

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JAMES A. DENNIS,)	
)	
Petitioner,)	
)	CIVIL ACTION
v.)	
)	No. 11-1660
JOHN E. WETZEL, Acting Secretary,)	
Pennsylvania Department of Corrections;)	
LOUIS S. FOLINO, Superintendent of the)	
State Correctional Institute at Greene;)	THIS IS A CAPITAL CASE
MARIROSA LAMAS, Superintendent of)	
The State Correctional Institute at Rockview,)	
)	ANITA B. BRODY, USDJ
Respondents.)	
)	
)	
)	

**BRIEF FOR AMICI CURIAE
THE PENNSYLVANIA INNOCENCE PROJECT, PROFESSOR EDITH GREENE,
PROFESSOR ELIZABETH LOFTUS, AND THE INNOCENCE NETWORK
IN SUPPORT OF PETITIONER JAMES DENNIS**

Marissa Boyers Bluestine (Pa. Bar No. 75973)
The Pennsylvania Innocence Project
1719 N. Broad Street
Philadelphia, PA 19122
(215) 204-4255
mbluestine@temple.edu

*Counsel for Amici Curiae
The Pennsylvania Innocence Project
Professor Edith Greene
Professor Elizabeth Loftus and
The Innocence Network*

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INTEREST OF *AMICI CURIAE*

The Innocence Network (“the Network”) is an association of organizations dedicated to providing *pro bono* legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The 65 current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the Netherlands, the United Kingdom, and New Zealand.¹ The Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons learned from cases in which the system convicted innocent persons, the Network advocates for reforms designed to enhance the truth-seeking functions of the criminal justice system and thereby prevent future wrongful convictions.

The Pennsylvania Innocence Project (the “Project”) is a nonprofit legal clinic and resource center founded in 2008, housed at Temple University’s Beasley School of Law, and a member of the Innocence Network. The Project’s board of directors and advisory committee include practicing lawyers, law professors, former United States Attorneys, former state court

¹ The member organizations include the Alaska Innocence Project, Association in Defense of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

prosecutors, and the deans of the law schools of Temple University, Villanova University, Drexel University, the University of Pennsylvania, and Rutgers-Camden. The Project provides *pro bono* investigative and legal services to indigent prisoners throughout the Commonwealth of Pennsylvania whose claims of actual innocence are supported by the results of DNA testing or other, powerfully exculpatory evidence or whose claims, after a preliminary investigation, evince a substantial potential for the discovery of such evidence. In addition, the Project works to remedy the underlying causes of wrongful convictions to better ensure that no one will be convicted and imprisoned for a crime they did not commit and to lessen the risk that a wrongdoer will escape justice because an innocent person was convicted in their stead.

The Network and the Project work to ensure that criminal trials arrive at accurate determinations of guilt and promote justice. Inasmuch as mistaken eyewitness identifications are the principal cause of wrongful convictions, *amici* have a compelling interest in ensuring that courts reviewing convictions based upon eyewitness identifications have access to the most up to date scientific information available.

Professors Edith Greene² and Elizabeth Loftus³ are academics who conduct research regarding eyewitness testimony. Their research, some of which is cited in this Brief, addresses

² Edith Greene is Professor of Psychology at the University of Colorado-Colorado Springs (UCCS), Director of the Graduate Concentration in Psychology and Law, and Director of the Psychology Honors Program. She received a BA in psychology from Stanford University, an MA in experimental psychology from the University of Colorado-Boulder, and a Ph.D. in psychology and law from the University of Washington. She has served as Fellow in Law and Psychology at Harvard Law School, faculty member of the National Judicial College, and Visiting Scholar at John Jay College of Criminal Justice, City University of New York. The co-author of a leading textbook in psychology and law (*Psychology and the Legal System*, 7th edition, published by Thomson/Wadsworth), Professor Greene teaches a survey course and an advanced undergraduate seminar in psychology and law, as well as a graduate proseminar in psychology and law. Dr. Greene's research focuses generally on the application of cognitive and social psychology to legal issues, and specifically on the behavior of various decision makers including juries, judges, attorneys, and witnesses. She has written about the factors that influence the reliability of eyewitnesses to accidents and crimes.

³ Elizabeth Loftus is Distinguished Professor at the University of California - Irvine. She holds faculty positions in three departments (Psychology & Social Behavior; Criminology, Law & Society; and Cognitive
(continued...)

the factors that influence the reliability of eyewitness testimony. *Amici* seek to provide the Court with an accurate summary of findings from eyewitness identification research and particularly to highlight scientific research which bears directly on Mr. Dennis's case.

The reliability of eyewitness testimony is a critical issue in Mr. Dennis's case. Both Mr. Dennis and the Commonwealth reference the reliability of eyewitness testimony in their briefs, and the Commonwealth even calls Mr. Dennis's references to the unreliability of eyewitness testimony "dubious."⁴ *Amici* submit this brief to assist the Court in understanding the science behind eyewitness testimony and the circumstances—many of which are present in Mr. Dennis's case—that may render it unreliable. This brief identifies the factors which may cause a factfinder or court to incorrectly believe, as the Pennsylvania Supreme Court did, that positive eyewitness identifications in the absence of any corroborating evidence constitutes "overwhelming" evidence of guilt.⁵ Indeed, in thirty-six percent of the Innocence Network's DNA-based exonerations, multiple witnesses misidentified the same innocent person. In those cases, the wrongly convicted were fortunate enough that post-conviction DNA testing could establish their

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Sciences), and in the School of Law, and is also a Fellow of the Center for the Neurobiology of Learning and Memory. She received her Ph.D. in Psychology from Stanford University. Since then, she has published 22 books (including the award winning *Eyewitness Testimony*) and close to 500 scientific articles. Loftus's research has focused on the malleability of human memory, eyewitness testimony, and also on courtroom procedure. She has been recognized for this research with six honorary doctorates (from universities in the U.S., Norway, the Netherlands, Israel, and Britain). She was elected to the Royal Society of Edinburgh, the American Philosophical Society, and the National Academy of Sciences. She is past president of the Association for Psychological Science, the Western Psychological Association, and the American Psychology-Law Society. Perhaps one of the most unusual signs of recognition of the impact of Loftus's research came in a study published by the Review of General Psychology. The study identified the 100 most eminent psychologists of the 20th century, and not surprisingly Freud, Skinner, and Piaget are at the top of that list. Loftus was #58, and the top ranked woman on the list.

⁴ See, e.g., Petition for Writ of Habeas Corpus, *Dennis v. Wetzel*, No. 11-1660 (E.D. Pa) at 96 n.27; Response to the Petition for Writ of Habeas Corpus, *Dennis v. Wetzel*, No. 11-1660 (E.D. Pa) at 49 n.21, 198.

⁵ See *Commonwealth v. Dennis*, 715 A.2d 404, 412 (Pa. 1998) (stating that "evidence of [Mr. Dennis's] guilt was, by any estimate, quite overwhelming").

innocence. Mr. Dennis is not so lucky. In light of the wealth of scientific evidence, corroborated by the experiences of nearly 200 individuals known to have been wrongly convicted based on eyewitness misidentifications, this Court should carefully consider Mr. Dennis's argument that evidence in his case was not "overwhelming."

INTRODUCTION

Studies of DNA-based exonerations demonstrate that eyewitness error is the leading contributor to convictions of innocent people. Eyewitness identification testimony is fallible, susceptible to inaccuracies, and yet so convincing that, when it is wrong, it poses a serious risk of convicting an innocent person that cannot be ameliorated by traditional adversarial tools.⁶ While the full extent of the problem of eyewitness misidentification is unknown, it is known that erroneous eyewitness identifications contributed to approximately three-quarters of the wrongful convictions ultimately overturned by DNA evidence—a troubling statistic by any measure. For over thirty years, cognitive scientists have studied human memory and recall and developed a significant body of convincing evidence that eyewitness testimony is fraught with reliability concerns and susceptible to irreversible contamination.

We know from this great body of research that eyewitness testimony can be rendered unreliable by factors that occur during the incident, such as the presence of a weapon or covering of a face, or by factors that occur subsequently, such as suggestive lineups or confirming feedback by law enforcement. Many of those factors are present in Mr. Dennis's case. The research also offers lessons about additional factors present in Mr. Dennis's case that undermine

⁶ Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson Law Review 727 (2007).

the reliability of an identification—to wit, a distinct mismatch between eyewitness’s description of the perpetrator and Mr. Dennis’s appearance and the non-identification of Mr. Dennis by some eyewitnesses. The presence of all of these factors together in Mr. Dennis’s case raises very substantial concerns that the wrong man was convicted of a capital crime.

Indeed, the scientific research has established that once a witness’ memory becomes improperly tainted, there is no remedy. The memory is forever changed, incapable of being ‘fixed,’ and the witness wholly believes the inaccuracy. It is because of the seeming strength of eyewitness testimony – the power of seeing a witness point to a defendant and declare him “the one” – that courts are coming to recognize that cases which hinge on such evidence may not be as “overwhelming” as believed.

ARGUMENT

I. **MISTAKEN EYEWITNESS IDENTIFICATIONS THWART JUSTICE BY IMPRISONING INNOCENTS AND ALLOWING THE GUILTY TO ESCAPE PUNISHMENT.**

No interest is served by imprisoning the wrong person for a crime, except perhaps the interest of the real perpetrator. Thus, while the presumption of innocence has historically been spoken of as a trade-off between wrongly convicting and wrongly acquitting,⁷ a wrongful conviction is also a *de facto* wrongful acquittal.⁸

⁷ See, e.g., *Coffin v. United States*, 156 U.S. 432, 454-56 (1895).

⁸ As Justice Marshall writes in his dissent to *Manson v. Brathwaite*: “For if the police and the public erroneously conclude . . . that the right man has been caught and convicted, the real outlaw must still remain at large. Law enforcement has failed in its primary function and has left society unprotected from the depredations of an active criminal.” 432 U.S. 98, 127 (1977) (Marshall J., dissenting).

Erroneous eyewitness identifications are the primary culprit in convictions of innocent people.⁹ In a study of 250 cases in which defendants were exonerated after conviction, Professor Brandon L. Garrett found that the “role of mistaken eyewitness identifications in these wrongful convictions is now well known. Eyewitnesses misidentified 76% of the exonerees (190 of 250 cases).”¹⁰ A 2009 Innocence Project study of over 200 cases in which convicted defendants were exonerated by DNA evidence found that mistaken eyewitness identifications accounted in whole or in part for 75% of the wrongful convictions.¹¹ Specifically, the Innocence Project found that “[o]ver 175 people have been wrongfully convicted based, in part, on eyewitness misidentification and later proven innocent through DNA testing.”¹² Similarly, a 1999 Department of Justice report studying 28 felony convictions subsequently overturned on the basis of DNA evidence concluded that eight-five percent of the convictions resulted primarily from erroneous eyewitness identifications.¹³ Attorney General Janet Reno explained:

Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in

⁹ “[M]istaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined. . . . [E]yewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence.” *United States v. Brownlee*, 454 F.3d 131, 141-42 (3d Cir. 2006) (quoting A. Daniel Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?*, 42 *Canadian Psychology* 92, 93 (May 2001)).

¹⁰ Brandon L. Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong* 48 (Harvard 2011).

¹¹ Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 *LAW & HUM. BEHAVIOR* NO. 1 1, 1 (2009). See generally E. Connors *et al.*, *Convicted By Juries, Exonerated By Science: Case Studies In The Use Of DNA Evidence To Establish Innocence After Trial* (2009), available at www.ncjrs.gov/pdffiles/dnaevid.pdf.

¹² Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes And How To Reduce The Chance Of A Misidentification* 3 (2009), available at www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf.

¹³ Nat’l Inst. of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* iii (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf>.

recalling and interpreting a witnessed event; it is the nature of human memory.¹⁴

These findings are consistent with other studies of wrongful convictions.¹⁵

II. MANY FACTORS KNOWN TO CONTRIBUTE TO DEMONSTRABLY FALSE IDENTIFICATIONS ARE PRESENT IN MR. DENNIS'S CASE

The causes of mistaken identifications are both well-studied and well-understood.

Researchers have identified a host of factors that directly affect the reliability of eyewitness identification. These factors are often divided into two categories: (1) estimator variables—those characteristics of the witness, perpetrator, or the conditions in which a crime occurred; and (2) system variables—those aspects of the criminal justice system over which the state can or should have control.

Many of the estimator and system factors researchers have identified as compromising the reliability of an identification are present in Mr. Dennis's case and make misidentification in this case more likely. Estimator variables include the presence of a weapon, the duration time of the incident, and the level of stress of the incident. All of these variables are present in Mr. Dennis's case.¹⁶

¹⁴ *Id.*

¹⁵ See, e.g., Roy S. Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, in *Expert Testimony On The Psychology Of Eyewitness Identification* 3 (Brian L. Cutler ed., 2009), available at http://works.bepress.com/christian_meissner/50/ (reviewing half a dozen studies of wrongful convictions that found erroneous eyewitness identification to be the primary (or in one case, one of two primary) bases for the wrongful convictions); *Convicted by Juries, Exonerated by Science*, *supra* n. 11, at 12-15 & Ex. 3 (reviewing 28 exonerations and finding that in all 22 of the non-homicide cases the victims identified the exoneree both prior to and at trial; many cases also had additional eye-witness identification); see also Epstein, *supra* note 6 at 331 (citing to Yale law professor Edwin Borchard's book *CONVICTING THE INNOCENT* published in 1932, which documented 65 cases of wrongful conviction and concluded "Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence . . . Juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence by or on behalf of the accused . . .").

¹⁶ Pennsylvania law seemed to prohibit eyewitness expert testimony at the time of Mr. Dennis's trial and the jury did not have the benefit of expert testimony about these variables at Mr. Dennis's trial. A case addressing (continued...)

Similarly, the passage of time between an event and a later identification procedure, the presentation of suspects simultaneously rather than one at a time (sequentially), the use of a non-blind administrator, and repeated exposure to a suspect are all known system variables which can impact the reliability of an identification. To varying degrees, each of these system variable elements is present in Mr. Dennis's case. The combination of these estimator and system variables may well have had an impact on the ultimate reliability of each witness' identification.

A. A Combination of Estimator Variables Are Present in Mr. Dennis's Case

1. The Violence of the Event and the Presence of a Weapon Make Misidentification More Likely

Human memory can be greatly impacted by events as they are occurring; when the witness' attention may be diverted, peripheral images may not be properly encoded. For example, eyewitness experiments "have consistently shown that the presence of a weapon, *e.g.*, a gun or knife in the hand of the culprit, leads to a reduced ability to recognize the face of the culprit later."¹⁷ In this case, all of the witnesses who testified at trial saw a gun, and two of those people saw the assailant fire the weapon.¹⁸ The presence of the gun during the time the eyewitnesses saw the assailants creates "weapon focus" effect—the "concentration of some witness's attention on a weapon ... during a crime, leaving less attention available for viewing

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whether to reserve this precedent is pending before the Pennsylvania Supreme Court. *See Commonwealth v. Walker*, 610 Pa. 8, 17 A.3d 921 (2011).

¹⁷ Wells & Quinlivan, *Suggestive Procedures*, *supra* n. 11 at 11.

¹⁸ NT 10/5/1992 at 8 (Howard testifies that she saw a silver gun); NT 10/5/92 at 81 (Bertha testifies that the assailant "had a revolver"); NT 10/8/92 at 57 (Cameron testifies that the assailant had a silver revolver).

other items”¹⁹—applicable to this case. This finding has been accepted by courts as a well-established principle of eyewitness memory.²⁰

In addition, scientific research has also shown that highly stressful or violent events increase the likelihood that the witness will misidentify the perpetrator. Witnesses to very violent crimes and victims of highly emotional, traumatic events are less able to recall details of those events correctly than are those who view nonviolent and less emotional events.²¹ Research shows that highly stressful situations increase the risk of “false-positive” identifications. For example, in a study of military trainees subjected to either highly stressful or non-stressful interrogations, false-positive identifications occurred among the high-stress group more than twice as often as those subjected to non-stressful interrogations.²² The researchers concluded that “contrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 minutes, a large number of subjects in this study were unable to correctly identify their perpetrator.”²³

Here, stress played a role in Mr. Dennis’s case given the violent close-range shooting death of Williams. All three witnesses who testified at trial observed a portion of the incident at the time they saw the assailant.²⁴ Testifying witness Zahra Howard initially viewed the shooter

¹⁹ Elizabeth F. Loftus et al., *Some Facts About “Weapon Focus,”* 11 *Law & Hum. Behav.* 55 (1987).

²⁰ *See, e.g., State v. Henderson*, 27 A.3d 872, 905 (N.J. 2011) (noting “when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness’ description of the perpetrator”).

²¹ Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony*, Civil and Criminal § 2-8 (3d ed. 1997).

²² Charles Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 *Int’l J.L. & Psychiatry* 265, 272 tbl. 1 (2004).

²³ *Id.* at 274.

²⁴ Statement of Zahra Howard (Oct. 22, 1991); Statement of James Cameron (Oct. 22, 1991); Statement of Thomas Bertha (Oct. 22, 1991).

when she and the victim, Chedell Williams, were confronted by the two assailants who yelled, “[g]ive me your fucking earrings!” Subsequently Howard hid behind a nearby vendor stand, and remained there during the shooting.²⁵ Similarly, testifying witness James Cameron observed both the shooting and a portion of the struggle leading up to the shooting.²⁶ In addition, testifying witness Thomas Bertha observed the assailant right after the shooting, as the man ran to the getaway car.²⁷ Bertha described how the assailant “looked at” him and began to raise the gun when Bertha stepped out into the street to try to stop the assailant.²⁸ These are common situations in which eyewitness’ experiences of stress and arousal would reduce their ability to form accurate memories, and which have led to faulty identifications.²⁹

2. Witnesses Viewed the Perpetrator for a Matter of Seconds

Not surprisingly, the amount of time that an eyewitness observes a perpetrator impacts the accuracy of his identification. For example, in a study of 640 witnesses who attempted to identify suspects in 314 lineups, researchers found that witnesses who viewed the suspect for more than a minute were more likely to correctly identify the suspect than those who viewed the suspect for less time.³⁰ Subsequent researchers have called one minute the “critical value” for

²⁵ NT 10/5/92 at 9-10, 24-25.

²⁶ NT 10/8/92 at 56.

²⁷ NT 10/5/92 at 80-81.

²⁸ NT 10/5/92 at 81.

²⁹ Morgan, Accuracy of Eyewitness Memory, *supra* n. 22, at 265, 272 tbl. 1.

³⁰ Tim Valentine, Alan Pickering, & Stephen Darling, *Characteristics of eyewitness identification that predict the outcome of real lineups*, 17 Applied Cognitive Psychology 969-993 (2003).

viewing suspects.³¹ Scientific research further demonstrates that the dilatory effects on memory of the presence of weapon and high stress, discussed *supra*, are most pronounced when the event is of short duration, as it was here.

All of the witnesses who testified at Mr. Dennis's trial viewed the perpetrator for only a few chaotic seconds.³² As such, their ability to form a good memory and then accurately identify the true perpetrator—even had they viewed him under less stressful circumstances—was considerably reduced.

B. The Presence of Several Problematic System Variables in Mr. Dennis's Case Make Misidentification Likely

Much of the research on eyewitness identifications has focused on the identification process itself. While the research in this area is expansive, this brief focuses on the areas relevant to the circumstances of the various identifications in this case: (1) the time that lapsed between the crime and the identification; (2) the effect of post-identification suggestion on a witness' certainty; (3) the potential influence of a non-blind administrator; (4) the presentation of the photo arrays and live lineups to the witnesses that were shown simultaneously rather than sequentially, and (5) the presentation of a live lineup after witnesses made an identification of Mr. Dennis from a photo array where Mr. Dennis was the only person in both the photo array and the live lineup. Each is addressed in turn.

³¹ Kenneth. A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139,147–48 (2008) (citing Valentine, *supra* n. 30).

³² Howard testified that she saw the shooter for five seconds, ten seconds, and twenty seconds. NT 12/23/91 at 27, 37; NT 10/5/92 at 24-25. Bertha testified that he saw the shooter for a second, and later testified he saw the shooter for 3-4 seconds. NT 12/23/91 at 66, 85. Cameron testified that he saw the shooter for twenty seconds and later testified he saw the shooter for 30-40 seconds. NT 12/23/91 at 49, 69.

1. Time Lapse Between the Event and the Identification Impacts Recall

Scientific research has shown a witness' ability to identify a perpetrator correctly decreases rapidly over time. Scientific literature terms this the "forgetting curve."³³ The rapid decrease in the ability of a witness to remember details as time passes has major implications for the reliability of eyewitness testimony. This includes the fact that human memory necessarily degrades over time; it does not improve. Thus, the more time that elapses between an incident and an identification procedure, the less reliable and accurate a subsequent identification may be. If months, weeks, or even days pass between the crime and the lineup, the eyewitness's ability to identify the perpetrator correctly is significantly reduced.³⁴

In this case, none of the eyewitnesses was shown a photo array until three days after the crime.³⁵ Even at this relatively close time to the event, two of the eyewitnesses, Howard and Cameron, were unsure whether Mr. Dennis was the assailant.³⁶ Neither positively identified Mr. Dennis until two months later, when a live lineup was conducted.³⁷ When the third witness,

³³ See Loftus & Doyle, *Eyewitness Testimony*, *supra* n. 21, at 49-52 (discussing the classic "forgetting curve" and memory for faces); David B. Fishman & Elizabeth F. Loftus, *Expert Psychology Testimony on Eyewitness Identifications*, 4 *Law & Psychol. Rev.* 87, 90-92 (1978) (citing a study using a staged crime to test eyewitness identification after seven weeks).

³⁴ See Fishman & Loftus, *Expert Psychology Testimony*, *supra* n. 33, at 90-92 (citing a study using a staged crime to test eyewitness identification after seven weeks).

³⁵ Statement of Zahra Howard (Oct. 25, 1991) ("10/25/91 Howard Stmt."); Statement of James Cameron (Oct. 25, 1991) ("10/25/91 Cameron Stmt."); Statement of Thomas Bertha (Oct. 25, 1991) ("10/25/91 Bertha Stmt.").

³⁶ NT 10/5/92 at 33-34, 41 (Howard admitting on cross examination that she said Mr. Dennis, "[l]ooks like the guy, but I can't be sure" when she viewed the photo array); NT 10/8/92 at 74 (Cameron admitting on cross examination that he said Mr. Dennis "looked familiar, but I can't be sure" when he viewed the photo array).

³⁷ See NT 10/5/92 at 14, 34-35 (Howard); NT 10/8/92 at 60 (Cameron); NT 10/5/92 at 119 (testimony of line-up administrator Detective William Wynn that the line-up was conducted on December 19, 1991 - two months after the crime).

Bertha, was initially shown the photo array, he was unable to positively identify Mr. Dennis.³⁸ However, Bertha later indicated he was sure Mr. Dennis was the assailant.³⁹

In each case, at the time the witness's memory was strongest (i.e., closest in time to the incident), she or he was unable to make an affirmative, certain identification. Only after the passage of time—which scientific research shows substantially degrades memory—was the witness able to make a positive identification of Mr. Dennis. This, of course, runs counter to known facts about human memory, particularly the well-documented forgetting curve.⁴⁰ Because human memory degrades over time, one would expect a witness who was unsure closer in time to the incident to have an even weaker memory later. As explained below, scientific research provides explanations for this otherwise impossible “improvement” in witness memory. Such improvement frequently occurs when witnesses are exposed to multiple identification procedures in which the police suspect is the only person to appear repeatedly. In light of the well-established research on the forgetting curve and the effect of multiple viewings on both identifying and non-identifying witnesses, it is clear that the ultimate identifications made by these three witness were likely a product of memory contamination and not, in fact, an expression of a reliable, independent memory.

2. Post-Identification Suggestion May Impact Certainty

Scientific research confirms that an eyewitness' identification can be corrupted or distorted by suggestive identification procedures; suggestive procedures can affect witnesses'

³⁸ See 10/25/91 Bertha Stmt. (initially stating that Mr. Dennis “looks like the one running with the gun”).

³⁹ See *id.*; NT 10/5/92 at 87.

⁴⁰ See Loftus & Doyle, *Eyewitness Testimony*, *supra* n. 21, at 49-52 (discussing the classic “forgetting curve”).

retrospective assessment of their opportunity to view the perpetrator,⁴¹ witnesses' retrospective assessment of the attention they paid to the perpetrator during the witnessed event,⁴² and witnesses' retrospective assessment of certainty.⁴³ Three examples of common events that can falsely inflate confidence are: post-identification briefing,⁴⁴ identification by co-witnesses,⁴⁵ and

⁴¹ Wells and Quinlivan describe the research as follows:

In a series of published experiments across a variety of psychological laboratories, witnesses to simulated crimes were shown lineups that did not include the culprit and made mistaken identifications. After their mistaken identification, a suggestive remark was made by the lineup administrator that seemed to confirm their selection ("Good, you identified the suspect in the case") or no suggestive remark was made by the lineup administrator. Later, all of the witnesses were asked, "How good was the view that you had of the culprit?" and "How well could you make out details of the culprit's face while witnessing the crime?" Of course, all these witnesses had the same (quite poor) view of the culprit. And, those who were not given the confirmatory suggestive remark seemed to understand rather well that their view was very poor. In the original experiment by Wells and Bradfield (1998), for instance, none reported that their view was good or excellent. Among those who were given the confirmatory suggestive remark, however, 27% said that their view was good or excellent. Similarly, among those who were not given the confirmatory suggestive remark, none reported that they could easily make out details of the face. Among those given the suggestive remark, in contrast, 20% reported that they could easily make out details of the face. Hence, the suggestive remark managed to lead a fairly large portion of mistaken eyewitnesses who had very poor views and little or no ability to make out face details to self-report that they had a good view and could easily make out details of the face.

Wells & Quinlivan, *Suggestive Procedures*, *supra* n. 11, at 10.

⁴² *Id.* at 11 ("[N]umerous experiments show that confirmatory suggestive remarks following a mistaken identification (e.g., 'Good, you identified the suspect') lead witnesses to inflate their estimates of how much attention they paid to the culprit during the witnessed event.").

⁴³ *Id.* at 12 ("[A]s with view and attention, we know that confirmatory suggestive remarks from the lineup administrator consistently inflate eyewitness certainty for eyewitnesses who are in fact mistaken").

⁴⁴ Eyewitnesses first made the identification and then a select few witnesses were briefed on how to respond to cross-examination at trial; those who were briefed reported increased confidence in their identification, without regard to the accuracy of their selection. Michael R. Leippe and Donna Eisenstadt, *Eyewitness Confidence and the Confidence-Accuracy Relationship in Memory for People*, in 2 *The Handbook Of Eyewitness Psychology*, 377, 407 (R.C.L. Lindsay et al., eds. 2007).

⁴⁵ Test subjects made identifications, and then were told that a co-witness had also made an identification of the culprit. When the co-witness selected the same target, the test subject's confidence in her choice increased by two points on a ten point scale, yet decreased by two points if the co-witness picked someone else. *Id.* at 408.

feedback from the test administrator.⁴⁶

In this case, Howard and Cameron only tentatively identified Mr. Dennis in the photo array yet positively identified him two months later and again at the trial. As human memory necessarily degrades over time and cannot be improved, this sequence of events is not only impossible but indicative of improper post-identification suggestion. This inflation of confidence is commonly found where a witness has received some form of post-identification confirmation.

Uncertainty of a witness's initial identification was a factor in most of the DNA exonerations involving eyewitness misidentification. Indeed, fully seventy-seven percent of witnesses in known misidentification cases initially indicated some level of uncertainty in their identifications while going on to testify to relative certainty of that identification at trial.⁴⁷

3. The Influence of a Non-Blind Administrator May Have Affected Certainty

The detective who conducted the photo arrays in this case knew the identity of the prime, or suspect—James Dennis. Indeed, when Bertha viewed the photo array, he initially said Mr. Dennis's photo “looked like” the shooter. Only after the array administrator—who knew Mr. Dennis was the suspect—asked whether he was “sure” did Bertha positively identify Mr. Dennis. Similarly, other witnesses who viewed the array may have only identified Mr. Dennis because of the influence of the administrator—which cannot now be known because the procedures were not video recorded.

⁴⁶ Researchers Leippe and Eisenstadt report that where investigators gave “confirming” feedback to witnesses post-identification, not only was the confidence of the witness inflated, but also, quite disturbingly, the feedback influenced the witnesses’ “retrospective reports on the formation and quality of their memories.” *Id.* at 409.

⁴⁷ Garrett, *supra*, n. 10 at 64 (showing that in 91 of 161 trials involving mistaken identification testimony, witnesses “had not been certain at all” at initial identification, and in an additional 34 of those trials, witnesses admitted to prior uncertainty at trial).

This involvement by a non-blind administrator occurs frequently may have falsely inflated the witnesses' confidence in their identifications. This influence need not be overt; simply having an administrator with knowledge of the suspect's identity is problematic. Researchers have shown that lineup administrators familiar with the suspect may leak the 'right' answer "by consciously or unconsciously communicating to witnesses which lineup member is the suspect."⁴⁸ Psychologists refer to that phenomenon as the "expectancy effect": "the tendency for experimenters to obtain results they expect. . . because they have helped to shape that response."⁴⁹ The fact that the witnesses were initially tentative in their identifications while later expressed 'certainty' raises the important question of potential lineup administrator influence. No accusation is here made that any influence was intentional, or even overt. Rather, known scientific principles teach us that just having an administrator who knows the identity of the suspect can be problematic in terms of accurate identifications.⁵⁰

4. Simultaneous Photo Arrays and Live Lineups Affect Reliability

The great weight of empirical research has demonstrated that lineups and photo arrays yield more reliable identifications when the individual lineup members or photographs are presented to the witness sequentially rather than simultaneously.⁵¹ This disparity is linked to the phenomenon known as "relative judgment"—in essence the tendency to pick the "best choice" among those available when all options are presented at the same time (i.e., simultaneously). In

⁴⁸ See Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 *Law & Hum. Behav.* 70, 71 (2009).

⁴⁹ Robert Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 *Behav. & Brain Sci.* 377, 377 (1978).

⁵⁰ *Id.*

⁵¹ *See id.*

effect, the witness says, “relative to the other lineup members (or photographs), this person looks the most like the perpetrator.”⁵² By contrast, when lineup members or photographs are shown sequentially, the witness determines whether each matches the characteristics of the perpetrator. Furthermore, once a witness has made an identification, whether the identification is correct or not, the witness’ memory of the identification can then “replace” the person’s memory of the event.

In this case, the participants at the lineup and photos in the photo arrays were presented to the witnesses simultaneously. In the photo array shown to the eyewitnesses, Mr. Dennis’s photo was placed in the first position of six photos.⁵³ When Mr. Dennis was placed in the lineup, he was standing alongside multiple individuals.⁵⁴ This procedure encouraged witnesses to ask which of the participants *looked most like* the perpetrator rather than which participant actually *was* the perpetrator. The equivocal responses of the witnesses demonstrate that they made exactly this type of relative judgment. Indeed, none of the witnesses immediately or emphatically identified Mr. Dennis, which would indicate an accurate identification. Rather, each appeared to engage in a deliberative process before informing police they were ready to make a choice. The delay in identification is problematic given studies which have shown that those who made their decision

⁵² See Gary L. Wells, Nancy K. Steblay, and Jennifer E. Dysart, *A test of the simultaneous vs. sequential lineup methods: An initial report of the AJS national eyewitness identification field studies*. Des Moines, IA: American Judicature Society 2, available at http://www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf (“[I]f the actual perpetrator is removed from a lineup and replaced with no one, a large share of eyewitnesses who would have picked the perpetrator tend to shift to another lineup member and identify that person rather than make no identification.”).

⁵³ 10/25/91 Howard Stmt.; 10/25/91 Cameron Stmt.; 10/25/91 Bertha Stmt.

⁵⁴ NT 10/5/92 at 120-21.

in fewer than ten to twelve seconds were nearly ninety percent accurate in their identification from a lineup whereas those taking longer were approximately fifty percent correct.⁵⁵

James Cameron told police Mr. Dennis “looks familiar” but that he wasn’t “sure.”⁵⁶ Zahra Howard similarly said Mr. Dennis’s photo “looks like the guy” but she could not “be sure.”⁵⁷ Thomas Bertha said that Mr. Dennis’s photo “looks like the one running with the gun.”⁵⁸ Anthony Overstreet, who later identified an uninvolved filler at the live lineup, told police Mr. Dennis’s photo “looks like the male who shot the girl.”⁵⁹ The process of deliberation, rather than recognition, is most apparent in Clarence Verdell’s statement at the time of the photo array when he said:

The best I can say is its either #1, #5, or #8. I concentrated more on the male that was directly behind Chedell & I believe him to be the accomplice... It looks more like #5, but #3 couldn’t be rulled [*sic*] out.⁶⁰

Not one eyewitness “recognized” Mr. Dennis’s photo. Rather, each one offered an equivocal statement of identification and appeared to engage in a deliberative process before informing police they were ready to make a choice.⁶¹ The delay in identification further calls the

⁵⁵ David Dunning & Scott Perretta, *Automaticity and Eyewitness Accuracy: A 10-to-12 Second Rule for Distinguishing Accurate From Inaccurate Positive Identifications*, 5 J. Appl. Psychol. 87, 961-62 (2002).

⁵⁶ 10/25/91 Cameron Stmt; NT 10/8/92 at 60.

⁵⁷ 10/25/91 Howard Stmt; NT 10/5/92 at 14, 34-35.

⁵⁸ 10/25/91 Bertha Stmt.

⁵⁹ Statement of Anthony Overstreet (Oct. 27, 1991).

⁶⁰ Statement of Clarence Verdell (Oct. 29, 1991).

⁶¹ 10/25/91 Howard Stmt.; 10/25/91 Cameron Stmt.; 10/25/91 Bertha Stmt.; 10/27/91 Overstreet Stmt.; Activity Sheet (Oct. 28, 1991) (noting that witness David Leroy did not identify anyone in the photo array); Statement of Joseph DiRienzo Jr. (Nov. 4, 1991).

accuracy of the identifications into question, making an identification essentially a matter of probability rather than recognition.⁶²

5. Mugshot Exposure Effect Impacts the Reliability of Identifications

When a witness makes an incorrect identification, the witness' memory of the actual event is often changed; the memory of the photo replaces the memory of the perpetrator's face.⁶³ In addition, researchers have identified a more general problem with photo arrays; exposure to a mugshot decreases accuracy at a subsequent lineup as it increases "false alarms."⁶⁴ Researchers have found that exposure to a suspect's mugshot decreases the accuracy of subsequent identifications at a live line-up, a phenomenon well documented in incorrect identifications.⁶⁵

That some (but notably not all) of the witnesses went on to identify Mr. Dennis in a live lineup two months after providing only tentative photo array identifications indicates that their memories of the photo array may have "replaced" their memories of the actual event. Or, more simply, that Mr. Dennis was familiar to them because they had seen his photo previously, and had no prior exposure to the other members of the lineup. When Howard and Cameron initially viewed the photo arrays, both said they were unsure if Mr. Dennis was the assailant.⁶⁶ Cameron did not positively identify Mr. Dennis until two months later, when a live lineup was

⁶² See Loftus & Doyle, *Eyewitness Testimony*, *supra* n. 21, at 49-52 (discussing the classic "forgetting curve").

⁶³ See Jennifer Dysart et al., *Mugshot Exposure Prior to Lineup Identification: Interference, Transference, and Commitment Effects*, 86 J. Appl. Psychol. 1280 (2001).

⁶⁴ Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 Law & Hum. Behav. 287, 306 (2006).

⁶⁵ *Id.*

⁶⁶ 10/25/91 Howard Stmt.; 10/25/91 Cameron Stmt.

conducted.⁶⁷ Howard did not affirmatively identify Mr. Dennis until even later, at the preliminary hearing.⁶⁸ Cameron and Howard’s initial uncertainty, followed by a later positive identification, indicates that they may have identified Mr. Dennis based on their exposure to his photo rather than their memories of the crime.

C. Non-Identifications by Two Witnesses are Probative of Mr. Dennis’ Innocence

Counsel in this case failed to investigate two non-identifying witnesses. One, George Ritchie, who indicated he got a “good look” at the shooter and would “recognize” him again,⁶⁹ was shown photos that included Mr. Dennis’ picture. He did not identify Mr. Dennis despite police pressure to identify someone as the shooter.⁷⁰ In addition, Anthony Overstreet claimed he “recognized” the shooter.⁷¹ Yet when he attended a live lineup including Mr. Dennis, Overstreet identified a filler as the shooter.⁷² Counsel failed to investigate either Ritchie or Overstreet, and neither man testified before the jury despite being eyewitnesses to the crime.

This failure to investigate two non-identifying witnesses was particularly critical because scientific research has shown that non-identifications of a suspect provide important evidence of innocence and of misidentification by other witnesses who do make a positive identification of a suspect. Indeed, as early as 1967 – and without the scientific research on the topic first published in 1980 – the Supreme Court recognized the importance of a witness’s prior non-

⁶⁷ NT 10/8/92 at 94-95.

⁶⁸ NT 10/5/92 at 33-35.

⁶⁹ 1991 Ritchie Stmt.

⁷⁰ PCRA Evid. Hrg. NT 5/6/05 at 35-39.

⁷¹ 10/22/91 Overstreet Stmt. at 5.

⁷² NT 9/21/92 at 84.

identification.⁷³ Despite this precedent, courts have not regularly applied this logic to witnesses who fail to identify a suspect (“non-identifying witnesses”).⁷⁴ Scientific researchers have questioned this failure, particularly in light of the system’s treatment of eyewitness identifications of suspects as highly probative of guilt.⁷⁵ In the 1980 study by Wells and Clark, non-identifications were shown to be *more* probative of innocence than suspect identifications were of guilt.⁷⁶ Moreover, the study showed that as between the two possible non-suspect selections (a foil selection and a “none of the above” responses), the “none of the above” response was more predictive of innocence.⁷⁷ In addition, a 2002 study found that no choice responses, filler identifications, and “don’t know” responses, all have probative value with respect to the suspect’s innocence; sometimes no choice and filler identifications have more probative value for innocence than positive identifications of the suspect have for guilt.⁷⁸

A recent meta-analysis of ninety-four comparisons showed that suspect identifications were more diagnostic regarding a suspect’s guilt or innocence than other responses, but that non-identifications were also diagnostic of the suspect’s innocence. Importantly, given the facts of this case, the researchers found that a suspect identification is less informative *if the lineup is*

⁷³ *United States v. Wade*, 388 U.S. 218, 241 (1967).

⁷⁴ A non-identification may take the form of a witness making no choice or of a witness choosing an innocent filler.

⁷⁵ Wells & Lindsay, *On Estimating the Diagnosticity of Eyewitness Nonidentifications*, 88 PSYCH. BULLETIN 776 (1980).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Wells and Olson, *Eyewitness Identification: Information Gain from Incriminating and Exonerating Behaviors*, 8 J. OF EXPERIMENTAL PSYCHOL.: APPLIED 155 (2002).

biased and that the probative value of a suspect identification is undermined if suggestive lineup instructions increase the willingness of witnesses to make an identification.⁷⁹ They note:

Non-identifications also are straightforward. They are diagnostic of the suspect's innocence. We reiterate the point made by Wells and Lindsay (1980) that non-identifications are not merely "failures" to identify the suspect, but rather carry important information whose value should not be overlooked.⁸⁰

They further note that foil identifications appear to be diagnostic of innocence when foils are selected based on their match to the description of the perpetrator given by a witness, but not when foils are selected on their match to the suspect.

The scientific research concerning the diagnosticity of non-identifications as applied to the facts of this case leads to the conclusion that the non-identifications by Overstreet and Ritchie are more probative of Mr. Dennis' innocence than the alleged identifications of Mr. Dennis by the other witnesses—whose identifications were initially uncertain and only amounted to positive identifications after engaging in a second identification procedure and potentially after receiving suggestive feedback from non-blind administrators.

D. The Substantial Mismatch in the Witnesses' Description of the Perpetrator and Mr. Dennis' Appearance Strongly Suggest He Was Misidentified

In Professor Garrett's study of the first 250 DNA-based exonerations, he found there was a substantial mismatch between the description provided by witnesses and the actual appearance of the innocent defendant in a full 62 percent of wrongful conviction cases based in part on misidentification (100 out of 161 cases).⁸¹ This finding is not merely coincidence; scientific

⁷⁹ Clark et al., *Regularities in Eyewitness Identification*, 32 LAW AND HUM. BEHAV. 187 (2008).

⁸⁰ *Id.* at 211.

⁸¹ Garrett, *supra*, n. 10 at 68-69.

research has established that there is a correlation between the presence of incorrect descriptors and inaccurate identifications.⁸²

In this case, there are significant differences between eyewitnesses' descriptions of the shooter and Mr. Dennis's appearance. Eyewitnesses consistently described the shooter as 5' 9" or 5' 10", considerably taller than Mr. Dennis, who is 5'4".⁸³ Eyewitnesses described someone 50 pounds heavier than Mr. Dennis, who at the time of the shooting weighed 125 pounds.⁸⁴ Eyewitnesses also described the shooter as dark complected, when Mr. Dennis is medium complected.⁸⁵ The clear mismatch between Mr. Dennis's appearance and eyewitnesses' descriptions of the shooter suggests the eyewitnesses may have misidentified Mr. Dennis.

⁸² Christian A. Meissner et al., *A Theoretical Review and MetaAnalysis of the Description-Identification Relationship in Memory for Faces*, 20 Eur. J. Cognitive Psychol. 414, 431, 435 (2008) (as the number of incorrect descriptors of a suspect increases, identification accuracy decreases).

⁸³ See 10/22/91 Howard Stmt. at 4; NT 10/5/92 at 31 (Howard estimating shooter's height at 5' 9" or 5' 10"); 1991 Leroy Stmt. at 3 (estimating shooter's height at 5' 10"); DiRienzo Jr. Stmt. at 3 (estimating shooter's height at 5' 9"); NT 10/5/92 at 99-101 (Bertha estimating shooter's height as 5' 9"); 1991 Ritchie Stmt. at 6 (describing shooter as 5' 9"); NT 10/14/92 at 74-75 (demonstrating that Mr. Dennis was 5-5 with a one inch heel).

⁸⁴ 1991 Ritchie Stmt. at 3 (describing shooter as 170 pounds); NT 10/5/92 at 101 (Bertha describing shooter as 180 pounds); NT 10/14/1992 at 75 (Mr. Dennis testifying he weighed between 125-132 pounds at the time of the shooting).

⁸⁵ NT 10/5/92 at 101 (Bertha testifying the shooter was "dark skinned"); NT 10/8/92 at 67, 82 (Cameron describing shooter as darker than himself); NT 10/14/92 at 75 (Mr. Dennis testifying that he has a "brown skin" complexion).

CONCLUSION

As the United States Department of Justice has explained in relation to wrongful convictions,

In the majority of the cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence. Clearly, however, those eyewitness identifications were wrong.⁸⁶

The lesson learned from the DNA cases is that eyewitness testimony is frequently flawed and must be subject to exacting scrutiny because of its power on a jury. Because DNA evidence is not available in most cases, a lack of DNA evidence does not excuse wrongful incarceration based upon mistaken identifications. Indeed the opposite is true. As the United States Supreme Court has pointed out, in the absence of physical evidence, “the identification of strangers is proverbially untrustworthy.”⁸⁷

There is no physical evidence linking Mr. Dennis to this crime. As detailed above, there are numerous reasons to question the “proverbially untrustworthy” identifications of Mr. Dennis in this case. Incongruities between the police procedures and known scientific principles – through no outright fault of police – lead to true questions as to the strength of the evidence presented against Mr. Dennis to establish his guilt.

In light of the overwhelming empirical and scientific consensus demonstrating the fallibility of eyewitness testimony, this Court should pause before adopting the Pennsylvania Supreme Court’s mischaracterization of the eyewitness testimony as “overwhelming” evidence of Mr. Dennis’s guilt. To the contrary, as described above, scientific research calls the reliability of the eyewitness identifications of Mr. Dennis sharply into question and raises a very real

⁸⁶ Convicted by Juries, Exonerated by Science, *supra* n. 11, at 24.

⁸⁷ *Wade*, 388 U.S. at 228 (citing Felix Frankfurter, *The Case of Sacco & Vanzetti: A Critical Analysis for Lawyers and Laymen* (1927)).

possibility that Mr. Dennis is among the large and growing number of people wrongfully convicted based on eyewitness testimony.

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Respectfully submitted,

/s/ Marissa Boyers Bluestine

Marissa Boyers Bluestine (Pa. Bar No. 75973)
THE PENNSYLVANIA INNOCENCE
PROJECT
1719 N. Broad Street
Philadelphia, PA 19122
(215) 204-4255

Professor Edith Greene
University of Colorado, Colorado Springs
1420 Austin Bluffs Parkway
Colorado Springs, CO 80918

Professor Elizabeth Loftus
University of California-Irvine
2393 Social Ecology II
Irvine, CA 92697

On Behalf of *Amicus Curiae*
THE INNOCENCE NETWORK
Keith Findley, President
University of Wisconsin Law School
Clinical Professor of Law
975 Bascom Mall, Room 4318H
Madison, WI 53706

Amici Curiae

CERTIFICATE OF SERVICE

Pursuant to Local Rule 5.1.2(8) of this Court, the BRIEF OF THE PENNSYLVANIA INNOCENCE PROJECT, PROFESSOR EDITH GREENE, PROFESSOR ELIZABETH LOFTUS, AND THE INNOCENCE NETWORK AS AMICI CURIAE SUPPORTING PETITIONER has been filed electronically and is available for viewing and downloading from the ECF system. Service will be accomplished on all parties through the Notice of Electronic Case Filing.

/s/ Marissa Boyers Bluestine