No. 20-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2020

MICHAEL TORRENCE

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE COURT'S RULING THAT CELL PHONE TOWER LOCATION DATA AND INTERPRETATION MAY BE PRESENTED BY AN UNQUALIFIED LAY WITNESS WHO IS UNABLE TO ANSWER SUBSTANTIVE QUESTIONS ON CROSS-EXAMINATION WITHOUT PARROTING, VIOLATES THE RIGHT OF CONFRONTATION AND CROSS-EXAMINATION ESTABLISHED BY THE 6TH AMENDMENT.

II.

WHETHER THE COURT'S RULING FINDING A LACK OF STATE ACTION IN A PREJUDICIAL PRETRIAL IDENTIFICATION INVOLVING ADMITTED POLICE "RECRUITMENT" OF LAY PERSONS CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

List of All Parties

Petitioner is Michael Torrence. Counsel of record for Mr. Torrence is the Hon. Joshua Farley, 514 S. 5th Street, Suite 102, Louisville, Kentucky 40202.

Respondent is the Commonwealth of Kentucky, represented by, Hon. Emily Lucas, Assistant Attorney General and Hon. Daniel Cameron, Attorney General of the Commonwealth of Kentucky, 1024 Capital Center Drive, P.O. Box 2000, Frankfort, Kentucky 40602-2000, (502) 696-5342, Counsel for Respondent.

List of Proceedings Below

Commonwealth v. Torrence, 16CR1550, 18CR0152, Jefferson Circuit Court (Kentucky), Judgment upon jury verdict 1/23/19
Commonwealth v. Torrence, 16CR1550, 18CR0152, Jefferson Circuit Court (Kentucky), Judgment of Conviction and Sentence 5/22/18
Order, *Commonwealth v. Torrence*, 16CR1550, 18CR0152, denying Motion for New trial and for JNOV..... 5/23/18
Torrence v. Commonwealth, Kentucky Supreme Court, 2018-SC-0322-MR, Opinion Affirming 2/20/20
Torrence v. Commonwealth, Kentucky Supreme Court, 2018-SC-0322-MR, Order, Denying Petition for Rehearing 7/9/20

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The Petitioner filed a direct appeal of his conviction and sentence in the Kentucky Supreme Court. That court rendered a decision which denied rejected Petitioner's Confrontation Clause claims without comment, and affirmed the lower court ruling denying his request for a hearing on police-arranged prejudicial pretrial identification, on February 20, 2020. It is attached here at the Appendix. The Petitioner filed for a Rehearing. Petitioner's request for a rehearing was denied by Order dated July 9, 2020. That Order is attached at Appendix . The trial court rulings denying Petitioner's Motion to suppress his pretrial identification; and denying Petitioner's Motion in Limine to exclude lay testimony regarding cell tower location evidence, were denied orally on the video record without written rulings.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a). The Supreme Court of Kentucky issued its Opinion affirming the trial court on February 20, 2020; and its decision denying a petition for rehearing on July 9, 2020 (and thereby affirming its original Opinion). This petition has been filed within ninety days of the latter Order, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

1. Summary

The Appellant was convicted of Assault First Degree and possession of a firearm by a convicted felon, by jury trial conducted in January, 2018. He was sentenced to a total of twenty-five years. The Appellant contended at trial that this is a case of misidentification, and offered alibi witnesses for his whereabouts during the time of the events in question. The State introduced testimony by a lay police officer about the putative conclusions to be drawn from historical cell phone tower location data and its underlying technology to attempt to place the Petitioner at or near the crime scene; and introduced a positive "photo array" identification of the Petitioner which had been immediately preceded by the displaying of a single, prejudicial photo of the Petitioner.

2. Preservation of Federal Question

Petitioner's jury trial began on 1/17/18. Prior to the selection of a jury, on 1/17/18, he presented a Motion to suppress his pretrial identification, citing Neil v. Biggers, 409 U.S. 198 (1972), contending that it was unduly suggestive, and requesting an evidentiary hearing[1]. The trial court denied this Motion and the request for a hearing, determining that no state action was involved in the showing of a

[1] Video record (VR) at 1/17/18, 10:49:35. Kentucky trial courts are recorded solely by video record, which is cited here as "VR," or "Trial" with date and time.

single photo of Petitioner just prior to the police[2]. At the same proceeding before trial, Petitioner filed a written Motion demanding all expert evidence in the case, and demanding exclusion of testimony regarding cell phone tower evidence, citing Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) as requiring a "right to cross examine expert in person." Petitioner again pursued both claims on a motion for new trial before the trial court after conviction but before appeal, and in his Brief on direct appeal before the Kentucky Supreme Court.

On May 17, 2016 between 4:00 and 4:30 in the afternoon, one Gerrado Thomas was found by passerby witnesses in the street at the intersection of 26th and Greenwood Streets in Louisville, having suffered a gunshot wound

[2] Id.

Thomas was yelling for help at that time, so drivers stopped to assist him[3]. At least one person assisting him called 911[4]. A beat officer arrived at the scene shortly, and asked Thomas who had shot him. Thomas stated an individual with the nickname "Man Man" was the assailant, and provided no further name or identifying information except that he was a "shorter black male."[5] It was not disputed by the lead detective that several persons in that community go by the nickname "Man Man."[6] No eyewitnesses other than the victim actually saw the shooting, the assailant, or the vehicle alleged to have been driven by the assailant.

3. Pretrial Identification of Petitioner

During an interview at the hospital a week or so later, Thomas claimed he had been trying to get a ride to work from an individual in a grey vehicle, and that the person Thomas identified as "Man Man" was a passenger in the vehicle from which he was seeking a ride[7]. Thomas claimed that this passenger, during the abbreviated ride, accused Thomas of having broken in his house at some earlier point. Thomas said he responded "stop playing with me," thinking the accusation was a joke[8]. The passenger then produced a gun, however, which he was holding between his legs.

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[3] Id.
[4] Id, and 10:26:30
[5] Trial 1/17/18 at 16:13:40 et seq
[6] Trial 1/18/18 at 13:50:21
[7] Trial 1/18/18 at 10:32:52 et seq.
[8] Id.

According to Thomas, as soon as he saw the gun, he opened the door to jump out of the moving vehicle. Thomas claimed he was shot in the back as he opened the door to the moving vehicle, and exited. He testified that the vehicle slowed down some, and then drove away[9]. No eyewitness saw the assailant, nor did any relate having seen any relevant car near, or exiting, the location where Mr. Thomas was eventually found in the street.

A detective arrived to conduct an interview of Thomas on May 23, 2016, while the latter was still hospitalized. Again, Thomas maintained that he only knew the assailant's street name, "Man Man," not a real name[10]. Thomas now claimed as well to know the location of a house where this person lived[11]. Thomas was directly asked by the lead detective at that time whether he knew the real name of this "Man Man," and he insisted he did not[12]. The police learned that the Appellant resided at the house being identified by the victim, and then compiled a photopak of six photos, which included the Appellant[13].

Meanwhile, however, prior to the showing of the photopak to Mr. Thomas by police, Mr. Thomas had already been shown a single photograph of Appellant, identifying him as the assailant. This occurred when Mr.

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[9] Id.
[10] Trial 1/18/18 at 13:51 et seq
[11] Id.
[12] Id.
[13] Id.

Thomas' family members and friends had come to visit him at the hospital. One of Mr. Thomas's hospital visitors was one Whitney Mitchell, who had already obtained a photo of the Appellant from a social media site[14]. When police returned to the victim at the hospital on May 26, 2016, to display the photopak pictures to him, Ms. Mitchell was already present. Ms. Mitchell had been visiting with Mr. Thomas, along with some other family members, and apparently had shown the photo of Appellant to Mr. Thomas[15]. Ms. Mitchell even provided police with the copy of the photo of Appellant she had obtained and shown to Mr. Thomas. Indeed, the Commonwealth even conceded at trial that "police basically recruited the victim's mother and sister to try to figure out who this guy was."[16] Police then proceeded, at that visit, following the showing of the single photo, to display the photopak of six photos to Mr. Thomas anyway, who identified Appellant as the person who attacked him. The additional role of these friends and family in previously pointing to the home of Appellant as that belonging to the alleged assailant was never made clear, because the trial court refused Petitioner's request for a hearing on the matter.

Appellant later challenged, prior to trial, this identification procedure used by police, contending that it was improperly

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[14] Id., at 16:49:48 et seq and Defense Exhibit #1.
[15] Id (Detective Snider) and at 11:12:17 (victim testimony)
[16] Trial 1/17/18, 16:04:09.

tainted by Ms. Mitchell having already shown the victim a copy of the social media photo of Appellant prior to the police identification procedure[17]. Indeed, the evidence indicated that Ms. Mitchell had shown the victim this photo just prior to the latter having viewed the photopak provided by police, on the same day. The Appellant contended that a hearing should be held to scrutinize exactly how this identification procedure occurred, that the identification should be excluded from evidence as produced by an unduly suggestive procedure, and that Mr. Thomas should not be permitted to make any in-court identification of Torrence. Despite its concession that the police had "recruited" the victim's mother and sister to "identify" the assailant[18], the Commonwealth contended, and the Court agreed, that the tainted identification procedure did not involve state action[19]. That is, that because Ms. Mitchell's actions in showing Mr. Thomas the single photograph of Appellant did not *apparently* involve state action, the identification would not be further analyzed under relevant law, no witnesses would be called, and the ID would not be suppressed.

Upon receiving the identification of Appellant by Mr. Thomas using the above procedure, police then arrested Appellant, believing that they had sufficient probable

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[17] Hrg. 1/17/18 at 10:41:49.
[18] Trial 1/17/18 at 16:04:09
[19] Hrg 1/17/18 at 10:49:35 et seq

cause to do so. Police questioned Appellant in custody. The latter maintained, as he did at trial, that he was not involved in the attack on Mr. Thomas, and had been with his five-year-old daughter during the day in question[20]. The daughter[21], and her mother[22], both testified at trial consistently with this alibi.

The Kentucky Supreme Court, in affirming the trial court's denial of even a hearing on the matter of the pretrial identification, purported to straightforwardly apply this Court's holding in Perry v. New Hampshire , that no state action was involved in the pretrial identification because it was not "arranged" by law enforcement:

Of course, without an evidentiary hearing on this issue, it remains unknown the extent to which law enforcement was involved in arranging this pretrial identification—what the prosecutor meant when he admitted that police had "recruited" the lay family members to identify the suspect. The Court simply held "In this case, there is no evidence in the record that Thomas's family or girlfriend was acting at police behest when they located and showed Thomas the single photograph of Torrence downloaded from social media." The Court determined additionally that, since the victim was sufficiently cross-examined at trial, this was sufficient to attack any taint stemming

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[20] Trial 1/18/18 at 2:09:18 to 3:05:15
[21] Trial 1/19/18 at 10:11:05 (Michayla Turner)
[22] Trial 1/18/18 at 16:56:43 (Tatiana Turner)

from the inarguably prejudicial pretrial identification procedure.

4. Cell Phone Tower Technology Evidence

At some point in the investigation, police obtained a set of records from a cell phone provider[23] purporting to be the historical records associated with a phone owned or used by the Appellant. Over the Appellant's pretrial and contemporaneous objection, these records were then used to form the basis of the lead detective's testimony about the nature of historical cell tower site data, and how such technology and data could be interpreted with regard to this case.[24] The detective first testified in this regard generally about cell tower connection and location technology[25]. He testified about the nature of the latitude and longitude coordinates generated in the historical records; the nature of the azimuth reading and compass direction sector from which the phone connects to the tower; the manner in which cell phones connect to towers; that the location data is only generated during certain events on the phone; and that cell phones are always

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[23] The lead detective testified that the provider was AT&T.
[24] 15:37 to 16:00 (direct testimony) and 16:26:33 to 16:29:48 (cross examination). It appears that the actual physical records were never offered as an exhibit at trial. Rather, the lead detective simply read entries from them together with his interpretation.
[25] Trial 1/18/18, 15:37 to 15:45.

searching for the strongest signal and always connect to the nearest tower[26].

The detective then testified that his analysis of the portion of the records setting out historical cell tower site data led to a conclusion that the phone in question had connected to a cell tower located within 1.13 miles of the scene where the victim was found in the road. The detective stated that this connection occurred just prior to "the shooting."[27] The detective further testified that the phone then connected to a second tower 1 kilometer from the "shooting scene"[28] at 14:27 hours, which he claimed was 1 minute after "the shooting." The detective went on to conclude that his analysis of the data in question disclosed that the location of the Appellant's alibi was 11 miles from the cell tower. In closing argument, the Commonwealth essentially contended that, based upon the detective's testimony in this regard, it was impossible that the Appellant was in the area he claimed to be during the relevant time.

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[26] Id.

[27] In this regard, the prosecutor and detective consistently operated from an assumption that the shooting actually occurred at the same time of the first 911 call at 14:26 hours, an assumption that was never supported by additional proof. Given that no scene witnesses claim to have witnessed the actual shooting or even the assailant, this assumption is dubious, at best.

[28] This conclusion is premised upon an assumption that the shooting itself occurred where the victim was found by passersby and responding police.

During the entirety of the detective's testimony, the Commonwealth did not ask him a single question that could fairly be characterized as eliciting any qualifications, training or experience, on any level, with regard to his interpretation of the data and technology of historical cell tower locations.

Torrence, represented by the public defender, challenged this entire line of testimony and evidence prior to trial, by a motion which demanded "exclusion of any Cell phone tower GPS data tendered in discovery as inadmissible and requiring expert testimony," citing this Court's 6th Amendment Confrontation precedent in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), as well as Kentucky precedent regarding Kentucky Rule of Evidence 702[29]. Torrence's position below was, because the State was adamantly refusing to introduce the evidence via an expert, despite it being the type of scientific, technical or specialized evidence requiring introduction through an expert, he was effectively deprived of the guarantee of confrontation and cross examination secured by the Sixth Amendment, because the State's witness was incapable of answering substantive questions regarding the technology and conclusions drawn from it. And indeed, as predicted, this was the type of answer offered by the lay police witness, on cross-examination, to a plethora of technical

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[29] Ky.R.Evid. 702 is not significantly different form Fed.R.Evid. 702.

questions: "the way it was explained to me was . . ."; "I was told . . ."; In effect, the defendant was cross-examining a hearsay declarant who was never named, and not produced at trial.

In its ruling on this matter, the Kentucky Supreme Court announced that it was fashioning a "new rule"[30], in this case, regarding such evidence and testimony. The Court canvassed decisions on this topic from several other states, treating it as an issue solely involving the rules of evidence. The Court held that the type of evidence in question did not require an expert to present it, because the witness was not really "offer[ing] an opinion about inferences that may be drawn from such evidence," and likened it to "simply marking coordinates on a map." The Court made not a single mention of Torrence's argument that this violated the Confrontation Clause.

After three hours of deliberation in this case, the jury returned a verdict of guilty as to assault first degree. The jury then found Appellant guilty of possession of a firearm by a convicted felon. The jury, finally, recommended a total penalty of twenty-five (25) years.

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[30] Torrence v. Commonwealth,

REASONS THE COURT SHOULD ISSUE THE WRIT OF CERTIORARI

I. THE KENTUCKY SUPREME COURT'S ANNOUNCEMENT OF A NEW RULE REGARDING TECHNICAL CELL PHONE EVIDENCE CONTRAVENES THE DICTATES OF THE CONFRONTATION CLAUSE

In a series of cases, this Court settled generally that "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2716 (2011) citing *Crawford v. Washington*, 541 U.S. 46, 54 (2006). Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Bullcoming*, 131 S.Ct at 2716 citing *Giles v. California*, 554 U.S. 353, 375 (2008).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), this Court confronted and rejected attempts to side-step the Confrontation Cluse requirement of live in-person testimony when the out of court testimony was "expert" in nature or the result of allegedly "neutral scientific testing." Confrontation is the proper constitutional cure to "weed out not only the fraudulent [expert]

analyst, **but the incompetent one as well.**" *Id.*, at 326. In that regard, cross-examination may be critical to revealing something like a risk of error in a particular technical method. *Id.* Finally, this Court rejected the notion that the evidence in question could be admitted as a traditional "business record, " because "do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless. Attempting to dispense with confrontation because certain testimony is "obviously reliable" is simply "akin to dispensing with jury trial because a defendant is obviously guilty." *Id.*, at 318-319.

In its most recent forays into the interpretation of the Confrontation Clause in the expert witness arena, this Court offered a fractured opinion which has proven very difficult to apply. *Williams v. Illinois*, 567 U.S. 50 (2012). In *Williams*, the Court confronted the issue of whether a state lab analyst could testify that she found a "match" between a previously-extracted DNA profile from the case, and the DNA profile of the defendant, without producing as a trial witness the expert who compiled and completed the first DNA profile. Like *Bullcoming* and *Melendez-Diaz*, the problem was one of an absent witness hiding in the background of the case, never produced at trial by the State, whose work and results were being offered into evidence solely by being parroted by another witness. This method effectively deprives the defendant of the ability to confront and cross-examine a

witness— but only if the hearsay in question is "testimonial" in nature. In *Williams*, four members of the Court concluded that the out of court DNA analyst was not required to be rendered up for cross examination, because her work was not being introduced for the truth of the matter asserted, and so it certainly was not "testimonial," as that term has been interpreted in cases following *Crawford v. Washington.*

Despite interpretive difficulties, in all three cases—*Bullcoming, Melendez-Diaz,* and *Williams*—there was no dispute that the witness who actually was produced by the state to testify in person was, herself, a qualified expert. Indeed, this fact was important enough in *Williams* that it forms one of the express bases for affirming the outcome in that case. ("It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks firsthand knowledge of those facts," *Williams* at 105.) But what is the impact of a state allowing, as happened here, an avowedly *non*-expert layperson to parrot technical information which could only have been produced by an expert, without producing that expert (or any expert)?

The witness in this case illustrated the devastating effect this procedure has on the proceedings and the right of confrontation. Namely, he blithely answered on cross examination, repeatedly, nothing more than

versions of 'I don't know,' or, worse, "the way it's been explained to me," and "I've been told that . . ." Permitting this type of testimony in lieu of a live qualified expert witness would be coming full circle from the Confrontation principles announced in *Crawford v. Washington*, to where we now not only have out of court witness statements repeated without being subject to cross-examination, these witness statements would not even meet the old, rejected exception of "particularized guarantees of trustworthiness" under the old formula of *Ohio v. Roberts*, 448 U.S. 56 (1980).

Nor does the State avoid this problem by, as the trial court stated, placing the burden on the defendant to simply "call your own witness to do that," a solution seemingly accepted by the Kentucky Supreme Court, *Torrence* at 17, but repeatedly and expressly rejected by this Court. "The Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court," *Bullcoming*, 564 U.S. 647, 666 (2011), citing *Melendez-Diaz*, 557 U.S. 305, 324 (2009).

The Supreme Court of Kentucky fashioned a "new rule" for the handling of what it sees as a form of technical, but non-expert, evidence, and in doing so completely sidestepped the Confrontation Clause problem created as a result. The Court noted approvingly of approaches in Tennessee, Indiana, and Ohio, which apparently similarly regard such technical information as not truly

testimony of "scientific, technical or other specialized knowledge"[31] requiring a valid expert witness. Several other states have rejected this approach, but were not cited by the court, including at least Maryland, Connecticut and West Virginia. See *State v. Payne*, 104 A.3d 142 (Md. App. 2014)(*held:* trial court erred by allowing lay police officer to testify to cell tower location data, which was expert testimony); *State v. Edwards*, 156 A.3d 506 (Conn. 2017) (same); *State v. Johnson*, 797 S.E.2d 557 (W. Va. 2017). Indeed, the approach of the Kentucky Supreme Court has been convincingly canvassed as the "minority position" on this topic, *Johnson*, 797 S.E.2d at 566.

The Court's Opinion below, however, never even mentions Torrence's primary 6th Amendment objection to the State's refusal to produce an expert, and proceeding solely with an unqualified lay witness who repeatedly testifies as to what he "has been told" about the technology in question, or that he "doesn't know" the answer to technical questions. But a state cannot simply avoid this entire problem by a refashioning or reinterpretation of its own evidence rules.

Finally, the problem presented by essentially allowing in expert hearsay through an unqualified lay witness is not dispensed with by a claim that the out of court portion of the statements are not "testimonial," as that

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[31] KRE 702; Fed.R.Evid 702(a)

term is used in *Crawford*, *Melendez-Diaz*, *Bullcoming*, and even *Williams*. *Williams* appears to be one of the first times this Court accepted a State's argument that a particular class of technical or expert evidence was not "testimonial," and therefore could be testified to without the original expert witness being subject to cross-examination . *Williams*, however, did not over-rule or even purport to limit the prior two cases. As a result, in *Williams*, the DNA profile viewed there as non-testimonial is an exceedingly narrow category—one which is largely defined by the traditional rules for admission of expert testimony, the most significant of which is that allowing experts to testify to hearsay

Of a completely different order is what happens in cases like this one: the importing of out of court, un-cross examined technical testimony or information through a lay witness, who is essentially the "incompetent examiner" warned of first in *Melendez-Diaz*, , 557 U.S. at 326; and later in *Bullcoming*. The detective here was repeatedly permitted to testify to what he "had been told" about the technology in question, and 'how it was explained to him' with regard to its underlying assumptions. Yet, where were the expert witnesses who were qualified in the technology, who had told him this, who 'explained' it all? The State here was allowed to claim (and will not be allowed to claim throughout Kentucky) that the Petitioner's cell phone was located at a certain place at a certain time, all based on assumptions about a

technology which real experts hardly agree on. This was evasion of the principles of the Confrontation Clause.

The Petitioner requests that this Court grant certiorari to review the application of the Confrontation Clause to this type of technical, but superficially "nonexpert" testimony.

II.
THE KENTUCKY SUPREME COURT'S RULING FINDING A LACK OF STATE ACTION IN A PREJUDICIAL PRETRIAL IDENTIFICATION, AND REFUSING A PRETRIAL JUDICIAL SCREENING, INVOLVING ADMITTED POLICE "RECRUITMENT" OF LAY PERSONS CONTRAVENES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

"recruit: verb: (c) to secure the services of, (d) to seek to enroll" MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/recruit (2020).

In this case, the prosecution announced that the police had "recruited" the victim's family to identify the suspect in the shooting, but also argued that there be no hearing outside the hearing of the jury to determine whether the identification was irrevocably prejudicial and tainted, insisting that no "state action" was involved in the identification.

The Kentucky Supreme Court, despite the prosecutor's solemn statement about police

recruitment of lay people in the identification procedure, cited *Perry v. New Hampshire*, 565 U.S. 228 (2012) in affirming both the conviction, and the trial court denial of a pretrial hearing on the matter. The Court stated "In this case, there was no evidence in the record that Thomas's family or girlfriend was acting at police behest . . ." Lack of evidence, however, is the natural outcome of denying a hearing on the matter. The real question arising from *Perry*, is at what threshold is a trial court bound to grant a defendant an evidentiary hearing outside the presence of the jury on the issue of a tainted identification? The state courts of last resort, and the federal circuit courts of appeal, are answering that question in a bewildering array of conflicting approaches.

The First Circuit describes the existence of a "debate" among circuits regarding "which approach applies, *Perry* or *Neil v. Biggers,* 409 U.S. 188 (1972)? One could argue either way." *United States v. Correa-Osorio*, 784 F.3d 11, 19 (1st. Cir. 2015). Although *Correa-Osorio* approaches the issue with regard to in-court identifications, the question described is whether the focus should be on the existence or degree of police arrangement of the identification, or the degree of "impermissibly suggestive" features there are to the identification. Id.

The Eleventh Circuit appears to invoke judicial pretrial screening of identifications based entirely on the degree of police

involvement, *United States v. Whatley*, 719 F.3d 1206 (11th Cir. 2013); while the Seventh Circuit appears to focus on the traditional concern of *Biggers*—i.e., how "impermissibly suggestive" was the identification procedure used, and did it "give rise to a very substantial likelihood of irreparable misidentification?" *Lee v. Foster*, 750 F.3d 687 (7th Cir. 2014). In the latter approach, there is less concern with the degree of police involvement, if the circumstances of the identification were suggestive and unnecessary. If so, a hearing is held to determine is there is a "substantial likelihood of irreparable misidentification." *Id.*

Other states and circuits have emphasized each of these two principles differently. The Third Circuit appears to interpret the mandate of *Perry* as rejecting any overt concern with the general unreliability of eyewitness testimony, in favor of the state action / police deterrence issue, at least as a threshold issue. *Dennis v. Sec'y, Pa. Dept. of Corr.*, 834 F.3d 263 (3d Cir. 2016). In *Dennis*, the concurrence also offers a detailed discussion of how *Perry*, despite turning so starkly on the state action issue, has prompted serious reforms among state supreme courts in the handling of eyewitness testimony. The Supreme Court of New Jersey is noted to have completely reformed the handling of such evidence in eth wake of *Perry*, to include detailed 9-part jury instructions on the handling of eyewitness testimony. *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (N.J. 2011). The Supreme Court of Oregon offered a

similar reform, citing *Perry*, in *State v. Lawson*, 352 Ore. 724, 291 P.3d 673 (Ore. 2012).

The Kentucky Supreme Court, on the other hand, repeatedly cites *Perry's* statement about the procedural "safeguards" of trial in front of the jury, as a prime rationale in affirming trial courts' refusal to conduct pretrial screening of suspect identifications, *Fairley v. Commonwealth*, 527 S.W.3d 792, 796-800 (Ky. 2017), *Jeter v.* Commonwealth, 531 S.W.3d 488, 495 (Ky. 2017), including this case *Torrence v. Commonwealth*, 2019-SC-0322-MR at 29-32 (Ky. 2020). Curiously, though, while the Kentucky Supreme Court repeatedly quotes *Perry* as to the primary "trial safeguards" identified in *Perry* to weigh against pretrial judicial screening--- that is, cross examination, special jury instructions on the fallibility of eyewitness testimony, and proof beyond a reasonable doubt[32]—it has yet to approve any form of jury instructions on the issue. Kentucky continues to adhere to the notion of "bare bones" jury instructions[33], *Crabtree v. Commonwealth*, 455 S.W.3d 390 (Ky. 2014), and even continues to allow trial courts discretion to reject defense expert testimony on the subject. *Welch v. Commonwealth*, 563 S.W.3d 612 (Ky. 2018).

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[32] See *Fairley*, 527 S.W.3d at 799;

[33] The Supreme Court rejected special jury instructions on eyewitness fallibility in an unpublished opinion rendered before *Perry*, in *Goodan v. Commonwealth*, 2003-SC-0657-MR (Ky. 2005), and appears to have not revisited this issue.

What Petitioner contends about *Perry* is that it should be enforced to its letter, rather than danced around by resort to *Biggers,* when the former appears to actually favor the defendant's position. This must especially be so in a legal environment like Kentucky, which simply lacks the procedural safeguards identified by the *Perry* plurality. That is, when the likelihood of police involvement in an identification procedure is high—high enough, say, for the prosecutor to announce that police had "recruited" the lay persons in the identification process—then judicial screening of the entire procedure is in order, *even if* the resulting identification (at least superficially) appears to fare well among the various factors identified in *Biggers* . *Perry* is not a "balancing" test. It does not ask whether there is a only little bit of state action in arranging a prejudicial identification. It asks simply whether the police were involved in arranging a suspect identification. If the answer is "yes," and there is some reason to suspect impermissible suggestiveness (such as a one-photo show-up right before administering a photo array), then a pretrial hearing is in order.

The rationale of both *Perry* and *Biggers* reveals why this must be the case. *Perry* focuses almost entirely on the deterrent effect on the police of imposing an exclusionary rule upon suspect pretrial identifications. "Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures . . ." *Perry,*

565 U.S. 228, 232-33. Thus, when no improper law enforcement activity is involved, no deterrent effect will occur no matter how high the degree of unreliability of the identification. The solution in such a case is to defer to "the rights and opportunities generally designed for that purpose," namely vigorous cross examination, protective rules of evidence, and "jury instructions on the fallibility of eyewitness identification."[34] *Id.*

So, then, what about the case where police involvement is certain enough that the prosecutor expressly states that the police "recruited" lay persons in the identification process (which itself was a model of suggestiveness—a single photo of the defendant, followed immediately thereafter with a superficially valid array of photos)? Does the state then get to avoid scrutiny of police involvement by recourse to the notion that trial cross-examination will clean it all up? The deterrent effect on a suggestive identification procedure arranged by police is the same, whether the resulting identification is only a little suggestive, or is outrageously suggestive. What is more likely the case, however, is that the degree of both of these factors is unknown until the trial court endeavors to find out, via a pretrial hearing.

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[34] Notably, Kentucky offers no such jury instruction. Thus, the Kentucky Supreme Court focused entirely upon how complete and effective the trial defense cross examination appeared to be.

An additional problem arising from lack of serious and vigorous enforcement of *Perry's* deterrence mandate is that the trial record has only a superficial and misleading appearance of validity, when in fact there are still too many unknowns to assess the possibility of police misconduct (whether intentional or accidental) based solely on cross examination of a lay witness in front of the jury. Cross examination of a lay witness at trial before the jury simply does not create the record needed to assess this issue, because it is not attacking the same thing the deterrence rationale is designed to prevent. The ablest trial advocate approaches cross examination of a lay witness identification with an eye toward displaying the lack of reliability of the witness's perception and memory, not the degree to which the police improperly tainted that witness in "remembering" or "perceiving." Indeed, defense trial strategy usually dictates against an invitation to needlessly attack the police in front of the jury. Such a strategy asks the jury to determine too much. It places before the jury the stark role of deciding whether to vote for the police or against the police, not simply determining whether guilt has been proven beyond a reasonable doubt. It is not the job of the jury, however, to figure out if police are improperly recruiting people to engage in improper one-photo show-ups just prior to a photo array, it is rather their job to determine whether the witness's identification is believable generally.

It is the job of the judiciary, on the other hand, to put a stop to the use of such identifications before that stage. The Petitioner seeks the issuance of a writ of certiorari in this case, to settle these issues arising from the application of *Perry v. New Hampshire*, 565 U.S. 228 (2012).

CONCLUSION

For the reasons set out above, the Court should grant a writ of certiorari to review the decision of the Supreme Court of Kentucky.

Respectfully submitted,

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No. 20-

IN THE
SUPREME COURT OF THE UNITED
STATES
October Term, 2020

MICHAEL TORRENCE

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

APPENDIX

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