IN THE SUPREME COURT

STATE OF LOUISIANA

No. 09-KK-1177

IN RE: STATE V. TRACEY YOUNG

Brief of *Amicus Curiae* in Support of
Tracey Young's Application for Rehearing
Case Number 10-06-0811 Section VII
Hon. Judge Donald R. Johnson Presiding

BRIEF OF *AMICUS CURIAE*

Kristin Wenstrom, LA Bar # 32006
Innocence Project New Orleans
3301 Chartres Street
New Orleans, LA 70117

On Behalf of *Amicus Curiae*

The Innocence Network
Keith Findley, President

and

Innocence Project New Orleans

TABLE OF CONTENTS

INTEREST OF THE *AMICI*

The Innocence Network is an association of organizations dedicated to providing *pro bono* legal and investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The forty-nine current members of the Innocence Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[1] To date, the Innocence Network's member organizations in the United States have helped to exonerate over 250 individuals with DNA testing and hundreds more without DNA testing. As perhaps the nation's leading authority on wrongful convictions, the Innocence Network is regularly consulted by officials at the state, local, and federal levels. Drawing on the lessons from cases in which innocent persons have been wrongfully convicted, the Innocence Network advocates study and reform to enhance the truth-seeking functions of the criminal justice system and to prevent future wrongful convictions. Innocence Project New Orleans (IPNO) is a founding member of the Innocence Network. IPNO is dedicated to identifying and rectifying wrongful convictions in Louisiana and Mississippi. IPNO investigates possible wrongful convictions and represents imprisoned clients with claims of actual innocence. Innocence Project New Orleans has obtained the release of fifteen men who were wrongfully convicted in Louisiana and Mississippi since its inception in 2001. IPNO also advocates for reforms in the laws in Louisiana to prevent future wrongful convictions.

Eyewitness error is the leading cause of wrongful convictions in this country, present in up to 76% of all such cases. The frequency is greater in Louisiana – nine out of the ten wrongful

---

[1] The member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defense of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Ohio Innocence Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandies Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), and the Wisconsin Innocence Project.

convictions that were subsequently overturned based on DNA evidence were the result of eyewitness misidentification. Because jurors are largely unaware of the fallibility of eyewitnesses and the procedures that can affect eyewitness reliability, the Innocence Network has a strong interest in preventing future wrongful convictions through educating jurors about the strengths and weaknesses of identifications.

STATEMENT OF THE CASE

I. The Crime

The State alleges that at 11:45pm on September 8, 2006, Mr. Aaron Arnold and Ms. Dionne Grayson were putting gasoline in her car when a man exited a white vehicle parked nearby, and approached them wielding a gun. This man demanded their wallets, and then, without warning, shots were fired. Both Mr. Arnold and Ms. Grayson were shot; Mr. Arnold subsequently died from his injuries, Ms. Grayson survived.

There were six witnesses to this crime, however only two made an identification. One of these individuals was Ms. Grayson, and the other witness, Nancy Segura, has not yet been located in order to secure her testimony at trial. None of the physical evidence from the crime scene has been linked to Mr. Young, making the single eyewitness identification by Ms. Grayson the only piece of evidence the jury will hear that connects Mr. Young to the crime.

II. Relevant Procedural History

Following Mr. Young's indictment for first-degree murder and the State's notice of intent to seek the death penalty, the defense filed a series of motions and a notice of intent to introduce expert testimony at trial from Dr. Roy Malpass. Dr. Malpass proposed to testify on the factors that may have affected the reliability of the identifications obtained during the course of the investigation of this case. Over the State's objection, the district court held a *Daubert* hearing on the admissibility of the defense expert testimony. Dr. Roy Malpass is a nationally-renowned scholar on eyewitness identification, facial recognition, and cross-cultural psychology who has been accepted as an expert on these fields in dozens of courts. At the hearing, Dr. Malpass testified, answering questions from the defense, the State, and the court itself. The district court accepted Dr. Malpass as an expert in the science of psychology with a special emphasis in the field of eyewitness identification. The court then heard testimony relating to Dr. Malpass's opinion on the relevant identification issues presented in the case. Following this testimony, the district ruled that Dr. Malpass would be permitted to testify at trial finding "that the proposed

testimony would be relevant in the event the State utilized eyewitness identifications at trial." *State v. Young*, No. 2009-KK-1177 2010 WL 1286933, *4 (La. April 5, 2010).

The State sought writs arguing that the district court "abused its discretion in finding that the proposed expert testimony would be relevant and not confusing to the jury." *Id.* The Court of Appeal denied the State's writ application. This Court "granted the State's application for certiorari to review the correctness of the district court's actions regarding the admissibility of the proposed expert's testimony." *Id.* at *5.

Following oral arguments, this Court held that "the district court erred in allowing the introduction of the testimony of the defendant's expert" and issued a *per se* rule excluding such testimony in all cases. *Id.* at *1.

SUMMARY OF ARGUMENT

The nation's courts have moved clearly and consistently towards admitting expert psychological testimony on the factors that are known to increase or decrease the accuracy of eyewitness identifications. This Court's previous opinion in this case issuing a *per se* ban on such testimony leaves this state out of step with the rest of the country. At a time when courts increasingly understand the science behind the factors that affect eyewitness accuracy, Louisiana has aligned itself with a diminishing minority of states that ignore the great strides made by the scientific community in this area.

This court's opinion overlooked the scientific research and recent case law from around the country in three main areas.

First, contrary to the Court's statement in its opinion, there is no great national debate about the admission of expert psychological testimony in the courts. All state courts that have recently addressed the issue have either: (1) created a presumption in favor of admissibility (*Utah v. Clopten*, 223 P.3d 1103 (Utah 2009)); (2) reversed previously existing *per se* bans on such testimony (*Johnson v. State*, 526 S.E.2d 549, 552 (Ga. 2000)). *State v. Schutz*, 579 N.W.2d 317 (Iowa 1998); *Commonwealth v. Christie*, 98 S.W.3 485, 488 (Ky. 2002); *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007); *State v. Alger*, 764 P.2d 119 (Idaho Ct. App. 1998)); or (3) left the issue in the discretion of the trial court on a case-by-case basis (most other states).

Second, the Court incorrectly assumed that the expert testimony offered by the defense in Mr. Young's case would not assist the jury because it addressed an area within the knowledge of the jurors and any factors that reduced or increased the accuracy of the identification in this case

could be emphasized in cross examination or closing argument. This assumption runs contrary to the clear conclusion reached by decades of published psychological and social science research. *See e.g.* Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727 (2007). This assumption has also been firmly rejected by other courts that have been faced with the issue. *See e.g. United States v. Brownlee*, 454 F.3d 131, 142 (3rd Cir. 2006).

Third, this Court's opinion suggested that expert psychological testimony on the factors affecting the potential accuracy of eyewitness identification would somehow be offered to "invalidate" the eyewitness identification testimony. *Young* at *8. This is a misunderstanding of the science, which highlights factors that that are both proven to increase and decrease the accuracy of identifications. The testimony does not "invalidate" the testimony of an eyewitness; it gives jurors the tools that they do not already possess within their general knowledge to assess the weight they will ascribe to an eyewitness's testimony in relation to the other evidence in the case. *See e.g. White v. State*, 926 P.2d 291, 294-295 (Nev. 1996).

ARGUMENT

I. There is no significant debate on whether district courts should retain discretion over the admissibility of expert testimony on the psychology of eyewitness identification; the national trend is clearly towards admission.

Since this Court decided *State v. Stucke,* 419 So. 2d 939 (La. 1982), the national trend has been towards the admission of expert testimony on the factors that affect the reliability of eyewitness identifications. Most notably, in *Utah v. Clopten*, 223 P.3d 1103 (Utah 2009) the Utah Supreme Court recently held that expert testimony on eyewitness identification shall be presumed admissible. The court held "expert testimony is generally necessary to adequately educate a jury regarding [the] inherent deficiencies" in eyewitness identification. *Id.* at 1108.

Courts across the country are overturning previous *per se* rules excluding expert testimony in favor of allowing trial courts the discretion to make admissibility decisions on a case-by-case basis. In *Johnson v. State*, 526 S.E.2d 549, 552 (Ga. 2000) the Georgia Supreme Court overruled its prior *per se* ban on eyewitness expert testimony, citing the national trend towards admitting such evidence. The court stated that, "consonant with the position adopted by '[a]n overwhelming majority of both federal and state courts that have addressed this issue,' we ... hold that the admission of expert testimony regarding eyewitness identification is in the discretion of the trial court."); *See also State v. Schutz*, 579 N.W.2d 317 (Iowa 1998) (overruling

state's *per se* rule excluding expert testimony on eyewitness identification); *Commonwealth v. Christie*, 98 S.W.3 485, 488 (Ky. 2002) (overruling state's *per se* rule excluding expert testimony on eyewitness identification); *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007) (discarding *per se* exclusion of eyewitness identification expert testimony); *State v. Alger*, 764 P.2d 119 (Idaho Ct. App. 1998) (broadening scope of admissibility of expert testimony on eyewitness identification); *Clopten*, 223 P.3d at 1106 (overturning Utah's "*de facto* presumption against admission of expert testimony on eyewitness identification").

In addition to these major shifts away from *per se* inadmissibility, many jurisdictions have been consistently ruling in favor of the introduction of expert testimony on eyewitness identification. *See e.g. Benn v. United States*, 978 A.2d 1257 (D.C. Cir. 2009) (remanding case for proper consideration because trial court failed to exercise discretion in excluding eyewitness identification expert testimony); *United States v. Brownlee*, 454 F.3d 131 (3rd Cir. 2006) (trial court erred in excluding expert testimony); *Newsome v. McCabe*, 319 F.3d 301 (7th Cir. 2003) (trial court did not abuse discretion in admitting expert testimony concerning eyewitness reliability); *United States v. Feliciano*, No. CR-08-0932-01, 2009 U.S. Dist. LEXIS 109317 (D. Ariz. Nov. 5, 2009) (admitting expert testimony on eyewitness identification); *United States v. Smith*, 621 F. Supp. 2d 1207 (M.D. Ala. 2009) (trial court did not abuse discretion by admitting eyewitness identification expert); *Ex Parte Williams*, 594 So.2d 1225, 1227 (Ala. 1992) (reversing trial court's exclusion of expert testimony in recognition of "trend in the law to allow expert testimony on the subject of human memory. In keeping with that trend, we hold that expert testimony on the subject of human memory can be introduced into evidence in cases turning on an eyewitness identification."); *Skamarocius v. State*, 731 P.2d 63 (Alaska Ct. App. 1987) (reversible error to exclude eyewitness expert testimony); *State v. Chapple,* 660 P.2d 1208, 1220 (Ariz. 1983) (trial court erred in excluding expert testimony); *People v. McDonald*, 690 P.2d 709 (Cal. 1984) (trial court prejudicially abused its discretion in excluding expert testimony on psychological factors affecting accuracy of eyewitness testimony); *State v. Alger*, 764 P.2d 119 (Idaho Ct. App. 1998) (*Scientific American* article discussing social science research disclosing problems of reliability in eyewitness identification testimony was admissible); *State v. DuBray*, 77 P.3d 247, 255 (Mont. 2003) ("It shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists."); *White v. State*, 926 P.2d 291 (Nev. 1996) (remanding for new

trial based on trial court's exclusion of expert testimony); *Echavarria v. State,* 839 P.2d 589 (Nev. 1992) (defendant should have been permitted to present expert testimony on difficulties with cross-cultural eyewitness identifications); *People v. LeGrand*, 8 N.Y.3d 449 (Ct. App. N.Y. 2007) (where case turns on eyewitness identification and there is little or no corroborating evidence; abuse of discretion to exclude expert testimony); *State v. McCord*, 505 N.W.2d 388, 391 (S.D. 1993) (trial court abused discretion in excluding expert in eyewitness identification. "Certainly, jurors have some experience and common sense knowledge of factors that may cause occasional mistakes in identification; however, they do not possess an expert's comprehensive training in assessing the reliability of identification.").

Although there are cases in which appellate courts have held that expert testimony was not relevant, there has been no trend toward *per se* exclusion of this type of evidence. Currently, only one Circuit has a *per se* rule banning this sort of testimony. *United States v. Fred Smith*, 122 F.3d 1355, 1357-59 (11th Cir.1997). However, in keeping with the trend toward admissibility, even the Eleventh Circuit considered overturning this rule. In *U.S. v. Charles Smith*, 148 Fed. Appx. 867, 872 n.8 (11th Cir. 2005), the Eleventh Circuit indicated that the defendant in that case had presented evidence that undermined the rationale for the court's 1997 decision to exclude all expert testimony and suggested that it was inclined to rule in favor of admitting the expert testimony, but could not only because it was bound by precedent. In state courts, only four have *per se* bans on the admission of eyewitness identification expert testimony and none of these courts have addressed the developments in our understanding of the science of identification in light of the DNA exonerations of the last 10-15 years.

In all other jurisdictions, state and federal appellate courts have only examined whether the trial courts abused their discretion in admitting (or excluding) such testimony, none of these courts removed that discretionary power from the purview of the trial courts. *See e.g. United State v. Brien*, 59 F.3d 274, 277 (1st Cir. 1995) (declining to adopt a blanket rule that qualified expert testimony on eyewitness identification must either be routinely admitted or excluded); *United States v. Amador-Galvan*, 9 F.3d 1414, 1417-18 (9th Cir. 1993) (declining to follow *per se* rule excluding expert testimony regarding credibility of eyewitness identification); *United States v. Smith*, 621 F. Supp. 2d 1207, 1219-21 (M.D. Ala. 2009) ("It would be anachronistic to categorically bar courts from employing the latest reliable scientific evidence in their effort to make sure that the trials that they administer resemble as closely as possible a search for

truth..."); *Campbell v. People*, 814 P.2d 1 (Colo. 1991) ("We agree that in some cases the admission of expert testimony on the reliability of eyewitness identification may be proper, but we decline to adopt a *per se* rule of admissibility. Instead, we share the view that the trial court is in a superior position to judge the advisability of allowing such testimony and, therefore, this matter is best left to the trial court's discretion."); *State v. Alger*, 764 P.2d 119, 127-28 (Idaho Ct. App. 1998) ("The courts should not categorically bar this new contribution of social science to the law. Rather, each introduction of a social framework – such as eyewitness observation research – should be evaluated carefully on its own empirical and legal merits. This evaluation requires trial judges to exercise a sound and informed discretion."); *Bomas v. State*, 987 A.2d 98, 112 (Md. 2010) (reiterating test for admissibility of expert testimony on eyewitness identification as whether testimony will be of "real appreciable help" to trier of fact); *Commonwealth v. Zimmerman*, 804 N.E.2d 336, 342 (Mass. 2004) ("The admissibility of expert testimony on the capacity of eye witnesses to make identifications is within the discretion of the trial judge.").

Over the last quarter century the national trend has been towards the admission of expert psychological testimony on the factors that affect the reliability of eyewitness identifications. If this Court's opinion in this case is left unaltered, Louisiana will be the only state court in the country to have issued a *per se* ban in the DNA age on the testimony of psychologists about the factors influencing the reliability of an eyewitness's identification. Contrary to the Court's opinion in this case, there is no significant debate about whether trial courts should retain the discretion to admit or exclude such testimony, and there is no trend toward *per se* exclusion of this evidence.

II. Contrary to the Court's prior opinion in this case, the information provided by expert testimony on eyewitness identification is not within the common knowledge of the jury, and thus does not invade the exclusive province of the jury.

Information learned from decades of experimentation and scientific research have taught us that many aspects of a human's ability to identify another person is not within the common knowledge of the jury, and therefore expert testimony on these issues does not invade the province of the jury. This Court stated that "the generalities of the inaccuracies and unreliability of eyewitness observations...are already within a juror's common knowledge and experience." *Young* at *7. This Court's opinion in this case overlooked the many journal articles, scientific studies, and court opinions that show that many of the factors that affect the reliability of eyewitness identifications are beyond the ken of the average layperson and some are actually

counterintuitive. For these reasons expert testimony is necessary to provide the jury with tools in order for them to make a determination on the reliability of a witness' identification.

Social Science and Psychological Studies

Studies have surveyed potential jurors regarding their knowledge of factors proven to impact identification accuracy, and they have consistently performed poorly. Over the past 25 years, researchers have consistently found that eligible jurors answered less than 50% of the questions correctly. Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony, in* 2 The Handbook of Eyewitness Psychology: Memory for People 453, 476-80 (R.C.L. Lindsay et al. eds., 2007). This conundrum is usually exacerbated by the fact that mistaken eyewitnesses are not lying, but rather believe, often with great confidence, in the accuracy of their identifications. In other words, it is not their creditability at issue, but their reliability. Even the most astute lawyer or observer cannot catch or detect a lie when the testifier is not lying, but genuinely believes her testimony. Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. Applied Psychol. 440 (1979); R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. Applied Psychol. 79 (1981); Gary L. Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. Applied Psychol. 688 (1981).

Many jurors (or potential jurors) are generally unfamiliar with the empirical findings of identification research and the science of perception, memory, and recall, or actually hold beliefs to the contrary. *See e.g.* Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115 (2006); Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, 453 (2007); Melissa Boyce et al., *Belief of Eyewitness Identification Evidence, in* 2 The Handbook of Eyewitness Psychology: Memory for People 501 (R.C.L. Lindsay et al. eds., 2007); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19 (1983); Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* chs. 11-13 (1995); Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*,

14 Law & Hum. Behav. 185 (1990); Michael R. Leippe & Donna Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments, in* Expert Testimony on the Psychology of Eyewitness Identification 169 (Brian L. Cutler ed., 2009); R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?* 79 (1981); J. Don Read & Sarah L. Desmarais, *Expert Psychology Testimony on Eyewitness Identification: A Matter of Common Sense, in* Expert Testimony on the Psychology of Eyewitness Identification 115 (Brian L. Cutler ed., 2009); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimentrics J. 177 (2006); Richard Seltzer et al., *Juror Ability to Recognize the Limitations of Eyewitness Identifications*, 3 Forensic Rep. 121 (1990); John S. Shaw, III et al., *A Lay Perspective on the Accuracy of Eyewitness Testimony*, 29 J. Applied Soc. Psychol. 52 (1999); Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 440 (1979); Gary L. Wells & Michael R. Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. Applied Psychol. 682 (1981); Gary L. Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 688 (1981).

In a 2007 article, Benton et al reported that survey studies show that overall there is a marked lack of correspondence between common knowledge and scientific knowledge on eyewitness issues. Specifically, Benton found that: (1) jurors underestimate the importance of factors that have been proven to affect the accuracy of an identification (e.g., lineup instructions, mugshot search, retention interval, lighting conditions, cross-race identifications, weapon presence); (2) jurors tend to rely heavily on eyewitness factors that are <u>not</u> good indicators of accuracy (e.g., relation between witness confidence and accuracy); and (3) jurors tend to overestimate accuracy rates in eyewitness identification situations and have difficulty distinguishing between accurate and inaccurate witnesses. Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony,* 475-487 (2007). Boyce et al made many of the same findings, and also concluded that people believe that witnesses are considerably more likely to be accurate than they actually are, ignore the impact of system variables on identification accuracy, and misperceive a correlation between witness accuracy and witnesses' level of detail in their testimony and/or recall for peripheral details about the event. Melissa

Boyce et al., *Belief of Eyewitness Identification Evidence*, 504-11 (2007). Based on her findings, Boyce writes that "clearly a goal should be to try to educate people about which variables actually affect eyewitness accuracy and which do not, so people can better calibrate their belief." *Id.* at 515.

Court Decisions

Courts across the country have recognized this research and it has informed the rationale of the scores of decisions on the admissibility of expert testimony on eyewitness identification. In *United States v. Brownlee*, 454 F.3d 131, 142 (3rd Cir. 2006) the Court of Appeals for the Third Circuit noted that jurors rarely enter a courtroom with an understanding of the ways in which eyewitness identifications are unreliable. Thus, the court stated, "while science has firmly established the 'inherent unreliability of human perception and memory,' this reality is outside 'the jury's common knowledge,' and often contradicts jurors' 'commonsense' understandings." *Id.* (internal citations omitted). In *United States v. Smith,* 621 F. Supp. 2d 1207 (M.D. Ala. 2009) the court held that expert testimony on eyewitnesses identification would not be prejudicial to the jury because it would "provide scientifically robust evidence that seeks to correct *misguided intuitions* and thereby prevent jurors from making common errors in judgment simply by giving them more accurate information about issues directly relevant to the case." Id. at 1219-1221 (emphasis added). Similarly, in *United States v. Feliciano*, No. CR-08-0932-01, 2009 U.S. Dist. LEXIS 109317 (D. Ariz. Nov. 5, 2009) the court noted that "many factors affecting eyewitness identification are 'not intuitively known' and often are contrary to common sense." *Id.* at *9 (internal citations omitted). The court also recognized that "'jurors are unaware of several scientific principles affecting eyewitness identifications. In fact, because many of the factors affecting eyewitness impressions are counterintuitive, many jurors' assumptions about how memories are created are actively wrong.'" *Id.* at *10 (quoting *United States v. Smithers,* 212 F.3d 306, 312 n.1 (6th Cir. 2000)). As far back as 1984, the California Supreme Court in *People v. McDonald*, 690 P.2d 709, 720 (Cal. 1984) noted that jurors know from personal experience and intuition that an eyewitness can be mistaken in their identification, and understand "the more obvious factors that can affect its accuracy, such as lighting, distance, and duration." *Id.* However, that court recognized over a quarter-century ago that scientific research had revealed other, less obvious factors that can affect the accuracy of an identification which "may be known only to some jurors, or may be imperfectly understood by many, or may be contrary to the

intuitive beliefs of most" and for that reason, expert testimony can be necessary for the jury to make a fully informed determination on the reliability of the identification. *Id.*

Finally, the Maryland Supreme Court recently encouraged trial courts in that state to recognize that "scientific advances have revealed (and may continue to reveal) a novel or greater understanding of the mechanics of memory that may not be intuitive to a layperson," and advised the courts to take this into account when deciding whether to admit expert testimony. *Bomas v. State*, 987 A.2d 98, 112 (Md. 2010).

Nation-wide, courts have digested the scores of studies and the body of research that has been generated on the sometimes surprising factors that enhance or decrease the reliability of the human process of recollection. Courts have incorporated this body of work into their opinions on expert admissibility. Louisiana will voluntarily join a diminishing minority in failing to do so.

III. Expert psychological testimony on eyewitness identifications assists jurors in understanding both the factors that are likely to increase and the factors that are likely to decrease the accuracy of an identification.

This Court's earlier opinion on this case was based on the incorrect assumption that expert testimony on eyewitness identifications only "focuses on the things that produce error without reference to those factors that improve the accuracy of identifications." *Young* at *7. Contrary to the opinion of this Court, expert testimony does not "presume[] a misidentification" by the eyewitness. *Id.* Rather, experts give jurors the tools with which they can weigh the testimony of the witness by explaining those factors that make an identification *more* reliable, and those that make it *less* reliable.

Contrary to the language of this Court's opinion, an expert does not "offer opinions on the credibility" of an eyewitness, nor do they testify "on the validity of" an identification. *Id.* at *8. Expert testimony on eyewitness identification contributes to the truth-seeking function of the jury. An expert does not presume an identification is mistaken, rather an expert provides the jury with a better understanding of how human memory and facial recognition operates, and how it is affected not only by the circumstances in which the witness observed the perpetrator, but also the circumstances in which the identification was obtained.

An expert testifies about the factors that may have affected the reliability of the identification. An expert can explain to a jury what, if any, aspects of the witness' encounter with the perpetrator would have enhanced or diminished their ability to identify the perpetrator at a

later time. An expert can also testify about the circumstances in which the identification was made. There are identification procedures that have been proven to guard against the fallibility of our memory and reduce the incidence of misidentification. When those procedures are used, an expert can testify about how this procedure improves the reliability of an identification. On the other hand, there are identification procedures that can exploit or taint a witness's memory, and are known to increase the incidence of misidentification. When these procedures have been used to obtain an identification, then the expert can explain how the procedure may have reduced its reliability.

A number of courts have recognized that expert testimony assists the jury in its search for truth. In denouncing a categorical bar on expert testimony the District Court for the Middle District of Alabama encouraged courts to employ "the latest reliable scientific evidence in their effort to make sure that the trials that they administer resemble as closely as possible a search for truth" and emphasized that such expert testimony "can only help to make factfinders more informed." *United States v. Smith*, 621 F. Supp. 2d 1207, 1219-1221 (M.D. Ala. 2009). Similarly, in 1996 the Nevada Supreme Court noted that excluding expert testimony on eyewitness identifications

> deprives jurors of the benefit of scientific research on eyewitness testimony [and] forces them to search for the truth without full knowledge and opportunity to evaluate the strength of the evidence. In short, this deprivation prevents jurors from having 'the best possible degree' of 'understanding of the subject' toward which the law of evidence strives.

White v. State, 926 P.2d 291, 294-295 (Nev. 1996) (internal citations omitted).

Circuit Court Judge Easterbrook's concurring opinion in *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999) summarizes well the value of expert testimony on eyewitness identification:

> Jurors who *think* they understand how memory works may be mistaken, and if these mistakes influence their evaluation of testimony then they may convict innocent persons. A court should not dismiss scientific knowledge about everyday subjects. Science investigates the mundane as well as the exotic. That a subject is within daily experience does not mean that jurors know it *correctly*. A major conclusion of the social sciences is that many beliefs based on personal experience are mistaken. The lessons of social science thus may be especially valuable when jurors are sure that they understand something, for these beliefs may be hard for lawyers to overcome with mere argument and assertion.

Id. at 1118. Rejecting the contention that a juror's common knowledge about the fallibility of memory is sufficient to accurately gauge the reliability of an eyewitness identification, the Wisconsin Appellate Court for the Seventh Circuit emphasized the importance of expert testimony,

> The question that social science can address is how fallible, and thus how deeply any given identification should be discounted. That jurors have beliefs about this does not make expert evidence irrelevant; to the contrary, it may make such evidence vital, for if jurors' beliefs are mistaken then they may reach incorrect conclusions. Expert evidence can help jurors evaluate whether their beliefs about the reliability of eyewitness testimony are correct.

United States v. Bartlett, 567 F.3d 901, 906 (7th Cir. Wis. 2009).

In overturning the district court's decision to allow expert testimony in this case, the Court overlooked the trend in the case law across the country that suggests an increased understanding from courts about the complexity of eyewitness identifications, and the fact that without aid from an expert, jurors lack the knowledge to accurately weigh eyewitness identification evidence. The Court incorrectly assumed that deficiencies in eyewitnesses' ability to identify the perpetrator can "easily be highlighted through effective cross-examination and artfully crafted jury instructions." *Young* at *8. This issue has been discussed at length in court opinions and scholarly journals, and the conclusion consistently reached is that cross-examination and jury instructions do not sufficiently educate the jury on the factors that affect the reliability of eyewitness identifications. *See, e.g., Clopten* at 1108 ("In the absence of expert testimony, a defendant is left with two tools – cross-examination and cautionary instructions – with which to convey the possibility of mistaken identification to the jury. Both of these tools suffer from serious shortcomings when it comes to addressing the merits of eyewitness identifications."); *United States v. Downing,* 753 F.2d 1224, 1230 n. 6 (3d Cir.1985) ("To the extent that a mistaken witness may retain great confidence in an inaccurate identification, cross-examination can hardly be seen as an effective way to reveal the weaknesses in a witness' recollection of an event."); Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727 (2007); Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony,* Fed. Cts. L.Rev. 1, 25 (2007) ("Jury instructions do not explain the complexities about perception and memory in a way a properly qualified person can. Expert testimony ... can

do that far better than being told the results of scientific research in a conclusory manner by a judge[,] especially since jury instructions are given far too late in a trial to help jurors evaluate relevant eyewitness testimony with information beyond their common knowledge." (internal quotation marks omitted)); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory,* 1 Psychol. Pub. Pol'y & L. 909, 924 (1995) ("Finally, judge's cautionary instructions also are no panacea. Current versions are inaccurate, overly broad, and easily lost amid a lengthy presentation of other closing instructions. Moreover, research ... suggests instructions do not effectively teach jurors about how to evaluate eyewitness testimony." (citations omitted)); Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions,* 42 Am.Crim. L.Rev. 1271, 1277 (2005) ("Although cross-examination is a powerful tool for exposing lies, it is not particularly effective when used against eyewitnesses who believe they are telling the truth."); Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error,* 97 J.Crim. L. & Criminology 807, 833 (2007) ("[J]udges' instructions do not serve as an effective safeguard against mistaken identifications and convictions and ... expert testimony is therefore more effective than judges' instructions as a safeguard." (omission in original) (internal quotation marks omitted)); Cindy J. O'Hagan, Note, *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony,* 81 Geo. L.J. 741, 754-55 (1993) ("Jury instructions should not be abandoned; they do have some value. But in some instances, courts have used jury instructions as an excuse to exclude expert testimony, claiming it is redundant. Because expert testimony is a more effective solution, jury instructions should be used as a complement to the expert testimony, not as a substitute." (footnote omitted)); Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 Stan. L.Rev. 969, 994-95 (1976) ("[T]he witness on cross-examination will not and cannot reveal the factors that may have biased the identification, for many of these influences operate unconsciously."); *id.* at 1002-05 ("Although special cautionary instructions regarding the unreliability of eyewitness testimony take a step in the right direction, they probably do not provide much protection against conviction of the innocent.").

Courts have consistently recognized that testimony on the factors that affect the accuracy of eyewitness identifications do not "invalidate" that testimony. The expert testimony provides jurors with valuable evaluation tools that they do not otherwise possess. Knowing how and why

different factors affect the accuracy of eyewitness identifications helps jurors see the strengths and weaknesses of the testimony before them.

CONCLUSION

Discussing this very issue in 2007, the Tennessee Supreme Court acknowledged that, "Times have changed." *Copeland*, 226 S.W.3d at 299 (Tenn. 2007). However, this Court's opinion leaves Louisiana virtually alone in the age of DNA exonerations in creating a *per se* rule banning the admission of expert psychological testimony on the factors affecting the accuracy of eyewitness identification. This Court's opinion in the case does not take account of the voluminous research demonstrating how such expert testimony assists jurors. The Court's opinion also seems to discard the recent consideration that all other courts have given the issue around the country. Granting rehearing in this case still allows this Court to find that the trial court abused its discretion in this case by admitting Dr. Maplass's testimony. However, keeping a *per se* rule of inadmissibility is a step backwards in an age when science has shown us that eyewitnesses are frequently the inadvertent cause of innocent men spending decades in prison for crimes they did not commit.

Undersigned *amici* respectfully urges this Court to reconsider its opinion creating a *per se* ban on the admission of expert psychological testimony regarding the factors affecting the accuracy of eyewitness identifications.

Respectfully Submitted

Kristin Wenstrom, LA Bar # 32006
Innocence Project New Orleans
3301 Chartres Street
New Orleans, LA 70117

On Behalf of *Amicus Curiae*

The Innocence Network
Keith Findley, President

and

Innocence Project New Orleans

VERIFICATION AND CERTIFICATE OF SERVICE

BEFORE ME, the undersigned authority, personally came and appeared Kristin Wenstrom who, being duly sworn, deposed and said that she is acting as counsel for the Innocence Network and Innocence Project New Orleans, that the statements contained in the forgoing Brief of *Amicus Curiae* are true and correct to the best of her information, knowledge and belief, and that a copy of the forgoing Brief of *Amicus Curiae* and Motion for Leave to File have been forwarded to the following by U.S. Mail:

Dylan C. Alge
Assistant District Attorney
Nineteenth Judicial District Court
Parish of East Baton Rouge
222 St. Louis Street #550
Baton Rouge, LA 70802
(225) 389-4706

Hon. Donald Johnson
Nineteenth Judicial District Court
Parish of East Baton Rouge
222 St. Louis Street #550
Baton Rouge, LA 70802
(225) 389-4706

Mark D. Plaisance
Margaret Lagattuta
Mark V. Marinoff
Office of the Public Defender
300 Louisiana Avenue
P.O. Box 3356
Baton Rouge, LA 70821-3356
(225) 389-3150

On the 27th day of April, 2010.

Kristin Wenstrom, LA Bar # 32006
Innocence Project New Orleans
3301 Chartres Street
New Orleans, LA 70117

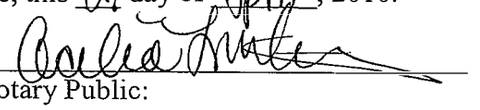
On Behalf of *Amicus Curiae*

The Innocence Network
Keith Findley, President

and

Innocence Project New Orleans

SWORN TO AND SUBSCRIIBED before me, this 27 day of April, 2010.



Notary Public:

: