

No. 79872-9

IN THE SUPREME COURT
STATE OF WASHINGTON

In re: The Personal Restraint of
RICHARD J. DYER,
Petitioner.

AMICUS CURIAE BRIEF OF THE INNOCENCE NETWORK
IN SUPPORT OF PETITIONER'S REHEARING MOTION

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I. EYEWITNESS MISIDENTIFICATION IS A HALLMARK OF A WRONGFUL CONVICTION

Despite legal safeguards, innocent people continue to be convicted in the United States. See Benjamin N. Cardozo School of Law, 200 Exonerated, Too Many Wrongfully Convicted, An Innocent Project Report on the First 200 DNA Exonerations in the U.S. (2007) (hereinafter 200 Exonerated).

Petitioner Dyer was convicted in 1980 of the rape of two women, primarily because the victims identified him as the perpetrator. In re Dyer, --- Wn.2d ---, 189 P.3d 759 (2008). Dyer continues to maintain his innocence and it is this assertion of innocence that has kept him in prison. Dyer's request to participate in the Sexual Offender Treatment Program (SOTP) was refused because an admission of guilt is required to enroll in the program. Id. at 772. Since Dyer can not participate in – and thus complete – SOTP, the Indeterminate Sentence Review Board (ISRB) denied him parole. Id. at 765. To add to the paradox, the DNA evidence in Dyer's case was destroyed. Id. at 771-772. He is therefore unable to prove his convictions were the result of mistaken eyewitness identification. Id.

Mistaken eyewitness identification has long been recognized as a leading cause of wrongful convictions. In United States v. Wade, 388

U.S. 218, 229 (1967), the Supreme Court acknowledged that mistaken identification “probably accounts for more miscarriages of justice than any other single factor.” In the years since Wade, advances in DNA technology have provided scientific proof that Wade’s prophecy is true. The Innocence Project at the Benjamin Cardozo School of Law report on the 200 persons exonerated by DNA testing found that 77% of those freed were convicted in part on eyewitness misidentification. See 200 Exonerated at pages 18-19. However, “[e]ven before the development of forensic DNA testing, mistaken eyewitness identification was responsible for the convictions of more innocent persons than any other combination of factors.”¹

Since Dyer’s trial, researchers have strived to understand why jurors believe eyewitnesses, even when they are wrong. Studies have shown that jurors are most influenced by the confidence an eyewitness expresses in his or her confidence in the identification. Gary L. Wells et al., Eyewitness Identification Procedures: Recommendations For Lineups

¹ See Jacqueline McMurtrie, The Role of the Social Sciences in Wrongful Convictions, 42 AM. CRIM. L. REV. 1271, 1275 (2005), citing Edwin M. Borchard, CONVICTING THE INNOCENT (Garden City Publishing Company 1932), at xiii (noting that eyewitness error occurred in 45% of sixty-five cases of wrongful conviction); C. Ronald Huff, Wrongful Conviction: Societal Tolerance of Injustice, 4 RES. SOC. PROBS. & PUB. POL’Y. 99, 101-103 (1987) (finding that mistaken eyewitness identification occurred in 60% of the 500 wrongful convictions studied); Arye Rattner, Convicted But Innocent, 12 LAW & HUM. BEHAV. 283, 291 (1988) (finding that eyewitness error occurred in 52% percent of the 205 wrongful convictions studied).

and Photospreads, 22 LAW & HUM. BEHAV. 603, 619-627 (1998) (hereinafter Wells, Recommendations). However, extensive scientific research establishes that high confidence on the part of an eyewitness does not directly correlate with high accuracy. Id. A juror's desire to believe a confident eyewitness is so strong that jurors will ignore other factors that are known to genuinely influence accuracy – such as disguises worn by the perpetrator, stress experienced by the victim, instructions that encourage a witness to make a selection, bias in the composition of the photo array or lineup, and the victim's focus upon a weapon. See Brian Cutler et al., Juror Sensitivity to Eyewitness Identification Evidence, 14 LAW & HUM. BEHAV. 185 (1990); Timothy P. O'Toole et al., District of Columbia Public Defender Eyewitness Reliability Survey, CHAMPION, April 2005, at 28-32 (a survey of approximately 1,000 potential jurors found that significant numbers of jurors do not understand the concepts of weapon focus, the effects of violence and stress and the lack of meaningful correlation between witness confidence at trial and the accuracy of eyewitness identification, overestimate the reliability of cross-racial identification and have no understanding of how police procedures can affect the accuracy of an eyewitness identification.).

Since Dyer's conviction, researchers have also identified factors that contribute to the high frequency of eyewitness error. At least two of

these factors are applicable to the identification obtained from the victim eyewitness in Dyer's case.

Passage of Time. It is well-established that memory fades over time. In one study 85 convenience store clerks were asked to identify (from target-present or target-absent photo arrays) a previously encountered customer either two hours or 24 hours after the encounter. False identifications from target-absent photo arrays occurred far more frequently after 24 hours (52.4%) than after two (15%). Brian Cutler, A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy, 4 CARDOZO PUB. L. POL'Y & ETHICS, J. 327, 336 (2006).

When the second victim identified Dyer, sixteen months had passed since the rape. In re Dyer, 189 P.3d at 771. Furthermore, the identification took place nearly one and a half years after the victim told police she would be unable to identify her attacker. Id.

Show-up Identifications: Research shows that, compared to properly conducted lineups and photo arrays, show-ups are more likely to yield false identifications. Wells, Recommendations, 22 LAW & HUM. BEHAV. at 27.

In Dyer's case, after telling the police she could not identify her rapist, the second victim identified Dyer when she saw him led into the

courtroom in handcuffs between two policemen. In re Dyer, 189 P.3d at 771. The show-up process used in the case was inherently suggestive. It conveyed to the victim that police believed Dyer was the perpetrator and moved her from an inability to identify her rapist to a certainty that Dyer was her attacker.

The dissent in Dyer recognized that the possibility of Dyer's innocence should not be ignored. In re Dyer, 189 P.3d at 771-772. In many respects, Dyer's case resembles the case of Charles Chatman. On January 3, 2008, Chatman was exonerated after serving 27 years of a 99 year sentence for a rape he did not commit. See Appendix 1, DNA Clears Man of Rape 26 Years Later, The Associated Press, Jan.3 2008, <http://www.msnbc.com/id/22493315> (visited 8/29/2008). Like Dyer, Chatman was convicted on the basis of the victim eyewitness. Id. Chatman was also repeatedly denied parole because he refused to admit guilt. He stated: "every time I'd go to parole, they'd want a description of the crime or my version of the crime. . . . I don't have a version of the crime. I will never admit to doing this crime that I know I didn't do." Id. In Chatman's case, evidence taken by the police in 1981 was not destroyed and he was able to obtain his freedom through post-conviction DNA testing. Unfortunately, Mr. Dyer will never have the same opportunity to prove his innocence. However, this Court should

reconsider the role that mistaken eyewitness identification plays in convicting the innocent and re-examine the ISRB's decision to deny Dyer parole.

II. CONCLUSION

Amicus urges his Court to grant Mr. Dyer relief.

DATED this ___ day of September, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing Amicus Brief on the following:

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APPENDIX 1



DNA clears man of rape 26 years later

Texas leads U.S. in prisoners freed by DNA testing

The Associated Press

updated 3:35 p.m. PT, Thurs., Jan. 3, 2008

DALLAS - Three times during his nearly 27 years in prison, Charles Chatman went before a parole board and refused to admit he was a rapist. His steadfastness was vindicated Thursday, when a judge released him because of new DNA evidence showing he indeed was not.

The release of Chatman, 47, added to Dallas County's nationally unmatched number of wrongfully convicted inmates.

"Every time I'd go to parole, they'd want a description of the crime or my version of the crime," Chatman said. "I don't have a version of the crime. I never committed the crime. I never will admit to doing this crime that I know I didn't do."

District Judge John Creuzot, whom defense lawyers credited with shepherding Chatman's case for exoneration through the legal system, recommended that Texas' Court of Criminal Appeals find Chatman not guilty. With several relatives dabbling at their eyes with tissues and cheering, Chatman was released.

"I really can't tell you how I feel," said his aunt, Ethel Barley. "But I can tell you it is a different feeling than I have had in a long time, just to be holding his own hand."

Before the crime is officially cleared from Chatman's record, the appeals court must accept the recommendation or the governor must grant a pardon. Either step is considered a formality after Creuzot's ruling.

Dallas leads country

Chatman became the 15th inmate from Dallas County since 2001 to be freed by DNA testing. He served more time than any of the other inmates, four of whom were in court Thursday to show their support.

Dallas has freed more inmates after DNA testing than any other county nationwide, said Natalie Roetzel of the Innocence Project of Texas. Texas leads America in prisoners freed by DNA testing, releasing at least 30 wrongfully convicted inmates since 2001, according to the Innocence Project.

One of the biggest reasons for the large number of exonerations is the crime lab used by Dallas County, which accounts for about half the state's DNA cases. Unlike many jurisdictions, the lab used by police and prosecutors retains biological evidence, meaning DNA testing is a viable option for decades-old crimes.

District Attorney Craig Watkins also attributes the exonerations to a past culture of overly aggressive prosecutors seeking convictions at any cost. Watkins has started a program in which law students, supervised by the Innocence Project of Texas, are reviewing about 450 cases in which convicts have requested DNA testing to prove their innocence.

"It is time we stop kidding ourselves in believing that what happened in Dallas is somehow unique," said Jeff Blackburn, the founder of the Innocence Project of Texas. "What happened in Dallas is common. This is Texas."

Friends, supporters flank Chatman

The hearing attracted a standing-room-only crowd that included Watkins, who was greeted warmly by two wrongly convicted Dallas men who have since won their freedom. Also there was state Rep. Terri Hodge, a member of the criminal jurisprudence committee, who promised unspecified reforms when the Legislature convenes in 2009.

Chatman was 20 when the victim, a young woman in her 20s, picked him from a lineup. Chatman said he lived five houses down from the victim for 13 years but never knew her.

She identified him in court as the attacker, and serology tests showed that the type of blood found at the crime scene matched that of Chatman — along with 40 percent of other black males.

Chatman said he was working at the time of the assault, an alibi supported by his sister, who was also his employer. Nevertheless, Chatman was convicted of aggravated sexual assault in 1981 and sentenced to 99 years in prison.

Helping others like himself

Chatman said he believes his race led to his arrest and conviction. The jury, he said, had one black member.

"I was convicted because a black man committed a crime against a white woman," Chatman said. "And I was available."

Chatman said he wants to work with the Innocence Project of Texas to support other people exonerated or wrongly convicted.

"I believe that there are hundreds, and I know of two or three personally that very well could be sitting in this seat if they had the support and they had the backing that I have," Chatman said. "My No. 1 interest is trying to help people who have been in the situation I am in."

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