IN THE FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

No. _____

IN RE: CALVIN DUNCAN V. BURL CAIN

Brief of *Amicus Curiae* in Support of
Calvin Duncan's Application for Supervisory Writs
Case Number 290-908 "G"
Hon. Judge Julian Parker, Presiding

BRIEF OF *AMICUS CURIAE*

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INTEREST OF AMICUS CURIAE

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 thirty-eight current members of the Network represent hundreds of prisoners with innocence claims in all fifty states, the District of Columbia, and abroad.[1] The Innocence 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 from cases in which innocent persons have been wrongfully convicted, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system and to ensure that future wrongful convictions are prevented.

In the present case, Calvin Duncan is seeking a discretionary writ from the lower court's denial of his claims for post-conviction relief. Mr. Duncan argues that the lower court refused to hear the merits of his claims based on the erroneous application of a procedural time bar. Specifically, Mr. Duncan argues that newly discovered evidence demonstrates that his conviction is infirm with the taint of

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[1] The member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defense of the Wrongly Convicted (Canada), California & Hawai'i 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, Griffith University Innocence Project (Australia), Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, 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), Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), 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, Ohio Innocence Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University-Justice Brandeis Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, Wesleyan Innocence Project (Texas), and Wisconsin Innocence Project.

constitutional violations under *Brady*. The Innocence Network urges this Court to ensure that Mr. Duncan's *Brady* claims be examined on the merits in light of the frailty of the evidence supporting his conviction. Indeed, Mr. Duncan's conviction rests almost exclusively on a single, dubious eyewitness identification. This brief explains how the eyewitness identification in this case is flawed and therefore not a sufficient basis upon which to rest Mr. Duncan's conviction in light of the *Brady* evidence.

Social scientists and psychologists have extensively studied eyewitness identifications and found that under certain circumstances—like those present in this case—eyewitness identifications can be severely unreliable. In these studies, researchers have analyzed a variety of characteristics of eyewitness identifications in order to determine what specific attributes of an identification will make it more or less likely to be inaccurate. In light of the data that scientists have uncovered, courts are increasingly wary of eyewitness testimony.

And rightfully so. In recent years, exonerations in over 200 cases based on DNA evidence have revealed a noteworthy pattern: An overwhelming majority of false convictions were based at least in part on eyewitness misidentifications. Notably, at the time this Court first examined the strength of the identification in Mr. Duncan's case in 1994, only twenty men had been exonerated through post-conviction DNA testing. Since then, an additional 197 prisoners have been exonerated through DNA testing, and over 75% of them were convicted on the basis of mistaken eyewitness identifications. The pattern demonstrates that eyewitness misidentifications are all too common and often result in what may well be the ultimate failure of the legal system—wrongful convictions. The lessons of these hundreds of DNA exonerations should not be ignored. Especially where eyewitness identifications are weak and form a major basis for a conviction, these wrongful convictions reveal the need for careful scrutiny by courts.

In light of the empirical and scientific data in this area, the Network has a strong interest in reminding courts of the flaws inherent to eyewitness identifications. In particular, the Network encourages courts to re-examine convictions where eyewitness identifications are particularly weak, especially where newly discovered evidence may exculpate a potentially wrongfully convicted person. In short, the Network encourages courts to look at the merits of claims for relief in cases, like Mr. Duncan's, where a conviction rests on a single eyewitness identification and new evidence suggests that the identification is unreliable.

FACTUAL BACKGROUND

A brief review of the facts regarding the eyewitness identification in this case is warranted.[2] Kristie Emberling was the sole eyewitness in this case. At the time of the incident, Ms. Emberling, a white female, was 15 years old. She watched as an unknown black man shot her boyfriend in the head during the commission of a robbery.

There are at least five different accounts of Ms. Emberling's descriptions of the assailant. While the accounts are inconsistent, it seems that the perpetrator was a light-skinned, heavyset black man. According to the arrest report, Mr. Duncan is dark-skinned, and according to medical regards taken before and after the incident, he had a medium build. Mr. Duncan had gold teeth at the time; the shooter did not. Ms. Emberling's description of the shooters' clothing changed across the varied accounts.

Seven months after the incident, a detective administered a photo-array lineup at Ms. Emberling's home which included Mr. Duncan's photograph. During the photo-array lineup, Ms. Emberling favored Mr. Duncan's photograph,

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[2]   Throughout this brief, the Network relies on the facts as presented in Petitioner's writ application. Any discrepancies are duly noted.

but she was unable to make a positive identification. It was not until sometime later that Ms. Emberling called the detective to follow up and settled on identifying Mr. Duncan. The evidence on the timing of Ms. Emberling's hesitation is inconsistent. According to the detective's report, Ms. Emberling called back within an hour; according to the New Orleans Police Department daily, it was twelve hours after Ms. Emberling was first shown Mr. Duncan's photograph; according to Ms. Emberling's grand jury testimony, it was up to a week later. No matter which account is correct, it is clear that Ms. Emberling hesitated for *at least* one hour before calling back to make her initial identification.

Another seven months passed before Ms. Emberling made her in-person identification. Ms. Emberling chose Mr. Duncan from the lineup. Notably, Ms. Emberling made this in-person identification of Mr. Duncan about a month after watching Mr. Duncan's televised extradition (from Oregon to Louisiana). Moreover, Ms. Emberling later revealed that she needed to see Mr. Duncan in person in order to make a positive identification and only really become certain of her initial photo identification after seeing him being extradited on television.

According to Ms. Emberling's pre-trial hearing testimony and the police notes on the lineup, the lineup consisted of suspects from various unrelated cases. The witnesses from these other multiple cases viewed the lineup together with Ms. Emberling. The police notes on the lineup revealed that the lineup was not tailored to the assailant's description (or that of Mr. Duncan), but instead included six individuals who ranged from 19 to 28 years in age, 118 to 185 pounds in weight, and 5′ 6″ to 5′ 10″ in height.

SUMMARY OF ARGUMENT

The Network does not dispute that eyewitness testimony often plays a critical role in solving crimes. However, an overwhelming and vast body of scientific research has carefully examined eyewitness testimony and identified

several severe flaws that must not be ignored. Certain factors—such as the characteristics of the eyewitness, the circumstances of the crime event, and the nature of the identification process itself—have a significant impact on the accuracy of eyewitness identifications. The studies in this area have been confirmed by the empirical data. Eyewitness misidentification is the single most common trait among cases where DNA evidence has conclusively demonstrated the innocence of a convicted person. In many of those cases, the eyewitness identification suffered from the very flaws identified as problematic in the scientific research. Because of new scientific research and empirical data, our understanding of eyewitness identifications and their inherent flaws has grown considerably since this Court last saw Mr. Duncan's case over ten years ago.

As the Louisiana Supreme Court observed: "Eyewitness testimony is at the same time the most trusted of evidence and too often the least reliable." *State v. Hammons*, 597 So. 2d 990, 998 n.8 (La. 1992) (citations omitted). Thus exists a troubling dichotomy: On the one hand, eyewitness testimony is often the sole evidence available to solve a crime; on the other hand, eyewitness testimony is frequently inaccurate, leading to wrongful convictions.

The Innocence Network submits that the liberty interests of the potentially wrongfully convicted—and the lessons we have learned concerning the perils of misidentification through over 200 DNA exonerations—tip this balance in favor of careful scrutiny of eyewitness testimony. It is precisely because eyewitness identifications are often so critical to convictions that courts must ensure the accuracy of these identifications. Therefore, it is particularly important that courts remain wary of convictions predicated heavily on eyewitness identifications—especially where the circumstances of the identification indicate unreliability—and that courts not decline to consider new exculpatory evidence simply because of the

existence of a single eyewitness identification, even when that evidence arises years after the conviction.

In light of both the scientific and empirical evidence undermining the reliability of eyewitness identifications, as well as the growing national understanding of the role this science must play in improving the criminal justice system, eyewitness identifications should be rigorously scrutinized by courts. This is especially true in cases like Mr. Duncan's, where the conviction rests primarily on the identification of a single eyewitness and other evidence strongly undermines the conviction. As the American Bar Association explained earlier this year, the risk of misidentification and wrongful conviction "is highest when identification of the defendant is a crucial issue, little or no evidence has been presented corroborating the eyewitness identification and the circumstances raise doubts about the reliability of the identification." American Bar Association, Section of Criminal Justice Committee on Rules of Criminal Procedure, Evidence and Police Practices, Fordham University Law School, Minutes of Meeting, at 5 (January 4, 2008).

As explained in greater detail below, Ms. Emberling's identification of Mr. Duncan is problematic because it arose out of circumstances that the scientific literature has shown often yield misidentifications. First, Ms. Emberling's identification of Mr. Duncan was a cross-racial identification, which is the type of identification most susceptible to error. Second, her initial identification of Mr. Duncan in a photo array was made seven months after the crime and only then after an appreciable period of hesitation and uncertainty. Third, her in-person identification was made seven *more* months after that and after seeing Mr. Duncan in the highly suggestive context of his extradition to Louisiana. In addition to that, the circumstances of the line-up—in which police did not even attempt to include individuals who looked similar to Mr. Duncan or the perpetrator—were plainly

problematic. In sum, the improbability of Ms. Emberling's ability to properly observe and recall under the circumstances, the passage of time between the crime and the identifications, and the highly suggestive nature of the identification process present a grave risk that a misidentification took place in this case.

For these reasons, the Innocence Network strongly urges this Court to reexamine Ms. Emberling's eyewitness identification and the other newly discovered evidence that might support Mr. Duncan's claim of innocence.

ARGUMENT

I. Development of Scientific Research Regarding the Reliability Eyewitness Identification

The idea that eyewitness misidentification is one of the most common causes of wrongful convictions is not new. *See, e.g.*, Edwin M. Borchard, *Convicting the Innocent* (1932). Yet early academic literature on the topic was largely ignored by the legal community. It was not until 1965 that the issue began to gain national attention from Patrick M. Wall's groundbreaking book entitled *Eye-Witness Identification in Criminal Cases*. In his book, Wall explained in common-sense terms how witnesses often misidentify suspects, that even trained observers err in identifications, how fear may affect a witness's memory, and that juries often place undue weight on evidence of identification. *See* Wall, *Eye-Witness Identification in Criminal Cases* 11–24 (3d ed. 1975).

In light of Wall's book, other scientists began to pay attention to the myriad of problems involved in eyewitness identifications. Throughout the 1970s, several peer-reviewed psychological research studies analyzed the effect of the human mind on eyewitness misidentifications. *See, e.g.*, David B. Fishman & Elizabeth F. Loftus, *Expert Psychology Testimony on Eyewitness Identifications*, 4 Law & Psychol. Rev. 87 (1978); Felice J. Levine & June L. Tapp, *The Psychology of Criminal Identification: The Gap From* Wade *to* Kirby, 121 Pa. L. Rev. 1079

(1973). Those studies overwhelmingly confirmed common sense: "Research on perception and memory suggests strongly that any eyewitness report should be evaluated cautiously and skeptically." Robert Buckhout, *Psychology & Eyewitness Identification*, 2 Law & Psychol. Rev. 75, 75 (1976).

As the research grew more solid, state and federal courts across the nation slowly began to recognize the importance of carefully scrutinizing eyewitness identifications. Indeed, numerous courts—including the United States Supreme Court—cited Wall's book for the proposition that greater care was needed in obtaining and relying on eyewitness identifications in criminal cases. *See, e.g.,United States v. Wade*, 388 U.S. 218, 229–34 (1967); *United States v. Smithers*, 212 F.3d 306, 311–12 (6th Cir. 2000); *People v. Beckford*, 532 N.Y.S.2d 462, 465 (N.Y. Gen. Term 1988).

During the 1980s and 1990s, psychological research expanded as researchers began to use scientific experiments to approximate the experiences of actual witnesses and to look for factors that might lead to misidentification. *See, e.g.,* Gary L. Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy*, 1 Psychol. Pub. Pol'y & L. 726, 726–27 (1995); Frederick E. Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 La. L. Rev. 721, 730 (1985); Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony, Civil and Criminal* § 2-3 (3d ed. 1997); Gary L. Wells, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603 (1998).

Over the last few decades, the peer-reviewed scientific literature has progressed far beyond mere common sense and now includes years of practical and simulated experiments, studies of the human memory process, and cognitive research. Researchers' "understanding of mistaken identification has matured greatly, so that we now have a rather large body of peer-reviewed, scientific

literature that forms an increasingly coherent picture of how mistaken identifications occur." Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, 29 The Champion 12 (2005). The research increasingly confirms the flaws in eyewitness identifications, as well as the psychological reasons for those flaws.

Indeed, psychological research today definitively shows that there are several contextual conditions that dramatically increase the likelihood that an eyewitness identification is wrong. Some of these complicating factors include: the presence of a weapon; the stress or violence associated with an event; the passage of time before the identification; suggestions by others; police tactics in conducting identifications; and differences in race between the witness and the accused. A review of the facts in this case reveals that many (if not all) of these factors were present in Ms. Emberling's eyewitness identification of Mr. Duncan.

II. Factors that Contribute to Misidentifications

There are contextual conditions that reduce an eyewitness's ability to properly identify the person whom he or she observed committing a crime. These factors can best be understood by dividing them into three main categories: the characteristics of the eyewitness; the circumstances of the crime event; and the identification process itself. Simply put, the presence of certain factors increases the probability of a misidentification. Each category and the factors demonstrating the extraordinary risk that Ms. Emberling misidentified Mr. Duncan as the perpetrator are discussed below.

A. Characteristics of the Eyewitness

Among the eyewitness characteristics that affect the accuracy of identification, race is perhaps the most well-studied. Over the years, numerous studies have conclusively shown that people of one race are frequently unable to accurately distinguish and identify people of other races. *See* Christian A.

Meissner & John C. Brigham, *Eyewitness Identification: Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3 (2001) (analyzing data from 39 research articles and 91 samples). "The evidence is now quite clear that people are better able to recognize faces of their own race or ethnic group than faces of another race or ethnic group." Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Annu. Rev. Psychol. 280–81 (2003). As a result of this research, several courts have adopted special jury instructions asking jurors to consider the problems with cross-racial identifications in assessing a witness's testimony. *See, e.g., United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972); *People v. Palmer*, 154 Cal. App. 3d 79 (Cal. Ct. App. 1984); *State v. Long*, 721 P.2d 483, 492 (Utah 1986); *New Jersey v. Cromedy*, 727 A.2d 457 (N.J. 1999).

In fact, just earlier this year, the Criminal Justice Section of the American Bar Association's Committee on Rules of Criminal Justice, Evidence, and Police Practice officially adopted the position "that Federal and state trial judges should consider giving a cross-racial identification jury instruction in certain situations to guard against the heightened risk of misidentification and wrongful conviction." American Bar Association, Section of Criminal Justice Committee on Rules of Criminal Procedure, Evidence and Police Practices, Fordham University Law School, Minutes of Meeting, at 5 (January 4, 2008). The Committee found that "[t]he risk is highest when identification of the defendant is a crucial issue, little or no evidence has been presented corroborating the eyewitness identification and the circumstances raise doubts about the reliability of the identification." *Id.* Finally, the Committee proposed model instructions, which candidly direct jurors to "consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race." *Id.*

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The identification in this case was cross-racial: The record shows that both the perpetrator and Mr. Duncan were black men, and that Ms. Emberling was a 15-year-old white girl. Importantly, Ms. Emberling's identification exhibits all the factors that the ABA Committee warned create a "heightened risk of misidentification and wrongful conviction"; specifically, the "identification of the defendant is a crucial issue, little or no evidence has been presented corroborating the eyewitness identification and the circumstances raise doubts about the reliability of the identification." Yet, of course, the jury did not have the benefit of an instruction on cross-racial identifications.

Specific evidence in this case further bolsters the scientific probability that Ms. Emberling could not cross-racially identify the perpetrator. First, Ms. Emberling made the odd comparison of the shooter to "the creature from the black lagoon, the lips and eyes." Second, she gave several different descriptions of the perpetrator to the police officers the week of the crime. Finally, Ms. Emberling seems to have consistently described the perpetrator as light-skinned; however, Mr. Duncan is dark-skinned. The general problems with cross-racial identifications as proven in the numerous studies—combined with Ms. Emberling's statements that demonstrate her specific difficulty in distinguishing among black people—draw her identification of Mr. Duncan into serious question.

B.   Circumstances of the Event

In its closing argument, the prosecution argued that Ms. Emberling would never have forgotten the face of the man who shot her boyfriend. However, this statement directly contradicts the science which shows that people are actually *less* likely to accurately remember a culprit's face during highly violent crimes involving weapons than during less violent crimes.

Indeed, according to the research in this area, 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. Loftus & Doyle, *Eyewitness Testimony* at § 2–8; Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687 (2004) (reviewing and analyzing twenty-seven tests on the effects of heightened stress on eyewitness identification); *see also* 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) (study showed that false-positive identifications occurred more than twice as often among high-stress group than among those subjected to non-stressful activities).

Moreover, the presence of a weapon during a crime causes the witness to focus on the weapon and reduces the witness's ability to recall other details, including what the perpetrator looked like. Elizabeth F. Loftus et al., *Some Facts About "Weapon Focus,"* 11 Law & Hum. Behav. 55 (1987); A. Maas & G. Kohnken, *Eyewitness Identification: Simulating the "Weapon Effect,"* 13 Law & Hum. Behav. 397 (1989); Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413 (1992) (analyzing the data and results of twelve tests conducted since 1976). Quite simply put, the presence of weapons is distracting and "draws attention away from other things such as the culprit's face." Wells & Olson, 282.

Ms. Emberling experienced robbery at gunpoint and watched as her boyfriend was shot in the head. The presence of a weapon—combined with the violence perpetrated against her loved one—make this exactly the type of crime that impairs the witness's ability to recall details accurately. The traumatic nature of the crime decreases the probability that Ms. Emberling accurately identified the perpetrator after the fact.

C.   Nature of the Identification Process Itself

Much of the research on eyewitness identifications has focused on the identification process itself. While the research in this area is quite expansive, this brief will focus on the four areas that are particularly relevant to the circumstances of Ms. Emberling's identification of Mr. Duncan: (1) the time that lapsed between the crime and the identification; (2) the amount of time the witness takes to render an identification; (3) general problems inherent to most lineups, especially with "fillers" (or non-suspects) who do not sufficiently match the description of either the perpetrator or the suspect; and (4) the effect of post-identification suggestion on a witness's certainty. Each issue is addressed in turn.

1.   Time Passage Between Crime Event and Identification

A witness's ability to correctly identify a perpetrator decreases rapidly over time. *See* Loftus & Doyle, *Eyewitness Testimony*, at 49–52 (discussing the classic "forgetting curve" and memory for faces); Fishman & Loftus, 4 L. & Psychol. Rev. at 90–92 (citing a study using a staged crime to test eyewitness identification after seven weeks). That is, the longer the time between the crime event and the witness's first opportunity to make an identification, the higher the risk of misidentification. Thus, the passage of months, weeks, or even days between the crime and the lineup significantly reduces the eyewitness's ability to accurately identify the perpetrator. Here, more than *seven months* passed before Ms. Emberling made her initial identification of Mr. Duncan from a photo array. As a result of this long passage of time, the probability that Ms. Emberling could accurately identify the perpetrator declined significantly by the time she ultimately made her initial identification.

2.   Amount of Time Witness Takes Rendering Identification

The amount of time an eyewitness takes during the actual identification process has also been studied by researchers. Witnesses who make identifications

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quickly are more likely to be accurate in their identifications than witnesses who

hesitate even slightly. David Dunning & Scott Perretta, *Automaticity and*

eyewitness accuracy: a 10- to 12- second rule for distinguishing accurate from

inaccurate positive identifications, 87 J. Appl. Psychol. 951–62 (2002); Dunning &

Stern, *Distinguishing accurate form inaccurate identifications via inquires about*

decision processes, 67 J. Pers. Soc. Psychol. 818–35 (1994); Robinson et al.,

Reaction time and assessments of cognitive effort as predictors of eyewitness

memory, accuracy and confidence, 82 J. Appl. Psychol. 416–25 (1997); Smith et

al., *Post-dictors of eyewitness errors: Can false identifications be diagnosed?*, 85

J. Appl. Psychol. 542–50 (2000); Sporer, *Eyewitness identification accuracy,*

confidence, and decision times in simultaneous and sequential lineups, 78 J. Appl.

Psychol. 22–33 (1993). In one study, researchers found that people who made

their identification decision in less than 10–12 seconds were nearly 90% accurate

in their identifications. Dunning & Perretta (2002). On the other hand, people

who took longer to make their identifications were only approximately 50%

correct. *Id.*

Here, newly discovered evidence after the trial revealed that when Ms.

Emberling first viewed a photo-array lineup[3] including Mr. Duncan's picture, she

did not make a positive identification at all. Instead, she called the detective back

at some point later[4] to make a tentative identification. Even after she called the

detective back, according to her own statement, she did not make a firm

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[3]   Notably, the photo-array lineup was conducted in the presence of the lead detective in the
case. The detective was aware that Mr. Duncan was the suspect and therefore the lineup
was not conducted in a "double-blind" fashion (i.e., where neither the lineup
administrator nor the eyewitness knows the identity of the suspected culprit). This is
problematic because lineup administrators may "inadvertently communicate their
knowledge about which lineup member is the suspect and which members are merely
fillers to the eyewitness through various verbal and nonverbal means." *See* Wells &
Olson, *Eyewitness Identification*, at 289.

[4]   As outlined in the Factual Background section, the facts regarding the period between the
photo-array lineup and her call to the detective are a point of inconsistency in the record.
However, it seems the period was between one day and one week of the photo-array
lineup.

identification until *after* she saw Mr. Duncan being extradited on television over *five months* after she first saw his photo—a period well over the 10–12 seconds common to accurate identifications.

3. General Lineup Problems

Voluminous research has shown that certain procedures used in lineups increase the likelihood of misidentification. No discussion of eyewitness identifications would be complete without some mention of lineup problems— especially in light of some of the problematic procedures that are implicated in this case.

One of the most pervasive and severe problems in lineups is that eyewitnesses tend to misidentify a person in a lineup as a culprit simply because— out of the individuals present in the lineup—the person looks the most like the actual culprit. "[M]istaken identifications [are] four times as prevalent when the fillers [or non-suspects] in a lineup d[o] not match the witness' descriptions of the culprit than when the fillers matched the witness' descriptions of the culprit." Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, 29 The Champion 12 (2005); *see also* Gary L. Well et al., *On the Selection of Distractors for Eyewitness Lineups*, 78 J. Applied Pscyh. 835–44 (1993). In other words, witnesses tend to choose someone in the lineup no matter what. When only one of the people in the lineup actually matches the perpetrator's description, the witness is most likely to identify that person as the culprit, regardless of whether the witness is actually certain that the person was the culprit of the crime.

Lineup procedures contribute to another psychological problem that leads to erroneous identifications, coined the "removal-without-replacement" effect:

> This effect was first demonstrated in 1993 in an experiment in which 200 witnesses to a staged crime were shown one of two lineups. In one lineup, the perpetrator was present. In the other lineup the perpetrator was removed from the lineup and not replaced. All witnesses were warned that the actual perpetrator might not be in the

lineup. When the perpetrator was present, 54 percent of the witnesses were able to pick him out and 21 percent made no identification. The remaining witnesses selected someone else from the lineup, the most popular other choice being person number two, who received 13 percent of the choices.

What happened when the perpetrator was removed from the lineup? Even though the witnesses were warned that the perpetrator might not be in the lineup, most of the witnesses simply selected the "next best" person, number two, whose rate of identification rose to 38 percent. *In other words, removal of the perpetrator did not result in most witnesses shifting toward the no-choice option. Instead, most witnesses simply shifted to someone else in the lineup.*

Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, 29 The Champion 12–13 (2005) (emphasis added). The "removal-without-replacement" effect demonstrates that, despite special instruction that the culprit may not be in the lineup, eyewitnesses feel psychologically compelled to choose *someone*—irrespective of whether that person is actually the culprit of the crime they witnessed. As mentioned, this problem is exacerbated where several of the individuals placed in the lineup do not match either the suspect or the actual culprit's descriptions. If the culprit is not present, the witness is likely to mistakenly identify the "second-best" choice.

After the photo-array lineup, Ms. Emberling indicated that the in-person lineup would be particularly important because she needed to see Mr. Duncan in person in order to make a positive identification. Despite the importance of the in-person lineup in this case, the lineup was far from adequate. The evidence in this case shows that the in-person lineup in which Ms. Emberling made her identification of Mr. Duncan was not specifically tailored to include fillers (or non-suspects) who resembled his description or that of the culprit. No special lineup was created for this case at all. Instead, the lineup consisted of suspects from various other crimes who were placed all together for simultaneous viewing by witnesses of a variety of crimes. As a result, the lineup was extremely random and included six individuals who ranged from 19 to 28 years in age, 118 to 185 pounds

in weight, and 5′ 6″ to 5′ 10″ in height. The likelihood of misidentification under these circumstances is high because the other individuals in the lineup most likely did not look even remotely similar to Mr. Duncan or the culprit, and consequently, did not actually test Ms. Emberling's memory of the event or her previous identification.

4. Effect of Post-Identification Suggestion on Certainty

Scientific research has also shown that the memories of eyewitnesses can be altered by later exposure to outside information and subtle suggestions regarding the identity of the perpetrator. In particular, one study found that exposing witnesses to photographs of an individual described as a suspect biased later identification. Bruce W. Behrman & Lance T. Vayder, *The Biasing Influence of a Police Showup: Does the Observation of a Single Suspect Taint Later Identification?*, 79 Perceptual & Motor Skills 1239 (1994). In that study, subjects viewed video of a crime. Half the subjects were shown a photograph of an individual who was not in the video and told he had been apprehended by the police. *Id.* at 1240–43. After five to seven days all the subjects viewed a photo array. *Id.* Those who had seen the photograph of the innocent individual were significantly more likely to choose him from the array, and approximately 40% of those who had seen the innocent suspect's photograph identified him as the perpetrator. *Id.* at 1243–44.

Significantly, Ms. Emberling saw Mr. Duncan's extradition (from Oregon to Louisiana) on television before making her final identification of Mr. Duncan in the in-person lineup. It is precisely this type of outside information—wherein guilt is clearly implied by the circumstances—that creates the risk of tainting identifications with false certainty. Exposure to suggestive material like this can have the psychological effect of convincing an unsure witness that she is more certain regarding an identification than she actually is. Under these circumstances,

not only is the identification Ms. Emberling made in the in-person lineup terribly flawed, but the post-crime television scene likely tainted her testimony at trial by falsely reassuring her of the "accuracy" of the tenuous identifications she had rendered all along.

III. Juries Are Often Unable to Distinguish Between Accurate and Inaccurate Witness Testimony

The connection between eyewitness identifications and jury convictions is also a subject of great concern. Jurors are overwhelmingly unable to correctly distinguish between accurate and inaccurate witness testimony. Wells & Olson, *Eyewitness Testimony*, at 277. In experiments with subject-jurors, the subjects tended to overestimate the accuracy of eyewitness testimony. Wells & Olson, *Eyewitness Testimony*, at 284–85. The results of these studies also show that poor witnessing conditions and other flaws in eyewitness testimony have little effect on subject-jurors, who consistently over-believe eyewitnesses. Wells & Olson, *Eyewitness Testimony*, at 285. Of course, this presents a significant problem, because wrongful convictions are ultimately made by jurors relying on faulty eyewitness testimony, and not by eyewitnesses directly.

IV. Empirical Evidence Confirms the Research: Examples of Wrongful Caused by Misidentifications

The flaws inherent to eyewitness identification are not merely a matter of academic interest. Empirical evidence increasingly confirms that mistaken eyewitness identifications are all too common.

The Innocence Project has gathered data showing that of the more than 210 wrongful convictions in the United States overturned on post-conviction DNA evidence, over 75% involved mistaken eyewitness identifications. Also, in a recent study reviewing 340 exonerations between 1989 and 2003, 64% of the cases involved at least one mistaken identification. *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. &

Criminology 523, 542 (2005). Another study concluded that approximately 90%
of the cases it analyzed involved one or more mistaken identifications; in one case,
there were *five* separate erroneous eyewitness identifications. Wells, *Eyewitness
Identification Procedures*, 22 Law & Hum. Behav. 605. The United States
Department of Justice determined that "mistaken eyewitness identification" was
one of the "leading causes of wrongful convictions." U.S. Dep't of Justice, Nat'l
Institute of Justice, Convicted by Juries, Exonerated by Science: Case Studies in
the Use of DNA Evidence to Establish Innocence After Trial, Pub. No. NCJ
161258, at xxx (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf.

A few examples from these DNA exonerations—some of which contain
witness identifications stronger than Ms. Emberling's identification of Mr.
Duncan—will help illustrate the problem.

A.   Ryan Matthews and Travis Hayes

Ryan Matthews spent five years and Travis Hayes spent over seven years in
prison for crimes they did not commit based on mistaken eyewitness
identifications. Matthews was sentenced to death and Hayes was sentenced to life
for the shooting death of Tommy Vanhoose, a convenience store owner, in Bridge
City, Louisiana.

In April 1997, a man wearing a ski mask entered Vanhoose's store and
demanded money. When Vanhoose refused, the perpetrator shot him four times
and fled, taking off his mask and diving into the passenger side window of an
awaiting car. Several eyewitnesses viewed the perpetrator's flight. One witness
was in her car and watched the perpetrator run from the store, fire shots in her
direction, and leap into a car. When she was later showed a photographic array,
she tentatively identified Matthews as the assailant. By the time of trial, she was
sure that Matthews was the gunman. Two other witnesses, in the same car,
watched as the perpetrator shed his mask, gloves, and shirt as he fled. The driver

claimed to have seen the perpetrator's face in his rearview mirror while he was being shot at and trying to block the escape. This witness and his passenger were brought to a show-up hours later. The driver identified Matthews. His passenger was unable to make an identification.

In 1999, based mainly on these identifications, Matthews and Hayes were convicted of murder. DNA testing results exonerated Matthews in 2004 and Hayes in 2007, and ultimately revealed the identity of the actual perpetrator. *See* http://www.innocenceproject.org/Content/174.php *and* http://www.innocenceproject.org/Content/206.php.

B.   Carlos Lavernia

In 1985, Carlos Lavernia was convicted of aggravated rape, based largely on the basis of the victim's eyewitness testimony. *See Lavernia v. Lynaugh*, 845 F.2d 493, 495 (5th Cir. 1988). Unable to make a positive identification during two photographic lineups, the victim later identified Lavernia as her assailant in a third photo lineup, fourteen months after the crime. *Id.* The Fifth Circuit affirmed the denial of Lavernia's habeas corpus petition, determining that the identification was reliable. *Id.* at 500. The court found that even though such a significant period of time had passed between the crime and the identification, "the victim could hardly have expressed more certainty with regard to her identification[,]" and she had "ample opportunity to view Lavernia[,] [and] . . . the description she gave the police of the assailant accurately fit Lavernia." *Id.* at 500. Lavernia was sentenced to ninety-nine years in prison, fifteen of which he served until he was exonerated by DNA evidence. *See* Innocence Project Case Profiles, http://www.innocenceproject.org/Content/198.php.

C.   Gene Bibbins

In March 2003, Gene Bibbins became the 125th person in the United States to be exonerated by post-conviction DNA testing. Bibbins had spent more than

fifteen years in prison for a 1986 rape that he did not commit after being convicted based on a false identification.

In June 1986, a young teenager was raped in her aunt's Baton Rouge apartment. She had been asleep when the assailant entered the room, climbed on top of her, and threatened her with a knife before raping her. The perpetrator stole a radio from the room before escaping out of a window. The victim reported the crime to her aunt, who contacted the police.

Bibbins, who lived in a different building in the same apartment complex, was arrested less than an hour later. He had found the radio between buildings and was stopped by police a few blocks from the complex. Bibbins was driven to the apartment building where the crime occurred. He remained in the car with a flashlight illuminating his face while the victim made her identification. The victim was then treated and a rape kit was collected.

At trial, the prosecution relied heavily on the victim's identification. Throughout, Bibbins claimed that he was misidentified, that he found the radio as he was exiting his building. The victim's initial description of the attacker was a man with long and curly hair, wearing jeans. Bibbins was wearing grey shorts and had short, cropped hair at the time.

Nonetheless, Bibbins was convicted of aggravated rape and aggravated burglary in March 1987 and sentenced to life in prison. In November 2002, the biological evidence from the crime was subjected to DNA testing and it confirmed that Bibbins could not have been the perpetrator. In March 2003, Bibbins was officially exonerated. *See* http://www.innocenceproject.org/Content/53.php.

CONCLUSION

As the United States Department of Justice has explained: "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." U.S. Dep't of Justice, Nat'l Institute of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, Pub. No. NCJ 161258, at 24 (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf.

The lesson learned from the DNA cases is that eyewitness testimony is frequently flawed and must be subject to exacting scrutiny. Because DNA evidence is not available in most cases, there is often no way to unequivocally refute eyewitness identifications, despite their numerous inherent flaws. Clearly, the lack of DNA evidence does not excuse wrongful incarceration based on mistaken identifications. Indeed, the opposite is true; as the high court of this State has explained: "[I]n the absence of physical evidence, the identification of strangers is proverbially untrustworthy." *Hammons*, 597 So. 2d at 998 n.8 (*citing Wade*, 388 U.S. 218, 228).

As detailed above, there are numerous reasons to question Ms. Emberling's identification in this case. Her identification was cross-racial, a factor that several courts—and now the ABA—have acknowledged to be inherently problematic. The scientific probability that Ms. Emberling would be unable to cross-racially identify the perpetrator is underscored by her actual testimony, which included several odd and inconsistent descriptions. Moreover, the circumstances of the crime—not the least of which is the fatal violence and the distressing presence of a weapon at the scene—make it unlikely that Ms. Emberling would be able to accurately recall the culprit's face.
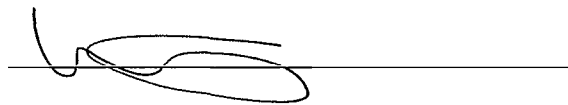
Furthermore, Ms. Emberling's identification itself was problematic. The initial photo-array lineup took place seven months after the crime and was not conducted in a "double-blind" fashion. During the photo-array lineup, Ms. Emberling was unable to identify Mr. Duncan (or anyone else) as the culprit; it was not until later that she believed that she could. Moreover, her in-person

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identification of Mr. Duncan did not occur until several months after that, and only *after* she had seen Mr. Duncan on television in suggestive circumstances. She has since stated that it was only then that she actually felt certain. Finally, the in-person lineup was not specially conducted for this crime and therefore did not include filler (non-suspects) who necessarily resembled Mr. Duncan or the culprit and therefore did not effectively test Ms. Emberling's memory.

In light of the empirical and scientific evidence demonstrating the fallibility of eyewitness testimony, especially in light of the circumstances of the identification in this case, the Network urges this Court to carefully examine the merits of Mr. Duncan's claim of innocence and not rest his conviction on a single, dubious eyewitness identification.

Respectfully submitted,

June 4, 2008

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VERIFICATION AND CERTIFICATION

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared William Sothern who, being duly sworn, deposed and said that she is acting as counsel for the Innocence Network, that the statements contained in the foregoing Brief of *Amici Curiae* are true and correct to the best of his information, knowledge and belief; and that a copy of the Brief of *Amici Curiae* and Motion for Leave to File has been served upon:

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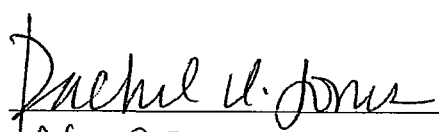636 Baronne Street
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On the 4ᵗʰ day of _June_, 2008.

_____
William Sothern

SWORN TO AND SUBSCRIBED before me, this 4ᵗʰ day of _June_,
2008

Rachel U. Jones NOTARY PUBLIC
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I hereby certify that a copy of the foregoing pleading has been served upon Donna Andrieu, Assistant District Attorney, Orleans Parish District Attorney's Office, 1340 Poydras Street – Suite 700, New Orleans, LA 70112; David Park, Counsel for Mr. Duncan, 636 Baronne Street, New Orleans, LA 70113; Glen Woods, *Pro Bono* Counsel for Mr. Duncan, 650 Poydras Street – Suite 2150, New Orleans, LA 70130; and the Hon. Julian Parker, Orleans Parish Criminal District Court, Section "G", 2700 Tulane Avenue, New Orleans, LA 70119, on the ____ day of _____, 2008.

WILLIAM SOTHERN