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IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	
Appellant,	:	On Appeal from the
	:	Cuyahoga County Court of
	:	Appeals, Eighth Appellate
vs.	:	District
	:	
JAMES TATE	:	Supreme Court Case No:
	:	2013-0910
	:	
Appellee.	:	Court of Appeals
	:	Case No: 97804

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MEMORANDUM IN RESPONSE  
OF APPELLEE JAMES TATE

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**STATEMENT AS TO WHY THIS CASE DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION AND  
IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

The Eighth District Court of Appeals properly reversed where the State failed to perform an elemental duty at trial – identifying the defendant.

In so ruling, the Eighth District acknowledged that the State need not proffer an in-court identification to present sufficient evidence to support a conviction. *State v. James Tate*, 8<sup>th</sup> Dist. No. 97804, 2013-Ohio-570, ¶ 12 citing *State v. Melton*, 8th Dist. No. 87186, 2006-Ohio-5610, ¶ 13; *State v. Shinholster*, 9th Dist. No. 25328, 2011-Ohio-2244, ¶ 24. The Court also acknowledged that circumstantial evidence could provide a substitute for an in-court identification in the instance that a defendant is not identified by a witness at trial. *Tate*, 2013-Ohio-570 at ¶ 11 citing *Cleveland Metroparks v. Lawrence*, 8<sup>th</sup> Dist. No. 98085, 2012-Ohio-5729; *In re K.S.*, 8<sup>th</sup> Dist. No. 97343, 2012-Ohio-2388.

However, the Eight District reviewed the evidence presented at trial, and in comparing its prior jurisprudence on the matter, found that the State failed to present sufficient circumstantial evidence of identification:

“In the case subjudice, there was not sufficient evidence, circumstantial or otherwise, that the appellant was ‘the man’ repeatedly referenced in the testimony of the victim and her two friends. There is absolutely no explanation on the record for the state’s failure to even attempt to elicit an in-court identification of the appellant from the victim or the other two witnesses. The record is clear, however, that the victim stood solely in the best position to make such an identification. According to her own testimony she was approached by a man, spent a reasonable amount of time conversing with him, accompanied him on a walk to the location of the alleged crimes and later recognized him inside the library.”

*State v. Tate*, 8<sup>th</sup> Dist. No. 97804 at ¶ 13.

The State of Ohio now asks this Honorable Court for a new factual review of the case, even though it acknowledges that the proper legal standard had been applied. The State of Ohio admits that it does not ask for a different interpretation of the law, or new proposition of law at all – *it simply re-states the law already applied by the Eighth District Court of Appeals:*

“Proposition of Law I. In-court identification of the accused is not required to secure a conviction where sufficient circumstantial evidence was presented at trial identifying the accused as the person about whom the witnesses were testifying.”  
Appellant’s Br. p. 3.

This proposition is not in conflict. The Eighth District Court of Appeals applied this very standard. See *Tate*, 2013-Ohio-570 at ¶ 11-12. In response to the State’s Motion of En Banc Consideration, the Eighth District Court of Appeals found no inter or intra-jurisdictional conflict.

The State otherwise fails to offer any reason why this case presents a unique constitutional question, or why it is of general interest. Appellant’s Br. p. 1. Instead, the State simply argues that this Court should review this case “because sufficient circumstantial evidence was presented at trial identifying the accused as the perpetrator...” Appellant’s Br. p. 1.

The State’s desire for a new factual review does not render this case one of constitutional significance, or one of great general interest. Thus, there is no larger question for this Court to answer.

Accordingly, Appellee respectfully requests that this Honorable Court deny jurisdiction to review this case.

## ARGUMENT IN SUPPORT OF APPELLEE'S POSITION

Response to Appellant's First Proposition of Law:

### **I. The Eighth District Court of Appeals Analyzed the Facts and Applied the Established Jurisprudence to Reach Its Conclusion.**

The Eighth District Court of Appeals applied the correct standard of law and properly reversed.

As the Eighth District held: "The failure to conduct an in-court identification is not fatal to the state's case when the circumstances of the trial indicate the accused is indeed the person about whom the witnesses are testifying." *Tate*, 2013-Ohio-570 at ¶ 12 citing *State v. Melton*, 8<sup>th</sup> Dist. No. 87186, 2006-Ohio-5610, ¶ 13; *State v. Shinholster*, 9<sup>th</sup> Dist. No. 25328, 2011-Ohio-2244, ¶ 24. "A long-established principle of criminal law is that the prosecution must prove 'beyond a reasonable doubt' the identity of the accused as the person who actually committed the crime." *Tate*, 2013-Ohio-570 at ¶ 11 citing *Cleveland Metroparks v. Lawrence*, 8<sup>th</sup> Dist. No. 98085, 2012-Ohio-5729, ¶ 13, quoting *In re K.S.*, 8<sup>th</sup> Dist. No. 97343, 2012-Ohio-2388.

In *Cleveland Metroparks*, the Eighth District held that insufficient evidence existed to sustain a conviction where two eyewitnesses failed to provide an in-court identification. *Cleveland Metroparks v. Lawrence*, 8<sup>th</sup> Dist. No. 98085, 2012-Ohio-5729.

The Eighth District Court of Appeals reversed, holding:

"In this case, there was not sufficient evidence, circumstantial or otherwise, that the appellant was the person whom Miss Rowland and Miss Difiore claim menaced them.

We recognize that those witnesses pointed out to a park ranger a vehicle, driven by the appellant, that they claimed followed them. We also acknowledge that Ranger David Albaugh made an in-court identification of the appellant as

the driver of said vehicle. However, that is not sufficient to prove the identity of the alleged perpetrator.

Miss Rowland and Miss Difiore were never asked to identify the appellant in court, they never viewed a photo array in which they identified the appellant and, other than pointing out a specific vehicle, a rather common Chevy Malibu, they did not make any further identification of the appellant to the ranger at the scene.

Appellant's conviction is vacated and he is ordered discharged.”  
*Id.* at ¶15-18.

The Eight District’s decision in *Tate* aligns with its decision in *Cleveland Metroparks*. The Eighth District applied the same legal standard from *Melton*, drew factual comparison to *Cleveland Metroparks*, and came to a conclusion based on the facts presented at bar:

“The record before the court is devoid of any testimony from the victim or either of her two friends identifying the appellant as the perpetrator.

....

In the case subjudice, there was not sufficient evidence, circumstantial or otherwise, that the appellant was ‘the man’ repeatedly referenced in the testimony of the victim and her two friends. There is absolutely no explanation on the record for the state’s failure to even attempt to elicit an in-court identification of the appellant from the victim or the other two witnesses. The record is clear, however, that the victim stood solely in the best position to make such an identification. According to her own testimony she was approached by a man, spent a reasonable amount of time conversing with him, accompanied him on a walk to the location of the alleged crimes and later recognized him inside the library.

**As in *Cleveland Metroparks* however, the witnesses who had direct contact with the perpetrator, B.P., T.W. and L.J., were never asked to identify the appellant in court and never viewed a photo array in which they identified the appellant as the perpetrator. As such, the trial court**

erred in denying appellant's Crim.R. 29 motion as to all counts."

*Tate*, 2013-Ohio-570 at ¶ 10, 13-14 (emphasis added).

As in *Cleveland Metroparks*, the State failed to sufficiently identify the defendant at trial or through a photo array. In its decision in *Tate*, the Eighth District noted these extremely relevant omissions from the State's case, and compared them with those in *Cleveland Metroparks* to address them. *Tate*, 2013-Ohio-570 at ¶ 10-15. Here, the Eighth District Court of Appeals found the State's new (and near-identical) omissions to be equally fatal to those found in *Cleveland Metroparks*. Because it properly applied relevant case law to the facts at bar, the Eighth District properly reversed the Trial Court, and properly vacated Appellee's conviction.

The application of *Cleveland Metroparks* represents a continuation of, rather than a deviation from, past precedent within the Eighth District Court of Appeals. The Eighth District Court of Appeals thus left no substantial constitutional question, or question of great general interest, for this Honorable Court's consideration.

Accordingly, Appellee respectfully requests that this Honorable Court decline jurisdiction to review this case.

**CONCLUSION**

For the reasons discussed above, this Honorable Court should not accept jurisdiction to review this case, as the Eighth District Court of Appeals decision invoked well-established and related precedent, properly applying it to facts and circumstances at bar.

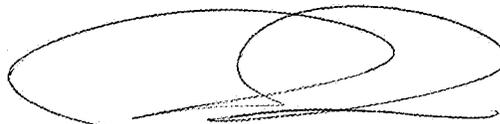
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Attorney for Appellee,  
James Tate

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing MEMORANDUM IN RESPONSE OF APPELLEE JAMES TATE has been hand delivered to the Prosecuting Attorney for Cuyahoga County at The Justice Center, 9<sup>th</sup> Floor, 1200 Ontario Street, Cleveland, OH 44113.

Date: 7/5/13

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a horizontal line and a few trailing strokes.

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James Tate