FILED January 30, 2014 12:05 PM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review vs. JERRIN LAVAZIE HICKMAN, *aka* Jerrim Lavezie Hickman Defendant-Appellant. Respondent on Review	Multnomah County Circuit Court Case No. 081235225 CA A144741 SC S061409

RESPONDENT'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals on an appeal from a judgment
of the Circuit Court for Multnomah County
Honorable MICHAEL MARCUS, Judge

Opinion filed: March 30, 2013
Reversed and Remanded
Author of Opinion: Schuman, Presiding Judge
Concurring Judges: Wollheim, Judge, and Nakamoto, Judge
Review Allowed: August 15, 2013

. . . continued

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January 2014

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

STATEMENT OF THE CASE

The state seeks review of the Court of Appeals decision reversing the trial court in *State v Hickman*, 255 Or App 688, 298 P3d 619 (2013). Respondent respectfully prays that this court affirm that decision.

REVISED QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented: Does the entire *Lawson/James* framework apply when a portion of the eyewitness identification process occurs in front of the jury?

Proposed Rule of Law: The logic of *Lawson/James* is even more compelling when portions of first-time identifications occur in front of the jury. The safeguards intended to prevent unreliable identifications are almost entirely absent, thereby increasing the likelihood unreliable evidence is admitted. Moreover, any exception to *Lawson/James* would create a powerful incentive -- and the means -- for prosecutors to circumvent the protections designed to reduce wrongful convictions. Nothing about a portion of the eyewitness identification process occurring in front of the jury would justify precluding application of the full and complete *Lawson* analysis.

Second Question Presented: There appears to be no dispute that the identifications in this case are unreliable if both prongs of the *Lawson/James* framework are applied. The state's position is that only the first prong should be considered when there is a first-time in-court identification. If the identification of a defendant is based largely on the "good look" the witnesses obtained when the shooter ran up to their car, but the evidence demonstrates – and the prosecutor conceded – that the defendant could not have been the person who ran up to the witnesses' car, does the identification survive the first prong of the *Lawson/James* framework?

Proposed Rule of Law: When an eyewitness identification is primarily based on observations of a person who the eyewitnesses identified as the defendant, but who could not have been the defendant because he was elsewhere, the identification does not satisfy the requirements -- including "personal knowledge" – of the first prong of the *Lawson/James* analysis.

Third Question Presented: Where there are multiple suspects to a murder, is the admission of two unreliable eyewitness identifications harmless when two additional identifications remain, one of which was made by one of the murder suspects himself, the other was made by a man under the influence of cocaine and alcohol who claimed to recognize the defendant through a ski mask, and both witnesses hoped to obtain – through their testimony – relief from impending federal sentences?

Third Proposed Rule of Law: The number of suspects, the ambiguity of the evidence against the defendant, and the powerful impact of jurors of even unreliable identifications would not support a finding that the admission of two unreliable identifications was harmless.

Supplemental Summary of Facts

The following facts are in addition to the facts contained in the Petitioner's Brief on the Merits. Respondent largely accepts the facts put forth in the petitioner's brief.

On December 31, 2007, Dontae Porter met up with the defendant to celebrate the new year with a number of other men. Tr 1240. A number of the "guys" went to a house party in separate cars. Tr 1242. Porter and another man drove together. Tr 1242. Immediately upon arriving, Porter witnessed a fight in progress, during which "a gentleman" ran into the house. Tr 1244. That man was Christopher Monette, who was later shot and killed. Tr 1245, 1267. Soon thereafter, "[w]ords were exchanged" between Porter and Monette. Tr 1268. The words were sufficiently heated, apparently, because two other people – "Junior" and "Demarco" -- both intervened. Tr 1268. Porter pulled out a pocketknife, because Monette was "a big individual." Tr 1268.

Shortly after Porter and Monette exchanged words, there was still an effort to calm Monette down. Tr 1270. Jerrin Hickman – the defendant -- arrived, and words were then exchanged between Hickman and Monette. Tr

1271. The argument stopped and the defendant walked away. Tr 1271. According to Porter, Hickman grabbed a ski mask out of Mr. Porter's back pocket. Tr 1272. This is a ski mask Porter usually wears. Tr 1272. Porter had previously lied about how the defendant obtained the ski mask. Tr 1273. Monette was shot, according to Brandon Miller, another person at the party, by someone wearing a ski mask. Tr 1677.

D witnessed the altercation that resulted in Monette's death. She was 19 years old at the time, from West Linn, Oregon. Tr 1517. The east side of Portland was "out of [her] element." Tr 1517. Around 11:30PM, she was in the backseat of a Toyota Corolla. Tr 1520. Two people sat in the front seats. Two other people – in addition to D -- were in the back seat. Tr 1520. D saw African-American men fighting near the front door of a house. Tr 1526. There were 25-50 other people in the yard. Tr 1526. Three or more men were fighting. Tr 1527. Monette wore a tank top, which he took off during the argument. Tr 1527. According to D, the other people whom she noticed "pretty much all looked, like, the same. They were all wearing really baggy clothing and many of them were very husky gentlemen." Tr 1527.

After Monette was shot, people started "running westbound, jumping into cars, cars were leaving." Tr 2093. Monette was laying on the driveway. Tr 1359. Later, numerous shell casings would be collected on or around the driveway. Tr 1355. It was a sloping driveway. Tr 2638.

The car D and N were riding in started to drive away. Tr 1781. The two women saw the man with the gun run toward the car and try to get in. Tr 1781. One of the other passengers repelled the man. Tr 1781. The car made it a few blocks from the house before the police stopped it. Tr 1787.

However, at that same time, Officer Mast came upon two men, one tall and the other short and stocky. Tr 2093-94. Those men were Porter and the defendant. Tr 3137. The prosecutor would later acknowledge that, in light of Officer Mast's testimony, the defendant was *not* the person who attempted to get into D and N's car[1]. Tr 3137.

Shortly after Officer Mast approached Porter and the defendant, a woman ran up yelling and screaming and claimed that the shooter was getting away in a car leaving at that very moment. Tr 2096. Hearing for the first time that someone had been shot, Officer Mast went with the woman to the driveway where Monette was still barely alive. Tr 2097.

The woman was identified as Tosha Granberg. Tr 2098. She identified

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[1] The exact quote from the prosecutor was:

> Meaning [Officer] Mast having contact with Hickman and Porter at the same time as these young ladies were thinking that the shooter was coming up to their car.
>
> Mr. Hickman could not have been in two places at once, but that point was completely vetted effectively by the defense. So this is not new evidence. It just isn't.

Tr 3137.

the shooter as "Cello." Tr 2099. The car she identified the shooter getting into was stopped. Tr 1496-98. Moncello James, aka Cello, was not in the car, but his identification was. Tr 2174-2175.

SUMMARY OF ARGUMENT

The state is not challenging the Court of Appeals' conclusion regarding the unreliability of the identifications by D and N under the entire *Lawson/James* framework. Nor is it claiming that first-time in-court identifications would somehow be more reliable. The central tenet of the state's argument is that unreliable evidence in the form of first-time in-court identifications is more likely to be recognized as unreliable by the jury and therefore given little or no weight. Thus, the state is essentially proposing this court remove the safeguards essential to ensuring reliable identifications because it speculates that doing so would be harmless.

Petitioner's Brief does not reject the entire application of *Lawson/James*. Rather, the argument is made that the *Lawson/James* framework should not apply in full when the identification procedure "occurs *entirely* in the presence of the jury and the defense attorney." State's BOM – 2. [Emphasis added.] In this case, however, only a small portion of the identification process involving D occurred in front of the jury. The flawed "admonishment" to D and N were in the prosecutor's office before the trial began. The procedure whereby D – once on the witness stand -- would signal to the prosecutor that she could

identify the defendant as the shooter, while technically in front of the jury, was not something the jury would have known to look for or recognized while it was occurring. The moment D recognized the defendant as the shooter appears to have occurred when the jury was out of the courtroom, and her first claim to identify him – and the accompanying hyperventilation -- occurred in the hallway when neither jurors nor defense counsel were present.

Even if the entire identification process had occurred in front of the jury, the state cites no authority for its claim that under such a circumstance the "undue prejudice is low" and the "danger nearly nonexistent." State's BOM-18, 19.[2] Rather, it is asking this court to accept its rhetorical arguments on faith, without the benefit of an evidentiary hearing on the merits of the state's argument. This court's standard for declining to send a *Lawson*-based argument back to the trial court, when the original evidentiary hearing was made pre-*Lawson* is that no reasonable court could exclude the identifications under the *Lawson* framework. That is a high standard. The state simply cannot meet that standard on the record before this court.

Lastly, there is not a single piece of evidence that the state relies on to argue for defendant's guilt that is not rife with ambiguity. Defendant left in a hurry, but so did most everyone else. Another person was identified at the time

[2] In contrast, this court's reliance on the applicable social science was notable for its range and breadth. Appendix, *State v Lawson/James*, 352 Or

of the shooting by an eyewitness immediately after it occurred. A third suspect suspect admitted to being intoxicated, fighting with the victim, pulling out a knife to use against the victim shortly before he was killed, worrying his DNA was on the murder weapon, knowing his DNA was on the mask that may have been used by the shooter, and hoping to get a reduction in his sentence on federal firearm charges in exchange for testifying for the state. The state's brief places a lot of weight on a couple of eyewitnesses who claim the shooter was around 5'6" or 5'7", approximately the height of the defendant. State's BOM – 40. Not only are eyewitness claims about height and weight notoriously unreliable, but the incident occurred on a sloping driving, which would have caused witnesses to misapprehend the height of the shooter relative to someone on another part of the driveway. Given the other potential suspects, the lack of any incontrovertible evidence against the defendant and the powerful impact on juries of unreliable identifications, the state cannot meet its burden that the erroneous admission of the eyewitness identifications was harmless.

ARGUMENT

I. THE *LAWSON/JAMES* FRAMEWORK IS BOTH APPLICABLE AND DISPOSITIVE

A. Applying the *Lawson/James* framework would result in the exclusion of the unreliable identifications

When the Court of Appeals reversed the defendant's conviction for

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724, 291 P3d 673 (2012).

murder and remanded for a new trial, it did not order the exclusion of the two eyewitness identifications. It simply ordered a hearing on the eyewitness identifications based on the analysis of *State v. Lawson/James*, 352 Or 724, 291 P3d 673 (2012), which had been issued while this case was under advisement. *Hickman* at 700. This Court had issued a similar order regarding the conviction of Lawson, but it had declined to do so for James, when this court concluded that "application of the revised test that we have established here could not have resulted in the exclusion of the eyewitness identification evidence." *Id.* at 765.

The same standard would apply here. The question before the court is whether, after a hearing in which the court can focus on the evidence – factual and scientific – that this court identified as important in *Lawson/James*, and after application of the *Lawson/James* standard, the trial court could not reasonably conclude that the eyewitness identifications should be excluded. Given, however, that the state's own brief does not claim that the eyewitness identifications at issue are reliable under the *Lawson* framework – in fact, it tacitly concedes that the identifications are not reliable by failing to argue to the contrary – it is highly unlikely that the trial court would *not* exclude the identifications. The evidence falls far short of the standard which would preclude remand: that no trial court would reasonably exclude the identifications. *Id.*

The state seeks to work around what, under these facts, is a nearly impossible standard for it to satisfy, by arguing instead that much of the *Lawson/James* framework would not apply. Though the proper application of *Lawson/James* might find the evidence both highly unreliable and highly prejudicial, as well as the type of evidence that "has contributed to date to 72 percent of the 301 wrongful convictions revealed by DNA evidence,"[3] nevertheless – according to the state – the entire framework of *Lawson/James* is inapplicable to an initial identification which occurs entirely in front of the jury and defense attorneys.

While the state's brief on the merits does not question the holding or analysis of *Lawson/James* itself, its attempt to carve an exception to *Lawson/James* is a challenge to the fundamental premise of that decision, which is that unreliable eyewitness identifications should be excluded because the "traditional methods of informing factfinders of the pitfalls of eyewitness identification — cross-examination, closing argument, and generalized jury instructions — frequently are not adequate to inform factfinders of the factors affecting the reliability of such identifications." *Id.* at 759. A first-time in-court identification would increase the drama and theatricality of an identification, but there is nothing in the record before this court to support the state's unscientific, speculative argument that somehow evidence that fails the

[3] *Id.* at 749, fn.

Lawson/James reliability test nevertheless would be rejected by the factfinder as unreliable, thus minimizing the undue prejudice. To the contrary, as discussed below, the circumstances surrounding first-time in-court identifications make the identification less probative and even more prejudicial, increasingly – not decreasing – the likelihood of a wrongful conviction.

B. The identifications only partially occurred in front of the jury

Petitioner's argument depends on a premise that for the most part does not apply to this case. It argues for the inapplicability of *Lawson/James* when the eyewitness identification occurs "entirely" in front of the jury and defense counsel. State's BOM – 2, 4. That premise is essential to the state's argument. However, as applied to D's identification, and to a lesser-degree N's identification, that premise is without support.

In *Lawson/James*, this court highlighted the importance of the pre-identification instruction.

> Studies show that the likelihood of misidentification is significantly decreased when witnesses are instructed prior to an identification procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone. **Indeed, one study found that in target-absent lineup procedures, witnesses who were warned that the perpetrator might not be in the lineup misidentified a suspect only 33 percent of the time, compared to 78 percent of the witnesses not so instructed.** Roy S. Malpass & Patricia G. Devine, Eyewitness Identification: Lineup Instructions and the Absence of the Offender, 66 J Applied Psychol 482, 485 (1981). There appears to be little downside to giving such instructions. According to a 2005 meta-analysis, unbiased instructions greatly increased correct

> suspect rejections in target-absent lineups, but had no appreciable effect on the rate of correct identifications in target-present lineups. Steven E. Clark, A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification, 29 Law & Hum Behav 395, 397 (2005).

Lawson at 780. [Emphasis added.]

Here however, the pre-identification instruction of D occurred in the prosecutor's office prior to the start of trial (and by definition outside the presence of the jury). The prosecutor had arranged for D to signal him silently during her testimony if she believed she could identify the defendant as the shooter. Tr 1559. The purpose of the signal was so that he would know to ask her during her testimony if she could identify him. Tr 1559.

Self-evidently, this type of admonition is the opposite of the "unbiased instructions" discussed in *Lawson/James*. Rather than highlighting the fact that the suspect might not be included in the line-up, a procedure which this court noted can greatly reduce the likelihood of a misidentification, the pre-identification instruction here implicitly emphasized that the shooter will be in the courtroom, that the prosecutor believes the defendant is the shooter, and the only issue is whether the witness can identify him as such. Again, the pre-identification instructions are a part of the identification procedure, as the state acknowledges, and neither of the instructions to both witnesses occurred in front of the jury or defense counsel. State's BOM – 34.

Avoidance of "prejudicial" conduct certainly includes refraining from

communicating to the eyewitnesses that the identification is simply confirmatory of what the police and the prosecutor already know -- namely that they got the right guy. *See United States v. Wade*, 388 US 218, 229, 87 SCt 1926, 18 LEd2d 1149 (1967). ("The fact that the police themselves have . . . little or no doubt that the man put up for identification has committed the offense . . . involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way.")

Furthermore, the "secret signal" serves to highlight the fact that the "in front of the jury" distinction is meaningless as a practical matter. When D was on the witness stand, prior to the failure of the recording system, she did not give the silent signal to the prosecutor. Tr 1559. The failure to give that signal would suggest that, up until the point the recording system broke down, she could not identify the defendant as the shooter[4]. But none of this would have been evident to the jury, which was unaware of the prosecutor's arrangement with the witness, despite the fact that it was occurring "in front of them." Given that the jury was not told about "the look" the witness was instructed to give, it is impossible to believe the jury would have recognized the absence of the look for what it was, much less been able to evaluate the weight that should be given to it.

[4] Furthermore, the fact that her visceral reaction to identifying the defendant did not occur until after she walked past him is compelling evidence

After the recording equipment failed, the court recessed. Tr 1523, 1556. The rest of the courtroom stood as the jury left the room. Tr 1556-57. It was either while the jury was leaving the courtroom or when the witness herself exited the courtroom, passing by the defendant, that she recognized him and, after reaching the hallway, began to hyperventilate. Tr 1557. What the prosecutor then heard and saw in the hallway, which informed him – even absent the signal – that she could identify the defendant as the shooter, neither the jury nor defense counsel witnessed. It is decidedly not true – despite the state's claim to the contrary (State's BOM – 33) -- that the jury had the opportunity to view D's demeanor when she made the identification. When the state asks this court to limit the application of the *Lawson/James* analysis to cases in which the eyewitness identification occurs "entirely" in front of the jury and defense counsel, regardless of the merits of that argument, it has no bearing to the identification of the defendant made by D.

The record regarding N's identification is less developed. But she too met with the prosecutor in his office prior to the start of trial. Tr 1796. No identification procedure was conducted. There is no particular reason to think that the pre-identification instruction was substantially different than the one the prosecutor had with D. If it were essentially similar, it would mean that, rather than conducting a pre-trial identification, with all the safeguards that would

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that the jury was not present at the moment she recognized the defendant.

entail, he would ask her to identify the shooter in court, when the suspect's identity was obvious and when the state's belief in that persons' guilt was self-evident[5]. Even without the better record which would be developed on remand, this too constitutes part of the eyewitness identification process. It alerted the witness that she would be asked if she could identify the person being prosecuted for the crime as the shooter, and it did not occur in front of the jury or defense counsel.

C. It is not likely that on remand the identifications would survive the first prong of the *Lawson/James* framework

Petitioner does not seek to do away with all parts of the *Lawson/James* framework when the identification occurs for the first time in the courtroom. State's BOM – 15-18. The state would retain the first step, which provides the "minimum baseline for reliability" for eyewitness identifications. *Lawson* at 758. That step implicates three interrelated evidentiary concepts: relevance under OEC 401, personal knowledge under OEC 602, and lay opinion under OEC 701. *Id.* at 741.

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[5] The state argues that the instructions in this case, at least as related to N, would have decreased the likelihood of a misidentification because she was told she did not have to identify anyone in the courtroom. State's BOM – 35. However, that is not the equivalent as telling the witness, as the *Lawson/James* opinion encourages, that the suspect may not be in the line-up or throwdown. *Lawson* at 780. Even had the prosecutor told the witness that the shooter might not be in the courtroom, such an admonition would hardly be credible when the prosecutor's reason for calling the witness is to obtain a conviction of the defendant.

However, under the facts and record in this case, it is not clear that upon remand the identifications would satisfy these foundational requirements. When the shooting occurred, both D and N were passengers in a car[6]. At the bail hearing that occurred in February, 2009, about ten months before the trial, Detective Rico Beniga described the substance of his interview with D shortly after the shooting. Tr 53. He said – based on that interview – "She had a – she didn't see the shooting and couldn't really describe much. Knew that there was an argument occurring, but could not give specific descriptions of who was involved." Tr 53.

As their vehicle began to drive away, they both saw the man with the gun run toward the car and try to get in. Tr 1781. One of the other passengers repelled the man. Tr 1781. The car made it a few blocks from the house before the police stopped it. Tr

Petitioner's brief repeatedly refers to the person who tried to get into the car as "the defendant." State's BOM -- 30 ("But defendant got closer as the car started to drive away after the shooting"); State's BOM -- 30-31 ("[D]efendant got up to her car window, tried to get in the car, and [N] got a good look at him at that time.")

However, as the prosecutor would concede during the motion for a new

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[6] D and N were passengers in the same car, but D testified she was 12 feet from the shooting and N testified she was 20-25 feet. Tr 1576; Tr 1780.

trial (Tr 3137), the defendant was *not* the man who, running from the crime scene, ran up to their car and attempted to get in, because he was with Officer Mast at the time. Tr 2093-94. It is certainly possible – and maybe even likely -- that the witnesses were right that the shooter attempted to get into their vehicle[7]. But that would mean, given the facts that came out during trial and the prosecutor's admission, that the defendant was *not* the shooter.

Alternatively, the witnesses' description of the face and hair and body of the shooter may not have been based on a view of the shooter at all, but rather on the person who attempted to get into their vehicle, the moment when – as petitioner's brief notes – N "got a good look at him." Tr 1799-1800; State's BOM -31. If in fact the witnesses never saw the face and hair of the shooter, only a person who was not the defendant, then their identifications would likely fail to satisfy the first prong of *Lawson/James.*

Under OEC 701, the proponent of the eyewitness identification evidence must prove, by a preponderance of the evidence, that the testimony is both rationally based on the witness's perceptions and helpful to the trier of fact. *Id.* at 754-755

[7] Even without the identifications being admitted, the witnesses' assertion that the shooter attempted to get into their car could still be presented to the jury. *Lawson* at 759. ("By excluding the particularly prejudicial aspects of an eyewitness's testimony, trial courts may be able to admit other relevant and probative aspects of that testimony, even though the eyewitness's testimony on balance might otherwise have been unduly prejudicial.")

To establish that the identification is rationally based on the witness's perception, the proponent must prove that the witness perceived sufficient facts to support an inference of identification and that the identification was, in fact, based on those perceptions. *Id.* Nonfacial features like race, height, weight, clothing, or hair color generally lack the level of distinction necessary to permit the witness to identify a specific person as the person whom the witness saw, although evidence that a witness "got a clear look at the perpetrator's face" would "ordinarily" satisfy the requirement of OEC 701. *Id.* at 755.

If there is evidence of an impermissible basis for an inference of identification, like suggestive law enforcement procedures, then the proponent must further establish that the witness's identification is rationally based on what the witness perceived and not from the impermissible procedure. *Id*. Importantly, although a defendant may present evidence of impermissible suggestive influences, the state ultimately bears the burden as the proponent of the evidence to prove that the identification was rationally based on the witness's perception and not on impermissible procedures. *Id.* at 756.

Here, the witnesses did not make an identification rationally based on their perceptions. Prior to trial, the witnesses did not describe to anyone what the shooter's face looked like. D's descriptions of the shooter were vague, inconsistent, and racially crass. She stated that the people who had been fighting on the night of the shooting "pretty much all looked, like, the same.

They were all wearing really baggy clothing and many of them were very husky gentlemen." Tr 1527. She said the shooter's age ranged from 20 to early 30s. Tr 1531. He was "stocky." Tr 1531. He seemed "very tall… maybe 5'7", 6 feet." Tr 1531. He had a "close Afro or braids." Tr 1531. In contrast, prior to trial, she had told defendant's trial counsel that the shooter had a "big afro." Tr 1563. She also stated to defendant's trial counsel that "black men all look the same to me. They are big and they are black." Tr 1563. In her testimony at trial, D stated that she did not see the shooter wear a hat or a ski mask. Tr 1603. N, on the other hand, said at trial that the shooter wore a "do-rag" around his head. Tr 1777. Later, when the shooter took off the do-rag, his hair appeared "nappy," and said that it appeared about three inches in length. Tr 1781-82. The first time N mentioned the shooter's hair was "two-and-a-half" years after the shooting. Tr 1793.

Once again, neither witness mentioned any specific or distinctive features of the shooter's face prior to the suggestive circumstances of trial. Additionally, the witnesses may not have been good at recognizing the faces of people that are of a different race since witness are significantly better at identifying members of their own race than those of other races. *Id.* at 736. And as noted above, the witnesses may have been describing the person who was repelled in his attempt to get into their car, a person who may or may not have been the shooter but certainly was not the defendant. Tr 3137.

Without an evidentiary hearing that would apply a *Lawson/James* framework – something unknown to the parties when the case was before the trial court -- it is impossible to predict with certainty what a trial judge would do. This court's standard, however, for not remanding back to the trial court for an evidentiary hearing is that under *no* circumstances would the evidence support exclusion under *Lawson/James. Id.* at 765.

D. The Identifications Were Unreliable In Large Part Because of the Conditions Under Which They were Made

It is important to recognize the state's argument for what it is. It is a claim that if we took all the safeguards for reliable identifications that the science compels, and we did the opposite, then the unreliability of the identifications would be obvious to the jury. If the unreliable evidence is evident to the jury, then it cannot cause undue prejudice and the admission of the evidence is harmless.

Here are examples of the safeguards that the state believes that, by disregarding in full, the evidence becomes admissible. The science, as set forth in the *Lawson/James* opinion, would stress the importance of having the identification conducted by a "blind administrators," that is, someone who themselves could not identify the suspect. *Id.* at 741-42. In a courtroom everyone knows who the suspect/defendant is.

As noted above, rather than an "unbiased" admonition, the prosecutor

indicated to the witnesses he would be asking if they could identify as the shooter the person he was personally prosecuting for the offense. As previously noted, it is highly prejudicial to conduct an identification which conveys to the witness that the government has "little or no doubt that the man put up for the identification has committed the offense." *United States v. Wade*, 388 US 218, 229, 87 SCt 1926, 18 LEd2d 1149 (1967).

The line-up construction should be based on physical similarities between the suspect and known innocents. *Lawson* at 742. With a sequential line-up, "the witness is less able to engage in relative judgment, and thus is less likely to misidentify innocent suspects." *Id.* An in-court identification during trial by definition involves no line-up at all.

The individual display of only one suspect to an eyewitness "suggests that the police think they have caught the perpetrator of the crime." *United States v. Brownlee*, 454 F3d 131, 138 (3d Cir. 2006); *see also Stovall v. Denno*, 388 US 293, 302 (1967) (noting forty years ago that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.").

As this court noted, "Witness memory can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness." *Lawson* at 742. It is hard to imagine external information that is more conducive for contaminating witness memory than the

circumstances of a trial and the physical appearance of the defendant in front of the witness.

The role of confirming feedback is difficult to ascertain in an in-court identification, since everything about an in-court identification would pre-confirm an initial identification before it is made. *Id.* But here, it would also serve to bolster the witness's certainty and confidence during cross-examination, as well as the description that she might give for the first time when the defendant is sitting in front of her.

In sum, the eyewitness procedures inherent in a first-time in-court identification – given that it involves the very opposite of what the science instructs -- promotes unreliability rather than safeguards against it. However, the state's position boils down to the claim that a jury is better able to recognize and discount an unreliable identification not just *when* all of the safeguards are disregarded but *because* the safeguards have been disregarded. Each of these safeguards serves to decrease the unreliability of identifications but by rendering them so transparently unreliable, the jury would be better positioned to reject the evidence.

It is also important that a first-time in-court identification does not merely reveal evidence, no matter how unreliable it may be. It *creates* evidence. As this court noted,

Because of the alterations to memory that suggestiveness can

> cause, it is incumbent on courts and law enforcement personnel to treat eyewitness memory just as carefully as they would other forms of trace evidence, like DNA, bloodstains, or fingerprints, the evidentiary value of which can be impaired or destroyed by contamination. Like those forms of evidence, once contaminated, a witness's original memory is very difficult to retrieve; **it is, however, only the original memory that has any forensic or evidentiary value.**

Lawson at 748. [Emphasis added.]

It seems unlikely that this court would condone the practice of having a highly important and influential DNA test being conducted for the first time during the trial and in front of the jury, in circumstances highly likely to contaminate the DNA sample.

By disregarding all of the safeguards that *Lawson/James* and the science compel, by creating an identification in the courtroom under circumstances that substantially increase the likelihood of contamination, the issue is not merely the ability of the jury to reject it; the new memory created by the circumstances of identification has no "forensic or evidentiary value." *Id.*

Moreover, by carving out an exception to most but not all of the *Lawson/James* framework, the state's proposal would create a procedural circus. Assuming *arguendo* the state's position is adopted, a defendant would reasonably seek to exclude the evidence under the first prong of *Lawson/James* by conducting a pre-trial evidentiary hearing. The state agrees that even under these circumstances, first-time identifications would still be subject to the initial

test, and the burden would be on the state. The hearing would occur, and the witness would be examined about the "personal knowledge" she may or may not possess which would allow her to identify the defendant. Inevitably, she would be asked to identify the defendant during this hearing, when not only all of the safeguards preventing unreliable identifications would be absent, but so would the jury.

Now that the first-time identification has occurred in highly suggestive circumstances outside the presence of the jury, the entire *Lawson/James* framework would apply, and there would need to be a second hearing to determine if the earlier hearing fostered the unreliability that would merit exclusion of the evidence[8].

E. Adopting the State's Argument would Increase the Frequency in Which Unreliable Evidence was Admitted and, Consequently, Increase the Frequency of Wrongful Convictions

It is worth emphasizing, again, that the state is not challenging the Court of Appeals' conclusion regarding the unreliability of the identifications by D and N under the *Lawson/James* framework. Nor is it claiming that first-time in-court identifications would somehow be more reliable or that unreliable

[8] Alternatively, both hearings could be reduced to one, which would initially involve only the first prong of *Lawson/James*, but once the identification is made by the witness outside the presence of the jury and the entire framework kicks in, there would need to be a determination if the hearing presently occurring is itself creating the kind of unreliable evidence that might

identifications would not be presented to the jury. The state's argument is essentially that if the safeguards are removed, the consequence of admitting unreliable identifications would be harmless.

An additional consequence of the state's argument, if adopted by this court, would be to *increase* the amount of unreliable and prejudicial evidence submitted to the jury. It is hard to square that with this court's goal of reducing wrongful convictions, given – as this court noted in *Lawson/James* – the centrality of unreliable identifications in convictions of defendants who were later exonerated by DNA testing. *Id.* at 749.

Moreover, an adoption of the state's argument would not just admit but *encourage* the admission of unreliable evidence. If the police or the prosecutor have doubts about a witness's ability to identify a defendant in a properly conducted photo throwdown, the obvious remedy would be to avoid any such throwdown, and to hold off on the identification until trial, when the circumstances of a first-time in-court identification would be expected to guarantee an answer favorable to the prosecution. This is not mere speculation; there would have been no reason to believe, prior to the trial in this case, that the witnesses could identify the defendant – or anyone -- as the shooter. Tr 53. A reliable identification procedure might have undermined the state's case. Despite a year between arrest of the defendant and trial, no throwdown was

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be excluded at the close of the hearing.

conducted, despite the self-evident witness availability. Even assuming the facts in this case – the secret signal, the avoidance of any pretrial identifications so that the identifications could be made at trial – were atypical, such procedures would gain currency if given the imprimatur of the Oregon Supreme Court.

II. The Evidence Was Not Harmless

"[A] harmless error is one that has 'little likelihood' of affecting the verdict." *State v. Lupoli*, 348 Or 346, 234 P3d 117 (2010).

The identification of the defendant by D and N was severely damaging in a case in which alternative suspects – known and unknown -- existed. The errors were not harmless individually, much less cumulatively.

Under these facts, the gate-keeper role of the court required exclusion, because even with effective cross-examination, "much eyewitness identification evidence has a powerful impact on juries[,]" which "seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime." *See State v. Delgado*, 902 A2d 888, 895, 188 NJ 48 (2006)("Eyewitness identification can be the most powerful evidence presented at trial, but it can be the most dangerous too."); *State v. Ledbetter*, 881 A2d 290, 316, 275 Conn 534 (2005), *cert den* 547 US 1082 (2006) ("Eyewitness identification evidence is particularly persuasive when the witness exhibits confidence in the identification."); *State v. Norrid*, 611 NW 2d 866,

869, 2000 ND 112 (2000) ("an eyewitness identification is powerful and compelling evidence in a criminal prosecution"); *People v. Daniels*, 88 AD 2d 392, 453 NYS 2d 699, 703 (2d Dept 1982) ("Because of its persuasive power and inherent unreliability, eyewitness identification is always fraught with peril but when, as here, it is suspect, it is frightening indeed.").

One alternative suspect, but not the only one, was Dontae Porter, who the jury might have been more inclined to exclude as the shooter at least in part because N and D both identified the defendant. Porter had been consuming alcohol. Tr 1303. He had had an argument with the victim that necessitated other people to intervene. Tr 1268. The argument was sufficiently heated that he threatened the victim by pulling out a knife. Tr 1268. The shooting occurred shortly thereafter. The ski mask which may have been used by the shooter belonged to Porter, and his DNA was on it. Tr 2063. He feared his DNA and/or partial fingerprints were on the murder weapon. Tr 1312. He originally lied in order to minimize his involvement. Tr 1304. His own testimony had been impeached by his two prior convictions for felon in possession of a firearm, his pending charge in federal court for felon in possession of a firearm, and a previous conviction for assault in the first degree with a firearm. Tr 1236-1237. Though Porter was substantially taller than the defendant, there was conflicting testimony about the shooter's height, and D had identified the shooter as "very tall." Tr 1531. Even Raymond Grant – who

was a friend of Porter's and had testified that he believed the shooter was on the shorter side – nevertheless could not rule out Porter as the shooter. Tr 1427.

Moreover, the studies conclude that height identification is one of the more unreliable identifications. Tr 2383.

Regarding an eyewitness's ability to judge height, Dr. Reisberg testified:

> If I remember Yuell's date correctly, witnesses were routinely off by five and six inches, so off by a half foot, so a fairly wide margin of error. And if I remember correctly their estimates of weight were quite similar – I mean, were just as bad. One of the things Yuell looked at was, can people at least make a judgment of, "well he was taller than I am, or shorter than I am" –
>
> . . . .
>
> Yeah even with those things [relatively height, the short one and the tall one], Yuell's data, again drawn from police records say eyewitnesses are just not very good at that.

Tr 2383-84.

Petitioner's brief makes note of the number of witnesses who put the shooter's height at lower than average. State's BOM -- 50. Reisberg's testimony specifically addressed this issue:

> [If] there's a situation set up that produces an illusion, every one of us is going to show the same illusion. I mean, that's the nature of these things and so if the circumstances don't favor accurate perception or accurate memory, we're all going to be pulled off track in the same way and so the consistency means we're just all making the same mistake, it can easily happen.

Tr 2421.

In this case, an illusion was present. Monette – who was by all accounts quite large -- was shot and killed on a "sloping driveway." Tr 2638. That fact

can create an illusion of relative height and make a person who might be near Monette's size to appear smaller than he actually is. This is a principle self-evident to anyone who has seen a basketball game on television. A 6' guard often appears quite short, relative to his teammates, until he is standing next to a referee or a fan, when his true height becomes apparent.

In sum, the guesses regarding the shooter's height was a red herring that very likely could have misled the police into excluding the actual shooter.

Out of the many other witnesses who were present at the time of the shooting, the only person other than Porter to identify the defendant as the shooter was Brandon Miller. Tr 1677. He originally denied seeing the shooting. Tr 1689. But Miller was serving a ten year prison sentence, and he later hoped that his testimony against the defendant would help reduce the sentence on a separate, pending federal firearm charge. Tr 1656-57. He testified at trial that the shooter was wearing a ski mask. Tr 1677. He believed he recognized defendant – his nephew – through the mask. Tr 1703. He explained that recognizing the defendant was analogous to a situation where, "[you] were around somebody everyday for long periods of time that if you seen them and they went tricker treating and had a mask on and you knew -- and it fit their face, you'd know who it was." Tr 1703. Soon thereafter he saw the defendant without the mask, running away at the same time he himself was running away. Tr 1701. While at the party, prior to Monette being killed,

Miller was consuming alcohol and cocaine. Tr 1665.

Porter was not the only suspect. Immediately after the shooting, Tasha Granberg identified another man as the shooter as well as the car he got into. Tr 2099. The car she identified the shooter getting into was stopped. Tr 1496-98. While the man she identified was not in the car when it was stopped, his driver's license was. Tr 2174-75.

The defendant did leave the scene in a hurry (Tr 1279, 1683, 1779), but so did most of the 25-50 people who had been at the party. Tr 2093. More significantly, D and N both believed the shooter attempted to get into their car as they drove away. Given the defendant was not the person who attempted to get into their car (Tr 3137), even if Porter was excluded as a suspect, D and N's testimony is compelling evidence that the defendant was *not* the shooter.

In sum, none of the state's arguments on harmless error meet the high standard.

> Under Article VII (Amended), section 3, of the Oregon Constitution, n12 an evidentiary error is "harmless" and may not result in reversal if there is little likelihood that it affected the verdict. *State v. Davis,* 351 Or 35, 261 P3d 1197 (2011). The appropriate inquiry is not whether a reviewing court regards the evidence of guilt as substantial and compelling, but whether the trial court's error was likely to have influenced the verdict as a matter of law. *Id.* at 60-62. In undertaking that analysis, the reviewing court must consider a trial court's evidentiary error in context and examine the nature and effect of the excluded and the admitted evidence. *Id.* at 62.

State v. Sanchez-Alfonso, 352 Or 790, 805, 293 P3d 1011 (2012)

CONCLUSION

For the reasons given above, there would be numerous downsides to the furtherance of justice were this court to adopt the state's proposal. The advantages – if any -- are less than clear.

Eyewitness identification is very seductive evidence. It holds great power to persuade, and juries are immune to traditional challenges to its reliability. The fact that *two* witnesses identified Mr. Hickman as the shooter – the only two witnesses to identify Mr. Hickman without motive or incentive to falsify evidence – is all the more powerful and all the more dangerous. There can be no reasonable dispute that the identifications were highly suggestive, and even assuming the state had attempted to put on evidence of independent reliability, or the judge had evaluated reliability within the proper framework and in reliance of the proper criteria, the evidence that can be culled from the record makes it clear that no facts existed that would render the identifications independently reliable. For this reason, this court should reject the state's invitation to carve out an exception to *Lawson/James*, which would both create a procedural circus and encourage abuse. If the court nevertheless adopts the exception, it should still reverse the conviction and remand to the trial court for a hearing on the first prong of the *Lawson/James* framework. Barring remand to the trial court, this court should remand to the Court of Appeals for an

analysis under the due process clause of the 14th Amendment of the United States Constitution, which the intermediate court did not need to address in light of its holding.

Dated this 30th day of January, 2014.

/s/ Ryan Scott

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 30, 2014, I directed the original Brief on the Merits of Respondent on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system. I further certify that on January 30, 2014, I directed the Brief on the Merits of Respondent on Review to be served upon Andrew Lavin, attorney for appellant, by mailing two copies, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,491 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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