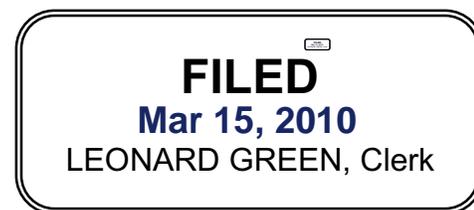


NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 10a0154n.06

No. 08-1524

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**



RODERICK DUANE LEWIS,

Petitioner-Appellant,

v.

JERI ANN SHERRY,

Respondent-Appellee.

ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
MICHIGAN

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Before: MARTIN, SILER, and MOORE, Circuit Judges.

PER CURIAM. Roderick Lewis appeals five issues for which the district court denied his motion for habeas relief: (1) admission of identification; (2) suppression of evidence; (3) jury instructions and communications; (4) ineffective assistance of trial counsel; and (5) ineffective assistance of appellate counsel. Having reviewed the briefs and record and heard oral argument, we find no reversible error warranting the grant of a writ of habeas corpus.

But this is not to say that there was no legal error committed. Though we agree with the majority of the district court's conclusions, *Lewis v. Sherry*, No. 05-74202, 2007 WL 4591299 (E.D. Mich. Dec. 28, 2007), *Lewis v. Sherry*, No. 05-74202, 2007 WL 1585641 (E.D. Mich. June 1, 2007), we must disagree with its conclusion that the identification was not unduly suggestive. *Lewis*, 2007 WL 1585641. The full circumstances associated with the identification—a line-up with few similarities among the participants; a pre-lineup sighting of the accused which showed a new,

distinctive characteristic; that only the accused had the distinctive characteristic; and the knowledge that the accused was definitely in the line-up—demonstrate that this line-up was unduly suggestive. However, while the state courts and the district court erred in finding that the line-up was not unduly suggestive, the witness' identification of Lewis was nonetheless reliable under the factors outlined in *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972). Therefore, the state court's admission of the identification was not an unreasonable application of federal law.

We therefore **DENY** Lewis' petition.