

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE )  
 )  
 v. ) ID No. 11050100172  
 )  
 MEDFORD HOLMES, )  
 )  
 Defendant. )

Submitted: August 22, 2012  
Decided: August 23, 2012

On Defendant Medford Holmes'  
Motion to Suppress Witness Identification

**OPINION**

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Justice, Wilmington, Delaware, Attorneys for the State

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**JOHNSTON, J**

In this capital murder case,<sup>1</sup> Defendant Medford Holmes (“Holmes”) has moved to suppress a witness’s May 12, 2011 out-of-court identification of Holmes as the perpetrator. Holmes contends that the photographic array shown to the witness was unduly suggestive and that, under the totality of the circumstances, the witness’s in-court identification would be unreliable.

On July 26, 2012, the Court held a suppression hearing. Following the hearing, both parties were directed to file supplemental memoranda. For the following reasons, Holmes’ Motion to Suppress Witness Identification is denied.

### **FACTUAL CONTEXT AND PROCEDURAL HISTORY**

#### ***April 27, 2011 Shooting***

On April 27, 2011, at approximately 3:31 p.m., Antonio Smith (“Smith”) was outside his residence, located at 2806 North Jefferson Street in Wilmington, Delaware. Smith was conversing with a friend Abdullah Talib-Din (“Talib-Din”), also known as Douglas Lum, on this sunny afternoon.

A man, later identified as Holmes, approached Smith and Talib-Din from the direction of 29th Street. As Holmes neared the two men, Talib-Din

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<sup>1</sup> Holmes was indicted on Murder First Degree, Attempted Murder First Degree, two counts of Possession of a Firearm During the Commission of a Felony, and Possession of a Firearm by a Person Prohibited.

asked: “What’s up?” Holmes, positioned in the street close to Smith’s residence, then fired a .40 caliber handgun at Smith and Talib-Din. Smith, a wheelchair bound paraplegic, was fatally shot once in the chest. Talib-Din was shot eight times in his abdomen and legs. Talib-Din survived his wounds. Following the shooting, Holmes fled down North Jefferson Street towards 28th Street.

The Wilmington Police Department was called to the scene at approximately 3:32 p.m. When officers arrived, Smith was found unresponsive in his wheelchair and Talib-Din was transported for treatment of his injuries.

#### ***April 27, 2011 Witness Interviews***

On the evening of April 27, Detectives Kimberly Pfaff (“Pfaff”) and Randy Nowell (“Nowell”) of the Wilmington Police Department interviewed several witnesses. Witness 1 was interviewed at his home. Witness 1 suffers from Expressive Aphasia, a condition caused by head trauma from a prior automobile accident. As a result of Witness 1’s condition, he is unable to verbally communicate or write. However, Witness 1 is able to express himself through physical movements, including hand gestures, head gestures and facial expressions, as well as through noises. Notwithstanding Witness 1’s limitations with respect to communicating, no

evidence has been presented to suggest that Witness 1's comprehension has been negatively affected by his condition.

When interviewed, Witness 1 indicated to the Detectives that he observed the shooting. At the suppression hearing, Detective Nowell testified as follows:

State: Did witness one communicate to you somehow that witness one viewed the shooting?

Detective Nowell: He did.

State: Okay. And can you please tell the Court how witness one communicated what this witness saw?

Detective Nowell: Again, it was – he was – this witness was asked [the] question: Did you observe the shooting? The witness would nod his head up and down; made a motion with his hand in the shape of a firearm.

Through hand gestures, Witness 1 then demonstrated his location within his home at the time of the shooting. Witness 1 indicated that he was positioned by a window on the first floor in the rear of his home, approximately 50 yards from where the shooting occurred.

Witness 1 indicated that immediately following the shooting, he observed the shooter for a second time. Again using hand gestures, Witness 1 indicated that he was positioned by a door on the first floor in the front of his home when he observed the suspect for approximately 30 seconds.

Witness 1 was positioned about 20 feet from the shooter this time. Witness 1 was unable offer any descriptive information regarding the shooter.

Detectives also interviewed Witness 2 and Witness 3 on April 27, both of whom observed the shooter immediately after the shooting. In the presence of Witness 3, Witness 2 offered some descriptive details of the shooting. According to Witness 2, the suspect was a slim male in his early 20's, wearing a black hat with a brim, a blue jacket, jeans and was clean shaven. Witness 2 stated that she heard five shots fired, and then saw a male come around the corner onto Jefferson Street with his right hand in his pocket. Witness 2 further stated that the male stood in front of her residence on Jefferson Street before fleeing down an alleyway.

On May 11, 2011, Holmes was developed as a suspect in the shooting, and two days later, Holmes was arrested by Wilmington Police.

### ***May 12, 2011 Photographic Array***

On May 12, 2011, as part of their ongoing investigation, Detectives returned to Witness 1's home.<sup>2</sup> Also present at the home were Witness 2 and Witness 3. The purpose of this meeting was to present a six-person photographic lineup to the witnesses. The photographic array contained Holmes' photograph in position number 3.

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<sup>2</sup> At the May 12, 2011 interview, Detective Pfaff was equipped with an audio recorder.

Before showing the witnesses the photographic lineup, Detective Pfaff gave the following instruction to the witnesses:

It's a piece of paper. It has six photos on it. They're all of the head, okay? What I'm going to need you guys to do is just take your time and look at it. Just be mindful that this picture, these pictures were all taken before the incident happened two weeks ago, okay? So hairstyles can be a little different. Facial hair can be a little different so if you guys can really concentrate on like the eyes, the nose, the mouth, the face, just the facial features themselves, okay? If you recognize somebody, great. If you don't, no big deal. Okay? So if you don't mind if we can just one at a time go into the other room and I'll show each of you and then see if you guys know and then we'll go from there. Okay? Who wants to go first? Real easy. Take as much time as you need.

After issuing this instruction, Detectives Pfaff and Nowell took Witness 2 into a separate room and showed Witness 2 the photographic lineup. Witness 2 was unable to identify the shooter in the lineup.

Detectives Nowell and Pfaff testified that they next took Witness 1 into a separate room<sup>3</sup> and showed Witness 1 the same photographic lineup as had been shown to Witness 2. According to Detective Pfaff:

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<sup>3</sup> Detectives Pfaff and Nowell testified during the suppression hearing that each witness was taken into a separate room and shown the photographic array. This contention is not supported by the record. A transcript of the May 12, 2011 interview reflects that after issuing the general pre-identification instruction, Detective Pfaff presented the photographic array to Witness 2. During this time, Witness 2 indicated that one of the photographs in the array was not the shooter:

0:05:12.1 Witness 2: Huh-uh, huh-uh. Huh-uh, no.

0:05:16.2 Detective Pfaff: None of them?

Witness one started looking in what appeared to be the top left portion of the lineup. Then his eyes moved – it appeared that he went to the second picture, and then it appeared that witness one went to the third picture. And witness one’s eyes never moved off of the third picture. Witness one’s eyes then filled up with tears.<sup>4</sup>

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0:05:17.8 Witness 2: (unintelligible)

0:05:18.8 Detective Pfaff: Okay. Alright that’s the only, that’s the only one we have.

0:05:24.3 Witness 2: Oh, okay.

0:05:25.1 Detective Pfaff: Okay.

0:05:25.2 Witness 2: His face is a little slim.

0:05:27.5 Detective Pfaff: Okay but like I said it could be, you know, the pictures were taken a while ago so things could be a little bit different but.

0:05:35.3 Witness 2: But that’s, that’s not him.

0:05:36.6 Detective Pfaff: Okay.

0:05:39.6 Witness 2: No, that’s not him.

Less than one second after Witness 2 states, “No, that’s not him”, the audiotape transcript reflects that Detective Pfaff is showing the photographic array to Witness 1. It strains credulity to believe that, in less than a second, Detective Pfaff ceased speaking with Witness 2, maneuvered Witness 1 into a separate room, and presented Witness 1 with the photographic array.

<sup>4</sup> Detective Nowell corroborated Detective Pfaff’s account of what happened when Witness 1 viewed the photographic array. According to Detective Nowell: “Witness one was standing up looking down at the line-up. Witness one started [looking] in the top left corner, photograph one, and then moved to the right. When Witness one got to [photograph] number three he stopped, looked at that photograph, he never – the witness never then brought his head back to [photograph] number four, back to the left of the page again, witness then took a few steps back, he became visibly upset, eyes began tearing up.”

Detective Nowell testified that Witness 1 appeared afraid upon viewing the lineup. According to Detective Nowell, Witness 1 was “swaying back and forth, [] moving his feet, shuffling [] his feet, things of that nature.”

Detective Nowell testified that it was apparent that “something on the [lineup] was having an effect on [Witness 1].” The following exchange then took place between Detective Nowell and Witness 1:

Detective Nowell: We can tell you’re looking at, at one of the pictures.

Witness 1: I can, I can, I can’t, I can’t, I can’t. I can.<sup>5</sup>

Detective Nowell: You don’t want to, you don’t want to say which one?

Witness 1: Hmm-mm.

Witness 1 did not make a positive identification of the shooter at this time.

Detectives Pfaff and Nowell then segregated Witness 3 and showed Witness 3 the same lineup. Witness 3 was unable to identify the shooter in the lineup.

Notwithstanding the witnesses’ failure to identify the shooter in the lineup, Detectives Pfaff and Nowell continued in their attempts to elicit a positive identification from the witnesses. Addressing all three witnesses,

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<sup>5</sup> Both Detective Pfaff and Detective Nowell testified that the phrase “I can’t” was one of the few phrases Witness 1 could say. This phrase, according to the Detectives, was frequently used by Witness 1 to express frustration.



Detective Nowell stated: “This is just we received a name and we put that name in the lineup. We’re not saying that this person did it...” Detective Pfaff added: “But if you do recognize somebody please let us know. I have to do – you know your neighbor up the street, she calls me every day crying.<sup>6</sup> She’s missing her son, and I’m trying my hardest to help her.”

In response to the Detectives’ statements and in close proximity to the other witnesses,<sup>7</sup> Witness 2 indicated that she recognized the individual in photograph number 4 in the lineup: “I know him on the end, he’s got those eyes. But (unintelligible), you know.”

Less than a minute later, Witness 3 pointed to photograph number 2. In response to Witness 3’s identification, Detective Pfaff stated, “Yeah, well no, that’s not the one that we’re looking at, no, but I appreciate...”

Addressing all three witnesses again, Detective Pfaff said the following:

So even if you were like one percent sure, can you just point to the person that you are maybe one percent think it is? You don’t have to sign your name to it. You don’t have to do anything. Just point it to me, and nothing else will be said about it. ... [I]f there is a person that one percent you think may resemble the person that you saw two weeks ago.

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<sup>6</sup> Detective Pfaff was referring to Mrs. Smith, the victim’s mother.

<sup>7</sup> Detective Pfaff testified that although the witnesses were in separate rooms, they were in close enough proximity that their comments were picked up by the audio recorder.

Detective Pfaff further advised the witnesses that their names would not be involved in the case if they made a positive identification. Detective Pfaff testified that she made those comments in an effort to comfort Witness 1: “Yes, I made that statement. That was to kind of put him – put witness one at ease that everything wasn’t resting on his shoulders, because he appeared so upset and torn whether to tell us or not to tell us. He was very scared.”

In response to Detective Pfaff’s inquiry, Witness 1 repeatedly stated: “I can’t, I can’t.” The following exchange then took place:

Detective Pfaff: Can you just tell me that? You don’t have to point. Can you tell me is he on the picture? Is he on that paper?

Witness 3: Is he on that paper there?

Detective Pfaff: Is he one of the six?

Witness 1: Mm-hmm.

Detective Pfaff: Yeah?

Witness 3: He’s one of the six on that picture?

Detective Pfaff: Okay.

Witness 1: Mm-hmm.

Detective Pfaff testified that as Witness 1 said “mm-hmm,” he was nodding his head affirmatively. Detective Pfaff interpreted Witness 1’s actions to

mean that “one of the six people on the photographic lineup was the shooter from April 27th.”

Still addressing Witness 1, Detective Pfaff stated:

Sir, I’ll tell you this. If you- we’re not going to- usually when somebody does a photo lineup whether they identify somebody or not, we have them sign their name on the back of it and the date and time that we talked to them....I’m, I’m not going to do that....

I think this, this is going to, to linger on you and weigh on you for some time because you know, you know what this person on this paper did. You saw him do it, and you know how bad Mrs. Smith up the street is hurting. You know it. This is going to weigh on you. This is going to weigh on you....

Sir, you don’t have to do it for us. You don’t have to do it for the Wilmington Police, but please do it for your neighbor .... It’s not like Mr. Smith was dealing drugs on the street or anything like that. He was in a wheelchair. He had nowhere to go .... He was trapped. And not that, you know, anybody deserves to get killed but this – he was completely helpless, completely helpless, and if anything this guy’s the biggest coward for doing, doing it to somebody like that.

Witness 1 still did not identify the shooter at this point.

For the next seven minutes, Detective Pfaff, Detective Nowell, Witness 2 and Witness 3 all encouraged Witness 1 to “point [the shooter] out” from the lineup. Interspersed within that seven-minute dialogue, Detective Pfaff inquired as to whether Witness 1 believed in God:

Detective Pfaff: Do you believe in God, sir?

Witness 1: Mm-hmm, mm-hmm.

Detective Pfaff: You know, the bible says no good deed goes unnoticed.

Witness 1: Mm-hmm, mm-hmm.

Witness 1 did not make a positive identification at this point.

Shortly thereafter, an unidentified male entered the home and conversed with Detective Pfaff. Detective Nowell, alone with all three witnesses in a separate room, again showed Witness 1 the photographic lineup.<sup>8</sup> Detective Nowell testified as follows:

I had the line-up, I was holding the line-up in front of my chest, like this, witness one was maybe five feet away, witness two and witness three were standing behind me, one to my left and one to my right.

As we were speaking with him, witness one lifted his right arm and walked over and placed his finger on photograph number three, Medford Holmes, all while shaking his head up and down indicating yes. I asked witness one if he was positive. And, again, it was clear his head was moving in an up and down motion.

According to Detective Nowell, Witness 1 was confident in his identification: “[Witness 1] was clearly nodding his head up and down. When asked if he was positive about this, he took his hand and [] placed it

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<sup>8</sup> The audio recorder was with Detective Pfaff at this point in the interview. Therefore, there is no audio recording of Detective Nowell’s conversation with the witnesses.

right on top of Medford’s photograph.” Due to Witness 1’s physical limitations, Detective Nowell did not have him sign the photographic lineup.

## **PARTIES’ CONTENTIONS**

### ***Holmes’ Argument***

Holmes argues that the Detectives’ procedures in presenting the photographic array to Witness 1 were unduly suggestive and that, under the totality of the circumstances, Witness 1’s identification is unreliable. In support of his argument, Holmes identifies several procedures used by the Detectives that he alleges were “improper”: (1) Witness 1’s presence during Witness 2’s interview with Detectives on April 27, 2011, in which Witness 2 provided descriptive information of the shooter; (2) Detective Nowell’s statement to the witnesses that officers believed the shooter’s photograph was included the lineup; (3) Witnesses’ close proximity to one another during presentment of the photographic array; and (4) Detectives Pfaff and Nowell’s utilization of pressure tactics to coerce Witness 1 into making an identification. Without citation to any case law, Holmes contends that such procedures were “over the top” suggestive.<sup>9</sup>

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<sup>9</sup> Holmes does not cite any authority – from this or any jurisdiction – supporting his claim that the identification procedure was unduly suggestive. Holmes’ failure to provide any support for his legal arguments would ordinarily justify waiver of those claims. *Hartford Ins. Co. v. Cmty. Sys., Inc.*, 2009 WL 1027103, at \*5 n.25 (Del. Super.). In *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008), the Delaware Supreme Court reiterated the obligation of counsel to provide supporting authorities:

Holmes argues that the suggestive tactics employed by the Detectives rendered Witness 1's out-of-court identification unreliable. Addressing the factors to consider when determining the reliability of a witness's out-of-court identification,<sup>10</sup> Holmes asserts as follows: (1) due to Witness 1's inability to verbally communicate, he was unable to offer any information as to the period of time in which he viewed the criminal at the time of the crime; (2) due to Witness 1's inability to verbally communicate, he was unable to offer any information pertaining to his degree of attention at the time of the crime; (3) due to Witness 1's inability to verbally communicate, he was unable to provide any description of the shooter; (4) due to Witness 1's inability to verbally communicate, he was unable to provide his level of certainty as to identification of the shooter; and (5) the significant period of

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In order to develop a legal argument effectively, the Opening Brief must marshal the relevant facts and establish reversible error by demonstrating why the action at trial was contrary to either controlling precedent or persuasive decisional authority from other jurisdictions. The failure to cite any authority in support of a legal argument constitutes a waiver of the issue on appeal.

These principles apply with equal force to legal arguments that are asserted by counsel in this Court. *Gonzalez v. Caraballo*, 2008 WL 4902686, at \*3 (Del.Super.). Counsel is reminded that courts are not obligated to do "counsel's work for him or her." *Id.* (citations omitted).

<sup>10</sup> See *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) ("[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.").

time that lapsed between the April 27, 2011 shooting and the May 12, 2011 presentment of the photographic array could have deteriorated Witness 1's memory. Holmes argues that evidence of Witness 1's out-of-court identification is inadmissible, and thus, his subsequent in-court identification also would be inadmissible.

In the alternative, Holmes argues that the current framework, by which Delaware courts evaluate the reliability and admissibility of an out-of-court identification, is inherently flawed and "not truly protective of a defendant's constitutional rights." According to Holmes:

The time is right for Delaware to recognize that its own framework for evaluating the admissibility of eyewitness identification evidence (set forth in *Harris*)<sup>11</sup> is inadequate in light of more than 35 years of extensive, reliable and consistent scientific research concerning eyewitness identification and memory that has been amassed on the subject since *Harris* was decided.

Relying on the New Jersey Supreme Court's recent decision in *State v. Henderson*,<sup>12</sup> Holmes urges the Court to consider additional system variables<sup>13</sup> and estimator variables<sup>14</sup> when evaluating eyewitness identification evidence.

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<sup>11</sup> *Harris v. State*, 350 A.2d 768 (Del. 1976).

<sup>12</sup> 27 A.3d 872 (N.J. 2011).

<sup>13</sup> System variables are factors such as lineup procedures that are within the control of the criminal justice system. Such system variables include: (1) conducting the identification

Holmes argues that consideration of the *Neil v. Biggers* factors, system variables, and estimator variables, renders Witness 1's out-of-court identification unreliable, and therefore, inadmissible. Holmes contends that such a determination necessarily precludes any subsequent in-court identification by Witness 1.

### ***State's Argument***

The State argues that Witness 1's identification of Holmes was not the product of police suggestiveness and is inherently reliable. According to the State, neither Detective Pfaff nor Detective Nowell suggested to Witness 1 whom to identify from the photographic array. Rather, the detectives provided adequate pre-identification instructions, informing the witnesses that "[i]f you recognize somebody, great. If you don't, no big deal."

Further, the State contends that any alleged "coercive" statements made by Detective Pfaff or Detective Nowell were merely the product of trying to get a frightened witness to relax. There is no evidence that these

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procedure double-blind; (2) administering proper pre-lineup instructions; (3) avoiding confirmatory or post-identification feedback; (4) making a full record of the witness's statement of confidence once an identification is made; and (5) shielding witnesses from viewing suspects or fillers more than once. *Id.* at 895-903.

<sup>14</sup> Estimator variables are "factors related to the witness, the perpetrator, or the event itself – like distance, lighting, or stress – over which the legal system has no control." *Id.* at 895.



statements suggested or persuaded Witness 1 to identify Holmes in the lineup.

Alternatively, the State argues that even assuming, *arguendo*, that the procedures employed by the detectives were suggestive, Witness 1's identification is nonetheless reliable. The State concedes that Witness 1 was unable to provide Detectives with a description of the shooter, but contends that the other *Neil v. Biggers* factors weigh in favor of reliability. In support of this argument, the State asserts that: (1) Witness 1 had the opportunity to view the shooter twice at the time of the offense; (2) Witness 1's ability to demonstrate to Detectives precisely what he observed evinces Witness 1's high degree of attention; (3) using head gestures, Witness 1 indicated to Detectives that he was certain that Holmes was the shooter; and (4) the 15 day period that elapsed between the shooting and Witness 1's identification is not so significant to render his identification unreliable.

### **ANALYSIS**

Holmes has moved to suppress Witness 1's out-of-court identification. Holmes argues that the photographic array presented to Witness 1 was impermissibly suggestive and that, under the totality of the circumstances, Witness 1's in-court identification would be unreliable. Holmes' challenge

is based upon the procedures employed by Detectives on April 27, 2011 and May 12, 2011 when interviewing the witnesses.<sup>15</sup>

**I. Admissibility of Witness 1's Out-of-Court Identification**

An identification procedure “will not pass constitutional muster where it is ‘so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’”<sup>16</sup> The fact that an out-of-court identification procedure is unnecessarily suggestive, however, does not *ipso facto* constitute a due process violation.<sup>17</sup> An unnecessarily suggestive identification procedure must also create the danger of an irreparable misidentification.<sup>18</sup> If the Court determines, “under the totality of the circumstances, that a pretrial identification procedure is impermissibly

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<sup>15</sup> Holmes does not challenge the mix of six photographs that were shown to Witness 1 as being unduly suggestive. His argument is solely related to the Detectives’ words and actions on April 27, 2011 and May 12, 2011. Having reviewed the photographic array, the Court finds the lineup free from suggestion. All six photographs are of persons with strikingly similar physical characteristics.

<sup>16</sup> *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (quoting *Simmons v. U.S.*, 390 U.S. 377, 384 (1968)).

<sup>17</sup> *Perry v. New Hampshire*, 132 S.Ct. 716, 720 (2012); *Monroe v. State*, 28 A.3d 418, 431 (Del. 2011); *Richardson v. State*, 673 A.2d 144, 147 (Del. 1996) (citing *Younger*, 496 A.2d at 550).

<sup>18</sup> *Younger*, 496 A.2d at 550.

suggestive but the identification is nevertheless reliable, evidence of the pretrial identification will not be excluded at trial.”<sup>19</sup>

In determining the admissibility of an out-of-court identification, the Court must engage in a two-tiered analysis.<sup>20</sup> The Court first must determine whether the out-of-court identification procedure was impermissibly suggestive.<sup>21</sup> If a determination is made that an out-of-court identification procedure is impermissibly suggestive, the Court then must determine whether there was a likelihood of a misidentification such that the identification was unreliable.<sup>22</sup> If the Court finds the pretrial identification to be admissible, it need not reach the admissibility of the in-court identification.<sup>23</sup>

**A. The Out-of-Court Identification Procedure was Impermissibly Suggestive**

Holmes contends that the procedures utilized by Detectives Pfaff and Nowell during Witness 1’s out-of-court identification were impermissibly suggestive. In support of his argument, Holmes relies upon the following

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<sup>19</sup> *Monroe*, 28 A.3d at 431 (citing *Manson v. Brathwaite*, 432 U.S. 98 (1977)).

<sup>20</sup> *Monroe*, 28 A.3d at 431 (citing *Younger*, 496 A.2d at 550).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982).

procedures: (1) Witness 1's presence during Witness 2's interview with Detectives on April 27, 2011, in which Witness 2 provided descriptive information of the shooter; (2) Detective Nowell's statement to the witnesses that officers believed the shooter photograph was included the lineup; (3) Witnesses' close proximity to one another during the presentment of the photographic array; and (4) Detectives Pfaff and Nowell's utilization of pressure tactics to coerce Witness 1 into making an identification.

Whether an out-of-court identification is impermissibly suggestive is a fact-specific inquiry.<sup>24</sup> "An identification is suggestive when the police conduct it in such a way that the witness' attention is directed to a *particular* individual as the suspect upon whom the police have focused."<sup>25</sup> In other words, a photographic array is impermissibly suggestive when it is the "equivalent of the authorities telling the witness, 'This is our suspect.'"<sup>26</sup>

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<sup>24</sup> *Weber v. State*, 38 A.3d 271, 277 (Del. 2012); *Richardson*, 673 A.2d at 147.

<sup>25</sup> *U.S. ex rel. Goodyear v. Del. Corr. Ctr.*, 419 F.Supp. 93, 96 (D. Del. 1976) (emphasis added).

<sup>26</sup> *Clark v. State*, 515 S.E.2d 155, 161 (Ga. 1999); *see also Sandres v. Alamager*, 2011 WL 7696446, at \*18 (D.C. C.D. Cal.) ("Impermissible suggestiveness may arise where a confrontation procedure or the circumstances underlying it placed a special focus upon a suspect such that it is suggested by police that the suspect is 'the' person for a witness to identify, or a witness perceived pressure from police officers to 'acquiesce' in identifying a particular individual such that the possibility is raised that the identification may have stemmed from suggestion and not from the witness's own recognition of the suspect.); *U.S. v. Mathis*, 2008 WL 1990443, at \*7 (S.D. Ohio) ("[P]hoto arrays generally become unnecessarily suggestive only when the officer conducting the array directs the witness to pick one *specific* photograph or otherwise indicates *which* photograph is the suspect, not

1. *Witnesses Not Sequestered at April 27, 2011 Interview*

Holmes first argues that the identification procedure was impermissibly suggestive because the witnesses were together on April 27, 2011 when Witness 2 gave a description of the shooter to the Detectives. During this interview, Witness 2 stated that the suspect was a slim male in his early 20's, who wore a black hat with a brim, a blue jacket, jeans and was clean shaven. Holmes appears to claim that this description, given in the presence of Witness 1, was impermissibly suggestive because it influenced Witness 1's subsequent identification of Holmes.

The Court finds no record evidence to support Holmes' claim that Witness 1 was present when Witness 2 provided a description of the shooter on April 27, 2011. The transcript from the April 27th interview reflects that Witness 1 was upstairs when Witness 2 gave a description of the assailant to the detectives. Holmes has offered no evidence to suggest that this is not the case.

Even assuming, *arguendo*, that Witness 1 was present, Holmes has failed to demonstrate how Witness 2's description improperly influenced Witness 1's identification of Holmes from the photographic array. While it

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when the officer merely indicates that the suspect is or may be somewhere in the array.”) (emphasis in original); *State v. Marquez*, 967 A.2d 56, 64 n.11 (Conn. 2009) (“[T]he term ‘suggestive’ signifies that the police have done something during the course of the identification procedure to suggest that the witness should choose a specific individual.”).

is true that the failure to sequester the witnesses may “invite[] the possibility of an exchange of information that might taint any subsequent identification,”<sup>27</sup> there is no basis to conclude that this possibility materialized here. No evidence has been presented “to indicate that anything said during the group questioning improperly suggested that [Holmes’] photograph should be chosen.”<sup>28</sup> Indeed, the Court’s review of the record shows nothing to suggest that Witness 1 obtained information from Witness 2’s description that aided or persuaded Witness 1 to distinguish Holmes from the other individuals in the lineup.<sup>29</sup> Therefore, the Court concludes that the failure to sequester the witnesses during the April 27, 2011 interview did not render the subsequent identification procedure impermissibly suggestive.

## *2. Advisement that Suspect in Photographic Lineup*

Holmes next argues that Detective Nowell improperly advised the witnesses that the photographic array included a photograph of someone

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<sup>27</sup> *State v. Boscarino*, 529 A.2d 1260, 1269 (Conn. 1987).

<sup>28</sup> *State v. Owens*, 663 A.2d 1094, 1099 (Conn. App. Ct. 1995).

<sup>29</sup> The fact that Witness 2 provided a physical description of the shooter at the April 27, 2011 interview does not alter the Court’s finding. Any taint Witness 2’s description theoretically may have had on Witness 1 was eliminated by virtue of the fact that the photographic array contained photographs of men relatively similar in age, features, skin tone, facial hair and photo background.

whom the police suspected. Specifically, Holmes points to the following comment made by Detective Nowell: “[W]e received a name and we put that name in the lineup.” This statement, Holmes argues, renders the photographic array unduly suggestive.

“Although a statement by an officer that an array includes a possible suspect is a factor to be considered in determining whether the procedure is suggestive, this comment by itself does not invalidate the identification procedure.”<sup>30</sup> The Court must consider the totality of the circumstances in determining whether such a statement is impermissibly suggestive.<sup>31</sup>

Viewing the totality of the circumstances, the Court finds that Detective Nowell’s comment did not render the array unduly suggestive. Although Detective Nowell stated that the police received a name and placed a photograph of that individual in the lineup, he at no time suggested or indicated which photograph depicted that individual.<sup>32</sup> Moreover, Detective

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<sup>30</sup> *Collier v. State*, 1988 WL 113300, at \*4 (Del.) (*State v. Neal*, 353 N.W.2d 83, 87 (Iowa 1984)). See also *U.S. v. Medford*, 658 F.2d 588, 591 (8th Cir. Minn.) (“[I]n the absence of evidence that the police coerced or intimidated the witnesses into selecting a photograph from the lineup, the fact that witnesses were informed that a suspect had been apprehended does not make the identification procedure unreliable.”).

<sup>31</sup> *Collier*, 1988 WL 113300, at \*3.

<sup>32</sup> See *id.* at \*4 (“[A]lthough the officer may have stated that the array contained a suspect, in no way did he indicate which photograph depicted the suspect, discuss the suspect, or describe what led the police to believe that the suspect was depicted in the array.”).

Nowell advised the witnesses that the individual whom the police placed in the lineup may not be the shooter. Finally, the witnesses initially were instructed: “If you recognize somebody, great. If you don’t, no big deal.”<sup>33</sup>

While it is preferable that the police not inform the witnesses that they have a suspect,<sup>34</sup> the Court finds that under the circumstances in this case, this information did not render the array impermissibly suggestive. “To suggest, as [Holmes] apparently does, that a witness would not recognize, without prompting from an officer, that a photographic array probably contained a suspect is to underestimate average intelligence.”<sup>35</sup> Indeed, it is only natural that a witness asked to view a lineup would assume that it would contain a suspect.<sup>36</sup> Therefore, the Court finds no merit to Holmes’ challenge that a statement that the array may contain a suspect, results in an impermissible suggestion.

### 3. *Coercion and Pressure*

Holmes next contends that Detectives Pfaff and Nowell employed pressure tactics designed to coerce Witness 1 into making an identification.

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<sup>33</sup> See *U.S. v. Martinez*, 2012 WL 3059728, at \*6 (D. Del.) (finding that detective’s failure to specifically instruct witness that perpetrator “may or may not be” in photographic array does not automatically render array suggestive).

<sup>34</sup> See *Collier*, 1988 WL 113300, at \*4.

<sup>35</sup> *Neal*, 353 N.W.2d at 87.

<sup>36</sup> *State v. Bivens*, 558 S.W.2d 296, 299 (Mo. Ct. App. 1977).



Such tactics included: (1) invoking sympathy for the victim’s family; (2) encouraging Witness 1 to aid law enforcement; (3) referencing the Bible and other religious symbols; (4) asking Witness 1 to identify suspect even if “one percent sure;” and (5) allowing Witness 2 and Witness 3 to be present when Witness 1 was shown the photographic array for a second time. Holmes argues that these tactics pressured Witness 1 into “finally point[ing] out the person that Wilmington Police wanted to be selected from that lineup.”

Although the Court does not condone the use of “pressure” tactics, it does not find that these tactics coerced Witness 1 into identifying Holmes. At no point in time during presentation of the photographic array on May 12, 2011 did Detectives Pfaff or Nowell pressure Witness 1 into identifying a *particular* individual.<sup>37</sup> Further, the Court finds no evidence demonstrating that Witness 1 acquiesced in the alleged pressure from Detectives. Rather, the record establishes that Witness 1 voluntarily met with the Detectives and, of his own volition, made an identification of Holmes.

Having considered the interview transcript, and having assessed the credibility of the Detectives as they testified during the suppression hearing

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<sup>37</sup> See *Sandres*, 2011 WL 7696446, at \*18. See also *U.S. v. Hills*, 2002 WL 1377717, at \*2 (D. Kan.) (finding photographic lineup not unduly suggestive where defendant failed to show any coercive pressure on the identifying witness to make an identification of any *particular* photograph) (emphasis added).

(subject to rigorous cross-examination), it appears to the Court that the Detectives employed these tactics in an effort to comfort a clearly and understandably frightened witness. Both Detectives Pfaff and Nowell testified that Witness 1 appeared visibly scared immediately upon viewing the photographic lineup. According to Detective Nowell, Witness 1 “took a few steps back, he was shaking his head, his eyes were tearing up..... he was fidgety, on his feet standing up, swaying back and forth.” Detective Nowell further testified that Witness 1 “became upset the longer that he viewed the line-up.” Based on Witness 1’s reaction, it was evident to Detective Nowell that “something on the [lineup] was having an effect on [Witness 1].”

The Court further notes that while coercive police activity may be violative of a defendant’s Fifth Amendment right against self-incrimination, the same Constitutional considerations are not implicated in the context of a witness identification. Coercive tactics used to elicit a suspect’s confession are, by definition, suggestive. The obvious purpose is to pressure the suspect to admit to the crime. Clearly, the response desired by law enforcement is “I did it.” A coercive interrogation is not a multiple choice test.

In contrast, encouraging a witness to identify the perpetrator is not necessarily improper. Courts have recognized this principle in establishing the two-tiered analysis<sup>38</sup> and the *Neil v. Biggers* factors.<sup>39</sup> In this case, what the Court must determine is whether the Detectives' statements to Witness 1 were suggestive in a manner that may have drawn Witness 1's attention to a particular photograph, and thus may have affected the reliability of the identification.

Of particular concern are references to sympathy for the victim's family and to religious beliefs.<sup>40</sup> Having carefully reviewed the record, the Court finds nothing in the comments regarding sympathy or religion that encouraged Witness 1 to select a particular photograph. Rather, these tactics were utilized when it became apparent that Witness 1 recognized the shooter in the array but was reluctant to confirm the identification out of fear. Therefore, the Court finds that the Detectives' efforts to comfort Witness 1 did not, in and of themselves, create an impermissible suggestion.

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<sup>38</sup> *Monroe*, 28 A.2d at 431 (citing *Younger*, 496 A.2d at 550).

<sup>39</sup> 409 U.S. at 199-200.

<sup>40</sup> *See, e.g., Brewer v. Williams*, 430 U.S. 387 (1972) (finding officers' appeal to defendant's religiousness was intended to elicit an incriminating response).

#### 4. *Close Proximity of Witnesses during Presentation of Photographic Array*

Holmes next argues that Witness 1 was improperly influenced by Witness 2 and Witness 3 because the witnesses were either in the same room, or in close proximity to each other, when Witness 1 viewed the photographic array. In support of this argument, Holmes points to the fact that the audio recorder, carried by Detective Pfaff when interviewing Witness 1, almost simultaneously recorded comments made by Witnesses 2 and 3 concerning the array. Holmes contends that the comments made by Witnesses 2 and 3, in the presence of, or in close proximity to, Witness 1, influenced Witness 1's identification of Holmes.

“An identification procedure by two or more witnesses in the presence of each other is ‘fraught with dangers of suggestion.’”<sup>41</sup> The obvious danger is that the identification by the first witness could improperly influence other witnesses in making their decisions.<sup>42</sup> Although some courts have adopted a *per se* exclusionary rule for simultaneous identification of a suspect by two or more witnesses in the presence of each other, Delaware courts have not.<sup>43</sup>

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<sup>41</sup> *Rudd v. State*, 343 F.Supp 212, 220 (D.C. Fla. 1972) (citing *U.S. v. Wade*, 388 U.S. 218, 234 (1967)).

<sup>42</sup> *King v. Commonwealth*, 142 S.W.3d 645, 651 (Ky. 2004).

<sup>43</sup> See, e.g., *U.S. ex rel. Smith v. Redman*, 414 F.Supp. 61 (D. Del. 1976); *Talbert v. State*, 1989 WL 88644, at \*2 (Del.); *State v. Foreman*, 1999 WL 462418, at \*3 (Del. Super.).

In *Talbert v. State*,<sup>44</sup> the Delaware Supreme Court declined to adopt a *per se* exclusionary rule, instead evaluating the admissibility of simultaneous witness identifications based on the totality of the circumstances.<sup>45</sup>

In the case *sub judice*, it appears to the Court that Witness 1 and Witness 2 either viewed the photographic array simultaneously or within close proximity to each other. The transcript suggests that Witness 1 was present when Witness 3 made comments concerning the photographic array. It seems likely that Witness 1 overheard the other witnesses' commentary regarding which photograph didn't depict the shooter. Plainly, this presents a risk that Witness 1 could have been influenced by the other witnesses' comments. Therefore, the Court finds that the presentation of the photographic array to Witness 1, while in the presence of, or in close proximity to, the other witnesses, was impermissibly suggestive.

**B. Witness 1's Out-of-Court Identification Shows Sufficient Indicia of Reliability**

The Court's finding that one part of the identification procedure was unduly suggestive does not automatically require suppression of the identification itself. "Instead, the trial judge must screen the evidence for

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<sup>44</sup> 1989 WL 88644 (Del.).

<sup>45</sup> *Id.* at \*2.

reliability pretrial.”<sup>46</sup> If the Court determines that there is “a very substantial likelihood of irreparable misidentification,”<sup>47</sup> the evidence must be suppressed. “But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.”<sup>48</sup>

As the United States Supreme Court explained in *Neil v. Biggers*,<sup>49</sup> in determining the reliability of an identification, a court must apply a totality of the circumstances analysis. The factors to be considered by the Court include: (1) the opportunity of the witness to view the subject at the time of the crime; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the subject; (4) the level of certainty of the witness’ identification; and (5) the length of time between the crime and the identification.<sup>50</sup> The “central question” is “whether under the ‘totality of the

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<sup>46</sup> *Perry v. New Hampshire*, --- U.S. ---, ---, 132 S.Ct. 716, 720, 181 L. Ed. 2d 694 (2012).

<sup>47</sup> *Simmons v. U.S.*, 390 U.S. 377, 384 (1968).

<sup>48</sup> *Perry*, 132 S.Ct. at 720.

<sup>49</sup> 409 U.S. 188 (1972).

<sup>50</sup> *Id.* at 199-200.

circumstances' the identification was reliable even though the confrontation procedure was suggestive.”<sup>51</sup>

*1. Speech Impairment Doesn't Automatically Render Pretrial Identification Unreliable*

As to the first four *Neil v. Biggers* factors, Holmes cites Witness 1's inability to verbally communicate as weighing in favor of suppressing Witness 1's identification. As to the final factor – the length of time between the crime and the identification – Holmes argues that 15 days is a significant period of time, whereby Witness 1's memory could have deteriorated. Therefore, Holmes argues that Witness 1's out-of-court identification is unreliable, and therefore, must be suppressed.

Contrary to Holmes' assertion, Witness 1's speech impairment does not discredit Witness 1's identification wholesale. Surely, a witness's inability to verbally communicate does not *ipso facto* render an out-of-court identification unreliable. Such a conclusion would effectively allow defendants “to commit crimes against persons born deaf and [mute] with impunity.”<sup>52</sup> The Court finds, as a matter of law, that Witness 1's inability

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<sup>51</sup> *Harris v. State*, 350 A.2d 768, 772 (Del. 1976) (citing *Neil*, 409 U.S. at 199).

<sup>52</sup> *People v. Spencer*, 457 N.E.2d 473, 479 (Ill. App. Ct. 1983) (citing *State v. Galloway*, 284 S.E.2d 509, 515 (N.C. 1981)).

to verbally communicate does not automatically preclude Witness 1 from “pointing an accusatory finger”<sup>53</sup> at Holmes.

Because Witness 1 cannot verbally communicate, the *Neil v. Biggers*’ “reliability” factors must be evaluated based on Witness 1’s non-verbal affirmations, including hand gestures, head gestures, facial expressions, demeanor and noises.

2. *Neil v. Biggers Factors Demonstrate Reliability of Out-of-Court Identification*

*Opportunity to View Criminal at the Time of the Crime*

Based on the evidence, the Court finds that Witness 1 had an ample opportunity to view the shooter. The record establishes that on April 27, 2011, in broad daylight, Witness 1 observed the shooter twice. Using hand gestures, Witness 1 demonstrated that, at the time of the shooting, he was positioned by a window on the first floor in the rear of his home. Recreating Witness 1’s line of sight, Detective Pfaff testified that it was possible for Witness 1 to have seen the area where the shooting occurred. Detective Pfaff further determined that Witness 1 was situated approximately 50 yards from where the shooting occurred.

Witness 1 indicated that, immediately after the shooting, he observed the shooter a second time. Again using hand gestures, Witness 1

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<sup>53</sup> *State v. Simmons*, 237 A.2d 630, 633 (N.J. Super. Ct. App. Div. 1968).



demonstrated that he was positioned by a door on the first floor in the front of his home when he observed the shooter for approximately 30 seconds. Recreating Witness 1's vantage point, Detective Pfaff stated that there was nothing obstructing Witness 1's view of the shooter. Detective Pfaff further determined that Witness 1 was situated approximately 20 feet from the shooter during Witness 1's second observation.

*Degree of Attention*

As to the second *Neil v. Biggers*' factor, the Court finds that Witness 1 had a relatively high degree of attention. When interviewed by detectives on the evening of April 27, 2011, Witness 1 indicated that he observed the shooting that occurred earlier in the day. At the suppression hearing, Detective Nowell testified:

State: Did witness one communicate to you somehow that witness one viewed the shooting?

Detective Nowell: He did.

State: Okay. And can you please tell the Court how witness one communicated what this witness saw?

Detective Nowell: Again, it was – he was – this witness was asked [the] question: Did you observe the shooting? The witness would nod his head up and down; made a motion with his hand in the shape of a firearm.

State: Okay. Did witness one make any noises to you when making this motion with his hand to replicate a firearm?

Detective Nowell: Yes.

State: And please tell the Court what those noises were?

Detective Nowell: I'm trying to – I can't recall if he was saying bang, bang or some – it was clear that he was telling us that he, you know, heard gunfire.

Witness 1 then physically demonstrated where he was positioned when he observed the shooter on both occasions.

The Court finds that Witness 1's vivid description of the shooting, through the use of hand gestures, head nodding and noises, evidenced his high degree of attention.<sup>54</sup> Further, Witness 1's ability to recognize the shooter a second time, albeit within a minute, corroborates this finding.<sup>55</sup>

Description of Shooter

Due to his speech impairment, Witness 1 was unable to provide detectives with a physical description of the shooter. Witness 1's failure to describe the shooter indicates a measure of unreliability in Witness 1's identification. As noted by the Sixth Circuit in *United States v. Crozier*<sup>56</sup>:

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<sup>54</sup> *Monroe v. State*, 28 A.3d 418, 434 (Del. 2011) (finding that witness' vivid description of the shooting and the defendant evinced witness' high degree of attention).

<sup>55</sup> *State v. Mullins*, 1999 WL 169350, at \*4 (Del. Super.) (“The victim's high degree of attention to her attacker's appearance during the assault is evidenced by her ability to recognize him a second time when she spotted him at Dominick's Pizza.”).

<sup>56</sup> 259 F.3d 503 (6th Cir. 2001).

The purpose of looking to prior identifications is to find an indicium of reliability. If [the witness] failed to describe [the defendant] before being presented with his photo in a suggestive manner, that fact should not be ignored, but rather cuts in favor of [the defendant's] argument that [the witness] identified him merely because of the suggestive photo line up.<sup>57</sup>

As such, the Court finds that Witness 1's inability to describe the shooter weighs against a finding of reliability.

*Witness's Level of Certainty*

The record establishes that Witness 1 was relatively certain in his identification of Holmes. Detectives Pfaff and Nowell testified that shortly after being presented with the photographic array for the first time, Witness 1's eyes became fixated on photograph number three, Holmes.<sup>58</sup> Witness 1's eyes then started to tear up. Although Witness 1 did not make an

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<sup>57</sup> *Id.* at 512.

<sup>58</sup> At the suppression hearing, Detective Pfaff testified as follows:

State: Detective Pfaff, can you explain to the Court how you're able to tell where witness one's eyes were tracking?

Detective Pfaff: I was standing right next to witness one and I was watching witness one's eyes as witness one was looking on the paper.

State: And explain to the Court how you are able to say that witness one's eyes were looking at the top part of the paper as opposed to the bottom part of the paper?

Detective Pfaff: You could just tell. He started from left to right and witness one, the eyes – witness one's eyes were towards the top of the page. Witness one's eyes never looked downward.

identification at this point, the Detectives interpreted Witness 1's reaction to mean that he recognized the shooter. According to Detective Nowell, it was apparent that "something on the [lineup] was having an effect on [Witness 1]." Witness 1's objective, and apparently genuine, physical reactions to viewing Holmes' photo constitute persuasive evidence of an identification.

Approximately thirty minutes later, Witness 1 was again shown the photographic array. In the presence of Detective Nowell, Witnesses 2 and 3, Witness 1 unequivocally identified Holmes as the shooter. According to Detective Nowell, Witness 1 placed his finger on photograph number three, Holmes. When asked if he was confident that the person he identified was the shooter, "[Witness 1] took his hand and placed it right on top of [Holmes'] photograph" and "clearly nodd[ed] his head upward and down." Based on Witness 1's conduct, the Court finds that Witness 1 was certain in his identification.

Moreover, and contrary to Holmes' assertion, at no point during the May 12, 2011 interview, did Witness 1 state that he couldn't make an identification. Although Witness 1 repeatedly states "I can't, I can't" while being shown the photographic array, Detectives Pfaff and Nowell testified that Witness 1 did not make such a statement because he could not identify

the shooter. Rather, Witness 1 uses the phrases “I can’t, I can’t” to express frustration.

*Length of Time*

The last of the *Neil v. Biggers* factors is the period of 15 days between the time of the shooting and Witness 1’s identification of Holmes. The Court does not find this time period to be significant. In *Clayton v. State*,<sup>59</sup> the Delaware Supreme Court found that a three-month lapse of time between the commission of the crime and the photographic lineup did not render the identification unreliable.<sup>60</sup> Rather, the time period was merely another factor for the jury to consider in assessing the credibility of the witness’s identification.<sup>61</sup>

\* \* \* \*

The Court finds that, under the totality of the circumstances, Witness 1’s out-of-court identification of Holmes was reliable, even though the procedure used in showing the photographic array was in part impermissibly suggestive. Holmes has not met his burden in demonstrating that there was

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<sup>59</sup> 2006 WL 141027 (Del.).

<sup>60</sup> *Id.* at \*2.

<sup>61</sup> *Id.*

a “very substantial likelihood of irreparable misidentification.”<sup>62</sup> Therefore, Witness 1’s out-of-court identification is admissible at trial. For the same reasons, Witness 1’s future, in-court identification will be admitted during trial.<sup>63</sup>

## **II. *Henderson* is Not Binding on this Court.**

Holmes contends that the current framework, under which this Court analyzes out-of-court identifications, is inadequate. Relying on the New Jersey Supreme Court’s recent decision in *State v. Henderson*,<sup>64</sup> Holmes urges the Court to consider additional factors when evaluating the reliability of eyewitness identification evidence. In *Henderson*, the New Jersey Supreme Court overruled its own precedent and announced new standards for evaluating the trustworthiness of identification evidence under the New Jersey Constitution.<sup>65</sup>

The Court declines to adopt the novel approach enunciated in *Henderson*. This Court will continue to follow the longstanding precedent

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<sup>62</sup> *Neil*, 409 U.S. at 198 (citing *Simmons v. U.S.*, 390 U.S. 377, 384 (1968)).

<sup>63</sup> See *Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982) (“Because [the witness’s] out-of-court identification was admissible, the admissibility of his in-court identification need not be reached.”).

<sup>64</sup> 27 A.3d 872 (N.J. 2011).

<sup>65</sup> *Id.*

of the United States Supreme Court, the Delaware Supreme Court, and the great weight of authority in the majority of other jurisdictions.

### **CONCLUSION**

The Court finds that the proximity of all three witnesses, during presentation of the photographic array to Witness 1, was unnecessarily suggestive. However, all other aspects of the identification procedure comport with due process and do not raise a substantial likelihood of irreparable misidentification.

Considering the totality of the circumstances, Witness 1's identification is reliable and need not be suppressed.

The weight to be given to Witness 1's out-of-court identification and in-court testimony, as well as the credibility of Witness 1, are issues of fact for the jury.

**THEREFORE**, Holmes' Motion to Suppress Witness Identification and Trial Testimony is hereby **DENIED**.

**IT IS SO ORDERED.**

/s/ Mary M. Johnston  
The Honorable Mary M. Johnston