

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

<p>PEOPLE OF THE STATE OF CALIFORNIA,</p> <p>Plaintiff and Respondent,</p> <p>v.</p> <p>KARL HOLMES, HERBERT McCLAIN, AND LORENZO NEWBORN</p> <p>Defendants and Appellants.</p>

No. S058734

CAPITAL CASE

Los Angeles County
Superior Court
No. BA092268

Appeal from the Judgment and Death Sentence
of the Superior Court of the State of California
County of Los Angeles, No. BA092268

HONORABLE J.D. SMITH, JUDGE PRESIDING

**APPELLANT McCLAIN’S SUPPLEMENTAL BRIEF
REGARDING LEGISLATION PERTAINING TO
EYEWITNESS IDENTIFICATIONS**

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**APPELLANT McCLAIN'S SUPPLEMENTAL BRIEF
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INTRODUCTION

This Supplemental Brief focuses on Penal Code section 859.7, enacted after the filing of Mr. McClain's reply brief in December 2012 to protect criminal defendants from unreliable eyewitness identifications. 2018 Stats., ch. 997, § 1b. The statute is relevant here because the heart of the prosecutor's case for Mr. McClain's convictions and death sentence was the testimony of eyewitness Gabriel Pina whose purported identification of Mr. McClain as the driver of a getaway car lacked any indicia of reliability. Because this is a special circumstances case, the consequences of misidentification are dire both as to guilt and punishment.

LAW AND ARGUMENT

This argument supplements the following two claims which are fully set forth in Mr. McClain's opening and reply briefs:

- I. **THE TRIAL COURT ERRED IN FAILING TO SUPPRESS GABRIEL PINA'S UNRELIABLE EYEWITNESS TESTIMONY WHICH RESULTED FROM HIGHLY SUGGESTIVE PRETRIAL PROCEDURES. (CLAIM 2, AOB 69-94.)**

- II. **THE TRIAL COURT'S EXCLUSION OF MCCLAIN'S PROPOSED LINGERING DOUBT EVIDENCE, THE PROSECUTOR'S MISCONDUCT IN ARGUING LINGERING DOUBT, AND THE ERRONEOUS JURY INSTRUCTIONS ON LINGERING DOUBT VIOLATED MCCLAIN'S FEDERAL CONSTITUTIONAL AND STATE LAW RIGHTS. (CLAIM 17, AOB:368-407.)**

- III. **PENAL CODE SECTION 859.7.**

Recognizing that:

Eyewitness misidentification is the leading contributor to wrongful convictions proven with DNA evidence nationally. In California, eyewitness misidentification played a role in 12 out of 13 DNA-based exonerations in the state[.]

in 2019, the state Legislature enacted Penal Code section 859.7, which requires law enforcement and prosecutorial entities to adopt uniform procedures for conducting photo lineups and live lineups of eyewitnesses to prevent both convictions of innocent defendants and inconsistent practices among jurisdictions. The statute became effective on January 1, 2020. Pen. Code § 859.7, Leg. History.

At the outset, Mr. McClain acknowledges that section 859.7 does not spell out a remedy for identifications produced under circumstances that do not comport with its procedural requirements.

However, the Legislature's fundamental purpose in enacting the statute was to prevent miscarriages of justice caused by just the type of dubious eyewitness identification proffered in this case.

Such protection is particularly critical here because no physical evidence links Mr. McClain to the crime. Thus, there is no forensic safeguard preventing his wrongful conviction and death sentence. For these reasons, Mr. McClain asks this Court to consider section 859.7 in its assessment of Mr. Pina's identification as it pertains to the aforementioned claims which are fully set forth in his opening and reply briefs.

Based on the record in this case, the following minimum requirements set forth in section 859.7 were not met¹:

¹ The record is unclear as to whether the following procedural requirements were met:

- (1) An eyewitness shall be instructed of the following, prior to any identification procedure:
 - (A) The perpetrator may or may not be among the persons in the identification procedure.
 - (B) The eyewitness should not feel compelled to make an identification.
 - (C) An identification or failure to make an identification will not end the investigation. § 859.7(a)(4).
- (2) In a photo lineup, writings or information concerning any previous arrest of the person suspected as the perpetrator shall not be visible to the eyewitness. § 859.7(a)(6).

A. Prior to conducting the identification procedure, and as close in time to the incident as possible, the eyewitness shall provide the description of the perpetrator of the offense. § 859.7(a)(1).

Here, Mr. Pina spoke with a police officer 30 minutes after the homicides took place. 26:RT:2695. The officer's notes indicate that Mr. Pina discussed seeing vehicles, hearing gunshots, and seeing people run away from the scene. 36:RT:3883-3886, 3894-3896. There were no descriptions of those people. According to the officer, had Pina stated that he could identify any suspects, the officer would have included that in his report. 36:RT:3897.

Four days later, after police had deemed Mr. McClain a suspect, they interviewed Mr. Pina at the police station; although police showed Mr. Pina photographs of cars, they did not show him photographs of any suspects in the case. 36:RT:3901, 3907, 3915. During that interview, Mr. Pina vaguely described the driver of the first car he saw as a black man in his early twenties with a jheri curl and shoulder length hair. 26:RT:2730. The interviewing officer's report made no mention of Mr. Pina's vantage point. 26:RT:2730.

Mr. Pina did not come forward with an identification until after, nearly two months later, a highly publicized \$40,000 reward was offered in exchange for information about suspects in the case — whose photographs were displayed on television as part of the announcement. 26:RT:2719-2720; 36:RT:3908; 71:RT:7097. Mr. Pina called police and said, "I can identify at least one person because I have seen him on television."

26:RT:2791, 71:RT:7096. According to the notes of the investigating detective, Mr. Pina also saw the photographs in the newspaper. 25:RT:2663; 26:RT:2718-2721, 2754-2755; 36:RT:3907-3908; 39:RT:4164-4167.

Five days later, Mr. Pina told police he could not describe the person he had seen. 25:RT:2664. Only then did police show Mr. Pina a series of photographic six packs which included a photograph of Mr. McClain. 26:RT:2696.

B. The investigator conducting the identification procedure shall use blind administration or blinded administration during the identification procedure². § 859.7(a)(2).

Detective Uribe, who conducted the photographic lineup, was one of the primary investigators on this case and showed the

² Penal code section 859.7 defines blind or blinded administration as follows:

- (1) “Blind administration” means the administrator of an eyewitness identification procedure does not know the identity of the suspect.
- (2) “Blinded administration” means the administrator of an eyewitness identification procedure may know who the suspect is, but does not know where the suspect, or his or her photo, as applicable, has been placed or positioned in the identification procedure through the use of any of the following:
 - (A) An automated computer program that prevents the administrator from seeing which photos the eyewitness is viewing until after the identification procedure is completed.
 - (B) The folder shuffle method, which refers to a system for conducting a photo lineup by placing photographs in folders, randomly numbering the folders, shuffling the

photographs to Mr. Pina after Mr. McClain was charged in this case. 10:CT:2667.

C. The investigator shall state in writing the reason that the presentation of the lineup was not conducted using blind administration, if applicable. § 859.7(a)(3).

No such explanation was recorded.

D. An identification procedure shall be composed so that the fillers generally fit the eyewitness' description of the perpetrator. In the case of a photo lineup, the photograph of the person suspected as the perpetrator should, if practicable, resemble his or her appearance at the time of the offense and not unduly stand out. § 859.7(a)(5).

Here, the six-pack contained only a single photograph depicting a person with long hair — the photograph of Mr. McClain. Peo. Exh. 17A-E. One of the men in the photo spread had no hair at all. Peo. Exh. 17A-E. Moreover, Mr. McClain was the only person in the photo lineup with a gold chain around his neck and his photograph was darker than all the others. Peo. Exh. 17A-E. Although all the men in the six-packs were African

folders, and then presenting the folders sequentially so that the administrator cannot see or track which photograph is being presented to the eyewitness until after the procedure is completed.

(C) Any other procedure that achieves neutral administration and prevents the lineup administrator from knowing where the suspect or his or her photo, as applicable, has been placed or positioned in the identification procedure.

American, their skin color, hairstyles, facial features, clothing, and demeanors varied greatly. Peo. Exh. 17A-E.

No reason was offered for this unduly suggestive procedure.

E. Only one suspected perpetrator shall be included in any identification procedure. § 859.7(a)(7).

Mr. Pina was shown six-packs containing photographs of both Mr. McClain and Mr. Holmes during the same identification procedure. Peo. Exh. 17A, 17B; 26:RT:2699, 2722-2723, 2781-2785.

F. Nothing shall be said to the eyewitness that might influence the eyewitness' identification of the person suspected as the perpetrator.

When Mr. Pina tentatively identified Mr. McClain's photograph from a six-pack, a detective immediately showed Mr. Pina a photograph of Mr. McClain that had appeared in the newspaper. 26:RT:2697, 2699-2700, 2719. The detective asked Mr. Pina: "Does this change your idea or change your image?" 39:RT:4160.

G. If the eyewitness identifies a person he or she believes to be the perpetrator, all of the following shall apply:

- 1. The investigator shall immediately inquire as to the eyewitness' confidence level in the accuracy of the identification and record in writing, verbatim, what the eyewitness says. § 859.7(a)(10)(A).**

According to the notes of the lead detective, Pina had difficulty selecting a photograph from the lineup because "looking

face to face I have not really seen him that good.” 2:CT:463; 26 RT 2697-2698.

When Mr. Pina ultimately pointed to McClain’s photograph, he told the detectives that he thought that was the guy, but he was not really sure. 26:RT:2697.

2. Information concerning the identified person shall not be given to the eyewitness prior to obtaining the eyewitness’ statement of confidence level and documenting the exact words of the eyewitness. § 859.7(a)(10)(B).

Mr. Pina admitted he had seen widely disseminated photographs of Mr. McClain and the suspects in this case. 26:RT:2718-2720; 36:RT:3908.

3. The officer shall not validate or invalidate the eyewitness’ identification. § 859.7(a)(10)(C).

As explained above, when Mr. Pina tentatively identified Mr. McClain’s photograph from a six-pack, a detective immediately showed Mr. Pina a photograph of Mr. McClain that had appeared in the newspaper. 26:RT:2697, 2699-2700, 2719. The detective asked Mr. Pina: “Does this change your idea or change your image?” 39:RT:4160. Mr. Pina only initialed the photograph he had selected from the six-pack line-up after the detective showed him McClain's photograph in the newspaper. 26:RT:2722.

H. An electronic recording shall be made that includes both audio and visual representations of the identification procedures. Whether it is feasible to make a recording with both audio and visual representations shall be determined on a case-by-case basis. When it is not feasible to make a recording with both audio and visual representations, audio recording may be used. When audio recording without video recording is used, the investigator shall state in writing the reason that video recording was not feasible. § 859.7(a)(11).

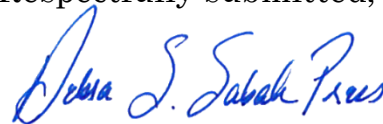
The lead detective on this case acknowledged that he and his partner could have recorded the photographic lineup, but did not do so. 39:RT:4163-4164. No explanation was offered.

CONCLUSION

For the foregoing reasons, to avoid a miscarriage of justice, Mr. McClain respectfully asks this Court to reverse his convictions in the Halloween case which rest primarily on spurious eyewitness testimony developed without any of the procedural safeguards currently required by section 859.7. Should this Court decline to reverse his convictions, he asks this Court to reverse his death sentence on the basis of lingering doubt.

Dated: May 19, 2021

Respectfully submitted,



Debra S. Sabah Press
Attorney for Appellant
HERBERT McCLAIN

CERTIFICATION OF WORD COUNT
PURSUANT TO RULE 8.520(d)

I, Debra S. Sabah Press, counsel for appellant Herbert McClain in the current case, hereby certify that the within Supplemental Brief was produced on a computer using a 13-point Century Schoolbook font. I further certify that, exclusive of the cover, table of contents, the proof of service, and this certificate, this brief contains 1,859 words, according to the word count of Microsoft Word, the computer program used to prepare the documents.

I declare under the penalty of perjury that the foregoing is true and correct, and that this certificate was executed on May 19, 2021, at Austin, Texas.

Dated: May 19, 2021



Debra S. Sabah Press

Attorney for Appellant
HERBERT McCLAIN

Re: *People v. Holmes, McClain, and Newborn*
Supreme Court No. S058734
Los Angeles County Superior Court No. BA092268

DECLARATION OF SERVICE

I, Debra S. Sabah Press, declare that I am over 18 years of age and not a party to the within cause. My business address is 3571 Far West Boulevard; PMB 140; Austin, TX 78731.

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REGARDING LEGISLATION PERTAINING TO
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STATE OF CALIFORNIA
Supreme Court of California**PROOF OF SERVICE**STATE OF CALIFORNIA
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/s/Debra Sabah Press

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