the D.C. common law and the Fifth Amendment to the United States Constitution.

Mr. Johnson requests an early evidentiary hearing on this matter.

Respectfully submitted,

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

<b>UNITED STATES OF AMERICA</b>	:	
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<b>v.</b>	:	<b>Judge Bayly</b>
	:	
	:	<b>Trial: December 8, 2004</b>
<b>RALPH JOHNSON</b>	:	

**ORDER**

This Court having considered the Defendant's Motion to Suppress Identification Evidence, it is this 1st day of October, 2004, hereby

ORDERED, that all identification testimony regarding a lineup identification are suppressed;

\_\_\_\_\_  
The Honorable John H. Bayly Jr.

Copies to:

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Notice of Filing and the attached letter have 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 1<sup>st</sup> day of October, 2004.

\_\_\_\_\_  
Vida B. Johnson