No. 18-7825

IN THE

SUPREME COURT OF THE UNITED STATES

TREVONTE JENKINS — PETITIONER, *pro se*

vs.

STATE OF OHIO — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

THE OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION PURSUANT TO USCS Supreme Ct R 15.6

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NEW POINTS TO BE ADDRESSED RAISED IN THE BRIEF IN OPPOSITION

The Respondent has provided the Court with a Brief in Opposition to Petitioner's Writ of Certiorari. It appears that the Respondent has modified the issues presented by Petitioner so as to weaken his position for seeking relief. The new points to be addressed in Respondent's Brief in Opposition are as follows:

1. Petitioner did not forfeit his argument related to the constitutional violation of an improper and constitutionally unsound first-time in-court identification procedure under *Neil v. Biggers*, or any other case involving the constitutional violation at issue.

2. The Respondent has wrongfully claimed there was no evidence of police involvement in the unnecessarily suggestive and unconstitutional identification procedure in the instant case, and has falsely claimed that there was no evidence that an unnecessarily suggestive identification procedure took place.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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INTRODUCTION

The Petitioner seeks relief from the prejudice he suffered from an unconstitutional first-time in-court identification procedure orchestrated by Ohio law enforcement officers. The Respondent has repackaged Petitioner's claims for relief by incorrectly describing his ground as a request for "a bright line rule prohibiting the use of first-time in-court identifications." Opposition Brief, pg. i. The Respondent's repackaging of the claim into a request for a definitive, hard line stance on an issue where circumstances vary widely, and amounts and types of evidence differ greatly, is a ploy to increase the likelihood that the Court would dismiss the issue.

Petitioner is well aware that the determination of guilt or innocence is often nuanced by many factors in an individual case. With this understanding, he is seeking review under the facts in his case, which may have broad implications for others who have been similarly prejudiced in violation of the U.S. Constitution. The Petitioner has been consistent in the claim of his violation in every lower court. As such is true, there can be no valid claim of waiver of the issue put before the Court.

The Respondent has also spuriously phrased a query to the Court regarding a standard that would apply "where there is no evidence that police used an unnecessarily suggestive procedure?" id. The state appellate court conceded that the only witness to identify Petitioner at the scene of the crime did not make a pretrial identification. *State v. Jenkins*, 2018-Ohio-2397 at ¶39. Omitted from the decision was the fact that the absence of a pretrial identification procedure was a

unified, purposeful scheme by law enforcement officers who knew, or should have known, that the omission would prejudice the Petitioner.

The chief detective in the case testified that it was "requested that no photo lineup be shown to [Eanes]" by "[his] bosses and the prosecutor and the city prosecutor" because "so much time had passed." TrT., pgs. 1034, 1040. All other witnesses in the case had either not seen the perpetrator, or identified Petitioner when asked to point him out in a photo array only as the person involved in an altercation earlier on the night of the crime—not as the shooter.

The only time the lone witness identified Petitioner was when he was seated in the courtroom at the defendant's table after the police had previously contacted the witness and told him "they had the guy." TrT., pg. 703. These alarming facts, even in the absence of others, show that there was a combined, orchestrated effort by many state law enforcement officers to prevent Petitioner from receiving the fundamental fairness required by the U.S. Constitution.

The Petitioner also requested the Court to review the standard of identification in light of modern, sound scientific principles which may be considered as being represented in *Neil v. Biggers*, 409 U.S. 188, or its progeny—*not* overturn these rulings or create a bright line rule.

PETITIONER'S ARGUMENTS CONTRA TO RESPONDENT'S COUNTERSTATEMENTS

Petitioner would note that the initial representation of the Respondent's Counterstatement starts with the Petitioner's involvement in an altercation with his girlfriend earlier on the night of the shooting at the scene of the crime.

Respondent omits the fact that Eanes was involved when Petitioner was beaten by several men during the affray. This fact prejudiced the Petitioner in the eyes of Eanes, attaching his likeness to a violent encounter, who then claimed the Petitioner was the person who committed the crimes in this case for the first time six and one half (6 ½) months later.

Respondent has also belittled the fact that Eanes—who was to have a clear memory of the events of the night of the crime that he would "never forget" (TrT., pg. 704-705)—was unable to identify the vehicle driven by Petitioner that night. Eanes, who "did not speak to police until a few weeks before trial, months after the shooting" described the vehicle as a "Ford Fusion or Taurus," when the vehicle was a white Hyundai Accent. *Jenkins*, supra. This fact is even more telling of the unreliability of the witness because he works in a car body shop and would be extremely familiar with different car models and makes. TrT., pg. 729. The witness testified that there were a "bunch of Ford Fusions" there that night (again, the Petitioner drove a Hyundai Accent), which would also lead to confusion of the identification. TrT., pg. 694, 730.

Eanes also did not correctly identify the clothing that Petitioner was wearing on the night in question after standing "face to face" with him. TrT. Pg. 687. He testified that the Petitioner was wearing a red shirt, red hat and some black jeans during the altercation, and that the driver of the vehicle that fired the shots was wearing the same thing. TrT., pgs. 687-688, 737-738. Eanes further attested that Petitioner's appearance "never changed" on the night in question. TrT., pg. 710.

However, Petitioner's clothing that was recovered by police with his blood on it from the altercation that night, confirmed by the testimony of his girlfriend, was a black shirt, a black hat, and blue jeans. TrT., pg. 1016, 1067, Opposition Brief, pg. 7..

Respondent also claimed that there were "other witnesses that confirmed [Petitioner's] guilt." Opposition Brief, pg. 2. A regurgitation of the state appellate court decision followed. Petitioner rebuts this assertion as follows:

Other than Eanes, there was no witness that claimed to have seen the person who fired the weapon on the night of the crime. Jonathan Bobak, a photographer, was shown a pretrial photo array and identified Petitioner as the person involved in the altercation with his girlfriend earlier in the evening and just "assumed that [Petitioner] was the shooter." Opposition Brief, pg. 3. George Trouche testified that he "did not see where the shots were coming from or who the shooter was." Id. Gregory Cunningham, the owner of the security company working the night of the crime, was shown a pretrial photo array and identified one Charles Donald, a filler photo, and did not attempt to identify any other pictures and did not pick out anyone else from the photo array. TrT., pgs. 549-550. Cunningham, however, was not outside when the shots were fired. Id., pg. 4.

The police were also confused by the pretrial identification of Cunningham. The officer who administered the pretrial photo array testified that "Cunningham only identified one individual, which was not [Petitioner], and that he understood Cunningham's identification to be of the shooter." Opposition Brief, pg. 6. As shown

previously, Cunningham did not identify Petitioner, had never seen the shooter and was not even outside when the shots were fired.

The appellate decision also gave undue weight to the key tag of the vehicle found at the scene of the altercation and the Petitioner's DNA from blood found inside the vehicle itself. Respondent misleadingly claimed the following:

> "Petitioner's] guilt did not rest solely on the Eanes's identification. {Petitioner] while assaulting his girlfriend, dropped a keychain to the vehicle used during the drive-by shooting, his DNA was recovered from the vehicle along with a ticket to the concert, his girlfriend confirmed that he was at the concert and the car he drove, and video evidence shows the vehicle consistent with the time frame of the shooting.
> Opposition Brief, pg. 9.

None of the above evidence is pertinent in the absence of Eanes' identification of Petitioner. Petitioner has never denied being at the concert that night, but his girlfriend never confirmed that she and Petitioner were in an altercation. Petitioner never denied that he was beaten by several men on the night of the concert. The tag of the rental vehicle driven by Petitioner was separated from the key of the vehicle during the earlier altercation, not during a shooting. The Petitioner's blood from the wounds received that night from the altercation—not the shooting—was found inside the rental vehicle that he drove to the concert. While both Petitioner and the vehicle he drove that night were swabbed for GSR, no test results were ever submitted. While Petitioner's girlfriend, who would have been in the car at the time of the shooting if Petitioner had committed the crime, confirmed that the car was used by Petitioner to drive her to the concert, she never stated she witnessed Petitioner fire a weapon out of the window of the Hyundai Accent—not a

Ford Fusion or Taurus. No testimony, forensic, or video evidence puts Petitioner's vehicle as that driven by a shooter except for Eanes statement at trial.

While these facts show that Petitioner was involved in the altercation, where he suffered injuries to the extent of bleeding, and that he drove a rental car, it does not substantiate any other aspect of the crime that was committed that night and there was no video footage of the shooting.

With these clarifications of the evidence in mind, from the clear and convincing evidence from the record, Petitioner asserts the following:

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT REVIEW BECAUSE PETITIONER NEVER FORFEITED HIS CLAIM, NOR DID HE ASK FOR A "BRIGHT LINE RULE" AGAINST ALL FIRST-TIME IN-COURT IDENTIFICATIONS

The crux of Respondent's argument is that Petitioner raised a constitutional claim under *Biggers*, and then tries to claim that "the *Biggers* standard is unworkable in the absence of a pretrial identification," which is alleged as a different argument than that presented in the state courts. Opposition Brief, pg. 9. This is an inference to fair presentation of the issue.

Petitioner would note that fair presentment "does not require a hypertechnical congruence between the claims made in the federal and state courts; it merely requires that the factual and legal substance remain the same." *Anderson v. Benik*, 471 F.3d 811 (7th Cir. 2006)

Petitioner has been consistent with the arguments related to his claim before the Court in every proceeding. His claim is that he did not receive a fair trial due to the constitutional violation of due process related to an unnecessarily suggestive and prejudicial first-time in-court identification procedure. His issue presented for the Court's review was related to a "flawed process related to a first-time in-court identification at trial by the State's only witness." Petitioner's Writ, Question Presented for Review.

While it is true that Petitioner argued his constitutional violation under the Court's holding in *Neil v. Biggers*, Petitioner has never asked for a "bright line" ruling that all first-time in-court identifications. As the issue has always been based on the denial of a fair trial related to an unnecessarily suggestive first-time in-court identification, there cannot be a bar to the presentation of modern scientific evidence in support of the same. That the evidence provides facts that may show inadequacies in the current legal standard that is approaching its 50th anniversary is not a forfeiture, but the provision of evidence in support of Petitioner's claim. See *Neil v. Biggers*, 409 U.S. 188 (1972).

A request for review providing scientific evidence that may contradict current standards is neither new, nor a ground under which Petitioner would forfeit his claim. The Court has regularly and fairly reviewed scientific evidence in the past as it has been made available for tangible evidence, such as DNA testing, e.g., *O'Dell v. Netherland*, 519 U.S. 1050 (1996), and psychological evidence, such as the developmental delays of the brain in adolescents presented in the well-known cases

of *Roper v . Simmons*, 125 S. Ct. 1183, 161 L. Ed. 2d 1, *Graham v Florida*, 560 U.S. 48, 130 S. Ct. 2011, and *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The same would be applicable herein.

II. THE EVIDENCE CLEARLY AND UNEQUIVOCALLY SHOWS THAT AN UNNECESSARILY SUGGESTIVE AND PREJUDICIAL IDENTIFICATION PROCEDURE TOOK PLACE AND THAT LAW ENFORCEMENT OFFICERS WERE INVOLVED

Respondent has asserted that "there is no evidence that police used an unnecessarily suggestive procedure." Opposition Brief, pg. i. The facts of the case show that there was no eyewitness of the shooter at the crime scene except for Eanes. Other witnesses, such as Bobak and Cunningham, were administered a blinded identification procedure consisting of a six photo array. Although it was claimed that the police were unaware of Eanes until "a few weeks before trial," law enforcement officers strategically and intentionally—Petitioner would assert prejudicially—did not administer any type of identification procedure to the witness. The chief detective in the case testified that he was "requested that no photo lineup be shown to [Eanes]" by "[his] bosses and the prosecutor and the city prosecutor" because "so much time had passed." TrT., pgs. 1034, 1040.[1]

While this was technically an inaction by law enforcement officers—a clearly planned "sin of omission" and not a "sin of commission"—the forbidding of the investigating officer to administer a blind photo array, a process enacted in the applicable law to prevent the prejudice suffered herein, is an overt act that is surely

[1] "Law enforcement officers" are defined under Ohio Revised Code 2901.01, which includes police officers and prosecuting attorneys; sections (a) & (h), respectively.

indicative of misfeasance, if not outright malfeasance. This unequivocal and inarguable fact certainly does not justify the Respondent's feckless and repeated claim that "the police had no involvement in the identification," Opposition Brief, pg. 12, when the police intentionally prohibited Eanes from providing a pretrial identification after other attempts with other witnesses had failed; made even more egregious and facetious as Eanes was told by police that they "had the guy." This fact, standing alone, is enough to warrant further inquiry into the State's actions and the fairness of the proceedings.

Respondent cites to *Kennaugh v. Miller*, 289 F.3d 36, 47 (2nd Cir. 2002) in urging the Court not to hear Petitioner's claim. Opposition Brief, pg. 10. *Kennaugh* relies on *Biggers* and *Manson v. Brathwaite*, 432 U.S. 98 (1977), which provides no more insight than the case law already at issue. As the case cited also relies upon precedents that predate the scientific evidence presented to the Court, Petitioner would still seek the Court's review in light of the newly presented evidence.

Respondent also avers that cross-examination, the only means that Petitioner had to challenge the identification procedure, was sufficient to cure any impropriety. Cross-examination cannot cure a witness' belief, even when wrong, in front of a jury who had already heard him identify the defendant as the culprit. It is obvious that the witness could not correctly identify anything about the Petitioner, with the lone and questionable exception of his face. An in-court identification is only permissible if it is "reliable" and "independent."[2] *Jenkins*,

[2] The appellate court reviewed the testimony under the "reliable" standard, but omitted the "independent" standard of review.

supra., citing *Biggers*. The witness had undoubtedly been biased by police—prior to his testimony—that they "had the guy" who committed the crimes and wanted Eanes to show up at court and point his finger at the singular defendant, ensuring a conviction on obviously fouled testimony. Petitioner cannot think of a more tainted and prejudicial procedure than that perpetrated by law enforcement officers.

Petitioner asserts that he surely did not receive a fair trial when the only eyewitness incorrectly identified Petitioner's vehicle—even though he worked professionally in a body shop—and incorrectly identified the clothing Petitioner was wearing on the night of the crime, yet claimed to be able to identify Petitioner as a shooter. The Court is not required to believe the incredible. The actions of the State are unsupportable under any standard of fundamental fairness, especially in light of the procedures in place under the applicable law and the scientific evidence presented in the Petition.

CONCLUSION

The Petition for Writ of Certiorari should be granted review and Petitioner should be provided a fair trial where the improper orchestrations of law enforcement officers and the resultant tainted evidence should be omitted.

Respectfully submitted,

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