

IN THE CIRCUIT COURT OF MAYCOMB COUNTY, ALABAMA

STATE OF ALABAMA,

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v.

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Case No. CC-00-0000

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JOE CLIENT.

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**MOTION TO SUPPRESS IDENTIFICATIONS**

Joe Client respectfully moves this Court to suppress the out-of-court identifications of Mr. Client. In support of this motion, Mr. Client submits the following:

1. Mr. Client is charged with capital murder in connection with the robbery-murder of Victor Victim. The State is seeking the death penalty.

2. On the night of January 17, 2016, Wilma Witness stood in front of the apartment building where she lives with her daughter and grandchildren, on the corner of Main Street and Taylor Boulevard. Ms. Witness was smoking a cigarette and talking on her cell phone. Three of the four street lights on that block were burned out. On that same block, William Eyewitness was checking his car's engine.

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

4. Ms. Witness went inside her daughter's apartment to call the police. About thirty minutes later, the police arrived. By that time, Mr. Eyewitness had fixed his vehicle and left the scene.

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

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

7. An officer shined a flashlight through the window of the police car in which Mr. Client was seated. The officer asked Ms. Witness if Mr. Client was the individual she saw running from the building. She was uncertain. After several minutes, Ms. Witness positively identified Mr. Client as the person she saw.

8. Mr. Client was arrested and charged with murder. After being arraigned and indicted, Mr. Client requested and was appointed legal counsel on January 23, 2016.

9. On February 16, 2016, while incarcerated in the county jail, Mr. Client was subjected to a lineup.

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

11. While the men in the lineup bore some similarities, Mr. Client was the only man taller than six feet. Mr. Client is six-foot, three-inches tall. Mr. Client wore a white T-shirt and no jacket during the lineup procedure.

12. Mr. Eyewitness selected Mr. Client by identifying him as “the tall one.”

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

13. The Sixth Amendment right to counsel attaches when formal legal proceedings are initiated, ensuring to “an accused who faces incarceration the right to counsel at all critical stages of the criminal process.” Iowa v. Tovar, 541 U.S. 77, 80-81 (2004). Postindictment lineups are a “critical stage” because of the “grave potential for prejudice, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial.” United States v. Wade, 388 U.S. 218, 236 (1967). Any postindictment identification procedure that requires the accused’s presence cannot be conducted constitutionally without notifying counsel. Id. at 237-38. Counsel’s presence at a lineup is required unless it is waived. Id. at 237. In order to waive counsel at a postindictment identification procedure, the accused must be apprised of his right to have counsel present and then “intelligently and understandingly” reject the offer of counsel. Carnley v. Cochran, 369 U.S. 506, 516 (1962).

14. Mr. Client’s counsel was not notified of the postindictment lineup. Nor was Mr. Client apprised of his right to have counsel present for the lineup. As a result, Mr. Client did not waive his right to have counsel present at the lineup and was unconstitutionally

denied counsel for this critical stage of the criminal process. Mr. Eyewitness must not be permitted to testify that he positively identified Mr. Client during a lineup.

## **II. THE STATE MUST BE PRECLUDED FROM INTRODUCING EVIDENCE THAT MR. EYEWITNESS AND MS. WITNESS POSITIVELY IDENTIFIED MR. CLIENT BECAUSE THE IDENTIFICATION PROCEDURES VIOLATED DUE PROCESS.**

### **A. The Out-of-Court Identification Made by Ms. Witness Is Unreliable and Should Be Excluded.**

15. A due process challenge to the admissibility of identification evidence requires a two-pronged analysis. First, the court must evaluate “whether the police used an unnecessarily suggestive identification procedure.” Perry v. New Hampshire, 565 U.S. 228, 235 (2012) (citations omitted); see also Brazell v. State, 369 So. 2d 25, 28 (Ala. Crim. App. 1978). This analysis hinges on the “objective characteristics of the identification procedure itself.” Ex parte Appleton, 828 So. 2d 894, 902 (Ala. 2001). A one-man showup, where a witness is shown a single suspect and asked if that suspect is the perpetrator, is “so unnecessarily suggestive and conducive to irreparable mistaken identification that it constitute[s] a denial of due process.” Manson v. Brathwaite, 432 U.S. 98, 104 (1977); see also Appleton, 828 So. 2d at 899.

16. The second prong requires analysis of whether the identification procedure “so tainted the resulting identification as to render it unreliable and therefore inadmissible.” Perry, 565 U.S. at 235; see also Brazell, 369 So. 2d at 28. The factors to be considered in making this determination are: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the perpetrator; (4) the level of certainty demonstrated at the confrontation; and, (5) the time between the crime and the confrontation. Perry, 565 U.S. at 239 n.5 (citing Manson v. Brathwaite, 432 U.S. 98, 114 (1977)); see also Ex parte Frazier, 729 So. 2d 253, 257 (Ala. 1998).

17. First, Ms. Witness’s identification is based on a one-man showup, an inherently unreliable procedure that tends to increase the likelihood of a false identification. See Appleton, 828 So. 2d at 899-900 (finding that one-man showup used to secure victim’s identification of defendant was unnecessarily suggestive). She only haltingly identified Mr. Client, despite being shown no other suspects and viewing Mr. Client while he was handcuffed in the back of a police car. This identification procedure was unnecessarily suggestive.

18. Second, the showup tainted Ms. Witness’s identification of Mr. Client and rendered it unreliable and inadmissible.

19. Critically, as in Appleton, the witness's description did not match the defendant's appearance that night. 828 So. 2d at 903 (noting that clothing seized differed in color from that described by witness before showup). Mr. Client was wearing a leather jacket and a baseball cap — not a hooded sweatshirt. Ms. Witness observed Mr. Client sitting in the backseat of a police car, so she could not determine his height. Viewing Mr. Client handcuffed in a police car unduly accentuated Ms. Witness's inclination to positively identify Mr. Client as the perpetrator. Even so, she was not immediately certain that Mr. Client was the right person. Taken together, these factors demonstrate a very "substantial likelihood of misidentification." Perry, 565 U.S. at 239.

B. The Out-of-Court Identification by Mr. Eyewitness Is Unreliable and Should Be Excluded.

20. Mr. Eyewitness's identification likewise was marked by suggestiveness and unreliability. Mr. Client was denied counsel during the lineup. Mr. Client was put in a lineup with four individuals who were all significantly shorter than him. Given that the individual fleeing the scene of the crime was described as "tall" and Mr. Client was the only person in the lineup who fit that description, the lineup was unfairly suggestive and created a "substantial likelihood of misidentification." Perry, 565 U.S. at 239.

21. Mr. Eyewitness's identification is even more unreliable than that of Ms. Witness. At the time the individual fled from Mr. Victim's apartment building, Mr. Eyewitness was leaning over the engine of his car and viewed the person from under the raised hood of his car. Mr. Eyewitness did not speak to the police immediately after the incident because he left the scene before the police arrived. Mr. Eyewitness did not identify Mr. Client until almost one month later. All of these factors taken together suggest that Mr. Eyewitness's identification of Mr. Client is unreliable and should be excluded.

**III. MR. EYEWITNESS AND MS. WITNESS SHOULD BE PRECLUDED FROM MAKING IN-COURT IDENTIFICATIONS OF MR. CLIENT.**

22. In-court identifications should be excluded when they are the "fruit of a suspect pretrial identification." Wade, 388 U.S. at 235. The State bears the burden of proving by clear and convincing evidence that any in-court identification is based on a "source independent of the unfair pretrial confrontation." Appleton, 828 So. 2d at 903 (citing Ex parte Frazier, 729 So. 2d 253, 259 (Ala. 1998)). If the State cannot carry this burden, the trial court is obligated to exclude the identification evidence. Id.

23. Mr. Eyewitness and Ms. Witness must be precluded from making in-court identifications of Mr. Client because their testimony would be based exclusively on unconstitutional out-of-court identifications. As the Supreme Court has noted, "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 . . . for all practical purposes be determined"

at the time of the initial identification and in the absence of defense counsel. Wade, 388 U.S. at 229. The unconstitutionally obtained identifications cannot be allowed to color the testimony of Mr. Eyewitness and Ms. Witness. Without reference to their previous identifications, neither Mr. Eyewitness nor Ms. Witness could reliably identify Mr. Client in court. Due process prohibits introduction of the prior identifications. Accordingly, the witnesses should not be allowed to rely on their prior unreliable identifications to point out Mr. Client at trial.

24. Because this is a capital case, this Court must apply special considerations to ensure that it is fair. “The fundamental respect for humanity” underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special need for reliability in determining whether the death penalty is appropriate. Johnson v. Mississippi, 486 U.S. 578, 584 (1988); see also Ex parte Monk, 557 So. 2d 832, 836-37 (Ala. 1989) (death penalty is “special circumstance” that justifies expansion of constitutional rights).

25. If the unreliable identifications of Mr. Client are not suppressed, he will be deprived of his right to due process, equal protection, counsel, and a fair trial, and a reliable sentencing as protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law.

For these reasons, Mr. Client respectfully moves this Court to:

- a. allow him to present evidence and argument on this motion at a pretrial hearing outside the presence of the jury; and
- b. grant his motion to suppress the unconstitutionally-obtained identification evidence.

Respectfully submitted,

/s/ Linda Lawyer

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[CERTIFICATE OF SERVICE]

[MOTION UPDATED ON 10/05/17]