IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. EARL BOOTH-HARRIS, Defendant-Appellant.	)	Supreme Court No. 18-0002

APPEAL FROM THE IOWA DISTRICT COURT
FOR DES MOINES COUNTY
THE HONORABLE JOHN G. LINN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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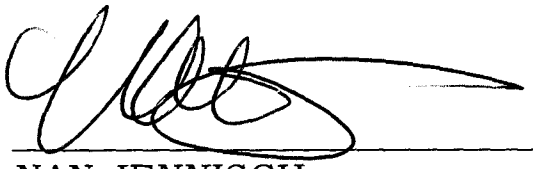
CERTIFICATE OF SERVICE

On January 11, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Earl Booth-Harris, No. M17101, Pontiac Correctional Center, P.O. Box 99, Pontiac, IL 61764.

STATE APPELLATE DEFENDER



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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court err in denying defendant's motion to suppress the identification of defendant by witness, Donnell Watson, as impermissibly suggestive and unreliable?

Authorities

State v. Niehaus, 452 N.W.2d 184, 186 (Iowa 1990)

State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)

State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015)

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State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012)

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State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015)

State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015)

Watkins v. Sowders, 449 U.S. 341, 352, 101 S.Ct. 654, 661, 66 L.Ed.2d 549, 558–59 (1981)

Elizabeth Loftus, Eyewitness Testimony 9 (1979)

State v. Henderson, 27 A.3d 872, 886 (N.J. 2011)

Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8-9, 279 (2011)

Perry v. New Hampshire, 132 S.Ct. 716, 738, 181 L.Ed.2d 694 (2012)

Simmons v. United States, 390 U.S. 377, 383-384, 19 L.Ed.2d 1247 (1968)

U.S. Const. amend. XIV

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Manson v. Braithwaite, 432 U.S. 98, 109, 116, 97 S.Ct. 2243, 2250, 53 L.Ed.2d 140, 151, 153 (1977)

State v. Mark, 286 N.W.2d 396, 403, 405 (Iowa 1979)

State v. Ripperger, 514 N.W.2d 740, 744 (Iowa Ct. App. 1994)

State v. Taft, 506 N.W.2d 757, 762 (Iowa 1993)

Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972)

Nicholas A. Kahn-Fogel, *Manson and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 Ala. C.R. & C.L.L. Rev. 175, 176 (2012)

Sarah Anne Mourer, *Reforming Eyewitness Identification Procedures Under the Fourth Amendment*, 3 Duke J. Const. L. & Pub. Pol'y 49, 60 (2008)

Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 Wyo. L. Rev. 189, 192 (2006)

Comm. v. Johnson, 650 N.E.2d 1257, 1261 (Mass. 1995)

State v. Dubose, 699 N.W.2d 582, 593-941 (Wis. 2005)

People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981)

State v. Henderson, 27 A.3d 872, 879 (N.J. 2011)

State v. Lawson, 291 P.3d 673 (Ore. 2012)

State v. Leclair, 385 A.2d 831, 833 (N.H. 1978)

The identification procedures were impermissibly suggestive.

State v. Henderson, 27 A.3d 872, 899 (N.J. 2011)

State v. Lawson, 291 P.3d 686 (Ore. 2012)

Watson's identifications of defendant was not reliable.

State v. Henderson, 27 A.3d 872, 904 (N.J. 2011)

Colin G. Tredoux et al., *Eyewitness Identification, in 1 Encyclopedia of Applied Psychology* 875, 877 (Charles Spielberger ed., 2004)

State v. Lawson, 291 P.3d 686, 688 (Ore. 2012)

The error in this case was not harmless.

Defendant's trial counsel was ineffective to the extent that error was not preserved.

State v. Clay, 824 N.W.2d 488, 500 (Iowa 2012)

II. Did trial counsel render ineffective assistance in failing to request a more thorough eyewitness identification instruction incorporating well-established system and estimator variables?

Authorities

State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006)

U.S. Const. amend. VI

U.S. Const. amend. XIV

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Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984)

State v. Marin, 788 N.W.2d 833, 837 (Iowa 2010)

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State v. Goff, 342 N.W.2d 830, 837-38 (Iowa 1983)

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State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009)

State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999)

State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982)

Iowa Bar Ass'n, *Iowa Crim. Jury Instruction* 200.45

U.S. v. Telfaire, 469 F.2d 552, 555 (D.C. Cir. 1972)

State v. Hohle, 510 N.W.2d 847, 849 (Iowa 1994)

National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification*, 1 (2014)

Commonwealth v. Gomes, 22 N.E.3d 897, 905-918 (Mass. 2015)

State v. Henderson, 27 A.3d 872, 920-922 & 925-926 (N.J. 2011)

Commonwealth v. Pressley, 457 N.E.2d 1119, 1120-1121 (Mass. 1983)

State v. Collins, No. 16-1094, 2017 WL 6027763, at *8 (Iowa Ct. App. November 22, 2017)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issues raised involve substantial issues of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

Defendant urges this Court to reevaluate its approach to the analysis of eyewitness identification procedures and diverge from the federal standard enunciated in Manson v. Braithwaite, 432 U.S. 98, 97 S.Ct. 224, 353 L.Ed.2d 140 (1977) under the Iowa Constitution. Additionally, he argues that Iowa's model jury instruction regarding eyewitness identification should be modified to incorporate well-established system and estimator variables.

STATEMENT OF THE CASE

Nature of the Case: Defendant, Earl Booth-Harris, appeals from his conviction for first-degree murder following jury trial, judgment, and sentencing in the District Court for Des Moines County. The Honorable John G. Linn presided over all relevant proceedings.

Course of Proceedings and Disposition in the District Court:

On December 29, 2016, the State filed a trial information charging defendant with the crime of first-degree murder, a Class "A" Felony in violation of Iowa Code sections 707.1 and 707.2. (Trial Information – 12/29/16) (App. pp. 4-6).

Defendant filed a motion to suppress on June 1, 2017. (Motion to Suppress – 6/01/17, p. 1) (App. p. 7). He argued, in pertinent part, that the eyewitness identification procedures – involving witnesses Donell Watson and Edward DeWitt – violated his due process rights under the federal and state constitutions.[1] (Motion to Suppress – 6/01/17, pp. 1-3) (App. pp. 7-9). He asserted that the eyewitnesses' out-of-court and in-court identifications should be excluded. (Motion to Suppress – 6/01/17, pp. 1-3) (App. pp. 7-9). A hearing was

[1] Defendant also contended that the statements he made to law enforcement after invoking his right to remain silent, under the federal and state constitutions, should be suppressed. (Motion to Suppress – 6/01/17, p. 3) (App. p. 9). The district court granted this part of defendant's motion to Suppress. (Ruling on Division III of Defendant's Motion to Suppress – 10/03/17) (App. pp. 19-22).

held on the matter on September 7, 2017. (Ruling on Divisions I and II of Defendant's Motion to Suppress – 10/03/17, p. 1; Ruling on Division III of Defendant's Motion to Suppress – 10/03/17, p. 1) (App. pp. 11, 19). The district court denied defendant's motion to suppress with respect to the identification by Watson. (Ruling on Divisions I and II of Defendant's Motion to Suppress – 10/03/17, p. 7) (App. p. 17). The court ruled that it was unable to address DeWitt's identification on the current record. (Ruling on Divisions I and II of Defendant's Motion to Suppress – 10/03/17, pp. 6-7) (App. pp. 16-17).

Jury trial was held on November 7-14, 2017. (Trial I, Tr. p. 1). The jury returned a guilty verdict on the charge of first-degree murder. (Verdict – 11/14/17) (App. pp. 26-27).

Defendant filed a motion for new trial on December 12, 2017. (Motion for New Trial – 12/12/17, p. 1) (App. p. 28).

Sentencing was held on December 18, 2017. (Sentencing Order – 12/18/17, p. 1) (App. p. 31). At the hearing, the court took up defendant's motion for new trial and overruled the

motion. (Sent. Tr. p. 2, L. 1-p. 13, L. 21). The court subsequently imposed judgment and sentenced defendant to a life-term in prison without the possibility of parole. (Sentencing Order – 12/12/17, p. 1) (App. p. 31).

Defendant filed timely notice of appeal on January 1, 2018. (Notice of Appeal – 1/01/18) (App. p. 34); this appeal followed.

Facts: A dispute between Deonte "Tae Tae" Carter and Terrance "Lil T" Polk over a pair of shoes escalated to a deadly shooting on February 16, 2015. (Trial II Tr. p. p. 20, L. 8-19; p. 27, L. 9-15; 113, L. 5-14; p. 125, L. 12-p. 126, L. 8). The incident took place near South Hill Park in the area of S. 7th and Elm Streets in Burlington, IA. (Trial II Tr. p. 112, L. 21-p. 113, L. 14; p. 205, L. 25-p. 206, L. 3). The feud began after Carter had accused Polk of breaking into his house and stealing his sneakers. (Trial II Tr. p. 99, L. 18-23; p. 160, L. 14-p. 161, L. 10; p. 163, L. 1-14). Carter and Polk agreed to meet at the park for a fist fight that afternoon, and each arrived with a group of people for back-up. (Trial II Tr. p. 63,

L. 23-64, L. 10; p. 166, L. 21-p. 174, L. 5). After heated words were exchanged, shots were fired. (Trial II Tr. p. 42, L. 2-4; p. 43, L. 2-p. 44, L. 5; p. 45, L. 13-21; p. 54, L. 20-p. 55, L. 2). Carter died after he was hit multiple times in the chest and hip. (Trial II Tr. p. 212, L. 8-p. 214, L. 11; p. 218, L. 5-p. 225, L. 19). Defendant, who was with Polk, was hit once in the leg and suffered a non-fatal injury. (Trial II Tr. p. 181, L. 9-p. 190, L. 8). Defendant was eventually identified as Carter's shooter and charged with first-degree murder. (Trial Information – 12/29/16; Trial II Tr. p. 195, L. 10-p. 196, L. 23).

The evidence showed that Carter had a run-in with Polk earlier that day at the residence of Rita Lewis, approximately a block from the park. (Trial II Tr. p. 92, L. 25-p. 97, L. 18). Carter was on the porch yelling at Polk, who was standing in the middle of the street with a group of people. (Trial II Tr. p. 98, L. 4-p. 99, L. 17). Carter threatened to "whoop" Polk for "robbing" his house. (Trial II Tr. p. 163, L. 1-14). Carter shouted, "I'm talking about the mother fucker shoes on your

feet!" (Trial II Tr. p. 99' L. 18-23). Polk was wearing a pair of Nike Air Jordans at the time. (Trial II Tr. p. 163, L. 8-14). Polk then taunted, "Do you want to fight?" (Trial II Tr. p. 163, L. 1-23). Lewis eventually came out and yelled at Polk to take the dispute elsewhere. (Trial II Tr. p. 99, L. 18-p. 100, L. 19; p. 163, L. 1-23). The group in the street consequently dispersed, and Carter went inside the house. (Trial II Tr. p. 100, L. 2-p. 101, L. 19).

The State's case rested primarily on the eyewitness testimony of Carter's cousin, Donnell Watson, who was with Carter at the time of the shooting. (Trial II Tr. p. 20, L. 8-11, p. 21, L. 10-11). Watson witnessed part of the argument between Carter and Polk at the Lewis residence. (Trial II Tr. p. 28, L. 24-p. 36, L. 25). Watson left the residence with Carter when Lewis told everyone to go. (Trial II Tr. p. 36, L. 22-p. 37, L. 7). According to Watson, Carter and Polk continued to communicate via social media afterwards. (Trial II Tr. p. 22, L. 1-p. 27, L. 25; p. 38, L. 12-17). When Watson asked what they were messaging about, Carter responded that Polk

wanted to fight. (Trial II Tr. p. 22, L. 1-p. 27, L. 25; p. 38, L. 12-17).

Watson testified that Carter drove with him to pick up Edward DeWitt, and then they all headed to the park. (Trial II Tr. p. 38, L. 20-p. 39, L. 10). Watson said that he only expected a fist fight and claimed no one brought weapons. (Trial II Tr. p. 42, L. 17-p. 43, L. 1; p. 45, L. 4-12; p. 62, L. 10-15). Once they got there, they parked and exited the vehicle, described as a black Yukon SUV. (Trial II Tr. p. 23, L. 14-20; p. 38, L. 20-p. 42, L. 1). Polk was there with the same people with him earlier at the Lewis residence. (Trial II Tr. p. 38, L. 20-p. 42, L. 1).

Watson testified that defendant, who he didn't know, confronted Carter. (Trial II Tr. p. 42, L. 2-4; p. 54, L. 20-p. 55, 2). Defendant asked Carter, "What's all that bitch-ass shit you was talking?" (Trial II Tr. p. 43, L. 2-11). Defendant pointed a gun at Carter but then lowered it. (Trial II Tr. p. 43, L. 12-17). Watson tried to diffuse the situation, but defendant was still focused on Carter. (Trial II Tr. p. 43, L. 12-p. 44, L. 5). Carter

replied, "You're going to have to do what you're going to do with it." (Trial II Tr. p. 43, L. 12-17). At that point, defendant began firing his gun. (Trial II Tr. p. 43, L. 12-p. 44, L. 5). Watson took off running down the street and heard around fifteen shots as he fled. (Trial II Tr. p. 43, L. 12-p. 44, L. 5; p. 45, L. 13-21).

Watson testified that once the shooting died down, he returned the where Carter was. (Trial II Tr. p. 45, L. 13-25). Watson saw Carter lying on the ground face down and DeWitt crying. (Trial II Tr. p. 46, L. 1-5). Watson went to check on Carter and saw that he had been wounded. (Trial II Tr. p. 46, L. 6-7). Watson and DeWitt fumbled for their phones, trying to call for help. (Trial II Tr. p. 46, L. 8-12; p. 47, L. 14-21). Watson testified that he noticed a gun, one he hadn't seen before, near Carter's feet at that point. (Trial II Tr. p. 46, L. 13-p. 47, L. 18; p. 53, L. 23-p. 54). Meanwhile, DeWitt was making a 911 call then. (Trial II Tr. p. 47, L. 14-21).

Watson next acknowledged removing the gun from the crime scene. (Trial II Tr. p. 47, L. 14-21). He testified that he

was in shock and scared at the time. (Trial II Tr. p. 47, L. 22-p. 48, L. 3). He picked up the gun and fled to the Lewis residence to get help. (Trial II Tr. p. 48, L. 4-11; p. 49, L. 4-10). Watson claimed to have "dropped" the gun on the side porch as soon as he got there. (Trial II Tr. p. 49, L. 4-10; p. 68, L. 5-10). Lewis answered the door, quite angry and upset. (Trial II Tr. p. 49, L. 11-14). She told Watson that she heard what happened and wanted him to get away from her house. (Trial II Tr. p. 49, L. 11-14). Watson then ran back to the crime scene just as law enforcement officers and first responders arrived. (Trial II Tr. p. 49, L. 15-p. 50, L. 2).

Watson was interviewed by law enforcement officers on two separate dates, on February 16 and February 18. (Trial II Tr. p. 51, L. 9-23). Watson admitted that he was not forthcoming when he first spoke to officers on February 16. (Trial II Tr. p. 69, L. 8-p. 73, L. 25). He explained that he was distrustful of them and frightened. (Trial II Tr. p. 87, L. 11-p. 88, L. 8). When he was shown a photograph of defendant, he did not identify him as the shooter. (Trial II Tr. p. 69, L. 11-p.

71, L. 7; p. 85, L. 9-p. 86, L. S.19; p. 89, L. 10-16). He further testified that he lied to officers when he indicated that he had no gun. (Trial II Tr. p. 69, L. 8-p. 73, L. 25). He later changed his story on February 18 and acknowledged that he had handled a gun at the time. (Trial II Tr. p. 51, L. 9-23; p. 81, L. 4-8). Watson testified that he thereafter took officers to the Lewis residence where the gun was eventually found. (Trial II Tr. p. 52, L. 1-p. 53, L. 22; p. 81, L. 4-8).

Further, the State introduced the statements defendant made to law enforcement on February 16. (Trial II Tr. p. 181, L. 9-p. 190, L. 8). Detective Josh Tripp interviewed defendant at the hospital in Monmouth, IL where he was being treated for a gunshot wound to the leg. (Trial II Tr. p. 181, L. 9-p. 186, L. 4). He told the detective that he'd been at the Maple Hills Apartments with friends. (Trial II Tr. p. 186, L. 5-p. 190, L. 8). He allegedly left there, walked westbound on Elm, and approached the intersection of S. 7th and Elm Streets. (Trial II Tr. p. 186, L. 5-p. 190, L. 8). A black SUV reportedly pulled into the area, five males exited the vehicle, and an argument

ensued. (Trial II Tr. p. 186, L. 5-p. 190, L. 8). Defendant stated that he continued walking with his friends when he started hearing gunshots. (Trial II Tr. p. 186, L. 5-p. 190, L. 8). He then took off running, at which point he was hit in the leg. (Trial II Tr. p. 186, L. 5-p. 190, L. 8). After he was shot, he continued running until he reached his residence two blocks away. (Trial II Tr. p. 186, L. 5-p. 190, L. 8; p. 201, L. 17-p. 202, L. 17). Once there, he changed clothes and contacted his father, who later took him to a hospital out of town. (Trial II Tr. p. 186, L. 5-p. 190, L. 8). Defendant claimed that he did not go to a local hospital for fear of retaliation by the individuals involved in the shooting. (Trial II Tr. p. 186, L. 5-p. 190, L. 8). He did not initially mention his friends' names but eventually revealed that he was with Polk and A.J. Smith. (Trial II Tr. p. 186, L. 5-p. 190, L. 8).

The evidence established that Watson thereafter identified defendant as the shooting suspect to law enforcement. (Trial II Tr. p. 190, L. 9-p. 198, L. 5). Detective Tripp interviewed Watson on February 18 at which time he

was presented with two photographic arrays. (Trial II Tr. p. 190, L. 9-p. 198, L. 5). Watson paused on defendant's photograph in the first array and said that it looked a lot like the shooter. (Trial II Tr. p. 194, L. 8-p. 195, L. 9). But, he also said that the shooter's eyes were more squinted. (Trial II Tr. p. 194, L. 8-p. 195, L. 9). Another photographic array was prepared with an entirely new lineup. (Trial II Tr. p. 195 L. 10-p. 196, L. 23). Watson had previously mentioned that the shooter had worn a hoodie. (Trial II Tr. p. 200, L. 5-10; p. 205, L. 3-21). The photographs in the second array therefore had hair cropped out to simulate the way Watson would have seen the shooter during the incident. (Trial II Tr. p. 200, L. 5-10). Watson positively identified defendant from the second array. (Trial II Tr. p. 195, L. 10-p. 196, L. 23).

Firearms and ballistics evidence suggested that there were two weapons involved in the shooting. (Trial III Tr. p. 156, L. 15-p. 157, L. 5). There were .45 caliber bullets and bullet fragments taken from the scene and Carter's body. (Trial II Tr. p. 117, L. 16-p. 118, L. 8; p. 216, L. 5-p. 217, L.

12; Trial III Tr. p. 33, L. 23-p. 34, L. 15; p. 38, L. 19-23; p. 71, L. 16-p. 72, L. 10). Those .45 caliber bullets and bullet fragments were fired from the same .45 caliber firearm. (Trial III Tr. p. 152, L. 17-p. 153, L. 17). In addition, there were .45 caliber casings scattered at the intersection. (Trial II Tr. p. 117, L. 16-p. 118, L. 8; Trial III Tr. p. 8, L. 1-p. 9, L. 6; p. 32, L. 1-7; p. 37, L. 37-p. 38, L. 23). Those .45 caliber casings were fired from the same .45 caliber firearm. (Trial III Tr. p. 155, L. 12-18; p. 156, L. 15-20). No .45 caliber firearm was ever recovered. (Trial III Tr. p. 133, L. 5-8). Furthermore, there were .40 caliber casings discovered in a nearby residential yard. (Trial III Tr. p. 8, L. 1-p. 13, L. 9). Those .40 caliber casings were fired from the gun that Watson took to the Lewis residence. (Trial III Tr. p. 156, L. 24-p. 157, L. 1). That gun was identified as a .40 caliber Ruger pistol. (Trial III Tr. p. 146, L. 15-p. 147, L. 14).

The State further offered firearms evidence which was seized from defendant's residence. A .45 shell casing was found on the ground right outside the back door. (Trial III Tr.

p. 84, L. 2-17). This casing was matched to the .45 caliber casings at the scene, indicating that they were fired from the same .45 caliber firearm. (Trial III Tr. p. 134, L. 11-p. 143, L. 8; p. 156, L. 15-23). In addition, a few live .45 caliber rounds were observed on a shelf. (Trial III Tr. p. 80, L. 24-p. 81, L. 7). They were the same brand as the .45 caliber casings at the scene and were likely manufactured around the same time. (Trial III Tr. p. 132, L.19-p. 133, L. 4; p. 143, L. 9-p. 146, L. 14).

The State presented evidence suggesting that defendant was shot when DeWitt returned fire. DeWitt was not called as a witness at trial. (Trial III Tr. p. 227, L. 1-4). The State introduced a recording of a 911 call during which DeWitt stated that he didn't know he'd hit someone but hoped he did. (Trial III Tr. p. 85, L. 23-p. 87, L. 25; State's Exhibit 9 - 911 Call). Shortly after the shooting, DeWitt was seen driving the black SUV from its original spot and then parking it on the other side of the street. (Trial II Tr. p. 49, L. 22-p. 50, L. 2; p. 66, L. 24-p. 67, L. 5; p. 122, L. 15-19; p. 146, L. 6-p. 149, L.

4; State's Ex. 10 – Dash Cam Video). The State theorized that DeWitt fired the gun that Watson removed from the scene. (Trial III Tr. p. 277, L. 1-p. 234, L. 4). That gun had fingerprints from a person unconnected to the case. (Trial III Tr. p. 122, L. 14-p. 124, L. 17).

Other relevant facts will be discussed below.

ARGUMENT

I. The district court erred in denying defendant's motion to suppress the identification of defendant by witness, Donnell Watson, which was impermissibly suggestive and unreliable. To the extent that error on the suppression issue was not preserved, defendant's trial attorney was ineffective.

Preservation of Error: This issue was properly preserved for review by the defendant's motion to suppress and the trial court's adverse ruling thereon. State v. Niehaus, 452 N.W.2d 184, 186 (Iowa 1990). (Motion to Suppress – 6/01/17; Ruling on Divisions I and II of Defendant's Motion to Suppress – 10/03/17) (App. pp. 7-9, 11-18). The challenge was raised under the Due Process Clause of both the United

States and Iowa Constitutions. (Motion to Suppress – 6/01/17) (App. pp. 7-9).

If this court finds that error was not preserved, defendant contends that his trial attorney provided ineffective assistance of counsel. Ineffective-assistance-of-counsel claims are not bound by traditional rules of error preservation. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006).

Standard of Review: "When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, our standard of review is de novo." State v. Brown, 890 N.W.2d 315, 321 (Iowa 2017). The appellate court looks to the entire record and "make[s] 'an independent evaluation of the totality of the circumstances.'" Id. (quoting In re Prop. Seized from Pardee, 872 N.W.2d 384, 390 (Iowa 2015)). Deference is given to the district court's fact findings due to its opportunity to assess the credibility of the witnesses, but those findings are not binding. Id. (*quoting* Pardee, 872 N.W.2d at 390).

Review of ineffective-assistance-of-counsel claims is de novo. State v. Clay, 824 N.W.2d 488, 494 (Iowa 2012). The right to assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution is the right to "effective" assistance of counsel. Ondayog, 722 N.W.2d at 784.

To establish his claim of ineffective assistance of counsel, defendant must demonstrate (1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984); State v. Gaskins, 866 N.W.2d 1, 5 (Iowa 2015). Defendant has the burden of proving both elements by a preponderance of the evidence. See State v. Halverson, 857 N.W.2d 632, 635 (Iowa 2015).

Discussion: "...[T]here is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!' " Watkins v. Sowders, 449 U.S. 341, 352, 101 S.Ct. 654, 661,

66 L.Ed.2d 549, 558–59 (1981) (Brennan, J., dissenting) (quoting Elizabeth Loftus, Eyewitness Testimony 9 (1979)) (emphasis in original). "Nationwide, more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification." State v. Henderson, 27 A.3d 872, 886 (N.J. 2011) (citation omitted). "Thirty-six percent of the defendants convicted were misidentified by more than one eyewitness." Id. (citing Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8-9, 279 (2011)). Even outside the DNA exoneration context, scientific research "reveals a troubling lack of reliability in eyewitness identifications." Id. at 888. This is so despite the fact that "eyewitnesses generally act in good faith" and misidentifications are typically "not the result of malice." Id.

"The empirical evidence demonstrates that eyewitness misidentification is 'the single greatest cause of wrongful convictions in this country.'" Perry v. New Hampshire, 132 S.Ct. 716, 738, 181 L.Ed.2d 694 (2012) (Sotomayor, J., dissenting). "Study after study demonstrates that eyewitness

recollections are highly susceptible to distortion by post-event information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures." Id. Moreover, "[e]yewitness evidence derived from suggestive circumstances... is uniquely resistant to the ordinary tests of the adversary process." Id. at 132 S.Ct. at 732, 181 L.Ed.2d 694. "An eyewitness who has made an identification often becomes convinced of its accuracy." Id. "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent...courtroom identification." Id. (quoting Simmons v. United States, 390 U.S. 377, 383-384, 19 L.Ed.2d 1247 (1968)).

Both the United States and Iowa Constitution guarantee due process of law. U.S. Const. amend. XIV; Iowa Const. art. 1, § 9. Impermissibly suggestive or unreliable identification procedures violate a defendant's right to due process. See Manson v. Braithwaite, 432 U.S. 98, 109, 116, 97 S.Ct. 2243, 2250, 53 L.Ed.2d 140, 151, 153 (1977); State v. Mark, 286 N.W.2d 396, 403, 405 (Iowa 1979); State v. Ripperger, 514 N.W.2d 740, 744 (Iowa Ct. App. 1994). Identification evidence may be so inherently suggestive or unreliable that due process bars its admission to the jury. Manson, 432 U.S. at116, 97 S.Ct. at 2254, 53 L.E.2d at 155.

Manson v. Braithwaite sets forth the federal due process test for evaluating a defendant's challenge to identification procedures. The United States Supreme Court there considered but rejected a per se rule of exclusion for impermissibly suggestive identification procedures. Instead, the Court adopted a two-prong test which asks: 1) Whether the procedure was impermissibly suggestive; and 2) If so, whether under the totality of the circumstances the

impermissibly suggestive procedure gives rise to a substantial likelihood of irreparable misidentification or whether the identification is ultimately reliable despite the suggestive procedure. Manson, 432 U.S. 98, at 97 S.Ct. at 2249, 53 L.Ed.2d at 149; State v. Taft, 506 N.W.2d at 762. The factors that are considered in evaluating reliability include those set out in Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972), namely:

> (1) The opportunity of the witness to view the suspect at the time of the crime;
> (2) The witness' degree of attention;
> (3) The accuracy of the witness' prior description;
> (4) The witness' level of certainty;
> (5) The length of time between the crime and the confrontation.

Manson, 432 U.S. at 114, 97 S.Ct. at 2253; Taft, 506 N.W.2d at 763.

As dissenting Justice Marshall noted in Manson, however, the notion that an impermissibly suggestive procedure could nevertheless yield a reliable identification is not viable:

> ...[T]his approach was criticized at the time it was adopted and has been subject to continuing

> criticism since. In my view, this conclusion totally ignores the lessons of Wade. The dangers of mistaken identification are, as Stovall held, simply too great to permit unnecessarily suggestive identifications. Neither Biggers nor the Court's opinion today points to any contrary empirical evidence. Studies since Wade have only reinforced the validity of its assessment of the dangers of identification testimony. While the Court is "content to rely on the good sense and judgment of American juries," the impetus for Stovall and Wade was repeated miscarriages of justice resulting from juries' willingness to credit inaccurate eyewitness testimony.

Manson, 432 U.S. at 119-20, 97 S.Ct. at 2255-2256, 53 L.Ed.2d 140 (Marshall, J., dissenting).

Since Manson was decided, "scientists and scholars who have evaluated the opinion have uniformly criticized it as insufficient to deter police from using flawed identification procedures and inconsistent with scientific evidence of the best ways to assess the reliability of evidence tainted by such procedures." Nicholas A. Kahn-Fogel, *Manson and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 Ala. C.R. & C.L.L. Rev. 175, 176 (2012). See also Sarah Anne Mourer, *Reforming Eyewitness Identification Procedures Under the*

Fourth Amendment, 3 Duke J. Const. L. & Pub. Pol'y 49, 60 (2008) ("[I]n light of today's extensive research in the area of eyewitness identifications and human memory, the rules promulgated by the Supreme Court in the 1970's do not, in fact, adequately safeguard against misidentifications and wrongful convictions."); Suzannah B. Gambell, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 Wyo. L. Rev. 189, 192 (2006) ("The United States Supreme Court has outlined when an eyewitness identification should be allowed in trial. Neil v. Biggers listed factors that, in 1972, the Court believed made an identification reliable despite being unnecessarily suggestive. Based on a large amount of scientific research completed in the past quarter century, several of these factors have been shown to be unreliable.").

Heeding the criticism and scientific developments, several state courts have diverged from the Supreme Court on state constitutional grounds, finding Manson's "reliability" analysis inadequate and unsound. See Comm. v. Johnson, 650 N.E.2d

1257, 1261 (Mass. 1995) (rejecting Manson "reliability" test and reaffirming application of per se exclusionary rule when identification was unnecessarily suggestive); State v. Dubose, 699 N.W.2d 582, 593-941 (Wis. 2005) (rejecting Manson standard, and holding unnecessarily suggestive identifications will be excluded); People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981) (per se rule of exclusion for unnecessarily suggestive identification procedures); State v. Henderson, 27 A.3d 872, 879 (N.J. 2011) (modifying Manson test for admissibility and articulating additional factors to consider when determining reliability of identification); State v. Lawson, 291 P.3d 673 (Ore. 2012) (revisiting and augmenting the process for testing admissibility of suggestive eyewitness identifications "in light of the recent scientific research").

This Court should diverge from the federal standard and apply, under the Iowa Constitution, a per se rule of exclusion for suggestive identification procedures, without undertaking the Manson second-step reliability inquiry. "Considering the complexity of the human mind and the subtle effects of

suggestive procedures upon it, a determination that an identification was unaffected by [suggestive] procedures must itself be open to serious question." Dubose, 699 N.W.2d at 592 (quoting State v. Leclair, 385 A.2d 831, 833 (N.H. 1978)). "Because a witness can be influenced by the suggestive procedure itself, a court cannot know exactly how reliable the identification would have been without the suggestiveness." Id.

Alternatively and at minimum, any reliability analysis under the Iowa Constitution should incorporate additional considerations beyond the Neil v. Biggers factors – namely the various system and estimator variables bearing on eyewitness reliability. System variables are factors like lineup procedures which are within the control of the criminal justice system. See Henderson, 27 A.3d at 895. Estimator variables are factors related to the factors related to the witness, the perpetrator, or the event itself – like distance, lighting, or stress – over which the legal system has no control. Id. Henderson identifies and explains the well-established system

and estimator variables that may impact the reliability of the identification procedures. See id. at 896-912.

The identification procedures were impermissibly suggestive. Defendant moved to suppress Watson's pretrial and in-court identification, claiming that the pretrial identification procedure violated his due process rights under the federal and state constitutions. (Motion to Suppress – 6/01/17, pp. 1-2) (App. pp. 7-8). The State filed a resistance to the motion to suppress, and the district court held an evidentiary hearing on the matter. (Resistance to Motion to Suppress – 6/08/17; Supp. 9/07/17 Tr. p. 1, L. 1-p. 30, L. 25) (App. p. 10). At the hearing, no witnesses testified, but police reports and a video recording of Watson's identification on February 18, 2016, were admitted into evidence. (Supp. Tr. p. 3, L. 1-p. 30, L. 25; Defendant's Exhibit A – Police Reports; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 4-12).

The record from the evidentiary hearing reveals the following facts. At approximately 2:41 p.m. on February 16,

2015, police officers were dispatched to the area of S. 7th and Elm Streets in Burlington, IA on a report of a shooting. (Defendant's Exhibit A – Police Reports, p.1) (Conf. App. p. 4). When officers arrived at the scene, they found a male who had suffered gunshot wounds lying on the ground. (Defendant's Exhibit A – Police Reports, p.1) (Conf. App. p. 4). The injured male was identified as Deonte Carter. (Defendant's Exhibit A – Police Reports, p.1) (Conf. App. p. 4). Officers also saw Donell Watson, a cousin of Carter's who had witnessed the shooting, standing nearby. (Defendant's Exhibit A – Police Reports, p.1) (Conf. App. p. 4). Officer Fogle interviewed Watson, and he provided the officer with an account of the incident along with a description of the both the male shooter and the gun. (Defendant's Exhibit A – Police Reports, pp. 1-3) (Conf. App. pp. 4-6).

Watson was subsequently transported to the Burlington Police Department for further questioning. (Defendant's Exhibit A – Police Reports, p. 3) (Conf. App. p. 6). He was interviewed by Officer Schwandt starting at 3:13 p.m.

(Defendant's Exhibit A – Police Reports, p. 5) (Conf. App. p. 8). At that point, Terrance Polk was a possible suspect in the shooting. (Defendant's Exhibit A – Police Reports, pp. 5-7) (Conf. App. pp. 8-10). Officer Schwandt consequently prepared a photographic array with six individuals, including Polk. (Defendant's Exhibit A – Police Reports, pp. 5-7) (Conf. App. pp. 8-10). At approximately 4:40 p.m., Officer Schwandt read the photographic identification admonition form to Watson, and he said that he understood it. (Defendant's Exhibit A – Police Reports, pp. 5-7) (Conf. App. pp. 8-10). When Officer Schwandt showed Watson the six photographs, he did not identify anyone as being the shooter involved in the incident. (Defendant's Exhibit A – Police Reports, pp. 5-7) (Conf. App. pp. 8-10).

By that time, Officer Schwandt had been informed that defendant had sustained a gunshot wound to the leg in the incident and was currently at a hospital in Monmouth, IL. (Defendant's Exhibit A – Police Reports, p. 7) (Conf. App. p. 10).

During the interview, Officer Schwandt showed Watson a single photograph of defendant. (Defendant's Exhibit A – Police Reports, p. 7) (Conf. App. p. 10). Watson responded that he did not know who the person in the photograph was. (Defendant's Exhibit A – Police Reports, p. 7) (Conf. App. p. 10). There was no indication that Officer Schwandt had read the photographic identification admonition form to Watson before showing him defendant's photograph. (Defendant's Exhibit A – Police Reports, pp. 5-7) (Conf. App. pp. 8-10).

Two days later, on February 18, 2015, Watson was interviewed again at the Burlington Police Department, this time by Lieutenant Klein. (Defendant's Exhibit A – Police Reports, pp. 8-9) (Conf. App. pp. 11-12). In the interview, Watson indicated that he was only able to see the shooter's face since the shooter was wearing a hoodie and other cold weather clothing. (Defendant's Exhibit A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Another photographic array with six individuals was prepared. (Defendant's Exhibit A – Police

Reports, pp. 8-9) (Conf. App. pp. 11-12). All the photographs had the areas around the face cropped out so as to simulate the way Watson would have viewed the suspect. (Defendant's Exhibit A – Police Reports, pp. 8-9) (Conf. App. pp. 11-12).

Sergeant McClune from the Des Moines County Sheriff's Department, who was not actively involved in the criminal investigation, presented Watson with the photographic identification admonition form and read it to him. (Defendant's Exhibit A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Watson signed the form at 2:12 p.m. (Defendant's Exhibit A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Segeant McClune then showed the photographs to Watson sequentially, one at a time. (Defendant's Exhibit A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Watson quickly ruled out five of the photographs, saying that they definitely did not depict the shooter. (Defendant's Exhibit A – Police Reports,

pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). However, he paused on Photograph No. 4 which was of defendant. (Defendant's Exhibit A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Watson said that the person in Photograph No. 4 appeared to be the one who shot Carter. (Defendant's Exhibit A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Watson said that he was 50% sure but that the eyes of the person in the photograph were more squinted than those of the shooter. (State's Exhibit 201 – DVD of Watson Identification).

Another photographic array was prepared with six individuals, including defendant and five new individuals. (Defendant's Exhibit A – Police Reports, pp. 8-9) (Conf. App. pp. 11-12). A different photograph of defendant was included. (Defendant's Exhibit A – Police Reports, pp. 8-9) (Conf. App. pp. 11-12). Sergeant McClure read the photographic admonition form to Watson once again. (Defendant's Exhibit

A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Watson signed the form at 2:29 p.m. (Defendant's Exhibit A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Sergeant McClure once more showed the photographs to Watson sequentially. (Defendant's Exhibit A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Watson identified the person in Photograph No. 4, which was of defendant, as the one who shot Carter. (Defendant's Exhibit A – Police Reports, pp. 8-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 11-12). Watson indicated that eyes of the person in that photograph were a closer match to those of the shooter. (State's Exhibit 201 – DVD of Watson Identification). Watson initially indicated that he was 70% sure of his identification but eventually stated that he was 100% sure. (State's Exhibit 201 – DVD of Watson Identification).

The identification procedures used in this case were impermissibly suggestive due to the sheer repetition of defendant's photograph through multiple viewings. Watson was shown a photograph of defendant three separate times, once on February 16, 2015,[2] and twice on February 18, 2015,[3] at which point he ultimately identified defendant as the shooter with 100% certainty. (Defendant's Exhibit A – Police Reports, pp. 7-9; State's Exhibit 201 – DVD of Watson Identification) (Conf. App. pp. 10-12). Viewing a suspect multiple times throughout the course of an investigation can adversely affect the reliability of any identification that follows those viewings. Lawson, 291 P.3d at 686. The negative effect of multiple viewings may result from the witness' inability to discern the source of his or her recognition of the suspect, an

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[2] Watson was shown a single photograph of defendant on February 16, 2015. Defendant asserts that the single-photograph display was unduly suggestive by making him stand out even more when he was later included in photographic arrays. See Demorst v. State, 228 So. 3d 323, 330 (Miss. Ct. App. 2017)(presentation of a single photograph for identification is generally unduly suggestive).

[3] Different photographs of defendant were included in the two photographic arrays which were shown to Watson on February 18, 2015.

occurrence referred to as source confusion or a source monitoring error. Id. at 686-687. A similar problem occurs when the police ask a witness to participate in multiple identification procedures. Id. at 687. Whether or not the witness selects the suspect in an initial identification procedure, the procedure increases the witness' familiarity with the suspect's face. Id. If the police later present the witness with another lineup in which the same suspect appears, the suspect may tend to stand out or appear familiar to the witness as a result of the prior lineup, especially when the suspect is the only person who appeared in both lineups. Id.

Furthermore, the identification procedures were impermissibly suggestive in that Watson was encouraged to inflate his level of certainty on his identification. When Watson was shown the second photographic array on February 18, 2015, he initially indicated that he was 70% sure that the person in Photograph No. 4, depicting defendant, was the shooter. (State's Exhibit 201 – DVD of Watson

Identification). However, Sergeant McClune made statements convincing Watson to state that he was 100% certain. Sergeant McClune told Watson that that if he was "feelin' it" then his level of certainty had to be more than 70%. Sergeant McClune then said, "What do you think? We're thinking we're at a hundred?" State's Exhibit 201 – DVD of Watson Identification). Watson responded, "Might as well say." (State's Exhibit 201 – DVD of Watson Identification). He agreed that he was 100% sure of his identification. (State's Exhibit 201 – DVD of Watson Identification). This situation presents similar risks to confirmatory or post-identification feedback, which occurs when police signal to eyewitnesses that they correctly identified the suspect. Henderson, 27 A.3d at 899. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Id. Feedback can also falsely enhance a witness' recollection of the quality of his or her view of an event. Id.

Watson's identification of defendant was not reliable.

Nor was the identification of defendant by Watson reliable in spite of the suggestive procedures.

Watson was no doubt traumatized by witnessing his cousin being murdered in cold blood. Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification. Id. at 904. High levels of stress are more likely than low levels of stress to impair an identification. Id. Scientific research affirms that conclusion and shows that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details. Id.

When Watson was first interviewed by Officer Fogle at the crime scene, he indicated that he could not see the shooter's face due to the clothing worn by the shooter. (Defendant's Exhibit A – Police Reports, p. 2) (Conf. App. p. 5). He said that the shooter was a black male who wore a dark-colored windbreaker with a black hoodie underneath (pulled up over

his head), dark blue jeans, brown boots, and a black skull cap (pulled down over his forehead). (Defendant's Exhibit A – Police Reports, p. 2) (Conf. App. p. 5). The fact that Watson did not get a good look at the shooter's face undermines the reliability of his subsequent identification of defendant from photographic arrays.

Even though Watson was unable to see the shooter's face, he was able provide a detailed description of the assailant's gun. (Defendant's Exhibit A – Police Reports, pp. 2-3, 6) (Conf. App. pp. 5-6, 9). However, this "weapon focus" likely rendered his identification of the shooter unreliable. When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. Id. "Weapon focus" can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration. Id. The shooting in the present case took place rather quickly. Only a few heated words were exchanged between Carter and the perpetrator before shots were fired. When the interaction is brief, as it

was here, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness' description of the perpetrator. See Id.

Not surprisingly, the amount of time an eyewitness has to observe an event may affect the reliability of an identification. Id. at 905. A brief or fleeting contact, like in the present case, is less likely to produce an accurate identification than a more prolonged exposure. See Colin G. Tredoux et al., *Eyewitness Identifcation, in 1 Encyclopedia of Applied Psychology* 875, 877 (Charles Spielberger ed., 2004).

Watson ended up positively identifying defendant as the shooter after viewing two photographic arrays both on February 18, 2015, two days after the incident took place. As previously noted, he told Officer Fogle at the crime scene shortly after the incident that clothing obscured the shooter's face which did not allow him to get a good look at the shooter's facial features. It is a basic principle that memories fade with time, and memories never improve. Henderson, 27 A.3d at 907. As a result, delays between the commission of a crime

and the time an identification is made can affect reliability. Id. In other words, the more time that passes, the greater possibility that a witness' memory of a perpetrator will weaken. Id.

Watson's drug use on the day of the incident would also have likely had a negative impact on the accuracy of his identification of defendant. During the police interview on February 16, 2015, Officer Schwandt detected the smell of marijuana coming from Watson's person. (Defendant's Exhibit A – Police Reports, p. 6) (Conf. App. p. 9). When Officer Schwandt asked if Watson if he had smoked any marijuana earlier in the day, he responded that he had smoked a marijuana cigarette "blunt" just before he and Carter arrived at the area of S. 7th and Elm Streets. (Defendant's Exhibit A – Police Reports, p. 6) (Conf. App. p. 9).

Finally, Watson's certainty regarding his identification of the shooter from the photographic arrays has no bearing on the reliability of the procedures. Watson picked defendant's photograph out of the two photographic arrays that were

shown to him during his police interview on February 18, 2015. (Defendant's Exhibit A – Police Reports, pp. 8-9) (Conf. App. pp. 11-12). When he was shown the second array, Watson initially indicated that he was 70% sure but subsequently indicated that he was 100% sure of his identification of the shooter. However, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy. Lawson, 291 P.3d at 688. Retrospective self-reports of certainty are highly susceptible to suggestive procedures and confirming feedback, a factor that further limits the utility of the certainty variable. Id.

Because the pretrial identification procedure at issue was impermissibly suggestive, the identification should be excluded under the Iowa Constitution. In addition to being suggestive the identification was also ultimately unreliable, and it should be excluded under the United States Constitution as well. Furthermore, the impermissibly suggestive and unreliable pretrial identification tainted the in-court identification of defendant at trial, rendering it

untrustworthy. The district court erred in failing to suppress the pretrial and in-court identifications of defendant by Donell Watson.

The error in this case was not harmless. The error was not harmless. Watson was the only eyewitness who positively identified defendant as the perpetrator, and his testimony was central to the State's case. The pretrial identification by Watson was impermissibly suggestive and unreliable and should have therefore been excluded. Watson's in-court identification should have been suppressed as well, since it was the product of his out-of-court identification. Accordingly, defendant should be afforded a new trial.

Defendant's trial counsel was ineffective to the extent that error was not preserved. To the extent error was not preserved with respect to the eyewitness identification issue, defendant asserts that his trial attorney was ineffective for failing to make the specific arguments currently advanced on appeal. For the reasons articulated above, his arguments are meritorious and would have likely resulted in his motion to

suppress being granted. The State's case rested primarily Watson's out-of-court and in-court eyewitness identifications of defendant as the perpetrator. Without this testimony, the outcome of the trial would have likely been different. Trial counsel breached an essential duty which resulted in prejudice to defendant. Defendant has met his burden in establishing his claim of ineffective assistance of counsel.

Conclusion: Defendant-Appellant, Earl Booth-Harris, respectfully requests that this Court reverse his conviction for first-degree murder and remand this matter to the district court for a new trial.

Alternatively, if this Court finds the record insufficient to resolve his ineffective assistance of counsel claim on direct appeal, defendant respectfully requests that such claim be preserved for a post-conviction relief action.

II. Trial counsel rendered ineffective assistance in failing to request a more thorough eyewitness identification instruction incorporating well-established system and estimator variables.

Preservation of Error. A claim of ineffective assistance of counsel provides an exception to the general rule of error preservation. State v. Ondayog, 722 N.W.2d 778, 784 (Iowa 2006).

Standard of Review. Ineffective assistance of counsel claims are reviewed de novo. Ondayog, 722 N.W.2d at 783.

The Sixth and Fourteenth Amendments of the United States Constitution and article I section 10 of the Iowa Constitution guarantee that a defendant is entitled to the effective assistance of counsel. Id. at 784. To prevail on a claim of ineffective assistance of counsel, the defendant must show, by a preponderance of the evidence, (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted from counsel's failure. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Discussion: The district court "is required to 'instruct the jury as to the law applicable to all material issues in the case....'" State v. Marin, 788 N.W.2d 833, 837 (Iowa 2010). The court "must... give instructions that fairly state the law as applied to the facts of the case." Id. at 838. "As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction." State v. Kellogg, 542 N.W.2d 514, 516 (Iowa 1996). Failure to sufficiently instruct a jury on the applicable law is reversible error. State v. Bennett, 503 N.W.2d 42, 45 (Iowa Ct. App. 1993).

Trial counsel has a duty to know the applicable law, protect the defendant from conviction under a mistaken application of the law, and make sure the jury instructions correctly reflect the law. See State v. Goff, 342 N.W.2d 830, 837-38 (Iowa 1983); State v. Allison, 576 N.W.2d 371, 374 (Iowa 1998); State v. Hopkins, 576 N.W.2d 374, 379-80 (Iowa 1998). Counsel has no duty to raise an issue that has no

merit. State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009). However, the fact that an issue is one of "first impression" in Iowa does not excuse trial counsel's failure to raise it. State v. Westeen, 591 N.W.2d 203, 210 (Iowa 1999). Although trial counsel is not required to "be a 'crystal gazer'" in predicting future changes in law, counsel does have a duty to "exercise reasonable diligence in deciding whether an issue is 'worth raising.'" Id. at 210 (quoting State v. Schoelerman, 315 N.W.2d 67, 72 (Iowa 1982)); see also Dudley, 766 N.W.2d at 623 (counsel ineffective for failing to raise meritorious legal argument which was "worth asserting.").

In the present case, the district court submitted to the jury Iowa's model instruction on eyewitness identification:

> The reliability of eyewitness identification has been raised as an issue. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to see the person at the time of the crime and to make a reliable identification later.
>
> In evaluating the identification testimony of a witness, you should consider the following:
>
> 1. If the witness had an adequate opportunity to see the person at the time of the crime. You

> may consider such matters as the length of time the witness had to observe the person, the conditions at that time in terms of visibility and distance, and whether the witness had known or seen the person in the past.
>
> 2. If an identification was made after the crime, you shall consider whether it was the result of the witness's own recollection. You may consider the way in which the defendant was presented to the witness for identification, and the length of time that passed between the crime and the witness's next opportunity to see the defendant.
>
> 3. An identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.
>
> 4. Any occasion in which the witness failed to identify the defendant or made an inconsistent identification.

(Jury Instruction 17 – Eyewitness Identification) (App. p. 25).

See also Iowa Bar Ass'n, *Iowa Crim. Jury Instruction* 200.45 (Eyewitness Identification). The language of Iowa's model instruction is based on the decision in U.S. v. Telfaire, 469 F.2d 552, 555 (D.C. Cir. 1972). See State v. Hohle, 510 N.W.2d 847, 849 (Iowa 1994). Trial counsel did not request an

alternative instruction or seek any modifications of the uniform instruction.

Defendant argues that trial counsel rendered ineffective assistance in failing to request a more detailed instruction which would fully inform the jury regarding how properly to evaluate eyewitness identifications.

The accuracy and trustworthiness of an eyewitness identification is limited by "system variables" and "estimator variables." National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification*, 1 (2014) (hereinafter "Identifying the Culprit"). System variables are the conditions relating to the procedures used to obtain identification and are under the control of law enforcement. Estimator variables cannot be controlled by law enforcement and include the conditions related to the actual viewing of the perpetrator in the first instance. *Identifying the Culprit*, at 14–17.

The Supreme Judicial Court of Massachusetts has recently held that its former uniform instruction (which was based on Telfaire) was inadequate and adopted more thorough

model jury instructions incorporating well-established system and estimator variables. See Commonwealth v. Gomes, 22 N.E.3d 897, 905-918 (Mass. 2015).

The New Jersey Supreme Court has also held that more detailed jury instructions on eyewitness identifications were required, similarly incorporating various system and estimator variables. State v. Henderson, 27 A.3d 872, 920-922 & 925-926 (N.J. 2011). The New Jersey Supreme Court has since adopted new model instructions on the issue. See also New Jersey Criminal Model Jury Instructions, available at https://www.njcourts.gov/attorneys/criminalcharges.html ("Identification - In Court and Out of Court Identifications").

In 2013, the National Academy of Sciences was called upon to assess the state of the research on eyewitness identification and make recommendations to improve the role of eyewitness identification in the criminal justice system. *Identifying the Culprit*, at xiii. In 2014, the committee recommended that "Jury instructions should explain in clear language, the relevant principles" to assist a jury in evaluating

eyewitness testimony. Id. at 112. The committee specifically recommended the New Jersey Criminal Model Jury Instructions, and specified that "the instructions should allow judges to focus on factors relevant to the specific case, since not all cases implicate the same factors." Id. The committee noted that "[w]ith the exception of the New Jersey instructions, jury instructions have tended to address only certain subjects, or to repeat the problematic Manson v. Brathwaite language, which was not intended as instructions for jurors." Id.

More detailed instructions on eyewitness identification should have been submitted in the present case. This Court should use this opportunity to revisit its approval of the current model instruction and adopt a jury instruction similar to the one adopted in New Jersey and recommended by the National Academy of Sciences in its report. Specifically, the jury instructions should have included the system and estimator variables relevant to this case and incorporated language closely tracking the New Jersey Model Jury Instructions on In-Court and Out-of-Court Identifications:

(1) **Stress:** Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification. Therefore, you should consider a witness's level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.

(2) **Duration:** The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by witnesses may not always be accurate because witnesses tend to think events lasted longer than they actually did.

(3) **Weapon Focus:** You should consider whether the witness saw a weapon during the incident and the duration of the crime. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of a subsequent identification if the crime is of short duration. In considering this factor, you should take into account the duration of the crime because the longer the event, the more time the witness may have to adapt to the presence of the weapon and focus on other details.

(4) **Distance:** A person is easier to identify when close by. The greater the distance between an

eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.

(5) **Lighting:** Inadequate lighting can reduce the reliability of an identification. You should consider the lighting conditions present at the time of the alleged crime in this case.

(6) **The Influence of Drugs:** The influence of drugs can affect the reliability of an identification. An identification made by a witness under the influence of drugs at the time of the incident may be unreliable.

(7) **Confidence and Accuracy:** You heard testimony that Donell Watson made a statement at the time he identified the defendant from a photographic array he selected is in fact the person who committed the crime. As I explained earlier, a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification. Although some research has found that highly confident witnesses are more likely to make accurate identifications, eyewitness confidence is generally an unreliable indicator of accuracy.

(8) **Time Elapsed:** Memories fade with time. As a result, delays between the commission of a crime and the time an identification is made can affect the reliability of the identification. In other words, the more time that passes, the greater the possibility

that a witness's memory of a perpetrator will weaken.

(9) **Multiple Viewings:** When a witness views the same person in more than one identification procedure, it can be difficult to know whether a later identification comes from the witness's memory of the actual, original event or of an earlier identification procedure. As a result, if a witness views an innocent suspect in multiple identification procedures, the risk of mistaken identification is increased. You may consider whether the witness viewed the suspect multiple times during the identification process and, if so, whether that affected the reliability of the identification.

(10) **Feedback:** Feedback occurs when police officers, or witnesses to an event who are not law enforcement officials, signal to eyewitnesses that they correctly identified the suspect. That confirmation may reduce doubt and engender or produce a false sense of confidence in a witness. Feedback may also falsely enhance a witness's recollection of the quality of his or her view of an event. It is for you to determine whether or not a witness's recollection in this case was affected by feedback or whether the recollection instead reflects the witness's accurate perception of the event.

See New Jersey Criminal Model Jury Instructions, available at https://www.njcourts.gov/attorneys/criminalcharges.html ("Identification - In Court and Out of Court Identifications");

see also Henderson, 27 A.3d at 895-912 (discussing how system and estimator variables affect the accuracy of eyewitness identification).

Furthermore, the jury should be instructed on the reality that memory is imperfect and bad faith on the part of the witness is not necessary to mistaken misidentification. Both Massachusetts and New Jersey have incorporated into their jury instructions the fact that human memory is not foolproof "like a video recording." Those instructions explain that "[t]he process of remembering consists of three stages: acquisition – the perception of the original event; retention – the period of time that passes between the event and the eventual recollection of a piece of information; and retrieval – the stage during which a person recalls stored information", and that "[a]t each of these stages, memory can be affected by a variety of factors" (namely the various system and estimator variables). See New Jersey Criminal Model Jury Instructions, available at https://www.njcourts.gov/attorneys/criminalcharges.html

("Identification - In Court and Out of Court Identifications"); see also Gomes, 22 N.E.3d at 919 (similarly stating). Such information was necessary to convey to the jury the reality that even an eyewitness who honestly believes they have made an accurate identification could be mistaken. Indeed, in Commonwealth v. Pressley, 457 N.E.2d 1119, 1120-1121 (Mass. 1983), the Massachusetts Supreme Court found it to be reversible error for the district court to refuse to instruct on the possibility of an honest but mistaken identification. It was important that the jury instruction on eyewitness identification be sufficient to alert the jury to the reality that an eyewitness may be honest and earnest but mistaken in their belief that they have identified the perpetrator.

In an unpublished opinion, the Court of Appeals State v. Collins, No. 16-1094, 2017 WL 6027763, at *8 (Iowa Ct. App. November 22, 2017), noted that Iowa courts have not adopted this interpretation of eyewitness-identification instructions. Trial counsel was not found ineffective for failing to request a jury instruction incorporating the system and estimator

variables discussed in Gomes and Henderson. Id. Nevertheless, defendant urges this Court to revisit this issue.

Trial counsel rendered ineffective assistance in failing to request a more detailed jury instruction, and such failure prejudiced defendant's defense. The accuracy of the eyewitness identification was the central issue at trial, and a more complete instruction was necessary to permit the jury to properly evaluate the identifications. There is at least a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. Defendant must be afforded a new trial.

Conclusion: Defendant-Appellant, Earl Booth-Harris, respectfully requests that this Court reverse his conviction for first-degree murder and remand this matter to the district court for a new trial.

Alternatively, if this Court finds the record insufficient to resolve his ineffective assistance of counsel claim on direct appeal, defendant respectfully requests that such claim be preserved for a post-conviction relief action.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument if this Court believes oral argument may be of assistance to the Court.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5,53, and that amount has been paid in full by the Office of the Appellate Defender.

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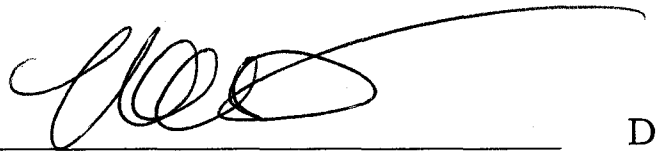

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