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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRYAN EDWARD ALLEN,

Petitioner.

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**STATE'S CONSOLIDATED RESPONSE TO  
AMICUS CURIAE BRIEFS**

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A. INTRODUCTION

Amici focus their briefs primarily on studies supporting a conclusion that, in general, people have greater difficulty identifying persons of a different race than they do identifying persons of their own race. Amici also more broadly attack the reliability of eyewitness testimony in general.

While interesting and important, these arguments miss the mark. The dispute between the parties in this case centers not on whether eyewitness identifications may be flawed under some circumstances, but on how the criminal justice system should address this issue consistent with the Washington Constitution. The dispute is not about the existence of the problem, but the form of the remedy.

The Washington Constitution is nearly unique in the specificity of its prohibition on judicial comment on the evidence. Many states explicitly allow judicial comment on the evidence, and the federal constitution does not prohibit such comment. Only one other state constitution includes the signal phrase "nor comment thereon" in cautioning that "[j]udges shall not charge juries with respect to matters of fact." The debate surrounding the adoption of this language in Washington, chronicled in contemporaneous

newspaper accounts, makes it clear that this phrase was not included in article 4, section 16 by chance, but by deliberate design of the framers of Washington's constitution. The phrase thus carries significant meaning and weight.

Amici nevertheless rely heavily on the New Jersey Supreme Court's recent opinion in State v. Henderson to support their argument that courts in Washington should be required to specifically instruct juries on the results of eyewitness identification studies, and to specially caution jurors about the testimony of an eyewitness. This reliance ignores fundamental differences between a state like New Jersey, which explicitly encourages judges to comment on the evidence, and Washington, which strictly prohibits such comment.

In Washington, the court's instructions are meant to instruct the jury on the law. Jurors learn the facts of the case through the evidence admitted at trial, including the testimony of lay and expert witnesses. Washington courts have broad discretion to allow expert testimony where it will aid the jury in assessing and weighing the evidence. Where the testimony of an eyewitness or the circumstances of the identification raise issues that require further explanation, an appropriate expert witness should be allowed to

fulfill this function. Substituting instructions from the court for this essential role of expert witnesses is not only largely ineffective, but it runs directly counter to Washington's constitutional prohibition on judicial comment on the evidence.

Nor should this Court be swayed by arguments that experts on the psychology of eyewitness identification are difficult to find, or too expensive. Such experts may be found at several of our state universities, and they regularly appear in Washington courts. The cost of expert services, where they are called for, is one of many that Washington citizens bear to provide a justice system that conforms to the requirements of our state constitution.

B. ARGUMENT IN RESPONSE

1. THE WASHINGTON CONSTITUTION STRICTLY PROHIBITS JUDICIAL COMMENT ON THE EVIDENCE.

Amici rely heavily on the New Jersey Supreme Court's recent decision in State v. Henderson, 208 N.J. 208, 27 A.3d 872 (2011). Henderson requires New Jersey trial courts to give "enhanced instructions" to juries, informing them of the various factors that might affect the reliability of an eyewitness identification

in a given case. 27 A.3d at 924. Amici suggest that Washington should follow New Jersey's example.

The New Jersey model cannot assist this Court. Trial courts in New Jersey may comment on the evidence. State v. Robinson, 165 N.J.32, 754 A.2d 1153, 1161 (2000) ("we leave it to the sound discretion of the trial court to decide on a case-by-case basis when and how to *comment on the evidence*") (emphasis added); State v. Brims, 168 N.J. 297, 774 A.2d 441, 446 (2001) ("[t]rial courts have broad discretion when *commenting on the evidence* during jury instruction") (emphasis added). This stands in stark contrast to Washington's explicit constitutional prohibition on judicial comment on the evidence: "Judges shall not charge juries with respect to matters of fact, *nor comment thereon*, but shall declare the law." Const. art. 4, § 16 (emphasis added).

The New Jersey Supreme Court made a number of telling observations in Henderson that illuminate the deep philosophical divide between New Jersey and Washington on this issue:

We anticipate, however, that with enhanced jury instructions, there will be less need for expert testimony. Jury charges offer a number of advantages: they are focused and concise, *authoritative* (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible *confusion to jurors*

created by dueling experts; *and they eliminate the risk of an expert invading the jury's role* or opining on an eyewitness' credibility.

Henderson, 27 A.3d at 925 (emphasis added). This passage shows a low regard for the role of witnesses in conveying relevant facts to a jury, and for the ability of the jury to intelligently weigh the evidence presented to them. Even more troubling, the New Jersey Supreme Court's words evince a strong preference that the jury be influenced by the "authoritative" voice of the trial judge, who is presumably free from the supposed bias of a "witness called by one side."

The approach espoused by the New Jersey Supreme Court in Henderson could not be further from the prevailing views voiced by the framers of the Washington Constitution as they grappled with proposed amendments to article 4, section 16. The debate at the Washington Constitutional Convention over a proposed amendment to article 4, section 16 that would have stricken the words "nor comment thereon" from the section, is chronicled in the contemporaneous newspaper articles that are appended to the Brief of Amicus Curiae Washington Association of Prosecuting Attorneys ("WAPA Brief"). One proponent of the amendment thought that a judge should be allowed to "protect the jury" from

lawyers who "tried to befuddle them." WAPA Brief, at A2. An opponent of the amendment responded that, if judges were allowed to comment on facts, "juries might as well be abolished for the judge would carry nine cases out of ten." Id. at A3. Another opponent voiced the opinion that "[m]any judges are too anxious to control the juries," and thus "the functions of judge and jury should be separate." Id. at B1. A third warned that "[t]he respect for the judge make [sic] the jury disregard important testimony." Id. at B3.

Delegates to the Constitutional Convention also debated whether to amend the section to allow judges to "state the testimony." Id. at A1, B2. One opponent of this amendment questioned why the judge should state the testimony when "[t]he jury were there for that purpose." Id. at A1. Another made the telling observation that, if a judge were allowed to state the testimony, "he could only state it as it appeared to him." Id. at A3.

This lively debate underscores the importance that the delegates to the Constitutional Convention attached to clearly delineating the roles of judge and jury in our system of justice in Washington. The fact that the amendments were rejected (Id. at A3-4, B4) evidences the importance that the majority of delegates attached to preserving the role of the jury as finders of fact, and the

suspicion with which they viewed any attempt to insert judges into that arena. The version of article 4, section 16 that was adopted by the framers of the Washington Constitution is the same one that appears in that document to this day.

The manner in which New Jersey trial courts actually instruct juries illustrates why the framers of the Washington Constitution were wary of allowing judges to comment on evidence, or even to "state the testimony."<sup>1</sup> New Jersey's long-standing (pre-Henderson) instruction on out-of-court eyewitness identification specifically invites the judge to comment on the evidence: "If necessary or appropriate for purposes of clarity, the judge may *comment on any evidence* relevant to any of the following factors." Appendix A-2 (emphasis added).<sup>2</sup> New Jersey's instructions on Battered Woman Syndrome and Child Sexual Abuse Accommodation Syndrome explicitly direct the trial judge to "*summarize [the] testimony*" of any experts who testified. Appendix

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<sup>1</sup> The New Jersey criminal jury instructions referenced in this brief are attached as Appendix A. They may be accessed at <http://www.judiciary.state.nj.us/criminal/juryindx.pdf>.

<sup>2</sup> The version of this instruction that is available online was last revised on 6/4/07. Appendix A-1. The New Jersey Supreme Court recently directed the appropriate committees to draft proposed revisions to this instruction in accordance with the opinion in Henderson. 27 A.3d at 925-26.

A-7, A-9, A-10 (emphasis added). These instructions clearly would contravene the Washington Constitution's prohibition on judicial comment on the evidence.

Amici also cite to the recent United States Supreme Court decision in Perry v. New Hampshire, \_\_\_ U.S. \_\_\_, 132 S. Ct. 716 (2012). Justice Ginsberg, writing for an eight-justice majority, held that the Due Process Clause requires a preliminary judicial inquiry into the reliability of an eyewitness identification *only* where the identification was procured under unnecessarily suggestive circumstances *arranged by law enforcement*.<sup>3</sup> Id. at 730.

In support of their arguments in favor of issue-specific jury instructions on eyewitness identification, amici point to the Perry Court's reference to such instructions: "Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence." Id. at 728-29. Such instructions were listed as one of a

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<sup>3</sup> Perhaps because the decision in Perry has foreclosed reliance on the federal Due Process Clause in some cases, Amicus Curiae The Innocence Network urges this Court to "evaluate whether defendants' due process and fairness rights are adequately protected under the Washington State constitution." Innocence Network Brief at 12. Because this issue is being raised for the first time in an amicus brief, and because the argument is not accompanied by the required analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), the State has moved by separate motion to strike the argument.

number of "safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability," including the right to confront the witness, the right to effective assistance of counsel both to cross-examine the witness and to point out flaws in the testimony during opening statement and closing argument, and the right to proof of guilt beyond a reasonable doubt. Id. Listing cautionary jury instructions with respect to eyewitness testimony as one of the many ways that the adversary system ensures the rights of a criminal defendant can hardly be construed as a directive to all states to adopt this method.

To the contrary, the Court's observation that "*many* federal and state courts have adopted [eyewitness-specific jury instructions]"<sup>4</sup> indicates a recognition that not *all* courts so instruct the jury. Moreover, the Court noted that "some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence." Id. at 729. Washington, of course, is one of those states. See State v. Cheatam, 150 Wn.2d 626, 649, 81 P.3d 830 (2003). Perry does not undermine the

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<sup>4</sup> Perry, 132 S. Ct. at 728 (emphasis added).

State's argument that, in Washington, where judicial comment on the evidence is prohibited, expert testimony provides a more than adequate means for a defendant to attack the reliability of eyewitness testimony.

Amici contend, however, that Washington courts already condone jury instructions similar to the type that they request. They rely on several existing pattern instructions.<sup>5</sup> But some of these instructions do no more than tell jurors what factors they may consider in weighing certain evidence. For example, WPIC 1.02 instructs jurors that, in judging the credibility of witnesses, they "may consider" certain listed factors; the instruction invites them to also consider "any other factors." WPIC 6.51 similarly instructs jurors that, in weighing expert testimony, they "may consider" certain listed factors, "among other things."<sup>6</sup> WPIC 5.01 merely defines direct and circumstantial evidence, telling jurors that "the law does not distinguish" between the two types of evidence in

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<sup>5</sup> See Brief of Amici Curiae American Civil Liberties Union of Washington et al., at 15-18.

<sup>6</sup> WPIC 92.16, while not cited by amici, similarly lists factors that jurors "may consider" in determining the accuracy of a blood or breath test, and tells jurors that they may also consider "any other factors."

terms of their weight; it is difficult to see how this instruction could be construed as a judicial comment on the evidence.

Amici rely most heavily on WPIC 6.05, which tells jurors that the testimony of an accomplice, when offered on behalf of the State, should receive "careful examination" and should be relied upon "with great caution."<sup>7</sup> The State addressed this argument in the Supplemental Brief of Respondent at 16-20. In summary, the court in State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974), treated this instruction as a long-standing rule with deep roots in the common law, whose basis lay in the special knowledge and expertise of the courts as to the testimony of accomplices. The same cannot be said of jury instructions that would convey factual information based on the current state of knowledge derived from eyewitness identification research. The cautionary instruction on accomplice testimony is properly treated as an outlier, and cannot support the type of instructions that amici propose.

Amici also reiterate the argument that an instruction that cautions jurors about eyewitness identification is not a comment on

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<sup>7</sup> Notably, this instruction is required only where the State relies *solely* upon the *uncorroborated* testimony of an accomplice. See WPIC 6.05, Comment (and cases cited therein).

the evidence because it addresses a particular "class" or "category" of witness, and not the specific witness who testified in the case. This argument is specious. There is no practical difference to jurors between an instruction that directs them to scrutinize the testimony of "an eyewitness" with special caution, and an instruction that directs them to scrutinize the testimony of the specific eyewitness who testified in the case before them with special caution.<sup>8</sup> In either case, jurors hear the authoritative voice of the trial judge commenting on the testimony. It is a fact "well and universally known" that jurors are anxious to obtain the opinion of the court on matters submitted to them, and that the court's opinion "has a great influence upon the final determination of the issues." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting State v. Crofts, 22 Wash. 245, 250-51, 60 P. 403 (1900)). The comments of the framers of the Washington Constitution, cited supra, show that they were aware of this influence, and were extremely wary of it.

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<sup>8</sup> See State v. Smith, 103 Wash. 267, 269, 174 P. 9 (1918) ("[I]t is not proper for the court to violate the constitutional prohibition against commenting upon the evidence by instructing the jury that it should regard the testimony of any class of witnesses with caution or suspicion.") (emphasis added).

The encroachment of the trial judge on the province of the jury, by instructing in the manner proposed by amici, is exactly what the prohibition on judicial comment on the evidence was meant to prevent. The delegates to the Washington State Constitutional Convention who successfully argued against weakening this constitutional prohibition realized that allowing the trial judge to comment on factual matters resulted in "one side or the other [having] an extra attorney according to which side the judge happens to incline to." WAPA Brief, at A2. They recognized that "if judges were to comment on facts juries might as well be abolished for the judge would carry nine cases out of ten." Id. at A3. They believed that "the functions of judge and jury should be separate." Id. at B1. This Court should adhere to the "rigorous standard" that has long been applied in Washington when reviewing jury instructions under article 4, section 16,<sup>9</sup> and reject the invitation to require specific cautionary jury instructions on cross-racial eyewitness identification.

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<sup>9</sup> See Lane, 125 Wn.2d at 838.

The consequences of embarking on the path proposed by amici must be considered. If this Court were to require cautionary jury instructions on cross-racial eyewitness identification, where would this lead? Would the Court then require specific cautionary instructions on stress, weapon focus, and the myriad other variables that might conceivably affect an eyewitness identification in a given case?

And where would the task end? Will the trial courts be directed to largely dispense with expert testimony in other contexts, and take the "more efficient" path of crafting jury instructions to address issues that have been researched by psychologists and that arguably are not within the common understanding of jurors? Will jurors be instructed, for example, on the phenomena underlying "battered woman syndrome," or "battered child syndrome," in lieu of expert testimony? See Cheatam, 150 Wn.2d at 646. Are the theories developed by psychologists in these areas (e.g., that delay in reporting or continuing to reside with an abuser does not necessarily mean that no abuse occurred) also now within the

knowledge of the courts, such that they should be conveyed to jurors as statements of law? Can the prohibition on judicial comment on evidence be circumvented because such instructions would apply to "categories" or "classes" of witnesses, and not the specific witness who testified in the case?

Amici avoid discussion of the reach of their proposal. This Court must nevertheless grapple with these questions in resolving this case.

2. EXPERT TESTIMONY IS BOTH CONSTITUTIONAL AND EFFECTIVE.

Amici acknowledge that "expert testimony is the most demonstrably effective means to educate juries." Brief of Amicus Curiae College and University Professors, at 30. They point out that, even when jurors are made to understand variables that influence eyewitness identifications, "they do not know how to apply their understanding to the interpretation of evidence." *Id.* at 28. Nevertheless, repeating the refrain that expert witnesses are scarce

and too expensive, they urge this Court to substitute jury instructions for expert testimony.<sup>10</sup>

Amici undermine their own argument. They admit that "[t]here is a limited amount of research on the effectiveness of broad jury instructions on eyewitness identification issues, and the few existing studies do not show consistent results." Id. at 32. Worse yet, "[t]o date, there is no published research on the efficacy of issue-specific instructions, including cross-race bias, a need that researchers are seeking to satisfy." Id. at 31. Amici conclude that "research is needed to understand the effectiveness of issues-specific [sic] instructions," and to "provide guidance about the

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<sup>10</sup> The claim that expert witnesses are difficult to find and prohibitively expensive has been made repeatedly in this case, largely without support. Since Allen neither proposed nor presented expert testimony in this case, there is no evidence in this record on the availability in Washington of experts on the psychology of eyewitness identification, or what the testimony of an expert would have cost. The State does not accept the claim that such experts are scarce in Washington. Two of the experts who joined as amici on the Brief of Amici Curiae College and University Professors are on the faculty of our state university system: Jennifer Devenport (Western Washington University) and Geoffrey Loftus (University of Washington). As to expense, the only authority offered is the Expert Services Policies and Procedures of the King County Office of the Public Defender. Brief of Amicus Curiae Fred T. Korematsu Center for Law and Equality, at 9 n.17. Amicus notes the general limit of \$500 for expert services on eyewitness reliability. Id. However, there are procedures in place to request additional funds in extraordinary circumstances, and a denial by OPD is subject to *de novo* review by the trial court. Expert Services Policies and Procedures at ¶¶ 5.6, 5.7. Amici have cited to no case where the necessity for additional funds for expert testimony on eyewitness identification was demonstrated, yet the request was denied. The State does not believe that such a scenario is common.

desirability and construction of issue-specific jury instructions." Id.  
at 32.

More troublesome even than the lack of evidence that these instructions are effective is the very real possibility that such instructions make jurors "merely skeptical," causing them to "discount[ ] the eyewitness testimony entirely." Id. at 34. This Court should not lose sight of the fact that many, perhaps most, eyewitness identifications are accurate, and *should* be credited by the jury. While failing to effectively convey relevant information on this subject to jurors can result in conviction of the innocent, simply cautioning jurors about eyewitness identification, without giving them the tools to discern which identifications are accurate and which are not, just as easily can result in exoneration of the guilty.

C. CONCLUSION

Trial judges in Washington have broad discretion to allow expert testimony on eyewitness identification when the facts of the case present issues on which jurors need additional information. This Court should not allow trial judges themselves to provide the jury with this type of information, based as it is on the results of studies designed by psychologists, through instructions that purport

to educate the jury on the relevant law. The practice proposed by amici would have trial judges tell jurors to weigh certain testimony with special caution, and then support the warning by conveying factual information to the jurors. Such a practice would invade the province of the jury so jealously guarded by the framers of the Washington Constitution, and would specifically violate the constitutional prohibition on judicial comment on the evidence.

DATED this 15<sup>th</sup> day of February, 2012.

Respectfully submitted,

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# **APPENDIX A**

**IDENTIFICATION: OUT-OF-COURT IDENTIFICATION ONLY**

(Defendant), as part of [his/her] general denial of guilt, contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that [he/she] is the person who committed the alleged offense. The burden of proving the identity of the person who committed the crime is upon the State. For you to find (defendant) guilty, the State must prove beyond a reasonable doubt that this person is the person who committed the crime. (Defendant) has neither the burden nor the duty to show that the crime, if committed, was committed by someone else, or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that (this defendant) is the person who committed it.

The State has presented testimony that on a prior occasion before this trial, [insert name of witness who identified defendant] identified (defendant) as the person who committed [insert the offense(s) charged]. According to the witness, [his/her] identification of the defendant was based upon the observations and perceptions that [he/she] made of the perpetrator at the time the offense was being committed. It is your function to determine whether the identification of (defendant) is reliable and believable or whether it is based on a mistake or for any reason is not worthy of belief.<sup>1</sup> You must decide whether it is sufficiently reliable evidence upon which to conclude that (this defendant) is the person who committed the offense[s] charged. You should consider the observations and perceptions on which the identification was based, and the circumstances under which the identification was made. Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence,

<sup>1</sup> United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933 (1967); State v. Green, 86 N.J. 281, 291-293 (1981); State v. Edmonds, 293 N.J. Super. 113, 118-119 (App. Div. 1996).

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standing alone, may not be an indication of the reliability of the identification.<sup>2</sup> In deciding what weight, if any, to give to the identification testimony, you may consider the following factors [cite appropriate factors]:<sup>3</sup>

**[If necessary or appropriate for purposes of clarity, the judge may comment on any evidence relevant to any of the following factors]<sup>4</sup>**

- (1) The witness's opportunity to view the person who committed the offense at the time of the offense.<sup>5</sup>
- (2) The witness's degree of attention to the perpetrator at the time of the offense.<sup>6</sup>
- (3) The accuracy of any description the witness gave prior to identifying the perpetrator.<sup>7</sup>
- (4) The degree of certainty expressed by the witness in making the identification.<sup>8</sup>

<sup>2</sup> State v. Romero, 191 N.J. 59, 76 (2007).

<sup>3</sup> The first five factors listed below were enumerated in Neil v. Biggers, 409 U.S. 188, 199, 93 S.Ct. 375, 382 (1972), and United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940, as the factors to be considered in evaluating the likelihood of misidentification. New Jersey courts employ the same analysis. State v. Madison, 109 N.J. 223, 239-240 (1988). See also State v. Cherry, 289 N.J. Super. 503, 520 (App. Div. 1995).

<sup>4</sup> See State v. Cromedy, 158 N.J. 112, 128 (1999) ("when identification is a critical issue in the case, the trial court is obligated to give the jury discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification"); State v. Green, 86 N.J. at 292, 293 (noting that model charge could have been used as a guide, court holds that "the defendant had a right to expect that the appropriate guidelines would be given, focusing the jury's attention on how to analyze and consider the factual issues with regard to the trustworthiness of [the witness's] in-court identification"); but see State v. Robinson, 165 N.J. 32, 42-45 (2000) (reaffirming obligation under Green to explain abstract identification factors in factual context of case, but holding that court need not necessarily summarize weaknesses of State's evidence); see generally, State v. Gartland, 149 N.J. 456, 475 (1997) (holding that jury charges must relate the law to the specific facts in a case); State v. A. Gross, 121 N.J. 1 (1990) (same); State v. Concepcion, 111 N.J. 373 (1988) (same).

<sup>5</sup> Facts that may be relevant to this factor include the witness's ability to observe what he/she said he/she saw, the amount of time during which the witness saw the perpetrator, the distance from which the witness saw the perpetrator, and the lighting conditions at the time. See Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253 (1977); Neil v. Biggers, 409 U.S. at 200-201, 93 S.Ct. at 382; State v. Madison, 109 N.J. at 239.

Where supported by evidence that the victim might have difficulty perceiving, recalling, or relating the events, it may be appropriate to add the following to factor (1): "... including the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly." State v. Herrera, 187 N.J. 493, 509 (2006) (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

<sup>6</sup> Facts that may be relevant to this factor include whether the witness was merely a passing or casual observer or one who would be expected to pay scrupulous attention to detail, whether the witness was involved in a direct confrontation with the perpetrator, whether the witness was nervous, shocked or scared as a result of any confrontation with the perpetrator, and whether the witness's attention was focused on or away from the perpetrator's features. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 382-383; State v. Madison, 109 N.J. at 240.

<sup>7</sup> Facts that may be relevant to this factor include whether any description the witness gave of the perpetrator after observing the incident but before making the identification was accurate or inaccurate, whether the prior description provided details or was just general in nature, whether the witness's testimony at trial was consistent with, or different from, his/her prior description of the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 200, 93 S.Ct. at 383; United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 240-241; State v. Edmonds, 293 N.J. Super. 113 (App. Div. 1996).

<sup>8</sup> Facts that may be relevant to this factor include whether witnesses making the identification received inadvertent or intentional confirmation, whether certainty was expressed at the time of the identification or some time later, whether intervening events following the identification affected the witness's certainty, and whether the identification was made spontaneously and remained consistent thereafter. See N.J. Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup

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- (5) The length of time between the witness's observation of the perpetrator during the offense and the identification.<sup>9</sup>
- (6) The circumstances under which the identification was made, and whether or not it was the product of a suggestive procedure<sup>10</sup>, including everything done or said by law enforcement to the witness before, during, or after the identification process.<sup>11</sup> In making this determination you may consider the following circumstances:

**[REFER TO CIRCUMSTANCES OF THE IDENTIFICATION PROCEDURE AS NECESSARY FOR CLARITY, CHOOSING AS APPROPRIATE ANY OF THE FOLLOWING FACTORS, OR ANY OTHER FACTORS RELATING TO SUGGESTIVENESS, THAT ARE SUPPORTED BY THE EVIDENCE:]**

- whether anything was said to the witness prior to viewing a photo array, line-up or showup;<sup>12</sup>
- whether a photo array shown to the witness contained multiple photographs of the defendant;<sup>13</sup>
- whether "all in the lineup but the [defendant] were known to the identifying witness";<sup>14</sup>

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Identification Procedures, April 18, 2001, at 2 (quoted in Herrera, 187 N.J. at 190); National Institute of Justice, Convicted by Juries, Exonerated by Science, June 1996, at 24 (available at <https://www.ndjrs.gov/pdffiles/dnaevid.pdf>); Gary Wells & Amy Bradfield, "Good, You Identified the Suspect," 83 J. Applied Psychol. 360 (1998); Ramirez, 817 P.2d at 781. Whether the witness made an identification quickly upon viewing the suspect, or whether the witness hesitated, may also be a relevant fact. See S. Sporer, Eyewitness Identification Accuracy, Confidence, and Decision Times in Simultaneous and Sequential Lineups, 78 J. Applied Psychol. 22, 23 (1993).

Other relevant facts include whether, at a time prior to making the identification of this defendant, the witness either failed to identify the defendant or identified another person as the perpetrator. See Manson v. Brathwaite, 432 U.S. at 115, 97 S.Ct. at 2253; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; Foster v. California, 394 U.S. 440, 442-443 & n.2, 89 S.Ct. 1127, 1128-1129 & n.2 (1969); United States v. Wade, 388 U.S. at 241, 87 S.Ct. at 1940; State v. Madison, 109 N.J. at 241. Madison cautions, with respect to an identification witness's "demonstrated certainty in his testimony," that "a witness's feeling of confidence in the details of memory generally do not validly measure the accuracy of the recollection," and that "[i]n fact, witnesses 'frequently become more confident of the correctness of their memory over time while the actual memory trace is probably decaying.'" Id. at 241-242 (quoting W.LaFave and J.Israel, Criminal Procedure).

<sup>9</sup> See Manson v. Brathwaite, 432 U.S. at 115-116, 97 S.Ct. at 2253-2254; Neil v. Biggers, 409 U.S. at 201, 93 S.Ct. at 383; State v. Madison, 109 N.J. at 242.

<sup>10</sup> Refer to the New Jersey Attorney General Guidelines, footnote 8 supra. The court should focus on any allegations of suggestive words or conduct by law enforcement or other persons that may effect the suggestiveness of the identification procedures.

<sup>11</sup> See State v. Herrera, 187 N.J. 493 (2006), in which the New Jersey Supreme Court addressed the propriety of a "show-up" identification; the majority opinion concluded that, while such a procedure is inherently suggestive, the identification procedure employed there was reliable and did not result in a substantial likelihood of misidentification.

<sup>12</sup> See State v. Cherry, 289 N.J. Super. 503 (App. Div. 1995).

<sup>13</sup> Id.

<sup>14</sup> United States v. Wade, 388 U.S. at 233, 87 S.Ct. at 1935.

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- whether “the other participants in a lineup were grossly dissimilar in appearance to the [defendant]”;<sup>15</sup>
- whether “only the [defendant] was required to wear distinctive clothing which the culprit allegedly wore”;<sup>16</sup>
- whether “the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail”;<sup>17</sup>
- whether “the [defendant] is pointed out before or during a lineup”;<sup>18</sup>
- whether the witness’s identification was made spontaneously and remained consistent thereafter;<sup>19</sup>
- whether the individual conducting the lineup either indicated to the witness that a suspect was present or failed to warn the witness that the perpetrator may or may not be in the procedure;<sup>20</sup>
- whether the witness was exposed to opinions, descriptions, or identifications given by other witnesses, to photographs or newspaper accounts, or to any other information or influence that may have affected the independence of his/her identification.<sup>21</sup>

**[CHARGE IN ALL CASES:]**

(7) Any other factor based on the evidence or lack of evidence in the case which you consider relevant to your determination of whether the out-of-court identification was reliable.

[(8) Jury should be charged on any other relevant factor present in the case<sup>22</sup>]

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<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id., 87 S.Ct. at 1935-1936.

<sup>19</sup> See Herrera, 187 N.J. at 509 (quoting State v. Ramirez, 817 P.2d 774, 781 (Utah 1991)).

<sup>20</sup> See N.J. Attorney General’s Guidelines, supra, Guideline I.B. (requiring administrator to instruct witness that perpetrator may not be present); State v. Ledbetter, 881 A.2d 290 (Ct. 2005) (requiring jury instruction to that effect).

<sup>21</sup> See Herrera, 187 N.J. at 509 (quoting Ramirez, 817 P.2d at 781 n. 2 (citing State v. Long, 721 P.2d 483, 494 n. 8 (Utah 1986)).

<sup>22</sup> The list of factors enumerated in Biggers and Madison is not exhaustive. See State v. White, 158 N.J. 230, (1999) (in declining to find plain error in identification charge, court notes that instruction went beyond model charge, “noting the discrepancy ... between identifications made by different witnesses”). Additional relevant factors that should be brought to jury’s attention include the witness’s inability to make an in-court identification if asked to do so while on the witness stand, any failure on the part of the State to record a line-up or preserve a photo array, as bearing upon the probative value of the out-of-court identification, see State v. Delgado, 188 N.J. 48, 63 (2006); State v. Earle, 60 N.J. 550, 552 (1972); State v. Peterkin, 226 N.J. Super. 25, 46 (App. Div. 1988), and any discrepancies between identifications made by different witnesses, State v. White, 158

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**[IN THE APPROPRIATE CASE,<sup>23</sup> CHARGE THE FOLLOWING FACTOR:]**

- (9) The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness's original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.<sup>24</sup>

**[CHARGE IN ALL CASES:]**

Unless the out-of-court identification resulted from the witness's observations or perceptions of the perpetrator during the commission of the offense, rather than being the product of an impression gained at the out-of-court identification procedure, it should be afforded no weight. The ultimate issue of the trustworthiness of the identification is for you to decide.

If, after considering all the evidence, you determine that the State has not proven beyond a reasonable doubt that (defendant) was the person who committed this offense [these offenses], then you must find him/her not guilty. If, on the other hand, after considering all of the evidence, you are convinced beyond a reasonable doubt that (defendant) was correctly identified, you will then consider whether the State has proven each and every element of the offense[s] charged beyond a reasonable doubt.

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<sup>23</sup> N.J. 230, 248.

An instruction that cross-racial identification is a factor to be considered "should be given only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability." State v. Cromedy, 158 N.J. at 132; see also State v. Romero, 191 N.J. 59 (2007).

<sup>24</sup> Cromedy holds that in order for the jury to determine the reliability of a cross-racial identification not corroborated by independent evidence, the jury must be informed "of the potential risks associated with such identifications," that the jury must be instructed "about the possible significance of the cross-racial identification factor,..." 158 N.J. at 132-33. In State v. Romero, 191 N.J. 59 (2007), the New Jersey Supreme Court refused to rule that cross-ethnic charges were required in cases involving an individual's identification of a person of another ethnic background.

**BATTERED WOMAN<sup>1</sup> SYNDROME – PURPOSES OTHER THAN DEFENSES<sup>2</sup>**

You have heard evidence about Battered Woman Syndrome, addressing the behavior of [a] certain witness[es]. In this respect, Dr. [A], Ph.D., testified on behalf of the State [and Dr. [B], Ph.D., testified on behalf of the defense].<sup>3</sup> The witness[es] was/were qualified as [an] expert[s] on Battered Woman Syndrome. You may only consider the testimony of this/these expert[s] for a limited purpose, as I will explain.

Many people have strong views about women who are battered, so some of you may question a battered woman's credibility based solely on the fact that she [CHOOSE APPLICABLE TERM] remained silent about the battering/ did not act to stop the battering/ continued to reside with the batterer/ denied that battering occurred]. The law recognizes that many people believe that a woman's claim that she was battered or abused is not credible solely because she remained silent or otherwise did not act to stop it. Evidence regarding Battered Woman Syndrome is relevant, if believed by you, because it can explain how such behaviors are among the many ways that a woman may respond to such battering.

You may not consider Dr. [A]'s testimony as offering proof that battering occurred. [Likewise, you may not consider Dr. [B]'s testimony as proof that battering did not occur]. Battered Woman Syndrome cannot be used to determine whether or not abuse occurred. It relates only to a pattern of behavior of a battered woman that may be present in some cases where battering is alleged. You may not consider expert testimony about Battered Woman Syndrome as proving whether battering occurred or did not occur. Similarly, you may not consider that testimony as proving, in and of itself, that \_\_\_\_\_, the alleged battered woman, was or was not truthful.

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<sup>1</sup> Use of the term "woman" is not meant to preclude evidence that this defense can be applied to someone other than a woman.

<sup>2</sup> A separate charge on Battered Woman Syndrome is offered when a defendant adduces evidence of it to support a defense. This model charge should be used when either party adduces evidence of the syndrome to explain why a victim or other witness failed to report that she was battered. See, for instance, State v. Townsend, 186 N.J. 473 (2006). As such, the language of this charge is derived primarily from that approved in State v. P.H., 178 N.J. 378, 399-400 (2004), for use when evidence of Child Sexual Abuse Accommodation Syndrome is adduced. This charge should be given, where applicable, as part of the Expert Witness charge.

<sup>3</sup> This Model Charge should be modified where an expert on Battered Woman Syndrome is called by only one party.

**BATTERED WOMAN SYNDROME –  
PURPOSES OTHER THAN DEFENSES**

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Dr. [A]'s testimony may be considered as explaining certain behavior of the alleged victim of battering. As I just said, that testimony may not be considered as proof that abuse did, or did not, occur. Battered Woman Syndrome, if proven, may help explain why a battered woman may [CHOOSE APPLICABLE TERM] [remain silent/ take no action/ continue to live with her batterer / deny that battering occurred].

In a burglary or theft case, if the owner did not report the crime for several years, your common sense might tell you that the delay reflected a lack of truthfulness on the part of the owner. No expert would be offered to explain the owner's conduct, because that conduct is within the common experience and knowledge of most jurors. By contrast, in a case such as this, expert testimony regarding Battered Woman Syndrome can help explain the effects that a sustained pattern of physical and/or psychological abuse can have on a woman.<sup>4</sup>

Here, Dr. [A] testified that, in cases involving battered women, [SUMMARIZE TESTIMONY]. This testimony was admitted for the limited purpose of explaining that the behavior of the alleged victim was not necessarily inconsistent with battering. [CHARGE, IF APPLICABLE: here, Dr. [B] testified that, in cases involving battered women, [SUMMARIZE TESTIMONY]. This testimony was admitted for the limited purpose of explaining that the behavior of the alleged victim was not necessarily consistent with battering.

In summary, testimony as to the Battered Woman Syndrome is offered only to explain certain behavior of an alleged victim of battering. As with all other expert testimony, you may not consider the expert testimony as in any way proving that \_\_\_\_\_ committed, or did not commit, any particular abusive act. The weight to be given to Dr. [A]'s [or Dr. [B]'s] testimony is entirely up to you. You may give it great weight, slight weight, or any weight in between, or you may in your discretion reject it entirely.

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<sup>4</sup> Townsend, 186 N.J. at 499.

**CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME<sup>1</sup>**  
**(WHERE STATE PRESENTS EVIDENCE THEREOF)**

The law recognizes that stereotypes about sexual assault complaints may lead some of you to question [complainant's] credibility based solely on the fact that [he/she] did not complain about the alleged abuse earlier. You may or may not conclude that his/her testimony is untruthful based only on his/her [silence/delayed disclosure] [CHOOSE APPLICABLE TERM]. You may consider the [silence/delayed disclosure] along with all other evidence including [complainant's] explanation for his/her silence/delayed disclosure in deciding how much weight, if any, to afford to complainant's testimony. You may also consider the expert testimony that explained that silence/delay is one of the many ways in which a child may respond to sexual abuse. Accordingly, your deliberations in this regard should be informed by the testimony presented concerning the child sexual abuse accommodation syndrome.<sup>2</sup>

You may recall evidence that (NAME) [failed to disclose, or recanted, or acted or failed to act in a way addressed by the Child Sexual Abuse Accommodation Syndrome]. In this respect, Dr. [A], Ph.D., testified on behalf of the State [and Dr. [B], Ph.D., testified on behalf of the defendant].<sup>3</sup> Both witnesses were qualified as experts as to the Child Sexual Abuse Accommodation Syndrome.<sup>4</sup> You may only consider the testimony of these experts for a limited

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<sup>1</sup> This charge should be given, where applicable, as part of the Expert Witness charge.

<sup>2</sup> This language is derived from that approved by the Supreme Court in State v. P.H., 178 N.J. 378, 399-400 (2004), and State v. W.B., 205 N.J. 588 (2011).

<sup>3</sup> This Model Charge should be modified where an expert on the Accommodation Syndrome is called by only one party.

<sup>4</sup> See State v. J.O., 252 N.J. Super. 11 (App. Div. 1991), aff'd 130 N.J. 554 (1993).

**CHILD SEXUAL ABUSE ACCOMMODATION  
SYNDROME (WHERE STATE PRESENTS  
EVIDENCE THEREOF)**

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purpose, as I will explain.

You may not consider Dr. [A]'s testimony as offering proof that child sexual abuse occurred in this case. [Likewise, you may not consider Dr. [B]'s testimony as proof that child sexual abuse did not occur]. The Child Sexual Abuse Accommodation Syndrome is not a diagnostic device and cannot determine whether or not abuse occurred. It relates only to a pattern of behavior of the victim which may be present in some child sexual abuse cases. You may not consider expert testimony about the Accommodation Syndrome as proving whether abuse occurred or did not occur. Similarly, you may not consider that testimony as proving, in and of itself, that \_\_\_\_\_, the alleged victim here, was or was not truthful.

Dr. [A]'s testimony may be considered as explaining certain behavior of the alleged victim of child sexual abuse. As I just stated, that testimony may not be considered as proof that abuse did, or did not, occur. The Accommodation Syndrome, if proven, may help explain why a sexually abused child may [delay reporting and/or recant allegations of abuse and/or deny that any sexual abuse occurred].

To illustrate, in a burglary or theft case involving an adult property owner, if the owner did not report the crime for several years, your common sense might tell you that the delay reflected a lack of truthfulness on the part of the owner. In that case, no expert would be offered to explain the conduct of the victim, because that conduct is within the common experience and knowledge of most jurors.

Here, Dr. [A] testified that, in child sexual abuse matters, [SUMMARIZE TESTIMONY]. This testimony was admitted only to explain that the behavior of the alleged victim was not

**CHILD SEXUAL ABUSE ACCOMMODATION  
SYNDROME (WHERE STATE PRESENTS  
EVIDENCE THEREOF)**

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necessarily inconsistent with sexual abuse. [CHARGE, IF APPLICABLE: here, Dr. [B] testified that, in child sexual abuse matters, [SUMMARIZE TESTIMONY]. This testimony was admitted only to explain that the behavior of the victim was not necessarily consistent with sexual abuse].

The weight to be given to Dr. [A]'s [or Dr. [B]'s] testimony is entirely up to you. You may give it great weight, or slight weight, or any weight in between, or you may in your discretion reject it entirely.

You may not consider the expert testimony as in any way proving that [defendant] committed, or did not commit, any particular act of abuse. Testimony as to the Accommodation Syndrome is offered only to explain certain behavior of an alleged victim of child sexual abuse.

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the following:

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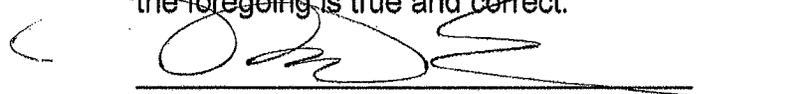
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**Susan Wilk**, Attorney for Petitioner (Bryan Edward Allen) @ [susan@washapp.org](mailto:susan@washapp.org), containing a copy of the State's Consolidated Response to Amicus Curiae Brief, in STATE V. BRYAN EDWARD ALLEN, Cause No. 86119-6, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington

02/15/12  
Date