

IN THE
SUPREME COURT OF MISSOURI

| | | |
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| STATE OF MISSOURI, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | No. SC88161 |
| |) | |
| JEROME MCDANIELS, |) | |
| |) | |
| Appellant. |) | |

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION NO. 12
THE HONORABLE DENNIS M. SCHAUMANN

APPELLANT'S SUBSTITUTE BRIEF

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Standard of Review. “Appellate review of a trial court’s denial of a motion to suppress is limited to a determination of whether sufficient evidence exists to support the trial court’s ruling.” *State v. Williams*, 18 S.W.3d 425, 431 (Mo. App. S.D. 2000) (citing *State v. Wise*, 879 S.W.2d 494, 503 (Mo. banc 1994)). In determining whether the trial court should have excluded identification testimony, the appellate court considers (1) whether the pretrial identification procedure was impermissibly suggestive, and (2) whether the suggestive identification procedure made the identification at trial unreliable. *Williams*, 18 S.W.3d at 431. “Upon review of a motion to suppress” the appellate court “examine[s] the record made at the motion to suppress hearing and the trial record.” *State v. Berry*, 54 S.W.3d 668, 672 (Mo. App. E.D. 2001). The appellate court views the facts and any reasonable inferences in the light most favorable to the trial court’s ruling on the motion to suppress. *State v. Hunter*, 43 S.W.3d 336, 340 (Mo. App. W.D. 2001). 43

“A pretrial identification procedure is unduly suggestive if the identification results not from the witness’s recall of first-hand observations, but rather from the police procedures or actions employed by the police.” *State v. Glover*, 951 S.W.2d 359, 362 (Mo. App. W.D. 1997). The key issue in determining whether unduly suggestive procedures tainted the pretrial or in-court identifications is

whether the witness has an adequate basis for the identification independent of the suggestive procedure. *Id.* at 363.....44

If the court determines that the pretrial identification procedures were unduly suggestive, it must then determine whether the suggestive procedures so tainted the identification as to lead to a substantial likelihood that the pretrial and in-court identifications were unreliable. *Glover*, 951 S.W.3d at 362; *Manson v.*

Brathwaite, 432 U.S. 98, 114 (1977).45

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This conviction rests entirely upon witness identification of Mr. McDaniels. The evidence was that first three, and later two, black men were in green car outside the check-cashing facility. Tr. 305, 306. One was wearing a red-hooded sweatshirt with no noticeable gold front teeth and no facial hair and tried to rob Shaw and Claspill with a rifle. Tr. 306, 339. The evidence was that just minutes later a man in a long-sleeved blue and white jersey or sweatshirt with a noticeable facial hair and "obvious" gold front teeth jumped out of the green car parked nearby and escaped from two school patrol officers. Tr. 400, 413, 414, 440, 452.45

Moore and Watson were sure that Mr. McDaniels was the bearded man with the gold teeth and the blue and white shirt. Tr. 339, 409, 446. Claspill and Shaw

were equally positive that Mr. McDaniels was the man who robbed them. Tr.

334, 374.46

For the Shaw/Claspill identification evidence in this case to be reliable requires a string of difficult inferences. Claspill, who testified that she was concentrating on the robber's mouth, must have failed to note "obvious" and "noticeable" front gold teeth that Officer Watson was able to see in the heat of a standoff with a man hunkered down in the front seat of a car. Tr. 339, 340, 414. Shaw, who was further away, also failed to take note of the gold teeth. Tr. 389. Under cross-examination on this point, both women claimed that the robber was completely hiding his teeth with his lips during the entire encounter, something that he apparently did not do with the school patrol officers. Tr. 340.46

In addition, for her identification to be accurate, Claspill (again, while concentrating on the robber's mouth from just a few feet away) would have to fail to notice facial hair that both school officers made particular and repeated note of. Tr. 339, 389, 340, 414. Further, for the Shaw/Claspill man and the Watson/Moore man to be the same person, he would have had to put on a red sweatshirt over his t-shirt to try to rob the women, and then take the red sweatshirt off and put an entirely new shirt on, presumably over the t-shirt he had been wearing originally. Instead of leaving the car or abandoning the rifle during the short time between the robbery and the encounter with the police, this

robber apparently thought it was more important to take a shirt off (the red sweatshirt), and put another shirt on (the blue and white shirt). The identification evidence is difficult to reconcile, and it is likely that Shaw/Claspill and Moore/Watson encountered an entirely different person. 46

This mistake happened, in part, because Shaw and Claspill were led to their "positive" identification of Mr. McDaniels through a flawed and suggestive identification procedure. "Improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." *Simmons v. United States*, 390 U.S. 377, 383 (1968). "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 lineup or courtroom identification." *Id.* at 383. "To be sure, the use of a photo array prior to a lineup identification may be impermissibly suggestive where there is only one 'repeat player.'" *United State v. Washington*, 353 F.3d 42, 45 (D.C. Cir. 2004). 47

Just days after the attempted robbery, Shaw and Claspill were presented with a photospread of four men. Tr. 325, 369; State's Exhibit 5A-D. Claspill, after viewing the spread, told the officer that "number three [Mr. McDaniels] kind of looked like the guy that had the gun" but that in the picture "his eyes were pretty much closed." Tr. 325. She thought Mr. McDaniels looked "the most familiar" of the four. Tr. 327. The police attached a note stating "no i.d. made." Tr. 327;

State's Exhibits 5A-D. Shaw viewed the photospread as well and also could not make a positive identification, though she too told the police that the third man looked the most familiar. Tr. 370..... 48

In January, approximately two months later, the police tried again with Mr. McDaniels, this time with a live lineup and new fillers. State's Exhibit 7. Not surprisingly, upon seeing Mr. McDaniels a second time, both women immediately recognized him and were now "positive" that Mr. McDaniels was the man in the red-hooded sweatshirt. Tr. 344, 386. 48

This second lineup, and all subsequent identifications, were tainted. Shaw and Claspill immediately recognized Mr. McDaniels, but only because they had viewed and scrutinized his picture before. And further, the witnesses were aware that their "tentative" identification in November had indeed been the suspect because the third man (Mr. McDaniels) made his appearance again in the second lineup – why would the police bother to assemble a second, live lineup with someone who was not a suspect at all?..... 48

Presenting Mr. McDaniels, and only Mr. McDaniels, to the witnesses a second time, for the sole purpose of getting a more "certain" identification, produces a completely meaningless result and taints all subsequent identifications.

Bolstering a weak or tentative identification by presenting the same person to the

witness again with new fillers produces unreliable results and creates too much risk of a false identification.49

The United States Supreme Court in *Foster v. California* overturned a conviction on similar facts. 394 U.S. 440 (1969). In *Foster*, the defendant was arrested as a suspect, and the witness viewed a lineup. *Id.* at 441. The witness "thought" Foster was the man who robbed him, though he "was not sure," even after talking with him. *Id.* After a second lineup where Foster was the only person who was presented again, the witness became "convinced" of Foster's guilt and expressed the certainty of his identification of Foster at trial as well. *Id.* The Court called this lineup scenario a "compelling example" of an unfair lineup procedure, because the police are essentially telling the witness, "this is the man" in the second lineup. *Id.* at 444. "This procedure so undermined the reliability of the eyewitness identification as to violate due process." *Id.*49

There are two Missouri cases distinguishing *Foster* that are different from this case. *State v. Smith*, 704 S.W.2d 290 (Mo. App. E.D. 1986), involved a robbery of a grocery store, where a suspect, Smith, was not positively identified one hour after the robbery. *Smith*, 704 S.W.2d at 290. Later, in a lineup, she positively identified the defendant as the robber. *Id.* A second witness had observed a man running out of the store and getting into a car. *Id.* at 291. That witness provided the police with a description of the automobile, and later identified Smith as the

man she saw with no problem. *Id.* Police found hundreds of dollars in cash stuffed under the front seat of Smith's car. *Id.* The Court of Appeals found that though the cashier's second identification, after once having viewed Smith through a two-way mirror at the police station, was arguably suggestive, it was not unreliable given the totality of the circumstances, including the other witness's independent identification. *Id.* at 292. 50

In this case, unlike *Smith*, both witnesses to the attempted robbery were tainted by the suggestive procedure that caused the later, "positive" identifications to be unreliable. The fact that both of these witnesses were uncertain and unable to make a positive identification – and then suddenly were able to “positively” identify Mr. McDaniels at the second lineup – is evidence that the second lineup that produced a false identification. 51

State v. Glessner also cites and distinguishes *Foster*. 918 S.W.2d 270 (Mo. App. S.D. 1996). In that case, an attempted robber with a “beard and mustache growth” confronted a clerk at a store. *Id.* at 273. When Foster was picked up three hours later, he was clean shaven but had what appeared to be shaving nicks on his face and neck. *Id.* None of the men in the lineup had a beard or mustache. *Id.* 274. The victim informed the police that one of the men, who was not the defendant, looked like the suspect, but that he did not think it was him. *Id.* Police then searched the defendant’s home and found evidence that the

defendant had shaved, as well as a loaded gun which the victim later concluded was similar to the gun involved in the incident. *Id.* Ten days later, police showed the victim a photo lineup of men with facial hair, which included the defendant, but no one else from the physical lineup. *Id.* at 275. The victim identified the defendant, who had a beard in the photograph, as the gunman. *Id.*51

The Court of Appeals held that what distinguished the case from *Foster* is that what led the victim to identify Glessner was not suggestive police procedures, even though Foster was the only one in common to both lineups, but rather that Smith had facial hair in the second photo lineup, which is how the victim remembered the person from the incident. *Id.* at 277. In *Foster*, there was no evidence that the physical appearance of the robber changed between the time of the robbery and the time of the lineup. *Id.* In *Foster*, the identification procedure that occurred made it all but inevitable that the victim would identify the defendant because the defendant was the only one present in all three viewings by the victim. *Id.*.....52

In this case, there was no independent witness to the robbery who was not tainted by the information that Mr. McDaniels was the suspect – both Shaw and Claspill weakly and tentatively thought Mr. McDaniels looked the most like the man with the gun, and then suddenly were able to "positively" identify him

when Mr. McDaniels was presented to them a second time in a new lineup.
Further, the presence of what appears to be an entirely different person in
different clothing, wearing a beard and obvious gold teeth (also identified as Mr.
McDaniels) by the school patrol officers is hardly probative at all, and is evidence
of the unreliability of the Shaw/Claspill identifications. Given the
suggestiveness and unreliability of this identification testimony, the fruits of the
live lineup, and the in-court identifications by the victims, should have been
suppressed. 53

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Admitting evidence of the second, "positive" identifications from the live lineup,
and later the in-court identifications, was clearly erroneous. The second lineup
likely produced a false identification because the women were aware that Mr.
McDaniels was the suspect. In presenting Mr. McDaniels to the witnesses again,
the police were essentially told these witnesses: "Try again – this is the man we
believe did this." In fact, these witnesses' identification testimony was to become
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JURISDICTIONAL STATEMENT

In the Circuit Court of the City of St. Louis, Cause No. 041-0442A, the State of Missouri accused the Appellant, Jerome McDaniels, of committing two counts of attempted first degree robbery in violation of section 563.011 (Counts I and III) and two counts of armed criminal action (Counts II and IV) in violation of section 571.015.¹ A jury convicted Mr. McDaniels of the charged offenses. On September 9, 2005, Judge Dennis M. Schaumann sentenced Mr. McDaniels to concurrent terms of 17 years of imprisonment on all counts. Mr. McDaniels filed a timely notice of appeal to the Missouri Court of Appeals, Eastern District on September 22, 2005.

The Missouri Court of Appeals, Eastern District, on October 10, 2006, issued its order and memorandum opinion affirming the judgment and sentence under Rule 30.25(b). This Court later transferred the case upon application by Appellant. Jurisdiction lies in this Court, the Supreme Court of Missouri. Mo. Const., Art. V, sec. 10; Rule 83.02.

¹ All statutory references are to RSMo 2000 unless otherwise indicated.

Appellant will cite to the Legal File as "L.F." and the Transcript as "Tr."

Appellant will cite to the Supplemental Record on Appeal as "Supp. ROA."

STATEMENT OF FACTS

The state accused Jerome McDaniels of attempting to rob two St. Charles County women at a check-cashing business on North Kingshighway in the City of St. Louis. L.F. 26-27.

Jury Selection

Mr. McDaniels is a 27-year-old African-American man. Tr. 259, 357. The victims in this case are white. Tr. 395. The State exercised five of its six peremptory challenges to exclude black women from the jury – Portia Cooper, Cheryl Rice, Keisha Crenshaw, Kimberly Fisher and Saudah Muhammad. Tr. 253-254. It also struck a black woman, Sandra McCloud, as its alternate strike. Tr. 263. Defense counsel challenged the strikes under *Batson v. Kentucky*, 476 U.S. 79 (1986), alleging that the strikes were based on both gender and race. Tr. 254, 263.

As to Ms. Crenshaw and Ms. Fisher, the State explained that he struck them because:

Your Honor, Ms. Crenshaw as well as Ms. Fisher, day-care providers that care for young children. The difference between them, those two and the other jurors, these were two day-care providers caring for young

children and their profession. It's a profession that is sympathetic to young people. And as that, I believe women cause them to be sympathetic to a young defendant and differentiating them from other jurors, Your Honor.

Tr. 259. The court asked him to clarify. *Id.* The prosecutor said that he struck both because of "their professions." *Id.* Defense counsel pointed out that Mr. McDaniels was not young—he was 27 years old. Tr. 259. He noted that no children of any age were involved in the case with which the women might relate to or sympathize as child care providers caring for young children. Tr. 260. Counsel argued that the prosecutor's reasons were irrelevant to the case. Tr. 260. He also pointed out that the state did not strike a similarly-situated white woman, who was a teacher at a community college. Tr. 260; Supp. ROA 19. He also noted that there were a number of teachers on the panel. Tr. 260.

The Court overruled the objection and noted that it "cannot find any reason why [the reasons] would not be reasonable in the eyes of the State. They're not racially motivated or gender motivated." Tr. 260.

The Attempted Robbery in North City

It was Halloween Day, 2003. Tr. 307. Jennifer Claspill and Dawn Shaw were driving on Interstate 70 from St. Peters to a shopping center in Fairview Heights, Illinois to buy a birthday present for Claspill's son. Tr. 288-289, 298, 338, 377. They stopped at a payday loan and check-cashing establishment at Kingshighway and Page in North St. Louis City. Tr. 298, 299. There were three black men standing by a green Mazda parked in the lot. Tr. 301, 350. A person Shaw identified as Mr. McDaniels was wearing a white t-shirt. Tr. 382-383, 392. Claspill parked next to the green Mazda, went inside, and received cash at 10:36 a.m. Tr. 303.

On their way out they passed the green Mazda again. Tr. 305. Now two men were in the car and one was huddled down in the passenger seat. Tr. 305. When Claspill walked by, the passenger pointed an assault rifle at her and demanded her purse. Tr. 306. The hood was up on his red sweatshirt, covering parts of his face. Tr. 306. Claspill was looking at his mouth. Tr. 339. He pointed the gun at Shaw as well, telling her to put her purse on the ground and step back. Tr. 307. Shaw yelled, "Jen, don't give him shit. Get in the car." Tr. 308.

Claspill unlocked her car and jumped in. Tr. 308. Shaw got in the passenger side and they pulled away. Tr. 314. Shaw called 911. Tr. 314, 354. The women spotted a police car parked nearby on Union Avenue; they jumped out of their car and told the two officers that black men had tried to rob them and gave them the Mazda's license plate number. Tr. 315, 355, 396.

Shaw and Claspill followed Officers Watson and Moore, who were school patrol officers, and spotted the green Madza right away on Maple Street. Tr. 363, 397. The officers parked behind the car. Tr. 397, 437. They saw two African-American men standing near the car and started talking to them. Tr. 397, 436. That is when they noticed another man huddled down in the front seat, who was wearing either a blue-hooded sweatshirt or blue and white shirt. Tr. 407, 452.

The man in the Madza was wearing a black skull cap, and had long braids or cornrows coming out of the back. Tr. 400, 452. He was wearing a blue and white long-sleeved jersey or sweatshirt, had obvious facial hair, "an unkempt beard," as well as three "obvious" and "noticeable" front gold teeth. Tr. 400, 404, 413, 414, 440. Officer Watson screamed at the man in the car to put his hands up. Tr. 398, 416.

Suddenly, the Mazda started veering backwards, and it hit a curb. Tr. 404, 440. The man in the car jumped out and ran down an alley. Tr. 405, 452. Officer Moore gave chase but lost him. Tr. 440, 452. The officers found a red-hooded sweatshirt and a rifle in the Mazda. Tr. 320. The other men near the car were gone by that time. Tr. 436-437.

Approximately ten days pass, and the police received information² that caused them to put Mr. McDaniels' picture in a photo lineup that Claspill viewed on November 10, 2003. Tr. 324, 385. There were four men in the photo lineup. Tr. 324. Claspill told the police that the third man (Mr. McDaniels) "kind of" looked like or "might be" the man in the red-hooded sweatshirt who tried to rob her, but that she wasn't positive. Tr. 325, 343;

² Mr. McDaniel's fingerprint was found on the outside of the green Mazda. His fingerprints were not found anywhere else, however, including the inside of the car or on the rifle. Tr. 285. Both the State and Mr. McDaniels filed motions in limine to exclude any fingerprint evidence, and the parties stipulated that fingerprint evidence was not going to be a part of the case. Tr. 9. The State later tried to use the fingerprint evidence as rebuttal evidence, which the court did not allow. Tr. 279-286.

State's Exhibit 5C. Sometime in January, about two months later, she and Shaw viewed a live lineup. Tr. 333, 373. Claspill recognized Mr. McDaniels "right away" when she walked into the viewing room. Tr. 334. She had seen Mr. McDaniels before from the photo lineup she viewed in November. Tr. 345. Mr. McDaniels was the only person who was present in both lineups. *Id.* Claspill identified Mr. McDaniels in court as the man wearing the red-hooded sweatshirt. Tr. 336.

Shaw also viewed a photo lineup on November 10, ten days after the crime. Tr. 368. She also thought that the third man (Mr. McDaniels) looked familiar, but that his eyes were partly closed. Tr. 370; State's Exhibit 5C. She also told the officer that she wanted to see a live lineup. Tr. 370. When she viewed the live lineup in January, she, like Claspill, "automatically knew it was him" when she saw Mr. McDaniels in another lineup. Tr. 374, 386.

Sometime later in January, the two school patrol officers (Moore and Watson) were shown a photograph of the physical lineup that Shaw and Claspill had viewed. Tr. 409; State's Exhibit 7. Officer Watson positively identified Mr. McDaniels as the man in car with the blue and white jersey, beard, and noticeable gold teeth. Tr. 409. The other school officer also

identified Mr. McDaniels as the man in the car in wearing blue and white with facial hair whom she chased. Tr. 452.

Gregory Rowan, who was also charged in connection with this incident, testified. Tr. 541. Mr. Rowan had entered an *Alford* plea before trial. Tr. 18, 52. Mr. Rowan testified that he and another man – not Mr. McDaniels – had arranged to meet Shaw and Claspill at the North City check-cashing business because the women wanted to buy crack cocaine. Tr. 542. Shaw had prior convictions for possession of a controlled substance, felony stealing, misdemeanor stealing, and fraudulent use of a credit device. Tr. 376-377.

Rowan testified that the green Mazda was a "rock rental"³ that didn't belong to him. Tr. 542. In the parking lot of the check-cashing establishment, the other man had tried to pass off "fake" crack cocaine, and Shaw and Claspill caught on to the ploy. Tr. 543. When he refused to give the women their money back, they started yelling. Tr. 543. Mr. Rowan denied that he was involved in the confrontation with police officers Moore

³ A rock rental is a car that is loaned for a certain time period in exchange for crack cocaine.

and Watson. Tr. 544. He testified that he had never met Mr. McDaniels before they were both charged in this case. Tr. 544.

Mr. McDaniels also presented the testimony of Kim Wilder, his former girlfriend. Tr. 492. She testified that Mr. McDaniels was living with her family at Goodfellow and Natural Bridge on October 31, 2003. Tr. 494, 495. She testified that she had left late for work as a nurse's assistant that day, at about 10:15 to 10:20 a.m., and he was asleep when she left. Tr. 495-496. She talked to him on the phone later in the morning because she had forgotten her keys. Tr. 498. Ms. Wilder's mother, Lisa Tillman, also testified that Mr. McDaniels was at home asleep that morning, and that she remembered that day because it was Halloween. Tr. 511, 515.

The jury returned guilty verdicts on all counts, attempted first-degree robbery (Counts I and III) and armed criminal action (Counts II and IV). L.F. 61-64. Having been found to be a persistent felony offender, the court sentenced Mr. McDaniels to concurrent terms of 17 years of imprisonment on all counts. L.F. 69-72. This appeal followed. L.F. 73-76. Other facts will be stated in the argument section to minimize repetition.

POINTS RELIED ON

I.

The trial court erred in overruling Mr. McDaniels' objection to the state's peremptory strikes of Keisha Crenshaw and Kimberly Fisher, African-American women, because the strikes were motivated by race and gender, violating McDaniels' and the venirepersons' right to equal protection under the law, and Mr. McDaniels' rights to due process and a fair and impartial jury, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a), and 22(a) of the Missouri Constitution. The state's claims – that it struck these women because "I believe women cause [sic] them to be sympathetic to a young defendant" and because they are "two day-care providers caring for young children" – were not gender-neutral, and were cover for intentional race and gender discrimination, evidenced by the fact that the State's reasons were in no way related to the defendant (aged 27) or to the facts of the case (an attempted robbery involving adults). Additionally, the state did not strike certain similarly-situated white or male jurors, and the strikes were overwhelmingly and disproportionately towards African-American females.

J.E.B v. Alabama ex rel. T.B., 511 U.S. 127 (1994);
State v. Smith, 5 S.W.3d 595 (Mo. App. E.D. 1999);
State v. McFadden, 191 S.W.3d 648 (Mo. banc 2006);
State v. Edwards, 116 S.W.3d 511 (Mo. banc 2003);
Mo. Const., Art. I, secs. 2, 10, 18(a), 22(a); and
U.S. Const., Amend. V, VI, XIV.

II.

The trial court erred and abused its discretion in overruling the motions to suppress the Shaw/Claspill identifications and allowing this evidence over objection, and in allowing their in-court testimony identifying Mr. McDaniels over objection, because the identification of McDaniels from the live lineup was a product of a suggestive procedure where the police took weak, tentative identifications and turned them into "positive" identifications by presenting Mr. McDaniels to the women a second time.⁴ The identifications by the victims are flawed and

⁴ In violation of Mr. McDaniels' rights to due process of law and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

unreliable, because there was a substantial risk of a false identification inherent in this procedure because in the second lineup the witnesses knew the identity of the suspect. The Shaw/Claspill identification is also unreliable because the two school patrol officers, Watson and Moore, testified that Mr. McDaniels was the man they encountered with noticeable gold front teeth, obvious facial hair, and a blue and white shirt. Based on the disparate characteristics of the two men they encountered, Shaw/Claspill and Watson/Moore likely encountered two entirely different people.

Manson v. Brathwaite, 432 U.S. 98 (1977);

Foster v. California, 394 U.S. 440 (1969);

Simmons v. United States, 390 U.S. 377 (1968);

Mo. Const., Art. I, secs. 10 and 18(a); and

U.S. Const., Amends. V, VI and XIV.

ARGUMENT

I.

The trial court erred in overruling Mr. McDaniels' objection to the state's peremptory strikes of Keisha Crenshaw and Kimberly Fisher, African-American women, because the strikes were motivated by race and gender, violating McDaniels' and the venirepersons' right to equal protection under the law, and Mr. McDaniels' rights to due process and a fair and impartial jury, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 18(a), and 22(a) of the Missouri Constitution. The state's claims – that it struck these women because "I believe women cause [sic] them to be sympathetic to a young defendant" and because they are "two day-care providers caring for young children" – were not gender-neutral, and were cover for intentional race and gender discrimination, evidenced by the fact that the State's reasons were in no way related to the defendant (aged 27) or to the facts of the case (an attempted robbery involving adults). Additionally, the state did not strike certain similarly-situated white or male jurors, and the strikes were overwhelmingly and disproportionately towards African-American females.

Preservation. The issue is preserved for appellate review. The state announced its peremptory strikes. Tr. 253-254. Defense counsel made a *Batson* objection based on both race and gender. Tr. 254. The state presented its reasons for striking Crenshaw and Fisher. Tr. 259. Defense counsel argued that the reasons were pretextual, noting that the state's reasons were not related to the facts of the case, that Mr. McDaniels was not young, that there were a number of teachers on the panel, and pointed out a similarly situated juror. Tr. 260. The court overruled the objection. Tr. 260. The issue was included in Mr. McDaniels' motion for new trial. L.F. 66.

Standard of Review. A trial court's finding with regard to a challenge under *Batson v. Kentucky* will be set aside if it is clearly erroneous. *State v. McFadden*, 191 S.W.3d 648, 651 (Mo. banc 2006). "A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake as been made." *Id.* A defendant can make out a *prima facie* case of discriminatory jury selection by "the totality of the relevant facts" of the prosecutor's behavior. *Id.*

To successfully raise a *Batson* challenge to an excluded juror, the defendant must first make a *prima facie* showing that the prosecution exercised its

peremptory challenges based on race or gender. *Id.* at 97. This can be accomplished by citing *Batson* and alleging that the strikes are motivated by race or gender and are pretextual, or by demonstrating that the prosecution had removed jurors “consistently and systematically” by race or gender. *State v. Edwards*, 116 S.W.3d 511, 525 (Mo. banc 2003); *Swain v. Alabama*, 380 U.S. 202 (1965).

Once the defendant makes a *prima facie* showing, the burden shifts to the state to come forward with a reasonably specific and race and gender neutral explanation for its strike. *Edwards*, 116 S.W.3d at 525. If the state gives a facially neutral reason for the strike, then step three follows, where the burden shifts to the defendant to demonstrate that the state’s facially-neutral explanation was pretext and that the strike was really motivated by race or gender. *Id.*; *McFadden*, 191 S.W.3d at 651.

The state used peremptory strikes to remove every woman it could from this jury. Tr. 253-254. Its strikes overwhelmingly targeted black women. *Id.* The prosecutor explained why he struck Venirewomen Crenshaw and Fisher:

Ms. Crenshaw as well as Ms. Fisher, day-care providers that care for young children. The difference between

them, those two and the other jurors, these were two day-care providers caring for young children and [sic] their profession. It's a profession that is sympathetic to young people. And as that, I believe women cause [sic] them to be sympathetic to a young defendant and differentiating them from other jurors, Your Honor.

Tr. 259. Later, he said simply that he was striking the women because of "their professions." *Id.*

If this Court interprets these remarks as the prosecutor striking these women because women are more "sympathetic" people, this is a simple case. The prosecutor proffered gender as his reason and did not meet his burden to give a gender-neutral explanation for his strikes. *McFadden*, 191 S.W.3d at 651.

Certainly, the "sympathetic" or emotional woman, unfit for the important and demanding work of a jury, has long been a pernicious stereotype and was until recently reflected in the law in many states, including Missouri. *See Hoyt v. Florida*, 368 U.S. 57, 60 (1961) (upholding law in the state of Florida restricting female jury service on the grounds that women, unlike men, are "the center of home and family life."); *Duren*

v. Missouri, 439 U.S. 357, 369 (1979) (invalidating Article I, sec. 22(b) of the Missouri Constitution that allowed all women to opt out of jury service).

Evidence of the exclusion of women through peremptory strikes based upon "invidious, archaic, and overbroad stereotypes" about women's competence and predispositions led to the extension of *Batson* to sex discrimination in jury selection. *J.E.B v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); see Babcock, "A Place in the Palladium: Women's Rights and Jury Service," 71 U. Cin. L. Rev. 1139 (1992) (proposing that gender be declared an unconstitutional proxy for juror competence and impartiality).⁵

Historically, aside from concerns about women's competence, "[t]he traditional stereotype that made women – particularly African American women – less desirable jurors from a prosecutor's standpoint was the idea that they would feel motherly toward a young male defendant."

⁵ The restriction of women on juries, which persisted into the 1970s, derived from the English common law that excluded women from juries based on "the defect of sex"; the ostensible need was to protect women from the indelicate matters that often accompany a trial and preserve their innocence. *J.E.B.*, 511 U.S. at 132.

Hightower, "Sex and the Peremptory Strike: An Empirical Analysis of J.E.B. v. Alabama's First Five Years," 52 Stan. L. Rev. 895, 914 n. 112 (2000).⁶

Rationales behind the prosecutor's fear of women on juries ranged from concern about a "mothering" instinct, to the even more outlandish fear that women would be sexually attracted to a male criminal defendant and

⁶ Black women are recognized by some academics as the most common "intersectional" target of purposeful discrimination in jury selection because of sex and race working in combination. See Montoya, "What's So Magic[al] About Black Women? Peremptory Challenges at the Intersection of Race and Gender," 3 Mich J. Gender & L. 369, 398-399 (1996); Babcock, 61 U. Cin. L. Rev. at 1162-1164. Some courts have recognized black women as a separately cognizable group for purposes of *Batson*. See, e.g., *People v. Motton*, 704 P.2d 176 (Cal. banc 1985); *People v. Garcia*, 636 N.Y.S.2d 370 (N.Y. App. Div. 1995). But other courts have viewed the problem differently, holding that both race *and* sex discrimination necessarily occurred when a combination of race and sex are the apparent target. See *State v. Gonzales*, 808 P.2d 40 (N.M. App. 1991); Montoya, 3 Mich J. Gender & L. at 392-402, 410-412 (advocating this approach and collecting cases).

unable to be fair. See, e.g., *Fisher v. State*, 587 So.2d 1027, 1037 (Ala. Crim. App. 1991) (prosecutor struck black venirewoman because, “It’s been my experience women are not good jurors in capital cases, having tried capital cases. They feel more sympathetic than men. They go in there and feel like a mother.”); *State v. Gilmore*, 511 A.2d 1150, 1167-68 (N.J. 1986) (two black venirewomen struck in robbery case of a black man because prosecutor wanted jurors “without maternal family instincts”); 7 Am. Jur. Trials 477 sec. 109 (1964) (discussing female jurors, stating that, “[t]he defendant may be sexually attractive to a woman juror either because he is young . . . and arouses a protective, maternal instinct in her, or because he has exceptional masculine qualities that attract her.”).⁷

⁷ *J.E.B.* notes that trial manuals into the 1980s instructed prosecutors that women are more likely to decide a case based on “intuition” or “sympathy.” 511 U.S. 127, 140. One warned, “[T]here is at least the chance [with] the woman juror (particularly if the man happens to be handsome or appealing) [that his] derelictions will be overlooked. A woman is inclined to forgive sin in the opposite sex; but definitely not her own.” *Id.*, citing M. Belli, *Modern Trials*, secs. 51.67 and 51.68, 446-447 (2nd ed. 1982).

The “maternal” stereotype was at play in *State v. Smith*, 5 S.W.3d 595 (Mo. App. E.D. 1999). There, the prosecutor's explanation for striking a African-American venirewoman was because she was a teacher, of "mothering age," and would likely sympathize with a "baby-faced" black male defendant. *Id.* at 597. Part of the prosecutor's explanation was that "the women are going to be the ones who hung [sic] us up on this child." *Id.* The Court of Appeals found that the prosecutor's comments were not gender-neutral. *Id.* at 596, citing *State v. Hayden*, 878 S.W.2d 883, 885 (Mo. App. E.D. 1994) (case first applying *Batson* to gender in Missouri). Like here, the state's explanation appeared to be based expressly on gender. *Id.* at 598.

In this case, the prosecutor let slip his all-too-common belief that female jurors are naturally more inclined to sympathize with male criminal defendants because of something innate. Tr. 259. His explanation was not gender-neutral. This is a plausible interpretation of his somewhat confusing statement about "women" and "sympathy," considering that his strikes were so notably disproportionate. Tr. 253-254, 259. If the prosecutor said what he appeared to say on the record, then the lower court clearly erred in finding his comments to be gender-neutral, and the

strikes should have never made it past *Batson's* second step. *State v. Parker*, 836 S.W.2d 930, 933 (Mo. banc 1992).

The prosecutor's second reason – "their professions" – does not hold up under what should have been careful scrutiny on the part of the trial court. It was a made-up, pretextual reason to exclude Keisha Crenshaw and Kimberly Fisher from this jury.

This Court has cautioned courts to take particular care in reviewing claims that a juror was struck based on a particular occupation – something the lower court failed to do. *Edwards*, 116 S.W.3d at 527. It is too easy for occupation-related explanations to stand in for what is really intentional sex or race discrimination. *Id.* "[I]n the vast majority of cases, a prospective juror's employment has nothing to do with his or her ability to fairly weigh the evidence and arrive at a just decision." *Edwards*, 116 S.W.3d at 550 (Teitelman, concurring). In evaluating these claims for pretext, the relevant factors to carefully consider are, (1) whether the explanation is race and gender neutral, (2) reasonably related to the case to be tried, (3) clear and reasonably specific, and (4) legitimate. *Id.* at 527. The occupation "must apply to the juror specifically and to the facts of the particular case." *Id.*

Under this standard, the lower court clearly erred. First, the women's occupation as "two day-care providers who care for young children" was not at all related to the case. Tr. 259. As trial counsel noted, there were no children involved in the case. *Id.* Mr. McDaniels was not a child, a teenager, or even of college-age. *Id.* The prosecutor did not make any observation or record that Mr. McDaniels looked juvenile, or younger than he was at the time of trial – 27 years old. *Id.* The prosecutor did not cite his experience with child day care workers on previous juries as being too sympathetic to adult criminal defendants around Mr. McDaniel's age. Compare *State v. McFadden*, 191 S.W.3d at 643 (evidence of pretext when prosecutor failed to describe what prior negative experiences with school district employees entailed) and *Edwards*, 116 S.W.3d at 525-526 (strike based on profession as postal worker non-pretextual because the prosecutor's explanation was detailed, and because he removed jurors in similar occupations). The reasoning bore no relationship to the case or the defendant, was vague and contradictory, and since child-care workers are overwhelmingly female, this particular occupation is particularly susceptible to abuse as a proxy for gender.⁸

⁸ See U.S. Bureau of Labor Statistics, "Women in the Labor Force: A Databook," 31, 43 (2006) available at <http://www.bls.gov/cps/wlf->

This Court has made clear that prosecutors, when they cite occupation, must articulate some connection between the occupation, some "undesirable" trait from the State's perspective, and the facts of the case. *Edwards*, at 527. The prosecutor here simply could not do that. The prosecutor did not explain how the "sympathetic" attitude towards "young" criminal defendants he believes exists in child care workers as a group applied to the particular women at issue (*Edwards*, at 527), nor did he question these women in detail about their occupations as he did with numerous other jurors. Tr. 140 (Crenshaw, saying she works at a preschool and Shaw, noting she watches children at home); Tr. 137-143 (asking numerous other jurors follow-up questions about their jobs). He did not explain how child care workers' "sympathy" towards children or young people translates into sympathy for criminal defendants, or towards Mr. McDaniels in particular. The prosecutor did not ask any questions about the panel's views towards young people, whether they would be likely to

[databook-2006.pdf](#) (last accessed January 18, 2007) (94.8 percent of child care workers and 95.8 percent of child day care service workers are women).

be sympathetic towards a "young" defendant, or any questions relating to sympathy towards young people or children. Tr. 45, 49, 55, 56, 62, 73-75, 89, 90, 93, 104, 133-134, 143.

He did not ask any jurors about their children or whether any had children close in age to Mr. McDaniels – several were fathers and mothers. Supp. ROA 14, 15, 17, 18, 19, 20. All the facts show that the prosecutor's concern that some jurors might sympathize with a "young" criminal defendant – even if Mr. McDaniels could be called young at 27 years of age – was an afterthought to justify striking these particular women. *Miller-El v. Dretke*, 545 U.S. 231, 244 (2005).

The presence of similarly-situated jurors not struck is also relevant to show purposeful discrimination, though it would be rare indeed to find a male nanny or day care worker in a jury pool because of the demographic makeup of child-care workers. *Edwards*, 116 S.W.3d at 526; *see supra* note 8. Yet, it appears that potential sympathy to "young people" or "young children" was of no concern to this prosecutor when the venireperson was not a female and African-American. For example, had the prosecutor been worried about jurors "sympathizing" with the "young," it might have made sense to strike, or at least question, men like Mark Vollmer (a white man) who was the father of four children. Supp. ROA 14.

It might have been a good idea to strike Jean Sherry, a white woman, who was a teacher at a community college, and thus likely to work with college-aged teenagers and young adults closer in age to Mr. McDaniels. Tr. 260, 628; Supp. ROA 19; *see Smith*, 5 S.W.3d at 598 (noting that state did not strike man who taught persons closer in age to defendant). It might have also made sense to strike, or question further, Steven Revere, a black man employed with the St. Louis Public Schools. Supp. ROA 19. An exact replica of the struck jurors is not necessary or practical to demonstrate pretext in combination with other factors. *McFadden*, at 652 ("a *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."). That these similarly-situated jurors were left alone shows that the "sympathy with the young" concern was one that the prosecutor used selectively, and pretextually.

Finally, and perhaps most tellingly, was the disproportionate makeup of the state's strikes. His decision to strike every female possible, and target black women specifically, is evident. The pool of 24 potential jurors available after the strikes for cause was relatively balanced demographically – 9 venirepersons were men and 15 were female; 9 were black, and 13 white. Supp. ROA 14-20; Tr. 233-

253.⁹ There were six black females, seven white females, and two women of other races available to the state. Supp. ROA 14-20; Tr. 233-253. There were three black men and six white men available. Supp. ROA 14-20; Tr. 233-253. Of these, the state used all of its strikes against women and all but one of its strikes against black women. Tr. 253-254; Supp. ROA 14-20. He struck peremptorily just 1 out of 13 available white persons and 83 percent – all but one – of the six available black females. Tr. 253-254; Supp. ROA 14-20. The fact that seven women and four African-Americans remained on the jury only shows that the prosecutor ran out of peremptory strikes. *J.E.B.*, 511 U.S. at 142 n. 13 ("the possibility that members of both genders will get on the jury despite the intentional discrimination is beside the point.")¹⁰ "Happenstance is unlikely to produce this disparity." *Miller-El*, 545 U.S. at 241.

⁹ There were 28 jurors available when the four available for alternate strikes are included. Including the alternates, there were four black males, seven white males, eight black females, seven white females, and two females of other races. Supp. ROA 14-20; Tr. 252-253.

¹⁰ Tr. 266; Supp. ROA 14-20 (resulting jury composed of six white females, two white males, three black males, and one black female).

The prosecutor's own words, as well as all the circumstances of this case, clearly show that this prosecutor excised women from this jury because they were women – and targeting black women specifically for reasons that are perhaps as old as the jury system itself. "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of our system." *J.E.B.*, 511 U.S. at 142 n. 13. These strikes violated the venirepersons' right to equal protection of law. U.S. Const. Amend XIV; Mo. Const. Art. I, sec. 2. They also violated Mr. McDaniels' right to equal protection, as well as his rights to a fair and impartial jury and to due process of law. U.S. Const. Amend V, VI, XIV; Mo. Const. Art. I, secs. 2, 10, 18(a), 22(a). The lower court clearly erred. This case must be remanded.

II.

The trial court erred and abused its discretion in overruling the motions to suppress the Shaw/Claspill identifications and allowing this evidence over objection, and in allowing their in-court testimony identifying Mr. McDaniels over objection, because the identification of McDaniels from the live lineup was a product of a suggestive procedure where the police took weak, tentative identifications and turned them into "positive" identifications by presenting Mr. McDaniels to the women a second time.¹¹ The identifications by the victims are flawed and unreliable, because there was a substantial risk of a false identification inherent in this procedure because in the second lineup the witnesses knew the identity of the suspect. The Shaw/Claspill identification is also unreliable because the two school patrol officers, Watson and Moore, testified that Mr. McDaniels was the man they

¹¹ In violation of Mr. McDaniels' rights to due process of law and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

encountered with noticeable gold front teeth, obvious facial hair, and a blue and white shirt. Based on the disparate characteristics of the two men they encountered, Shaw/Claspill and Watson/Moore likely encountered two entirely different people.

Preservation. The issue is preserved for appellate review. Mr. McDaniels moved before trial to suppress evidence of the Shaw/Claspill identifications of him as the man in the red-hooded sweatshirt. L.F. 5, 24. Trial counsel objected to the admission of Exhibit 7, a photograph of the live lineup at which both women identified Mr. McDaniels, and the court granted a continuing objection on the identification issue. Tr. 334. Trial counsel objected to the admission of the in-court identifications. Tr. 310-12, 355-57. The issue was included in Mr. McDaniels' motion for new trial. L.F. 65. Should this Court find his point is not preserved, plain error review is requested. Rule 30.20.

Standard of Review. "Appellate review of a trial court's denial of a motion to suppress is limited to a determination of whether sufficient evidence exists to support the trial court's ruling." *State v. Williams*, 18 S.W.3d 425, 431 (Mo. App. S.D. 2000) (citing *State v. Wise*, 879 S.W.2d 494, 503 (Mo. banc 1994)). In determining whether the trial court should have

excluded identification testimony, the appellate court considers (1) whether the pretrial identification procedure was impermissibly suggestive, and (2) whether the suggestive identification procedure made the identification at trial unreliable. *Williams*, 18 S.W.3d at 431. “Upon review of a motion to suppress” the appellate court “examine[s] the record made at the motion to suppress hearing and the trial record.” *State v. Berry*, 54 S.W.3d 668, 672 (Mo. App. E.D. 2001). The appellate court views the facts and any reasonable inferences in the light most favorable to the trial court’s ruling on the motion to suppress. *State v. Hunter*, 43 S.W.3d 336, 340 (Mo. App. W.D. 2001).¹²

“A pretrial identification procedure is unduly suggestive if the identification results not from the witness’s recall of first-hand observations, but rather from the police procedures or actions employed by the police.” *State v. Glover*, 951 S.W.2d 359, 362 (Mo. App. W.D. 1997). The

¹² Plain error will result if “there was a substantial likelihood of misidentification so that reception of the evidence would amount to a miscarriage of justice.” *State v. Ross*, 680 S.W.2d 213, 215 (Mo. App. W.D. 1984).

key issue in determining whether unduly suggestive procedures tainted the pretrial or in-court identifications is whether the witness has an adequate basis for the identification independent of the suggestive procedure. *Id.* at 363.

If the court determines that the pretrial identification procedures were unduly suggestive, it must then determine whether the suggestive procedures so tainted the identification as to lead to a substantial likelihood that the pretrial and in-court identifications were unreliable. *Glover*, 951 S.W.3d at 362; *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

This conviction rests entirely upon witness identification of Mr. McDaniels. The evidence was that first three, and later two, black men were in green car outside the check-cashing facility. Tr. 305, 306. One was wearing a red-hooded sweatshirt with no noticeable gold front teeth and no facial hair and tried to rob Shaw and Claspill with a rifle. Tr. 306, 339. The evidence was that just minutes later a man in a long-sleeved blue and white jersey or sweatshirt with a noticeable facial hair and "obvious" gold front teeth jumped out of the green car parked nearby and escaped from two school patrol officers. Tr. 400, 413, 414, 440, 452.

Moore and Watson were sure that Mr. McDaniels was the bearded man with the gold teeth and the blue and white shirt. Tr. 339, 409, 446.

Claspill and Shaw were equally positive that Mr. McDaniels was the man who robbed them. Tr. 334, 374.

For the Shaw/Claspill identification evidence in this case to be reliable requires a string of difficult inferences. Claspill, who testified that she was concentrating on the robber's mouth, must have failed to note "obvious" and "noticeable" front gold teeth that Officer Watson was able to see in the heat of a standoff with a man hunkered down in the front seat of a car. Tr. 339, 340, 414. Shaw, who was further away, also failed to take note of the gold teeth. Tr. 389. Under cross-examination on this point, both women claimed that the robber was completely hiding his teeth with his lips during the entire encounter, something that he apparently did not do with the school patrol officers. Tr. 340.

In addition, for her identification to be accurate, Claspill (again, while concentrating on the robber's mouth from just a few feet away) would have to fail to notice facial hair that both school officers made particular and repeated note of. Tr. 339, 389, 340, 414. Further, for the Shaw/Claspill man and the Watson/Moore man to be the same person, he would have had to

put on a red sweatshirt over his t-shirt to try to rob the women, and then take the red sweatshirt off and put an entirely new shirt on, presumably over the t-shirt he had been wearing originally. Instead of leaving the car or abandoning the rifle during the short time between the robbery and the encounter with the police, this robber apparently thought it was more important to take a shirt off (the red sweatshirt), and put another shirt on (the blue and white shirt). The identification evidence is difficult to reconcile, and it is likely that Shaw/Claspill and Moore/Watson encountered an entirely different person.

This mistake happened, in part, because Shaw and Claspill were led to their "positive" identification of Mr. McDaniels through a flawed and suggestive identification procedure. "Improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." *Simmons v. United States*, 390 U.S. 377, 383 (1968). "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 lineup or courtroom identification." *Id.* at 383. "To be sure, the use of a photo array prior to a lineup identification may be impermissibly

suggestive where there is only one 'repeat player.'" *United State v. Washington*, 353 F.3d 42, 45 (D.C. Cir. 2004).

Just days after the attempted robbery, Shaw and Claspill were presented with a photospread of four men. Tr. 325, 369; State's Exhibit 5A-D. Claspill, after viewing the spread, told the officer that "number three [Mr. McDaniels] kind of looked like the guy that had the gun" but that in the picture "his eyes were pretty much closed." Tr. 325. She thought Mr. McDaniels looked "the most familiar" of the four. Tr. 327. The police attached a note stating "no i.d. made." Tr. 327; State's Exhibits 5A-D. Shaw viewed the photospread as well and also could not make a positive identification, though she too told the police that the third man looked the most familiar. Tr. 370.

In January, approximately two months later, the police tried again with Mr. McDaniels, this time with a live lineup and new fillers. State's Exhibit 7. Not surprisingly, upon seeing Mr. McDaniels a second time, both women immediately recognized him and were now "positive" that Mr. McDaniels was the man in the red-hooded sweatshirt. Tr. 344, 386.

This second lineup, and all subsequent identifications, were tainted. Shaw and Claspill immediately recognized Mr. McDaniels, but only

because they had viewed and scrutinized his picture before. And further, the witnesses were aware that their "tentative" identification in November had indeed been the suspect because the third man (Mr. McDaniels) made his appearance again in the second lineup – why would the police bother to assemble a second, live lineup with someone who was not a suspect at all?

Presenting Mr. McDaniels, and only Mr. McDaniels, to the witnesses a second time, for the sole purpose of getting a more "certain" identification, produces a completely meaningless result and taints all subsequent identifications. Bolstering a weak or tentative identification by presenting the same person to the witness again with new fillers produces unreliable results and creates too much risk of a false identification.

The United States Supreme Court in *Foster v. California* overturned a conviction on similar facts. 394 U.S. 440 (1969). In *Foster*, the defendant was arrested as a suspect, and the witness viewed a lineup. *Id.* at 441. The witness "thought" Foster was the man who robbed him, though he "was not sure," even after talking with him. *Id.* After a second lineup where Foster was the only person who was presented again, the witness became "convinced" of Foster's guilt and expressed the certainty of his identification of Foster at trial as well. *Id.* The Court called this lineup

scenario a "compelling example" of an unfair lineup procedure, because the police are essentially telling the witness, "this is the man" in the second lineup. *Id.* at 444. "This procedure so undermined the reliability of the eyewitness identification as to violate due process." *Id.*

There are two Missouri cases distinguishing *Foster* that are different from this case. *State v. Smith*, 704 S.W.2d 290 (Mo. App. E.D. 1986), involved a robbery of a grocery store, where a suspect, Smith, was not positively identified one hour after the robbery. *Smith*, 704 S.W.2d at 290. Later, in a lineup, she positively identified the defendant as the robber. *Id.* A second witness had observed a man running out of the store and getting into a car. *Id.* at 291. That witness provided the police with a description of the automobile, and later identified Smith as the man she saw with no problem. *Id.* Police found hundreds of dollars in cash stuffed under the front seat of Smith's car. *Id.* The Court of Appeals found that though the cashier's second identification, after once having viewed Smith through a two-way mirror at the police station, was arguably suggestive, it was not unreliable given the totality of the circumstances, including the other witness's independent identification. *Id.* at 292.

In this case, unlike *Smith*, both witnesses to the attempted robbery were tainted by the suggestive procedure that caused the later, "positive" identifications to be unreliable. The fact that both of these witnesses were uncertain and unable to make a positive identification – and then suddenly were able to “positively” identify Mr. McDaniels at the second lineup – is evidence that the second lineup that produced a false identification.

State v. Glessner also cites and distinguishes *Foster*. 918 S.W.2d 270 (Mo. App. S.D. 1996). In that case, an attempted robber with a “beard and mustache growth” confronted a clerk at a store. *Id.* at 273. When Foster was picked up three hours later, he was clean shaven but had what appeared to be shaving nicks on his face and neck. *Id.* None of the men in the lineup had a beard or mustache. *Id.* 274. The victim informed the police that one of the men, who was not the defendant, looked like the suspect, but that he did not think it was him. *Id.* Police then searched the defendant’s home and found evidence that the defendant had shaved, as well as a loaded gun which the victim later concluded was similar to the gun involved in the incident. *Id.* Ten days later, police showed the victim a photo lineup of men with facial hair, which included the defendant, but

no one else from the physical lineup. *Id.* at 275. The victim identified the defendant, who had a beard in the photograph, as the gunman. *Id.*

The Court of Appeals held that what distinguished the case from *Foster* is that what led the victim to identify Glessner was not suggestive police procedures, even though Foster was the only one in common to both lineups, but rather that Smith had facial hair in the second photo lineup, which is how the victim remembered the person from the incident. *Id.* at 277. In *Foster*, there was no evidence that the physical appearance of the robber changed between the time of the robbery and the time of the lineup. *Id.* In *Foster*, the identification procedure that occurred made it all but inevitable that the victim would identify the defendant because the defendant was the only one present in all three viewings by the victim. *Id.*¹³

¹³ The defendant in *State v. Meeks* raised a claim that an in-court identification was unreliable and should have been suppressed because he was the only man in common to two previous lineups in which the witness could not make a positive identification. 770 S.W.2d 709 (Mo. App. E.D.

In this case, there was no independent witness to the robbery who was not tainted by the information that Mr. McDaniels was the suspect—both Shaw and Claspill weakly and tentatively thought Mr. McDaniels looked the most like the man with the gun, and then suddenly were able to "positively" identify him when Mr. McDaniels was presented to them a second time in a new lineup. Further, the presence of what appears to be an entirely different person in different clothing, wearing a beard and obvious gold teeth (also identified as Mr. McDaniels) by the school patrol officers is hardly probative at all, and is evidence of the unreliability of the Shaw/Claspill identifications. Given the suggestiveness and unreliability of this identification testimony, the fruits of the live lineup, and the in-court identifications by the victims, should have been suppressed.

Admitting evidence of the second, "positive" identifications from the live lineup, and later the in-court identifications, was clearly erroneous. The second lineup likely produced a false identification because the

1989). To this, the court at that time merely said, "We disagree." The case did not cite or distinguish *Foster*.

women were aware that Mr. McDaniels was the suspect. In presenting Mr. McDaniels to the witnesses again, the police were essentially told these witnesses: "Try again – this is the man we believe did this." In fact, these witnesses' identification testimony was to become the only direct evidence tying Mr. McDaniels to this incident. This Court cannot allow a conviction and 17-year sentence to rest on such weak and tainted evidence.

CONCLUSION

WHEREFORE, based on his argument in Points I and II of his brief, Appellant Jerome McDaniels requests that this Court reverse his convictions and remand his case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I hereby certify that on this 18th day of January 2006, two true and correct copies of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to Shaun Mackelprang of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Book Antiqua Serif 14 point font. The word-processing software identified that this brief contains 8,151 words. The enclosed diskette has been scanned for viruses with a currently updated version of McAfee VirusScan Enterprise 7.1.0 software and found virus-free.

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APPENDIX

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