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March 13, 2023

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BRIEF ON BEHALF OF DEFENDANT-PETITIONER IN RESPONSE TO THE ATTORNEY GENERAL'S AMICUS CURIAE BRIEF

SUPREME COURT OF NEW JERSEY
DOCKET NO. 087251

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Certification from a Judgment of the Superior Court of New Jersey, Appellate Division.
v.	:	
QUINTIN D. WATSON,	:	Sat Below:
Defendant-Petitioner.	:	Hon. Ronald Susswein, J.A.D. Hon. Richard Geiger, J.A.D. Hon. Richard Hoffman, J.A.D.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-petitioner Quintin Watson relies on the procedural history and statement of facts set forth in his supplemental and appellate briefs.

LEGAL ARGUMENT

Mr. Watson relies on the legal arguments in his previous submissions to this Court and the Appellate Division, and adds the following:

POINT I

NEW JERSEY HAS CONSISTENTLY REQUIRED THAT LAY OPINION TESTMONY BE BASED ON FIRST-HAND PERSONAL PERCEPTIONS. THE ATTORNEY GENERAL'S POSITION TO THE CONTRARY MISCONSTRUES THIS CASELAW AND THE FEW OUT-OF-STATE CASES ON WHICH IT RELIES.

The Attorney General (AG) asks this Court to adopt a rule allowing police opinion testimony regarding what a video depicts so long as the officer viewed the video "extensively," and claims that this approach is consistent with New Jersey law and has been adopted by other jurisdictions. (See AG 6-31)[1] However, the AG is mistaken on both counts. First, a closer look at the out-of-state cases the AG cites reveals the inaccuracy of its claims: the unpublished Third Circuit case involves a police officer testifying about a video of an incident that he personally experienced. And both the intermediate appellate case from Michigan, and the cases from the Ninth Circuit are easily

[1] 5T: November 13, 2018 trial transcript
ACLU-NJa: American Civil Liberties Union of New Jersey's appendix
AG: Attorney General's brief
Dsb: Defendant's Supplemental Supreme Court brief
Dsupp: Defendant's March 28, 2022 Appellate Division Supplemental Letter
IP: Innocence Project's brief

distinguishable.

Because the AG devotes so much of its brief to these cases, a more extended discussion is warranted to provide the Court with a fuller picture of what these cases do — and don't — stand for. First, the Attorney General's reliance on United States v. Brown, 754 Fed. App'x 86 (3d. Cir. 2018) (AG 19, 22) is puzzling, and not just because it is an unpublished case. In Brown, the police witness, Detective Mullin, opined at length about a surveillance video in which he himself was depicted, of events *that he witnessed in person*. See id. at 88-89 (noting that Mullin's narration of surveillance videos was rationally based on his "personal observations from the day of the pursuit"); see also United States v. Brown, No. 16-cr-16 RGA, 2017 U.S. Dist. LEXIS 90483, *3-*4, *14 (D. Del. June 13, 2017) (underlying trial court opinion denying motion for new trial and judgment of acquittal) (describing Mullin as having "pursued [d]efendant the day of the arrest," and that he "testif[ied] to same," explaining his testimony: "After describing his appearance and the appearance of his partner, Mullin walked the jury through extensive video tape that showed his vehicle circling in and out of frame and showed Defendant at times running and at times walking."). Thus, Brown certainly does not stand for the premise that the Third Circuit has adopted a rule that the personal-perception requirement is satisfied simply through repeated pre-trial viewing of a video, or that the opinion

of a non-observer of an event regarding what a video depicts, frame-by-frame, is helpful to the jury under the meaning of N.J.R.E. 701.

The other out-of-jurisdiction cases on which the AG relies are inapposite primarily because they addressed the propriety of opinion testimony regarding slowing down, freeze-framing, and otherwise altering or enhancing video, by witnesses who did not view the underlying events of the original video, but were integral to the creation of the altered video and/or images about which they were testifying. For example, in People v. Fomby, 831 N.W.2d 887 (Mich. Ct. App. 2013) (AG 19-20, 22), a certified video forensic technician reviewed a six-hour-long surveillance video of a gas station where a fatal armed robbery occurred, and produced short clips of specific individuals and isolated particular frames to create still images. He explained his process, then "provided his opinions regarding the identity of the individuals within the video as compared to the still images from the portions of the video." Id. at 888-90. As the court explained, the technician "was comparing the video surveillance video to still images that he himself had *created* from the six-hour long video," and his "testimony only linked individuals depicted in the surveillance video as being the same individuals depicted in the still photographs." Id. at 891 (emphasis in original).

Similarly, in United States v. Begay, 42 F.3d 486 (9th Cir. 1994) (AG 18, 20, 21, 27), the witness was testifying about alterations to an original video of

an event, not simply opining on what he thought the original video depicted, contrary to the AG's assertions. In Begay, hundreds of people had descended upon a government building and engaged in a violent confrontation with police. It was chaos; many in the crowd descended upon a police officer's car, battering it and smashing its windshields before attacking him through the windows. Id. at 489, 495. A videotape of the incident which depicted the actions of about 200 demonstrators, was played at trial as Exhibit 1. An "enhanced portion" of that video," Exhibit 105, was also played at trial. Exhibit 105 was created by taking a portion of Exhibit 1, slowing that portion down and enhancing the video quality, and "color-coded circles and arrows were added to aid the jury in tracing the movements of each of the" defendants. Id. at 495, 502. Exhibit 105 showed defendant Begay leaning into the police car as the officer-victim was being clubbed. Id. at 495-96, 502. The defendants did not dispute the accuracy of the identifications of the various actors in Exhibit 105. Id. at 502.

The trial court permitted the introduction of Exhibit 105, on the condition that a witness needed to explain the circles and arrows, and be subject to cross-examination. Id. at 502. The officer who had Exhibit 105 created was the one who testified about it. Although he was not present at the incident itself, he had extensively reviewed Exhibit 1 (the original video) and photographs of the incident. He explained how Exhibit 105 was created and testified while it was

played. Ibid. Again, the defendants did not challenge the accuracy of the officer's identification of them in the video. Nor did the officer provide narration/opinion testimony regarding what the original video, Exbibit 1, depicted. Ibid. Rather, the question before the Ninth Circuit was whether the officer could testify about Exhibit 105, the enhanced extraction although he had not been present at the scene of the melee. Id. at 502-03.

It was against this context and procedural history that the court held the testimony admissible. The court reasoned that because the officer's testimony about Exhibit 105 was rationally based on his perception of Exhibit 1, the personal perception requirement was met under F.R.E. 701 for his testimony about Exhibit 105. Id. at 503. The court explained: the officer's "testimony concerned only the scenes depicted in Exhibit 105 as extracted from Exhibit 1, the original videotape. Thus, [the officer] need only have perceived the events depicted in Exhibit 1." Id. at 502. In addition, the court's ruling regarding the helpfulness prong was based on its conclusion that testimony about Exhibit 105 "involved a factual explanation of" those enhanced portions of video, rather than "offer[ing] arguments or conclusions concerning the actions of those depicted in the videotape." Id. at 503.

And in United States v. Torralba-Medina, 784 F.3d 652, 657 (9th Cir. 2015), the challenged testimony was provided by an Immigration and Customs

Enforcement (ICE) agent who was assigned to the human-smuggling investigation at issue in the case. He provided expert testimony, explaining how smugglers evade checkpoints and how to distinguish guides from migrants. Ibid. The ICE agent also provided fact testimony regarding his involvement in the particular investigation, testifying for days about his observations of the particular shuttle company at issue, including how he would often watch live video feed of comings and goings from the shuttle company, as well as viewing each of the videos roughly 50 times. Id. at 657, 659. He pointed out unique characteristics of cars in the video and clothing worn by particular individuals, linked different cars to specific conspirators, counted passengers, and explained to the jury how much time elapsed between clips. Id. at 659-60.

The "narration" of videos was not the central issue in the case, with much more focus on the trial court's failure to properly instruct the jury on the agent's dual role as both a lay and expert witness and the admissibility of his opinions the meaning of ambiguous phrases in recorded calls and the role of various individuals in the smuggling organization. See id. at 659-61. Indeed, there was no objection to the agent's testimony at trial regarding video of the arrivals and departures from the shuttle company. Although on appeal the court sanctioned the agent's testimony as helpful in understanding "the import of the videos," there was no analysis of the agent's personal perception beyond stating,

incorrectly, that Begay had permitted lay opinion on a video based solely on extensive pre-trial review. Id. at 657. Furthermore, although the court asserted that merely having viewed the video was sufficient, it appears that the agent's opinion was also based on viewing a live feed other facts and observation from his investigation, and his years of experience patrolling the border including undercover work. Id. at 657, 659-60.

Thus, Torralba-Mendia inaccurately stated the Begay holding, with no real analysis. It is also not consistent with New Jersey law. Although the AG asserts that there is no first-hand perception requirement under N.J.R.E. 701 (AG 16-18, 20), this Court has never permitted a lay witness to opine about what a video or photograph depicts unless the opinion is grounded in that witness's real-life observations of the subject of their opinion. See, e.g., State v. Sanchez, 247 N.J. 450, 469 (2021) (lay witness who had personally seen defendant more than 30 times in real life could opine on whether photograph was of defendant because her opinion was based on those first-hand personal perceptions of him in real life); State v. Singh, 245 N.J. 1, 17-20 (detective who had personally seen defendant wearing particular sneakers when he arrested him could opine on whether those sneakers looked similar to those in surveillance video); State v. Lazo, 209 N.J. 9, 24 (2012) (police officer who had not observed crime or defendant in real life could not opine that his arrest photo resembled the

composite because it was not based on his prior experience with defendant); see also State v. Derry, 250 N.J. 611, 625-36 (2022) (testimony from case agent about meaning of words and calls based upon listening to thousands of recorded conversations not admissible under N.J.R.E. 701).

The other cases cited by the AG also support Mr. Watson's position, because in each case, the witness's opinion was based on something that he had perceived outside of the courtroom. For example, in State v. Labrutto, 114 N.J. 187, 202 (1989), the police officer was permitted to opine about point of impact of two cars when his opinion was based on his personal, real-life observations of the scene of the accident, including tire tracks, scuff marks, debris, position of the vehicles, and the nature of their damage. And in Trentocost v. Brussel, 164 N.J. Super. 9, 12 (App. Div. 1978), the police officer was permitted to offer an opinion about the character of a neighbor based upon the "frequency with which he answered calls, quelled disturbances and made arrests in area." See State v. McLean, 205 N.J. 438, 459 (2011) (so characterizing basis of lay opinion in Trentocost).

Finally, even if this Court were to move away from its prior N.J.R.E. 701 precedent regarding personal perception as requested by the AG, the video in this case — a short, straightforward, uncomplicated, video of a single person entering a bank, briefly interacting with the teller, and then leaving — is about

as far as one can get from the chaotic, busy, fast-paced Begay riot scene or Torralba-Mendia's composite of multiple video clips of numerous vehicles, people, and events occurring over time. Cf. People v. Sykes, 972 N.E.2d 1272, 1274, 1281 (Ill. App. 2021) (improper to permitted officer to narrate 3-minute long video with one person portrayed). For example, in Torralba-Mendia, the ICE agent testified that he had watched video live as well as watching each recording 50 times, and was able to point out specific unique characteristics and number of people and vehicles from several videos. A jury viewing the many video clips only at trial would be unlikely to discern these specific details, which, though apparently undisputed, were numerous. And in Begay, not only was the video of a complicated and fast-moving riot scene, but the testimony of the witness itself was not about the video of the event, but rather, his enhancements of that video that created Exhibit 105. And, as mentioned above, the defendants in Begay did not dispute the accuracy of the identification of the various actors in the video.

Ultimately, adopting the AG's position would mean that, as a practical matter, in virtually every case the prosecutor will have a law enforcement officer testify about his opinion on what is depicted on a video, because video evidence is ubiquitous, and there will always be an officer who reviewed the video at issue pre-trial. As detailed in previous submissions, such a rule is flatly contrary

to this Court's jurisprudence and would unfairly allow the prosecutorial authority to bolster its fact witnesses and vouch for the State's theory of the case.

In this case, Sgt. Vitelli's opinions about what the suspect looked like, where he touched surfaces in the bank, and the significance of his purported actions were based solely on his review of the surveillance footage. This inadmissible testimony improperly vouched for the State's theory of why Mr. Watson's fingerprints were not among those collected at the bank, and unfairly bolstered the sole eyewitness's description and problematic in-court identification. Especially in a case like this — where the video was short and uncomplicated but not clear; the eyewitness (who had identified someone else) was not even asked about the video; the forensic evidence pointed only to people other the defendant; and what and who the video depicted was the sole issue at trial — the law enforcement opinion testimony about the video was inadmissible, and its admission incalculably harmful, requiring reversal. U.S. Const. amends. V, VI and XIV; N.J. Const. art. 1, ¶¶ 1 and 10.

POINT II

FIRST-TIME IN-COURT IDENTIFICATIONS SHOULD NOT BE PERMITTED; HOWEVER, EVEN IN A CASE-BY-CASE ANALYSIS, IT WAS PLAIN ERROR TO PERMIT THE STATE TO ELICIT THE IDENTIFICATION IN THIS CASE, PARTICULARLY GIVEN THE PROSECUTOR'S COMMENTS IN SUMMATION AND THE FAILURE TO PROPERLY INSTRUCT THE JURY.

The AG argues that the "protections of our adversarial system minimize[] the possibility of in-court misidentification," yet, this is contrary to the undisputed social science, as well as New Jersey caselaw. Mr. Watson respectfully refers the Court to his prior submissions, especially his March 28, 2022, supplemental letter and his supplemental brief (Dsb; Dsupp), and the briefs submitted by amici curiae Innocence Project and American Civil Liberties Union of New Jersey, adding the following:

In State v. Henderson, 208 N.J. 208, 302 (2011), this Court recognized that unreliable identifications must be excluded, and juries cannot evaluate identification evidence without "thorough instructions tailored to the facts." The Court emphasized that questions of admissibility and proper instructions must be informed by the science of memory and eyewitness identification, rather than being based on "a dated[] analytic framework that has lost some of its vitality." Ibid. "[R]ecogniz[ing] that scientific research relating to the reliability of

eyewitness identification is dynamic," the Court modified the Manson/Madison framework to reflect the updated available social science. Id. at 292, 303.

Although the Court's modified framework "avoid[ed] bright-line rules," the Henderson decision made clear that this was not because the Court deemed all bright-line rules automatically verboten as urged by the AG. Rather, the Court explained that its concern was that it did not want to create a system in which otherwise reliable identifications would be excluded any time a police officer failed to perfectly execute an out-of-court identification procedure:

> The framework avoids bright-line rules that would lead to suppression of reliable evidence any time a law enforcement officer makes a mistake. Instead, it allows for a more complete exploration of system and estimator variables to preclude sufficiently unreliable identifications from being presented and to aid juries in weighing identification evidence.

Id. at 303. Thus, our eyewitness identification jurisprudence is based on striking a balance between, on the one hand, not excluding otherwise reliable identifications from a properly instructed jury's consideration, and on the other hand, ensuring that when an objectional procedure results in "a very substantial likelihood of misidentification," it is not admitted at trial. Id. at 289. And social science, rather than outdated intuition or speculation, is what underpins that determination.

Applying this guiding principle, the State should not be permitted to elicit

first-time in-court identifications, especially when the witness previously identified a different person in a prior, fair procedure. As discussed above, in the context of out-of-court identifications, the question is whether law enforcement made a mistake that *could affect* the reliability of the identification, thus necessitating the case-by-case analysis under Henderson. First-time in-court procedures are different[2] because they are by their very nature inherently unreliable, and overwhelmingly unduly prejudicial, as evidenced by the wealth of evidence provided by Mr. Watson and amici. Neither the AG nor the State has submitted any evidence to the contrary, despite the Appellate Division's express invitation to do so. Nor have they provided support for the claim that cross-examination and having a witness testify under oath are adequate "safeguards," or even for their claim that live identifications may be more accurate than those from photographs. This is unsurprising, as the research shows both that the trial process is ineffective at exposing mistaken identifications, and witnesses are not, in fact, better at identifying a live person than a photograph. (See, e.g., Dsupp. 1-9; ACLU-NJa 177-96; IP 5-29)

Furthermore, even if this Court declines to categorically bar first-time in-

[2] The Court should, however, reject the notion that the prosecutor is a private actor; it is axiomatic that the prosecutor is a state actor and part of law enforcement. See, e.g., ACLU v. Cnty. Prosecutor's Ass'n, 474 N.J. Super. 243, ___, 2022 N.J. Super LEXIS 146, *22 (App. Div. 2022) (citations omitted).

court identifications, a case-by-case analysis would exclude the identification here. Almost two years had passed between the robbery and trial; the witness only viewed the robber for a very short period of time under stress and while distracted by collecting money; the robber's face was partially obscured by a hat; the robber was of a different race than the witness; the witness identified a different person in an out-of-court identification procedure; and the prosecutor told him where the defendant would be sitting — and, even after all that, under supremely suggestive circumstances and the expectation that he would select Mr. Watson, *he still was not entirely sure of his identification*. If any in-court identification is lacking in reliability and fails to further the court's truth-seeking function, it is the one in this case. The probative value of Gambarrotti pointing out Mr. Watson as the robber was, in reality, very weak, but its capacity to unduly prejudice the defendant was vast. The jury experienced the theatrical moment at the end of the direct examination. (5T:66-7 to 23) And worse, it was left without appropriate guidance on how to evaluate it.

As discussed at length in Mr. Watson's prior submissions, Gambarrotti's first-time in-court identification was a linchpin of the case. And, any moderating effect of his lack of certainty, along with his prior identification of a different person, was eviscerated by the prosecutor's summation which (falsely) reassured the jury that his in-court identification was more reliable, and that

"any possibility of misidentification" had been "eliminate[d] . . . completely." (See Dsb 41-43) For the reasons expressed here and in prior submissions, the wrongful admission of the first-time in-court identification, particularly coupled with the prosecutor's summation and the lack of instruction to the jury warning it that an in-court identification is highly suggestive and therefore may be unreliable, violated Mr. Watson's constitutional rights to due process and a fair trial, and his conviction should be reversed. U.S. Const. amends. V, VI and XIV; N.J. Const. art. 1, ¶¶ 1 and 10; R. 2:10-2.

CONCLUSION

This was a misidentification case with no physical evidence tying the defendant to the crime: no DNA, only fingerprints of other people, no clothing found matching the description, no cell site data, or any other evidence at all. Only the in-court identification of the sole eyewitness, who selected another man in a photo array, directly inculpated Mr. Watson. And the only other evidence was a brief, pixelated video of the suspect, with his face partially obscured, and an opinion of a non-eyewitness derived from a still from that video. For the reasons expressed herein and in prior submissions, Mr. Watson respectfully urges the Court to vacate his conviction and remand for a new trial.

Respectfully submitted,

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