

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0270

STATE OF WEST VIRGINIA,
Respondent,

v.

BYRON BLACKBURN,
Petitioner.

BRIEF OF AMICI CURIAE THE WEST VIRGINIA INNOCENCE PROJECT
AND THE INNOCENCE PROJECT, INC. IN SUPPORT OF PETITIONER
BYRON BLACKBURN

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STATEMENT OF INTEREST OF AMICI CURIAE¹

The West Virginia Innocence Project is a legal clinic addressing underlying issues that lead to wrongful convictions in our justice system, with a focus on those issues important to the people of West Virginia. To that end, the West Virginia Innocence Project seeks to prevent wrongful convictions in West Virginia by advocating legal reforms designed to enhance the truth-seeking functions of West Virginia's criminal justice system. The West Virginia Innocence Project has an interest in promoting justice by ensuring that criminal trials are fairly conducted and the due process rights of all defendants are adequately protected.

In West Virginia, six prisoners have been exonerated of crimes they did not commit through DNA testing. In five out of the six cases, the wrongful conviction was based, in part, on the testimony of eyewitnesses who turned out to be mistaken about the identity of the perpetrator. The current framework for evaluating eyewitness identification evidence in West Virginia risks the admission of unreliable eyewitness testimony, which may lead to future wrongful convictions. Accordingly, the West Virginia Innocence Project has a compelling interest in the adoption of a scientifically valid legal framework that ensures only reliable eyewitness identification evidence is admitted in criminal trials. Such a framework would ensure that the actual perpetrators are brought to justice while preventing the innocent from being wrongfully convicted.

The Innocence Project is an organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. To date, the work of the Innocence

¹ This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici and their members, has made a monetary contribution to the preparation or submission of this brief.

Project and affiliated organizations has led to the exoneration of 316 individuals who were wrongly convicted for crimes they did not commit, as proven by post-conviction DNA testing. The Innocence Project has a compelling interest in promoting justice by ensuring that criminal trials reach accurate determinations of guilt.

The Innocence Project also seeks to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Preventing wrongful convictions enables the more accurate identification of those who actually committed the crimes. Indeed, in 48 percent of the wrongful convictions proven by post-conviction DNA testing, the work of the Innocence Project also helped identify the real perpetrators of those crimes. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's objectives help to ensure a safer and more just society.

Nearly 75 percent of individuals exonerated by DNA testing were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. Inasmuch as mistaken eyewitness identifications are the principal cause of wrongful convictions, the Innocence Project has a compelling interest in the adoption of a scientifically valid legal framework that reduces the risk of eyewitness misidentifications leading to erroneous convictions. Likewise, nearly 30 percent of individuals exonerated by DNA testing had their convictions caused by, or related to, false confessions. Many wrongful convictions proved by post-conviction DNA testing involved both eyewitness misidentification and wrongful conviction. As a result, *amici* have a substantial interest in

ensuring that courts reviewing convictions based on these two leading causes of wrongful conviction do so in light of the robust body of scientific research available to them.

STATEMENT OF FACTS

Amici curiae incorporate by reference the facts in the defendant-appellant's brief. In addition, we emphasize the following facts.

On November 29, 2011, an assailant attempted to rob the Wendy's Restaurant in Bluefield, West Virginia. Tr. 35. Wearing clothing that covered his head and face, the assailant stormed into the restaurant with a machete. Tr. 236, 245, 252–53, 298. He jumped over the counter and rushed into the kitchen. *Id.* He grabbed one of the employees from behind and held the machete to his throat, and demanded money. *Id.* Less than one minute later, the assaulted employee got away from the assailant and frantically ran out of the building through the back door. *Id.* The other two employees present during the robbery also managed to escape through the back door without being harmed. *Id.* The assailant exited the building through the front door. *Id.*

After the crime, none of the three employees were able to provide a description of the perpetrator. The assaulted employee, Daniel Back, merely told the police that the perpetrator was a male and was wearing a dark colored jump suit and a gray hoodie over his head. *Id.* at 263–64.

One week later Back saw Blackburn's booking picture on the internet in connection with the robbery and read that Blackburn had confessed to the crime. *Id.* After viewing this information online, he concluded that Blackburn was the perpetrator that he witnessed one week earlier. *Id.* at 220–21, 226. Although this information led Back to believe that Blackburn was the perpetrator, he did not share this information with anyone else, including the police. *Id.* at 226. Although the Bluefield Police Department had a

suspect in custody, it did not contact any of the three witnesses to participate in a lineup or other identification procedure. Tr. 220–21.

Approximately one year later, Back was subpoenaed by the State to testify as an eyewitness regarding the events that took place on November 29, 2011 and identify the perpetrator. During the in-camera hearing to determine whether Back would be permitted to testify, Back surprisingly stated that the perpetrator's eyes were blue and his skin color was "a pinkish, reddish tone." *Id.* In his statements to the police on the night of the crime, Back did not mention anything about eye color or skin color. And after Back stated, "yea that's him," the prosecution suggested, "do you mean that Byron Blackburn the defendant whose seated here in the court is the person that attacked you at the Wendy's?" *Id.* Given that the prosecution verbally pointed to Blackburn, and there were no other suspects in the room, Back identified Blackburn. *Id.* Defense counsel objected to this identification, but the court admitted the identification and allowed Back to testify. *Id.* at 5–9.

In addition to the eyewitness testimony, the prosecution introduced Blackburn's confession at trial. After nine interrogations over a span of several days, and after the State offered to drop his domestic terrorism charge that carried a life sentence in exchange for confessing to the robbery, Blackburn confessed. *Id.* at 181–191. However, Blackburn's mental state was severely compromised at the time of his confession. He was taking powerful pain medication—morphine and Lortab—to alleviate the pain from his elbow injury that he suffered during the arrest. *Id.* at 171–73, 178–79, 208–09, 477–81. He was also struggling with alcohol abuse and was having thoughts of suicide. *Id.* at 362–64. Furthermore, he was suffering from depression because he was separated from his wife and was unemployed. *Id.* at 443. In addition to his compromised mental state, the

interrogators falsely told him that he had failed the polygraph to which he was subjected in an attempt to elicit a confession. *Id.* at 178–82.

The substance of Blackburn's confession is also problematic. Blackburn told the police exactly where he allegedly hid his machete and the clothes he wore during the robbery, but the police were unable to locate any of those items. *Id.* at 347–48. Blackburn also stated in his confession that he found the machete at his parents' home, but his step-father testified that he neither owned a machete nor previously saw one anywhere near his house. *Id.* at 472–74. Blackburn further stated that that he wore a green jacket and black pants and there was nothing covering his head. *Id.* at 331–34. However, Back stated that the perpetrator wore a dark colored jump suit and a hoodie over his head. *Id.* at 263–64.

SUMMARY OF ARGUMENT

In evaluating eyewitness identification evidence in the face of a due process challenge, West Virginia courts follow the legal framework adopted by the United States Supreme Court in *Manson v. Brathwaite*, 432 U.S. 98 (1977). *See State v. Boyd*, 280 S.E.2d 669, 678 (W.Va. 1981). Under this two-part test, a court must first determine whether an identification procedure was suggestive. The focus then shifts to reliability - "a court must look to the totality of the circumstances and determine whether the identification was reliable. . . ." *Id.* at 678 (quoting *State v. Kennedy*, 249 S.E.2d 188, 189 (W.Va. 1978)). Courts must consider the "totality of the circumstances" and are directed to consider the following non-exhaustive factors: (1) the witness' opportunity to view the perpetrator; (2) the witness' degree of attention; (3) the accuracy of the witness' description; (4) the witness' level of certainty at the time of the confrontation; and (5) the time between the crime and confrontation. *Id.*

In the more than 35 years since the Supreme Court decided *Manson*, a robust body of peer-reviewed scientific research on eyewitness memory and perception has emerged. The "science abundantly demonstrates the many vagaries of memory encoding, storage, and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications ... [it is] the gold standard in terms of the applicability of social science research to the law." *State v. Henderson*, 208 N.J. 208, 283 (2011), *holding modified by State v. Chen*, 208 N.J. 307 (2011) (internal quotations omitted).

This research demonstrates how the circumstances surrounding the crime in this case impaired the witness's ability to accurately process and remember the event and the perpetrator. These include the very limited opportunity of the witness to view the perpetrator, the presence of the weapon, the perpetrator's mask and hood, the delayed identification of one of the witnesses, the co-witness statements made about the robbery before the identification, the information seen on the internet by one of the witnesses before he made the identification, and the suggestive in-court identification procedure conducted by the prosecutor. This is true despite the witness's retrospective statement of certainty. Research shows that witness certainty has little to no correlation with the accuracy of an identification in most circumstances, although it is the single most important factor to jurors evaluating identification evidence. *See State v. Lawson*, 352 Or. 724, 745 (2012).

A significant body of peer-reviewed scientific research on false confessions has also emerged. The scientific research has shown that false confessions are a product of

two main types of factors: situational factors and dispositional factors. Situational factors are those that are external to the suspect and introduced by the interrogator that create an atmosphere of oppression, and include lengthy interrogations, the presentation of false evidence, and minimization. Dispositional factors are those inherent to the individual being interrogated that make the suspect particularly vulnerable to police pressure, and include cognitive and intellectual disabilities, personality traits, and psychopathology.

Many of these factors are present in this case, which indicates that Blackburn gave a false confession. For example, he was interrogated nine times, the interrogators falsely told him he failed a polygraph, and the State offered to drop his domestic terrorism charge which carried a life sentence in exchange for his confession to the robbery. Further, his mental state was severely compromised due to alcohol abuse, depression, suicidal tendencies, and his reliance on powerful pain medication. His confession was also rife with inaccuracies.

Amici Curiae not only supports Appellant Byron Blackburn's request for reversal and remand, but also urges the Court to reexamine its legal framework for evaluating and treating eyewitness identification evidence. The scientific research has revealed that the *Manson*-based balancing test is scientifically flawed and incapable of ensuring reliability. The *Manson* balancing test fails to account for (1) the corrupting effect of suggestion on the reliability factors; (2) the resulting impossibility of weighing suggestion and reliability; (3) the fallibility of witness self-reports generally, even where suggestion is not present; and (4) the total absence of scientific support for using certainty as a measure of reliability. The state supreme courts of New Jersey and Oregon conducted extensive reviews of the scientific research and concluded that, for these reasons, the *Manson*-based balancing test must be eliminated. *Lawson*, 352 Or. at 746. *Accord Henderson*, 208 N.J.

at 288.

Amici Curiae urges the Court to join New Jersey and Oregon in replacing the test in *Boyd* with one that is scientifically sound, or by directing a special master (as in *Henderson*), committee, or study group to reach a determination of the continuing validity of the *Manson* test in light of the scientific research. No less is required in order to ensure fairness and accuracy in West Virginia's criminal trials and prevent future miscarriages of justice based on mistaken eyewitness testimony.

Should the Court decline to so rule, the Innocence Project respectfully suggests that the Court implement a range of safeguards that will improve the reliability and accuracy of identification testimony, including but not limited to: setting new admissibility standards for showup identifications; eliminating witness certainty from the reliability analysis unless it is recorded in the witness' own words at the time of the identification; and expanding remedies to ensure that jurors have appropriate context for evaluating identification evidence, e.g., expert testimony and robust, science-based jury instructions. *See* New Jersey's recently revised jury instructions, available at: http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.

ARGUMENT

I. THIS CASE PRESENTS A SIGNIFICANT RISK OF WRONGFUL CONVICTION BASED ON EYEWITNESS MISIDENTIFICATION AND FALSE CONFESSION

Although the precise number of eyewitness misidentifications and false confessions cannot be quantified, the number among DNA exonerations suggests the shocking magnitude of these problems. Of the 316 wrongful convictions established through post-conviction DNA testing, 72% (227) involved eyewitness misidentifications,

27% (84) involved false confessions, and 8% (26) involved both contributing causes. As experts estimate that only 10 percent of all criminal cases have testable DNA that can definitively establish guilt or innocence, these numbers represent just the tip of the iceberg.

For example, Ted Bradford spent almost ten years in prison for a rape that he did not commit. His conviction in Washington State rested almost entirely on eyewitness identification evidence and his false confession. On September 29, 1995, a man wearing a mask broke into a young woman's house and raped her. The victim was able to provide only a general description of the perpetrator. Bradford was arrested six months later in connection with a series of indecent exposure incidents. Investigators believed he may have been involved with the rape, so they interrogated him for eight consecutive hours and subjected him to a polygraph test. Bradford was denied an attorney, and confessed to the crime after five hours of interrogation. Two neighbors claimed they saw a car similar to the one owned by Bradford near the scene of the crime, and one of the neighbors said she had seen Bradford driving the car. Based on the confession and the eyewitness evidence admitted at trial, Bradford was convicted of the crime and was sentenced to ten years imprisonment. Bradford's conviction was later reversed based on DNA testing. *See* http://www.innocenceproject.org/Content/Ted_Bradford.php (last visited April 10, 2014).

Damon Thibodeaux was also wrongly convicted based on eyewitness identification evidence and his false confession. In July 1996, the body of a fourteen-year-old girl was found in Bridge City, Louisiana. The girl had been raped and murdered.

Thibodeaux was brought in for questioning after the murder, and was subjected to a polygraph test. He was told that he failed the polygraph test, and after an eight hour interrogation, he confessed to the crime. Two eyewitnesses also testified that they saw someone walking near where the body had been discovered, and both selected Thibodeaux from a photo array and identified him in court. However, these two eyewitnesses had already seen Thibodeaux's photograph in the news before identifying him in the photo array. He was sentenced to death. Fifteen years later, DNA testing showed that Thibodeaux was innocent. A reinvestigation further showed that his confession was false in every significant aspect. *See* http://www.innocenceproject.org/Content/Damon_Thibodeaux.php (last visited April 10, 2014).

These examples illustrate, and DNA exonerations and decades of robust social science research have proved, the long-recognized danger of wrongful conviction presented by eyewitness misidentification and false confessions. *See, e.g., United States v. Wade*, 388 U.S. 218, 228 (1967) ("the annals of criminal law . . . are rife with instances of mistaken identification"); *Escobedo v. Illinois*, 378 U.S. 478, 489 (1964) ("[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."). What was once supposition and hypothesis is now, almost five decades after *Wade* and *Escobedo*, cold, hard fact, thanks in large part to the DNA exonerations and the scientific research. Courts across the

country have begun to alter their approaches to evaluating both eyewitness identification and confession evidence in light of the wrongful conviction cases and the scientific research.² The scientific research undermines the reliability of both the eyewitness

² By way of example, in *State v Guilbert*, 306 Conn 218, 283; 49 A3d 705, 750 (2012) (Rogers, C.J. concurring), the Connecticut Supreme Court compiled the following list of federal and state cases recognizing the scientific community's acceptance of the research regarding the reliability of eyewitness identification and the admission of expert testimony based on that research:

Ferensic v. Birkett, 501 F.3d 469, 482 (6th Cir.2007) ('expert testimony on eyewitness identifications * * * is now universally recognized as scientifically valid and of aid [to] the trier of fact for admissibility purposes'); *United States v. Smithers*, 212 F.3d 306, 313 (6th Cir.2000) (noting that 'the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research'); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir.1986) ('This [c]ourt accepts the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper. * * * We cannot say [that] such scientific data [are] inadequate or contradictory. The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point.'). *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir.1985) (noting 'the proliferation of empirical research demonstrating the pitfalls of eyewitness identification' and that 'the consistency of the results of these studies is impressive'); *United States v. Feliciano*, United States District Court, Docket No. CR-08-0932-01 P11X-DGC [2009 WL 3748588] (D.Ariz. Nov 5, 2009) ('[t]he degree of acceptance [of the scientific data on the reliability of eyewitness identifications] within the scientific community ... is substantial'); *People v. McDonald*, 37 Cal.3d 351, 364-65, 690 P.2d 709, 208 Cal.Rptr. 236 (1984) ('[E]mpirical studies of the psychological factors affecting eyewitness identification have proliferated, and reports of their results have appeared at an ever-accelerating pace in the professional literature of the behavioral and social sciences. * * * The consistency of the results of these studies is impressive, and the courts can no longer remain oblivious to their implications for the administration of justice.'). *overruled in part on other grounds by People v. Mendoza*, 23 Cal.4th 896, 4 P.3d 265, 98 Cal.Rptr.2d 431 (2000); *Brodes v. State*, 279 Ga. 435, 440-41, 614 S.E.2d 766 (2005) (scientific validity of research studies concerning unreliability of eyewitness identifications is well established); *State v. Henderson*, 208 N.J. 208, 218, 27 A3d 872 (2011) (noting that, '[f]rom social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, [scientific research and studies demonstrate] that the possibility of mistaken identification is real,' that many studies reveal 'a troubling lack of reliability in eyewitness identifications,' and that '[t]hat evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised'); *People v. LeGrand*, 8 N.Y.3d 449, 455, 867 N.E.2d 374, 835 N.Y.S.2d 523 (2007) ('[E]xpert psychological testimony on eyewitness identification [is] sufficiently reliable to be admitted, and the vast majority of academic commentators have urged its acceptance. * * * [P]sychological research data [are] by now abundant, and the findings based [on the data] concerning cognitive factors that may affect identification are quite uniform and well documented. * * *'); *State v. Copeland*, 226 S.W.3d 287, 299 (Tenn.2007) ('[S]cientifically tested studies, subject to peer review, have identified legitimate areas of concern' in area of eyewitness identifications); *Tillman v. State*, 354 S.W.3d 425, 441 (Tex.Crim.App.2011) ('[E]yewitness identification has continued to be troublesome and controversial as the outside world and modern science have cast doubt on this crucial piece of evidence. * * * [A] vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views

identification and confession evidence in this case. On review, this Court should consider this research in evaluating the trial court's decision to admit this questionable – but highly persuasive – evidence.

A. Back's Misidentification in this Case Presents a Substantial Risk for Wrongful Conviction

1. Eyewitness misidentification is the leading cause of wrongful convictions

By far the most common contributing cause of wrongful convictions is eyewitness misidentification. In West Virginia, five out of the six wrongful convictions established through post-conviction DNA testing involved mistaken eyewitness identifications. The facts and circumstances relating to the wrongful conviction cases involving eyewitness misidentification vary widely; most involve well-intentioned but mistaken eyewitnesses who were also crime victims. Some notable examples in West Virginia include:

- William O'Dell Harris, who was convicted of rape based on the mistaken identification by the victim. The victim identified Harris in a police lineup and also made an in-court identification of Harris. Harris served seven years in prison before DNA testing proved his innocence. *See* http://www.innocenceproject.org/Content/William_ODell_Harris.php (last visited April 10, 2014).
- Larry Holdren, who was convicted of raping and murdering a jogger based on the mistaken eyewitness identification by the victim. The victim identified

relating to memory * * *'); *State v. Clopten*, 223 P.3d 1103, 1108 (Utah 2009) ('empirical research has convincingly established that expert testimony is necessary in many cases to explain the possibility of mistaken eyewitness identification'); *State v. Dubose*, 285 Wis.2d 143, 162, 699 N.W.2d 582 (2005) ('[o]ver the last decade, there have been extensive studies on the issue of identification evidence')."

Holdren one month after the crime in a photo lineup. Holdren served fifteen years in prison before DNA testing proved that he was innocent. See http://www.innocenceproject.org/Content/Larry_Holdren.php (last visited April 10, 2014).

2. Robust, peer-reviewed and widely accepted scientific research provides important context for understanding the identification in this case

Over the past several decades, widely-accepted scientific research has revealed common factors whose presence can undermine the reliability of eyewitness identifications.³ Social science research concerning the reliability of eyewitness identifications is robust and reliable. This research has been reviewed, replicated, and retested, and it is widely accepted in the research community. See *State v. Henderson*, 27 A.3d 872, 916 (2011), *State v. Lawson*, 291 P. 3d 673, 685–86 (2012). See also Jared Dodson, *The Linchpin of Identification Evidence*, 117 W. VA. L. REV. 1, 21–35 (forthcoming 2014) (attached as Appendix A). This research has also been tested for external validity, which determines the extent to which a finding can be generalized across different people and settings. Steven Penrod & Brian Bornstein, *Generalizing Eyewitness Reliability Research*, in 2 Handbook of Eyewitness Psychology: Memory for People 529, 532 (R.C.L. Lindsay et al. eds., 2007). Following its comprehensive review of the scientific research, the New Jersey Supreme Court described the research as the “gold standard in terms of the applicability of social science research to the law.” *Henderson*, 27 A.3d at 916.

³ Although Back’s testimony in this case was “resemblance” testimony – i.e., he testified that the person he saw at the crime scene resembled the person he later saw in the photograph on television – rather than an in-court identification, the same scientific research and legal analyses apply. See *United States v. Greene*, 704 F.3d 298 (4th Cir. 2013). See p. 21, below.

Memory is a complex, creative and constructive process that does not function like a videotape. Scientists have identified the three stages of memory: encoding (the process by which an observed event is acquired by the mind), storage (the time between the first and the third stage), and recall (the process by which information is retrieved to the conscious level). While people have the ability to accurately encode information, retain it in storage and then recall it at a later time, these processes depend on a host of conditions – some of which can be controlled for by the criminal justice system (“system variables”) and some of which cannot be controlled because they relate to the event, the witness or the perpetrator (“estimator variables”).⁴ Research teaches that, at each stage, memories can be easily changed or contaminated, that people are often not aware that their memories have been affected by later acquired information, and that it may be impossible to recover the “original” or accurate memory, if it ever existed. See *Lawson*, 291 P.3d at 687–88. Contamination can come from many sources, including external information, such as media reports or suggestive questioning. *Id.* at 709. *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 792, 906 N.E.2d 299, 308 (2009).

Neuroscientists and experimental psychologists who study memory support the view of psychologists who study eyewitness identification that memory is malleable, susceptible to contamination, and can be fairly understood in the legal context, if not as a biological fact, as “trace evidence.” See *Lawson*, 352 Ore. at 747-48, 291 P.3d at 689. Memories exist in the brain as physical traces which can be altered and contaminated if they are not handled properly and according to strict, science-based protocols. *Lawson*, 352 Ore. at 747-48, 291 P.3d at 689.

⁴ The research on system and estimator variables is extensive. This brief only addresses the factors that are relevant to Blackburn’s case. For a more complete discussion of system and estimator variables, see the appendix to *Lawson*. See *Lawson*, 352 Ore. 767-70, 291 P. 3d at 700.

i. Estimator Variables

Estimator variables cannot be controlled by the legal system; they occur at random in the real world. Estimator variables affect the strength and accuracy of the memory created. Numerous estimator variables are at play in this case, diminishing the reliability of Daniel Back's identification.

a. Memory Decay

Memories decay rapidly even over very short periods of time, and memories can easily be contaminated over time. See Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 139, 143, 148 (2008). Even a delay of just one week can cause the "typical eyewitness viewing a perpetrator's face that [is] not highly distinctive . . . to have no more than a 50% chance of being correct in his or her lineup identification." *Id.* at 147; See Krafka and Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. Personality & Soc. Psychol. 65 (1985) (finding substantial misidentification in target-absent arrays from two to twenty-four hours after event). *Henderson*, 208 N.J. at 266-68, 27 A.3d at 907; *Lawson*, 352 Ore. at 777-79, 291 P.3d at 705. Significantly, memory never improves. *Henderson*, 208 N.J. at 267, 27 A.3d at 907.

Here, on the day of the incident, when his memory was at its best, Back told police that he had not seen the perpetrator's face because it was covered by his disguise. Then, after a delay of approximately 7 days, Back saw the photograph of Blackburn on the news, identifying him as the police suspect in the robbery and detailing that Blackburn had confessed to the crime. Although Back did not inform anyone [confirm]

that, upon seeing this report, he believed that Blackburn was the robbery, in his report of this at trial, he significantly elaborated on his description of the perpetrator, who he was initially unable to describe. At the time of trial, he explained that he “knew” the person in the news report was the perpetrator because of his eye and skin color. Since we know as a scientific fact that memory does not improve, it is reasonable to conclude that Back’s identification was the product of the suggestive circumstances surrounding his belated viewing of Blackburn’s photograph rather than the discovery of new or improved memory.

b. Duration

The amount of time an eyewitness has to observe an event may affect the reliability of an identification, such that a brief contact is less likely to produce an accurate identification than a prolonged exposure. Colin G. Tredoux, et al., *Eyewitness Identification*, in *1 Encyclopedia of Applied Psychology* 875, 877, Charles Spielberger ed., 2004); Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associates with Initial Memory Strength*, 18 *Psychol., Crime & Law* 473 (2012). *Henderson*, 208 N.J. at 262-64, 27 A.3d at 905; *Lawson*, 352 Ore. at 772-73, 291 P.3d at 702. Back viewed the incident for less than 30 seconds. Tr. 221. Here, all three witnesses testified to the short duration of the crime.

c. Attention and Weapon Focus Effect

A person’s capacity for processing information is finite, so the more attention a person pays to one aspect of an event, the less attention he pays to other aspects. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the*

Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, 33 *Law & Hum Behav* 1, 10-11 (2009). *Lawson*, 352 Ore. at 770-71, 291 P.3d at 701. The "weapon focus effect" – that the presence of a weapon decreases later identification accuracy – is one of the most robust findings in the scientific literature.⁵ A meta-analysis of nineteen weapon-focus studies that involved more than 2,000 identifications found a small but significant effect: an average decrease in accuracy of about 10% when a weapon was present.⁶ Studies on weapon focus effect also demonstrate an increase in misidentifications in a weapon present condition as compared with a weapon absent condition.⁷ See *Henderson*, 208 N.J. 208 at 262, 27 A.3d 872 ("When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. 'Weapon focus' can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.") The weapon focus effect is strongest where the interaction is shortest. *Id.* ("When the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness' description of the perpetrator.")

"Weapon focus effect" occurs when the presence of a weapon interferes with an eyewitness's ability to encode a perpetrator's face by interrupting the eyewitness's attention to the perpetrator. Research shows that crime witnesses and victims will focus on a dangerous weapon to the exclusion of all other information – including the perpetrator's face. Elizabeth F. Loftus et al., *Some Facts About "Weapon Focus"*, 11

⁵ See *Dysart Aff.* ¶¶ 39-41.

⁶ Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 *LAW & HUM. BEHAV.* 413, 415-17 (1992).

⁷ Maass & Koehnken, *Eyewitness Identification: Simulating the "Weapon Effect"*, 13 *LAW & HUM. BEHAV.* 397, 401-02 (1989) (Sixty-four percent of witnesses in a weapon-present condition misidentified a filler from a target-absent lineup, compared to 33% from the weapon-absent group.)

Law & Hum. Behav. 55 (1987). The weapon-focus effect may also inhibit the memory trace by affecting long-term memory formation. Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413 (1992). Here, the perpetrator not only carried a dangerous weapon – a machete – he held it against Back.

d. Stress

Scientific research reveals that high levels of stress induce a defensive mental state that results in a diminished ability to accurately process and recall events. Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687, 687, 699 (2004). This mental state leads to inaccurate eyewitness identifications. *See id.* at 699. A review of 16 studies involving 1727 participants found that accurate identifications decreased 22.2% under high stress conditions. *Id.* at 692, 694. *Henderson*, 208 N.J. at 261-62, 27 A.3d at 904; *Lawson*, 352 Ore. at 767-72, 291 P.3d at 700-701. The negative effect of high stress is exacerbated by the presence of a weapon. At the time of the crime, Back was held by the robber at machete point, a situation that is sure to induce high levels of stress and negatively affect his ability to process and recall events.

e. Disguise

Even “subtle disguises can . . . impair identification accuracy.” Brian L. Cutler & Margaret Bull Kovera, *Evaluating Eyewitness Identification* 43 (2010). In a scientific experiment, when the “perpetrator” wore a hat, participants only made accurate identifications 27% of the time; when the “perpetrator” did not wear a hat, participants made accurate identifications 45% of the time. Brian L. Cutler et al., *The Reliability of*

Eyewitness Identification: The Role of System and Estimator Variables, 11 *Law & Hum. Behav.* 233, 240, 244-45 (1987); Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 *CARDOZO PUB. L. POL'Y & ETHICS J.* 327, 332 (2006) (summarizing results of six studies showing that identification accuracy dropped from 57% to 44% when perpetrators' hair and hairline cues were masked). *Henderson*, 208 N.J. at 266-68, 27 A.3d at 907; *Lawson*, 352 Ore. at 774-75, 291 P.3d at 703.

In this case, the perpetrator was wearing a disguise that covered his entire head and most of his face. As all three witnesses told police on the night of the crime, this disguise prevented them from seeing enough of the perpetrator's face to provide a description. One might also surmise that it was the presence of this disguise that led law enforcement to decide not to subject any of these witnesses to a fairly composed identification procedure, even after they had established Blackburn as their suspect.

f. Duration

The amount of time an eyewitness has to observe an event may affect the reliability of an identification, such that a brief contact is less likely to produce an accurate identification than a prolonged exposure. Colin G. Tredoux, et al., *Eyewitness Identification*, in 1 *Encyclopedia of Applied Psychology* 875, 877, Charles Spielberger ed., 2004); Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associates with Initial Memory Strength*, 18 *Psychol., Crime & Law* 473 (2012). *Henderson*, 208 N.J. at 262-64, 27 A.3d at 905; *Lawson*, 352 Ore. at 772-73, 291 P.3d at 702. Back viewed the

incident for less than 30 seconds. Tr. 221. Here, all three witnesses testified to the short duration of the crime.

Based on these numerous estimator variables at play, it is unlikely that Back made a strong memory of the perpetrator's face – if he made any memory of it at all. Thus, it is extremely unlikely that Back would have been able to identify the perpetrator – one year after the incident – based solely on his independent memory formed on the night of the incident.

Scientific research offers another explanation. The research shows that suggestive circumstances – whatever their source⁸ – can alter a witness's memory for an incident. *Henderson*, 208 N.J. 264-65, 27 A.3d at 909; *Lawson*, 352 Ore. at 787-89, 291 P.3d at 710. Moreover, the research shows that witnesses are often unaware that their memories have been altered by the suggestive circumstances or later acquired information. *Id.* Here, the context of Back's viewing of an identified police suspect who the news report stated had confessed to the crime was highly suggestive. The context in which Back came to believe that he could identify the perpetrator presents a classic case of memory contamination. See Jennifer Dysart et al., *Mugshot Exposure Prior to Lineup Identification: Interference, Transference, and Commitment Effects*, 86 J. APPL. PSYCHOL. 1280 (2001); Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 306 (2006).

Back claimed that his memory improved and became significantly more detailed after viewing Blackburn's photograph and learning that he had confessed to the crime.

⁸ *Lawson*, 352 Ore. at 787-89, 291 P.3d at 710 ("witness memory is equally susceptible to contamination by nonstate actors" as it is to post-event memory contamination by state actors).

Because we know that memory does not improve but rather deteriorates rapidly, Back's claimed memory improvement shows that Back's memory was likely contaminated by viewing Blackburn's photograph on television.

Back's testimony regarding his level of certainty also highlights a problem with the accuracy of his identification. Back testified that on a scale from one to ten, his level of certainty was a nine. Tr. 258. This was certainly a powerful statement, considering "eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification." *State v. Lawson*, 291 P.3d 673, 778 (Or. 2012). See Gary L. Wells *et al.*, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440, 446 (1979); Michael R. Leippe *et al.*, *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 LAW & HUM. BEHAV. 194, 194 (2009). This is because jurors are unaware of how susceptible witness certainty is to manipulation by suggestive procedures or confirming feedback. *Lawson*, 291 P.3d at 778. See Tanja R. Benton *et al.*, *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 120 (2006).

However, research shows that witness confidence or certainty is a poor indicator of identification accuracy. *Lawson*, 291 P.3d at 778. Specifically, retrospective certainty—witness confidence in the accuracy of the identification after it has occurred—may have a rather weak correlation with accuracy. *Id.* See Gary L. Wells & Elizabeth A. Olsen, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 283 (2003). Further, retrospective self-reports on eyewitness certainty are highly susceptible to suggestive

procedures and confirming feedback, which further undermines the certainty variable. *Id.* Therefore, Back's statement about certainty is deceiving: it has a powerful impact on the jury and the court but science has shown that it has no bearing on accuracy.

ii. Co-Witness Statements

Research has shown that when a witness speaks with another witness before the identification procedure is conducted, the accuracy of the identification is affected. Accordingly, witnesses who speak amongst themselves about what they saw before making the identification are more "susceptible to misinformation from their co-witnesses and, as a consequence, produce[] less accurate recall accounts." Lorraine Hope et al., *'With a Little Help from my Friends. . .': The Role of Co-witness Relationship in Susceptibility to Misinformation*, 127 ACTA PSYCHOL. 476, 481 (2008). This effect is accentuated when the witnesses had been previously acquainted because acquaintances are "significantly more likely to incorporate information obtained solely from their co-witness into their own accounts." *Id.* Stated another way, co-witness feedback may cause a person to form a false memory of details that she did not actually observe. *Henderson, supra.* at 908.

Recent studies have supported this contention. *See* Lorraine Hope et al., *"With a Little Help from My Friends ...": The Role of Co-Witness Relationship in Susceptibility to Misinformation*, 127 ACTA PSYCHOL. 476, 481 (2008) (noting that all participants "were susceptible to misinformation from their co-witness and, as a consequence, produced less accurate recall accounts than participants who did not interact with another witness"); Helen M. Paterson & Richard I. Kemp, *Comparing Methods of Encountering Post-Event Information: The Power of Co-Witness Suggestion*, 20 *Applied Cognitive*

Psychol. 1083, 1083 (2006) (“Results suggest that co-witness information had a particularly strong influence on eyewitness memory, whether encountered through co-witness discussion or indirectly through a third party.”); John S. Shaw, III et al., *Co-Witness Information Can Have Immediate Effects on Eyewitness Memory Reports*, 21 *LAW & HUM. BEHAV.* 503, 503, 516 (1997) (“[W]hen participants received incorrect information about a co-witness's response, they were significantly more likely to give that incorrect response than if they received no co-witness information.”). See also Jared Dodson, *The Linchpin of Identification Evidence*, 117 *W. VA. L. REV.* 1, 21–35 (forthcoming 2014) (attached as Appendix A).

In this case, Back testified that he and the other eyewitness to the crime, Davis, spoke about the events that occurred during the robbery before the identification was made. Tr. 225–26. Back and Davis were also previous acquaintances: they worked together at Wendy’s. Accordingly, Back was susceptible to misinformation from Davis, which may have caused him to form a false memory of details that he did not actually observe, especially because the two were previously acquainted.

This memory contamination that occurred when Back saw the news report and spoke to Davis was further exacerbated by the circumstances of Back’s in-court identification. Rather than subject Back to a true memory test in the form of a fairly composed identification procedure, the prosecutor instead created an unduly and unnecessarily suggestive procedure in court: a witness who has never been subjected to a fair out-of-court identification procedure is asked, for the first time, to identify a defendant as he sits at the defense table at his criminal trial a year after the original event. Moreover, when Back expressed uncertainty about whose photograph he “recognized” on

the news, the prosecutor prompted Back to identify Blackburn. Under these circumstances, it is simply impossible to know if Back's identification was a product of his or her original memory, which has never been properly tested, or a product of the extraordinarily suggestive circumstances of the in-court identification procedure. As the Fifth Circuit explained in a case involving an in-court identification made ten months after the crime where no prior out-of-court identification had been made, "Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime." *United States v. Rogers*, 126 F3d 655, 659 (5th Cir. 1997).

The circumstances surrounding Back's identification can be analogized to a police "showup", where a single suspect is presented to a witness to make an identification. Showup identifications have been widely condemned as inherently suggestive because the witness knows that the person being shown is the police suspect so naturally concludes that he or she must be "the one." There is also no way to determine if a witness is guessing in a showup because there will never be a false-positive response. *Lawson*, 352 Ore. 781-83, 291 P.3d at 707. *Accord Henderson*, 208 N.J. at 259-260, 27 A.3d at 902-03; *State v. Dubose*, 699 N.W.2d 582 (Wisc. 2005); *Commonwealth v. Martin*, 850 N.E.2d 555 (Mass. 2006). While showups can be useful – when, for example, they are conducted within two hours of the incident and the individual matches the witness's description and is detained in close physical proximity to the crime – showup identifications carry significant risks of misidentification. A field experiment revealed that two hours after an encounter, 58% of witnesses failed to reject an "innocent suspect" in a photo showup. A. Daniel Yamey et al., *Accuracy of Eyewitness Identifications in*

Showups and Lineups, 20 L. & HUM. BEHAV. 459, 464 (1996). Here, Back's viewing of Blackburn alone, knowing that he was the person charged with the crime who had also confessed to the crime, carries all of the dangers and none of the benefits of a traditional showup. The risks associated with unnecessary showups – that the witness will affirm the identity of the police suspect and that his memory will become contaminated in the process – are present here and, together with the many estimator variables that undermine the reliability and strength of Back's original memory required the suppression of *any* identification testimony from that witness.

3. *Traditional methods of adversarial testing are not effective at revealing mistaken eyewitness identifications*

Because eyewitnesses sincerely believe their testimony and are unaware of the factors that may have contaminated their memories, they are more likely to appear as credible witnesses in the face of cross-examination. See *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) (witnesses “who are credible because they believe every word they utter on the stand – may be mistaken.”). Because jurors confound certainty and accuracy, cross-examination is less likely to be effective in discrediting eyewitnesses. *Henderson*, 208 N.J. at 234-38, 27 A.3d at 888-89; Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STEINSON L. REV. 727, 772 (2007).

Moreover, scientific research reveals that jurors routinely over-believe eyewitness testimony. See Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. AM. J. PSYCHOL. 143, 146 (2002) (mock jury conviction rates increased from 49% to 68% when a single, vague eyewitness account was added). Scientific research confirms that identification evidence “has been shown to be comparable to or

more impactful than physical evidence . . . and even sometimes confession evidence.” Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in 2 Handbook of Eyewitness Psychology: Memory for People 501, 505 (R.C.L. Lindsay et al. eds., 2007). One reason for this is that, as research has revealed, many of the factors known through scientific research to affect the reliability of eyewitness identifications are either “unknown to the average juror or contrary to common assumptions.” *Lawson*, 352 Ore. at 761-63, 291 P.3d at 697.

Jurors also tend to overestimate “the likely accuracy of eyewitness evidence.” See John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 28 (1983). Jurors may make this mistake because they “rely heavily on eyewitness factors that are not good indicators of accuracy.” 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 Handbook of Eyewitness Psychology: Memory for People 453, 484 (R.C.L. Lindsay et al. eds. 2007). Social scientists theorize that jurors rely heavily on factors that are not correlative of accuracy because many of the scientific principles underlying the reliability of eyewitness testimony are counter-intuitive or do not comport with common sense. See Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL’Y & L. 909, 921 (1995). Thus, jurors cannot accurately discriminate between correct and mistaken eyewitnesses and routinely credit the testimony of mistaken eyewitnesses. See *id.* at 925.

For all of these reasons, cross-examination cannot sufficiently expose the problem of mistaken eyewitnesses. It is not only cross-examination that has been shown to fail to

uncover the fallibility of eyewitness identification. Traditional jury instructions have also been criticized for failing to properly educate jurors about the factors that undermine the reliability of eyewitness identifications. *See Henderson*, 27 A.3d at 919–20.

B. Blackburn’s Confession Bears All of The Hallmarks of Scientific Research on False Confessions

That some people falsely confess to crimes they did not commit has been conclusively demonstrated. One of the most high-profile examples is the so-called “Central Park jogger” case, where five juveniles were convicted after confessing to a 1989 rape. Over a decade later, a New York court vacated all five convictions when DNA testing and another man’s confession established that the rape had been committed by a different person. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 894-900 (2004).³ In the same year, DNA evidence proved the innocence of Eddie Joe Lloyd, a Michigan man who had falsely confessed to a 1984 rape and murder and had served 17 years in prison. *See* http://www.innocenceproject.org/Content/Eddie_Joe_Lloyd.php (last visited Apr. 10, 2014). People have confessed to the most heinous of crimes, carrying the most severe consequences.

A confession’s power can influence all aspects of the case against the confessor. Police frequently suspend investigations upon receiving a confession, thus curtailing the likelihood that the true perpetrator will be found. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DE NV. U. L. REV. 979, 984 (1997). A person who has given a confession likely will be subject to harsher charges than a suspect who has not confessed, and the prosecutor likely will put the confession at the center of the case. *Id.* Prosecutors are less likely to offer plea

bargains to suspects who have offered confessions. *Id.* In addition, a confession may influence the content of other witness' testimony, thus corrupting supposedly independent (and possibly exculpatory) evidence. Lisa E. Hasel & Saul M. Kassin, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 PSYCHOL. SCI. 122, 125 (2009). Knowledge that a suspect has confessed even can taint forensic examination results. See Itiel E. Dror & David Charlton, *Why Experts Make Errors*, 56 J. FORENSIC IDENTIFICATION 600, 605–13 (2006) (finding that fingerprint experts' identifications were influenced by contextual information such as whether the suspect had confessed).

Although many people may associate false confessions with the use of torture or other forms of physical harm, mere verbal, psychological interrogation techniques can be just as effective. Most confessions later proven false by DNA testing have occurred in the absence of physical coercion. See Saul M. Kassin *et al.*, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 6 (2010) (noting that by the mid-1960s, law enforcement had abandoned physical interrogation techniques); Nat'l Registry of Exonerations (showing none of the exonerations using DNA evidence were for convictions prior to the 1970s). Indeed, as the United States Supreme Court recently noted, "the pressure of custodial interrogation is so immense that it 'can induce a frighteningly high percentage of people to confess to crimes they never committed.'" *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011) (quoting *Corley v. United States*, 556 U.S. 303, 321 (2009)); *cf. Arizona v. Fulminante*, 499 U.S. 279, 293 (1991) (White, J., dissenting) ("[T]he use of coerced confessions, 'whether true or false,' is forbidden 'because the methods used to extract them offend an underlying principle in

the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.”) (quoting *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961)).

The study of false confessions has taken place over several decades, and hundreds of academic articles and books have been published on the topic. The pace of research has increased in the past 15 years, as has academic and legal notice of the phenomenon. Significantly, the American Psychology-Law Society (a division of the American Psychology Association), after extensive peer review, has published a White Paper on false confessions. Saul M. Kassin *et al.*, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010) [hereinafter *APA White Paper*]. A significant portion of this now-accepted research has focused on the factors that can cause a person to produce a false confession.

The scientific research has shown that false confessions are a product of two main types of factors: (1) situational factors, factors external to the suspect and introduced by the interrogator that create an atmosphere of oppression; and (2) dispositional factors, factors inherent to the individual being interrogated that make the suspect particularly vulnerable to police pressure. Understanding relevant psychological principles and the specific factors that create a risk of eliciting a false confession will assist juries by providing them with a framework for analyzing the reliability of suspects’ confessions and providing information they neither have nor intuitively know.

Situational factors. Situational factors that frequently appear in cases involving proven false confessions are lengthy interrogations, the presentation of false evidence, and

minimization. Studies have found that while most interrogations last less than two hours. APA White Paper at 16, false confessions tend to occur in interrogations lasting significantly longer, *see* Drizin & Leo, 82 N.C. L. REV. at 948-49 (study of 125 proven false confessions finding that, of those cases in which the interrogation length was available, 84% lasted longer than six hours). Studies also have shown that even though interrogators legally may lie to a suspect about the existence of evidence against him, the introduction of such false evidence can make the suspect vulnerable to manipulation, such as causing him to believe he is trapped and has no option other than confessing, or causing him to doubt his own memory and believe the purported “evidence” instead. APA White Paper at 16-18. Lastly, both laboratory studies and analyses of proven false confessions have shown that minimizing the moral turpitude of the suspect’s alleged crime by developing themes that allow the suspect to justify or otherwise explain the reasons the crime occurred, such as by suggesting it was an accident or was another person’s idea, can elicit false confessions. *Id.* at 18-19.

In this case, many of these situational factors were present at the time of Blackburn’s confession. First, Blackburn was interrogated 9 different times. Secondly, the police intentionally fabricated evidence to elicit a confession from Mr. Blackburn. Tr. 178-82. Trooper Smith, Detective Hamm, and Detective Crook told Blackburn that he had failed the polygraph test to which he was subjected regarding the robbery. *Id.* He was told that “everyone knows you did it” and to “just come clean” in light of the results of the polygraph test. *Id.* Blackburn was then interrogated for 1 ½ hours after the polygraph test was administered under the belief that he had failed the polygraph test and was going to be charged with the robbery. *Id.* Lastly, Blackburn’s interrogators

minimized the consequences associated with the robbery. *Id.* at 186. Blackburn was promised that the domestic terrorism charge, which carried a sentence of life imprisonment, would be dropped in exchange for confessing to the robbery. *Id.* Blackburn even testified that the reason he confessed to the robbery was because he thought he was helping himself by taking the lesser charge. *Id.* at 192.

Dispositional factors. Dispositional factors that can affect an individual's decision-making in an interrogation setting include youth, cognitive and intellectual disabilities, and personality traits and psychopathology. Drizin and Leo's study of 125 false confessions found that juveniles (persons under 18 years of age) comprised approximately one-third of the cases examined. Drizin & Leo, 82 N.C. L. REV. at 944; *see also* APA White Paper at 19-20 (discussing how the psychological and developmental makeup of juveniles makes them particularly susceptible to interrogation techniques that can produce false confessions: compared to adults, they have less maturity and responsibility, are more vulnerable to outside pressure, have less developed personalities, and are less knowledgeable about legal matters). Those with intellectual disabilities, including various tendencies that create a higher susceptibility to suggestion and other forms of influence, as well as a diminished capacity to understand and appreciate *Miranda* warnings, also are overrepresented among false confessors. APA White Paper at 20-21. Persons with mental illnesses are a third category of persons over-represented with false confession cases. *Id.* at 21-22. Antisocial personality traits are associated with both false denials and false confessions, and traits associated with mental illness have been linked to false confessions. *Id.*

Here, several of these dispositional factors were present at the time of his confession, which affected his mental state and decision-making. To begin with, Blackburn had been having thoughts of suicide. He testified that the reason he made the phone call that led to the domestic terrorism charge is because he hoped that the police would kill him, committing what is known as “suicide by police.” Tr. 362–64. He was also depressed because he was unemployed and was estranged from his wife at the time of the confession. *Id.* at 443. Moreover, Blackburn was under the influence of powerful narcotics—morphine and Lortab—when he made his confession because he suffered a fractured elbow during his arrest. *Id.* at 171–73, 178–79, 208–09, 477–81. In fact, he had taken Lortab just 45 minutes before his polygraph test. *Id.* at 179. He had also been struggling with an alcohol abuse problem at the time of his confession. Brief of Petitioner-Appellant at 3, *State v. Blackburn* No. 13-0270 (W.Va. June 13, 2013). All of these factors show that Blackburn’s mental health was severely compromised at the time of his confession. Thus, Blackburn was highly susceptible to techniques that lead to false confessions and was likely unable to fully understand the consequences of giving a confession.

While some of these factors may appear obvious, surveys of potential jurors and laypersons have revealed that they do not fully comprehend the impact these factors may have in eliciting a false confession, or they may not understand when these factors apply. *See Gross & Shaffer, Exonerations in the United States, 1989-2012* at 40. Moreover, jurors have difficulty crediting evidence that a confession may be false or coerced. “[P]eople reflexively trust confessions, as they do other statements against self-interest.” Hasel & Kassin, 20 *PSYCHOL. SCI.* at 122. To most people, the idea that

someone would confess to a crime he did not commit is highly implausible, and laypersons believe that they would never falsely confess to a crime during a police interrogation. *See, e.g.*, Costanzo, Shaked-Schroer & Vinson, 7 J. EMPIRICAL LEGAL ST. at 238-39 (over 91% of mock jurors surveyed disagreed that they would be likely to confess to a minor crime if interrogated by police; over 93% disagreed that they were likely to confess to a serious crime); *cf.* Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOL. 215, 218-19 (2005) (describing study demonstrating that innocent suspects may waive their rights during interrogation because they think their innocence means they have no need for such protections).

Jurors' personal beliefs about their own likelihood of confessing to a crime they did not commit, combined with their lack of understanding of the pressures brought against an accused during interrogation or the psychological effects of those pressures, may help explain studies showing that the introduction of confessions will increase conviction rates even when non-expert evidence of coercive techniques is introduced without further explanation. For example, in one study, the presence of a confession was sufficient to convert an acquittal into a conviction, "irrespective of the contexts in which it was elicited and presented." Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 42 (1997). Other studies have shown that confessions are one of the most powerful forms of evidence that can be introduced against a defendant, significantly surpassing eyewitness evidence and character evidence. *See* Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 475-76, 481 (1997); *see also*

Henkel, Coffman & Dailey, 26 BEHAV. SCI. & LAW at 561 (only 26% of respondents disagreed with the statement that “[a] confession is a strong indicator of a person’s guilt,” and 66% stated that a person who signed a written confession during interrogation was definitely or probably guilty). In the absence of expert testimony, then, laypersons tend to put great weight on a confession’s existence, even if the confession is uncorroborated, undermined by other exculpatory evidence, or otherwise proven to be unreliable.

In this case, it is evident that Blackburn’s confession was unreliable. In his confession, Blackburn told the police exactly where he hid his machete and the clothes he wore during the robbery, but the police were unable to locate any of those items. Tr. 347–48. Blackburn also stated in his confession that he found the machete at his parents’ home, but his step-father testified that he neither owned a machete nor previously saw one anywhere near his house. Tr. 472–74. Blackburn further stated that that he wore a green jacket and black pants and there was nothing covering his head. Tr. 331–34. However, a Wendy’s employee and witness to the crime, Daniel Back, stated that the perpetrator wore a dark colored jump suit and a hoodie over his head. Tr. 263–64. As mentioned above, laypersons are unaware of the factors contributing to false confessions, and are persuaded by confessions regardless of the context in which it was elicited. Thus, it is likely that the jurors gave significant weight to Blackburn’s confession even though it contains numerous inaccuracies.

II. WEST VIRGINIA’S FRAMEWORK FOR EVALUATING AND TREATING EYEWITNESS EVIDENCE DOES NOT EFFECTIVELY PROTECT DEFENDANTS’ DUE PROCESS RIGHTS BECAUSE IT IS A SCIENTIFICALLY UNSOUND METHOD OF DETERMINING RELIABILITY.

A. West Virginia's Current Framework Used to Detect Unreliable Eyewitness Evidence is Scientifically Flawed

The U.S. Supreme Court first articulated the *Manson* test in 1977 – well before the explosion in social science research that has taken place over the last three decades on eyewitness identification. The Court reasoned, “reliability is the linchpin in determining the admissibility of identification testimony.” *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). To determine whether the Due Process Clause requires suppression of tainted identification evidence obtained by suggestive police identification procedures, the Court established a two-step test: (1) the court must decide whether the identification evidence was obtained through unnecessarily suggestive means; and if so, then (2) the court must determine if the suggestive procedures used by the police render the identification unreliable by examining the five reliability factors identified in *Neil v. Biggers*: “(1) [the] opportunity of the witness to view the criminal at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of the witness’ prior description of the criminal, (4) the level of certainty demonstrated by the witness at confrontation, and (5) the length of time between the crime and the confrontation.” *Id.* at 112–14.

The West Virginia Supreme Court of Appeals explicitly adopted the *Manson* test, *State v. Boyd*, 280 S.E.2d 669, 678 (W.Va. 1981), which remains the framework by which West Virginia courts determine whether the Due Process Clause requires suppression of tainted identification evidence.

The balancing test adopted by the Supreme Court in *Manson* and by the West Virginia Supreme Court in *Boyd* (the “*Manson/Boyd*” test) is inadequate because (1) when an identification occurs in a suggestive context, this tends to falsely inflate the self-reported reliability factors (opportunity to observe, attention paid, and certainty); (2)

confirming feedback falsely inflates the self-reported reliability factors and, even with best efforts, some form of confirming feedback is virtually inevitable between the time a witness makes an identification and the time a witness testifies at a trial; (3) there is little support for description accuracy being an accurate measure of reliability; and (4) witness certainty at the time of the identification is the only certainty statement that even weakly correlates with reliability and that certainty statement, not an in-court statement of certainty, is the only certainty statement that should go before a jury.⁹

Of the several flaws in the existing *Manson/Boyd* approach, none is more fundamental than the effect of making an identification in a suggestive context on the reliability factors. As the New Jersey Supreme Court explained in *Henderson*, “when [self-]reports are tainted by a suggestive process, they become poor measures in a balancing test designed to bar unreliable evidence.” See *Henderson*, 208 N.J. at 286, 27 A.3d at 286. Thus, despite the fact that making an identification in a suggestive context actually *decreases* reliability, suggestion can increase the likelihood that a court applying *Manson* will find that the identification was reliable. “The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions.” *Id.*

Based on this overwhelming scientific research, numerous courts across the country have changed how they approach eyewitness identification evidence. Some courts have incorporated scientific research findings into their application of the *Manson* balancing test, by using scientific research findings to apply the test. See *Young v.*

⁹ See Wells, G. & Murray, D. (1983). What can psychology say about the Neil v. Biggers criteria for judging eyewitness accuracy? *Journal of Applied Psychology*, 68, 347-362; Wells, G. & Quinlivan, D. (2009). Suggestive eyewitness identification procedures and the Supreme Court’s reliability test in light of eyewitness science: 30 years later. *Law and Human Behavior*, 33, 9-10.

Conway, 698 F. 3d 69 (2d Cir. 2012); *State v. Ledbetter*, 881 A.2d 290 (Conn. 2005); *Commonwealth v. Santoli*, 680 N.E.2d 1116 (Mass. 1997); *People v. LeGrand*, 196 Misc.2d 179, 747 N.Y.S.2d 733 (2002). The application of the social science has led some courts to eliminate those reliability factors that do not comport with science or to implement intermediate remedies, such as enhanced jury instructions and expert testimony, that will assist jurors in reaching informed decisions about the reliability of particular identification evidence.

Other courts, like the supreme courts of New Jersey and Oregon have completely altered their framework for evaluating and addressing eyewitness identification evidence. In New Jersey, the *Manson* balancing test was rejected in favor of a new approach allowing for pretrial hearings when defendants can show evidence of suggestiveness that can lead to mistaken identification, enhanced jury instructions that educate jurors about all aspects of eyewitness identification and memory, and burden shifting upon the state to show that proffered eyewitness identification is reliable. See *Henderson*, 27 A.3d at 919–20. See also *State v. Chen*, 27 A.3d 930, 936 (N.J. 2011). In Oregon, the state’s evidence code was used to create a new approach that treats eyewitness evidence like trace evidence (putting the burden of production on the proponent) and allows for the possibility of hearings in cases only involving estimator variable. See *Lawson*, 291 P.3d at 689.

In 2011, the Massachusetts Supreme Judicial Court created a study committee on eyewitness identification “to consider how we can best deter unnecessarily suggestive procedures and whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness testimony.” *Commonwealth v. Walker*, 953 N.E.2d 195.

208 n. 16 (Mass. 2011). In 2013, the study group issued its report. JAY D. BLITZMAN ET AL., SUPREME JUDICIAL COURT STUDY GROUP ON EYEWITNESS EVIDENCE: REPORT AND RECOMMENDATIONS TO THE JUSTICES (2013), available at <http://www.mass.gov/courts/sjc/doc/eyewitness-evidence-report-2013.pdf> [hereinafter *SJC Report*]. In the report, the Group took a scientific approach to eyewitness identification, acknowledging that “memory and eyewitness identification has both grown and matured over the past thirty years.” and developed a list of recommendations that courts, counsel, and police can use to deal with eyewitness evidence. *See* SJC Report at 1-2. The group issued comprehensive, science-based recommendation that, if accepted, would alter the way in which identification evidence is collected by police, challenged before courts, and presented to juries. In particular, the study group recommended that the Supreme Judicial Court expand the bases for challenging identifications and that courts take judicial notice of all of the scientific findings set forth in *Lawson. Id.* at 46.

(i) **New Jersey**

Based on its extensive review of the scientific research and the role of eyewitness misidentifications in wrongful convictions, the New Jersey Supreme Court took what was then unprecedented action of rejecting the *Manson* balancing test in favor of a far more robust totality of the circumstances test in evaluating whether admission of equivalent eyewitness identification testimony satisfies due process. This test would allow for the consideration of all relevant evidence – whether relating to system or estimator variables – when making a determination about the reliability of eyewitness identification evidence. *Henderson*, 27 A.3d at 288–89. The new test provides: (1) defendants can obtain a pretrial hearing by showing “some evidence of suggestion that could lead to a

mistaken identification”); (2) the State must then offer proof to show that the proffered eyewitness identification is reliable, considering both system and estimator variables; and (3) the ultimate burden is on the defendant to prove a very substantial likelihood of irreparable misidentification. *Id.*

In addition to the opportunity for comprehensive pre-trial hearings, *Henderson* provides for enhanced jury instructions that educate jurors about all aspects of eyewitness identification and memory, and may be given to the jury at the close of evidence as well as during the trial when the witness testifies. *Id.* at 296, 924.

The New Jersey Supreme Court has similarly laid out a framework for analyzing whether eyewitness testimony should be excluded in cases where an eyewitness identification is impacted by a private actor, rather than suggestion by a state actor. *Chen*, 27 A.3d at 937. In these cases, courts will hold preliminary hearings under New Jersey’s Rule of Evidence 104 to determine, first, that the evidence is relevant and second, that the risk of “undue prejudice, confusion of issues, or misleading the jury” does not substantially outweighs its probative value. *Id.* The evidence will be excluded if either of these prongs is not met. In setting forth the test for cases involving private actor suggestion, the court made one modification to the test set forth in *Henderson*, requiring a higher initial threshold of suggestiveness to trigger a hearing in that a private actor’s behavior must be “highly suggestive” to trigger a hearing. *Id.* at 942–43.

(ii) Oregon

Oregon courts have adopted a burden-shifting test for evaluating the admissibility of eyewitness testimony under the rules of evidence. *Lawson*, 352 Ore. 757, 291 P.3d at 694. Under this test, the proponent of identification evidence has the burden of

demonstrating by a preponderance of the evidence that the witness perceived sufficient facts to support an inference of identification and that the identification was, in fact, based on those perceptions; if the state satisfies its burden that eyewitness evidence is not barred, the burden shifts to the defendant to establish that, although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.

(iii) Massachusetts

The Study Group recommended, *inter alia*:

1. The Supreme Judicial Court should “take judicial notice as legislative facts of the modern psychological principles regarding eyewitness memory set out in” *Lawson*. SJC Report at 2.
2. Pretrial judicial inquiry into the reliability of eyewitness evidence and remedies available for admitted evidence should be expanded.
3. Revised, expansive, science-based jury instructions (drafted by the Study Group) should be adopted. Judges and attorneys should be trained to properly implement the revised instructions and the instructions should be periodically reviewed to “reflect changes in the science of eyewitness identification.” *Id.* at 4. A “majority of the Study Group recommends that [the revised instructions] are not a substitute for expert testimony on eyewitness identification.” *Id.*

B. This Court Should Recognize and Apply the Robust Scientific Research and Alter Its Test for Evaluating Eyewitness Evidence

This case provides an opportunity for West Virginia to join sister courts that have modified or abandoned the *Manson* test in favor of scientifically supported frameworks for evaluating eyewitness identification evidence. West Virginia should follow the lead of these courts and take this opportunity to modify its test for evaluating the admissibility and treatment of eyewitness identification evidence in light of more than thirty years of robust scientific research.

This Court may analyze the admissibility and treatment of eyewitness testimony under either a due process or evidentiary analysis. What is important is that the Court adopt a new approach that is consistent with the scientific research and offers sufficient protection against wrongful conviction based on misidentification.

At a minimum, the court should adopt a new legal framework with the following features:

- i. Eliminate the balancing test set forth by the United States Supreme Court in *Manson* and adopted in *Boyd*;
- ii. Eliminate the *Manson/Boyd* “all or nothing” approach, which offers courts only two choices when evaluating identification evidence: suppress or admit;
- iii. Use intermediate remedies that ensure that jurors have information and context for critical evaluation of eyewitness evidence (instructions, experts, *in limine* rulings);
- iv. Hold pre-trial hearings that allow for the consideration of data and evidence that enhances the capability of the trial court to evaluate the strength of witness memory and the sources of potential memory contamination. This

will assist courts in formulating intermediate remedies that counsel from both sides will be aware of before the trial commences. This would involve increased use of experts at pre-trial hearings, more testimony from witnesses about the strength of their recollection, and better evaluation of identification procedures;

v. In some problematic cases, estimator variables alone can provide a basis for holding pre-trial evidentiary hearings concerning the reliability of identification evidence even if there is no suggestive conduct.

vi. Use special masters or blue ribbon committees to review scientific data and make recommendations for incorporating new scientific findings (including in jury instructions);

vii. Suppress either the out-of-court or in-court identifications when there is a substantial probability of misidentification.

III. WHETHER OR NOT THE COURT ALTERS ITS TEST, IT SHOULD FIND THAT BACK'S IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED

Back identified Blackburn in highly suggestive circumstances. The reliability of that identification is in serious doubt not only as a result of the suggestion inherent in the identification procedure, but also because of the presence of many estimator variables that render Back's initial memory highly suspect and the memory contamination that occurred when he viewed Blackburn's photograph and learned that he was the police suspect and had confessed, as well as when he conferred with another witness. As a result, the trial court's admission of Back's identification violated Blackburn's due

process rights. See *Lawson*, 291 P.3d at 705; SJC Report at 70. Moreover, this identification testimony should have been excluded based on West Virginia's Code of Evidence.

A. Under Any of the New Approaches, The Court Should Not Have Admitted Back's Identification Testimony

Under a modified due process approach that takes into consideration the totality of the circumstances, the state would not have been able to meet its burden of showing that the eyewitness testimony was reliable. Blackburn could obtain a pretrial hearing by showing evidence of suggestion that could lead to a mistaken identification and the State would not be able to offer proof to show that the proffered eyewitness identification was reliable. Nothing in this case points to reliability. Even if the State could make such a showing, the identification would be inadmissible because Blackburn could prove a very substantial likelihood of irreparable misidentification. Given all of the estimator variables at play in this case, the highly suggestive manner in which Back came to identify Blackburn, and Back's admission that he could not identify the perpetrator immediately after the incident, the likelihood of irreparable misidentification in this case was extremely high. Thus, under a totality of the circumstances due process test, the court should not have admitted Back's identification testimony.

Likewise, under the New Jersey evidentiary approach set out in *Chen*, the court also should not have admitted Back's identification testimony. As discussed above, the test in *Chen* modifies the *Henderson* test by requiring an initial threshold of the private actor's behavior being "highly suggestive" to trigger a hearing. Plainly, the prosecutor identifying Blackburn as the defendant and as the person Back claims to have seen and "recognized" a newscast that identified him as the suspect who confessed was "highly

suggestive,” satisfying the burden set out in *Chen*. Having satisfied this initial threshold, the remainder of the *Chen* analysis is the same as the test set out in *Henderson*. Thus, for the same reasons, the court should have suppressed Back’s identification testimony under an evidentiary analysis based on that set forth in *Chen*.

Back’s identification testimony would also be inadmissible under the *Lawson* approach. The state would be unable to demonstrate by a preponderance of the evidence that the witness perceived sufficient facts to support an inference of identification and that the identification was based on those perceptions. There is no evidence that Back perceived sufficient facts to make an identification (other than Back’s self-reports that were likely inflated by the contamination resulting from his viewing of Blackburn’s photo and communications with Davis, offered a full year after he admitted not being able to see the perpetrator’s face). Even if the court somehow found that there the state could meet this burden, Blackburn would then have an opportunity to establish that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or misleading the jury. In this case, the evidence was not probative or, at best, minimally probative. This would be strongly outweighed by the danger of unfair prejudice and misleading the jury. For these same reasons, Back’s identification should also have been excluded under West Virginia’s Rules of Evidence.

B. Even Under the Current *Manson/Kasper* Balancing Test, The Court Should Not Have Admitted Back’s Identification Testimony

The trial court in this case found that the issue of whether or not to admit Back’s eyewitness testimony required a due process analysis. The trial court was correct in finding that the admission of an unreliable identification testimony should be analyzed

under *Boyd*. Back's testimony should have been inadmissible based on an examination of the *Manson/Boyd* factors:

(1) *Opportunity to view the perpetrator*: Back's opportunity to view the perpetrator was extremely limited. He was able to view the perpetrator for less than 30 seconds. This is telling because a brief contact is less likely to produce an accurate identification than a prolonged exposure. Further, the perpetrator was wearing a mask, which made it impossible for Back to see the perpetrator's face.

(2) *Degree of attention*: The perpetrator used a weapon (a machete) to commit the crime, which decreases the accuracy of the identification. When a weapon is used, it interferes with an eyewitness's ability to encode a perpetrator's face by interrupting the eyewitness's attention to the perpetrator. Research shows that crime witnesses and victims will focus on a dangerous weapon to the exclusion of all other information – including the perpetrator's face.

(3) *Accuracy of description of perpetrator*: Back could not offer a description of the perpetrator to the police and did not see the perpetrator's face.

(4) *Level of certainty*: At the time of the incident, Back gave no indication that he could make an identification. He later claimed that only after a week passed and he saw a photograph of the suspect on television and learned that he had confessed did Back claim he had a high level of certainty regarding his much-delayed identification. Suggestive circumstances regarding an identification – as were present here – inflate witnesses' certainty ratings, explaining the lack of correlation between witness certainty and accuracy. Back's high level of certainty after viewing Blackburn's photograph on television is evidence that his memory was contaminated by suggestion.

(5) *Time between crime and confrontation*: Perhaps most damning, approximately a year passed between the altercation and Back's in-court eyewitness identification. Tr. 205.

C. Admitting The Eyewitness Testimony in this Case Was not Harmless Error.

Other than Back's testimony identifying Blackburn, the evidence in this trial was extremely weak. The other eyewitnesses could not make an identification. Back's confession bore all of the hallmarks of a false confession, as established by the scientific research. Perhaps most troubling, his confession contained information that was at odds with what the police knew about the investigation and also failed to lead to any independent corroborating evidence. In light of the lack of other reliable evidence connecting Blackburn to the crime and the highly prejudicial effect of eyewitness identification and confession evidence on juries, the admission of Back's testimony – whether found to be a constitutional or non-constitutional error – cannot be held to have been harmless. *See State v. Williams*, 381 S.E.2d 265, 268–69 (W.Va. 1989).

CONCLUSION

The West Virginia Innocence Project and the Innocence Project respectfully request that this Court adopt a new framework for the admission and treatment of eyewitness identification testimony, consistent with the powerful scientific consensus concerning variables that affect the accuracy and reliability of such testimony. Whether or not the court adopts such a new framework, the identification testimony in this case should not have been admitted. Based on this and the questionable confession, Amici Curaie believe the judgment of conviction should be reversed.

Respectfully Submitted.

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CERTIFICATE OF SERVICE

Amici hereby certify that on this 11th day of April, 2014, true and accurate copies of the foregoing **Amicus Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

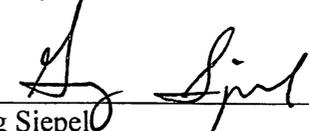
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