No. 18-6980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RONNIE WALLACE LONG

Petitioner-Appellant,

v.

ERIK A. HOOKS, Secretary, NC Dep't of Public Safety

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, GREENSBORO

BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT, INC. IN SUPPORT OF PETITIONER-APPELLANT

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STATEMENT OF CONSENT TO FILING

Petitioner-Appellant has consented to the filing of this *amicus curiae* brief, the Respondent-Appellee has withheld consent. A motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a)(3) accompanies this brief.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 18-6980 Caption: Ronnie Wallace Long v. Erik A. Hooks

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(name of party/amicus)

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Signature: /s/ Breon S. Peace Date: October 1, 2018

Counsel for: The Innocence Project, Inc.

CERTIFICATE OF SERVICE

****

I certify that on October 1, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Breon S. Peace (signature) October 1, 2018 (date)

INTEREST OF *AMICUS CURIAE*

The Innocence Project, Inc. (the "Innocence Project") is a non-profit 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 Project and affiliated organizations has led to the exoneration, by post-conviction DNA testing, of 362 individuals.

Eyewitness misidentification is the leading contributing cause of wrongful convictions, playing a role in 254 of the 362 wrongful convictions identified through post-conviction DNA testing. To minimize the risk of wrongful convictions based on mistaken eyewitness identification, the Innocence Project has a compelling interest in ensuring that courts employ a legal framework that adequately protects criminal defendants from the use of identification evidence that is so unreliable as to create a significant risk of misidentification.

STATEMENT PURSUANT TO RULE 29(C)(5)

No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF FACTS

The Innocence Project refers the Court to Petitioner-Appellant's submissions for a comprehensive recitation of the facts. We briefly summarize here certain facts relevant to the victim's identification.

On April 25, 1976, in Concord, North Carolina, an assailant broke into the home of Mrs. Gray Bost and sexually assaulted her at knifepoint. J.A. 195, 197 & 202.[1] Throughout the assault, the assailant was pushing the victim's head, "mashing [her] face to the side." J.A. 242 & 245-46. The assailant also repeatedly told her not to look at his face. J.A. 242-43. The victim suffered injuries requiring hospitalization at Cabarrus Memorial Hospital. J.A. 208.

Following the assault, Sgt. David Taylor of the Concord Police Department ("CPD") spoke with the victim at the hospital. J.A. 301-02. The victim provided the following description of her assailant:

> black male, height, five foot, five to five foot nine, slender build, slim hips. Subject was plain spoken, used correct English and at times spoke very softly. No speech defect, accent, or noticeable brogue evident. Subject was wearing a dark waist length leather jacket, blue jeans with a dark toboggan pulled over his head. Could possibly have been wearing gloves.

J.A. 369-70.

On May 5, 1976, Sgt. Taylor and Lt. George Vogler of the CPD requested that the victim accompany them to district court. J.A. 307. During *voir dire*, the

[1] "J.A." refers to the Joint Appendix.

victim testified that when they asked her to accompany them to court, the officers informed her that "they had reason to believe that" her assailant might be present in court and hoped she would identify him. J.A. 171. The victim agreed and, on May 10, accompanied Sgt. Taylor and Lt. Vogler to court. J.A. 307-08. The officers told her to "sit [in the gallery] and to look around and see if [she] saw anybody that [she] knew, or the man that raped [her]." J.A. 153. The officers watched from the jury box. J.A. 156.

There were an estimated sixty to sixty-five people in the courtroom, including a dozen black men, one of whom was Long. J.A. 310-11. The victim spent sixty to ninety minutes of "constantly just looking" at individuals in the courtroom. J.A. 155. Long was present in the courtroom the entire time the victim was there; however, the victim only identified Long as her assailant when the presiding judge called Long forward on an unrelated charge. J.A. 174-75. At the time, he was wearing a brown leather jacket, J.A. 311, an article of clothing similar to one that the victim said her assailant wore the night of the assault.

Approximately fifteen to twenty minutes after her courtroom identification, the victim accompanied Sgt. Taylor and Lt. Vogler to the police station. Once there, the officers showed her a photographic array containing six to eight photographs, including one of Long in a black leather jacket. J.A. 159-61 & 175-76. Long was the only individual photographed wearing a black leather jacket,

which was one of the only salient details the victim offered in her initial description, and which the victim testified was "identical" to the one her assailant wore during the assault. J.A. 161. None of the other men from the courtroom were included in this photographic array. The victim once again identified Long.

Following the victim's identifications, Long was arrested on rape and burglary charges. At Long's trial, the victim once again identified him and testified that there was no doubt in her mind as to his identification. J.A. 166. The victim's identification of Long was the central piece of evidence against him at trial. He was convicted and subsequently sentenced to life in prison. As of this year, Long has spent 42 years in prison, but has maintained his innocence and has consistently sought relief from these charges.

SUMMARY OF ARGUMENT

Courts have long recognized the limitations of eyewitness identifications and the potential danger they create in the criminal justice system. *United States v. Greene*, 704 F.3d 298, 306 (4th Cir. 2013) ("'Positive identification testimony is the most dangerous evidence known to the law.'" (quoting *Smith v. Paderick*, 519 F.2d 70, 75 (4th Cir. 1975)). Only more recently, though, has exculpatory DNA evidence and scientific research exposed the pervasiveness of eyewitness misidentification. Eyewitness misidentification is the primary contributing cause of wrongful convictions established through DNA testing. *See* Innocence Project, *DNA Exonerations in the United States*, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Sept. 28, 2018).

Decades of scientific research help explain which factors tend to lead to unreliable eyewitness identifications. These include factors known as "estimator variables," which relate to the eyewitness, the crime, or the perpetrator and can affect a witness's ability to form a strong and accurate memory. *See* John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. in the Pub. Int. 10, 13-14 (2017). It also includes "system variables," factors which are within the control of the criminal justice system that can contaminate a witness's memory or cause her to make an identification based on external information rather than her own,

independent recollection of events. *Id.* at 14-15. Despite widespread agreement among scholars and courts that eyewitness identifications can be unreliable, *see Greene*, 704 F.3d at 306, the criminal justice system continues to place disproportionate weight on positive identifications at trial.

In this case, the victim identification was the central piece of evidence against Long. Critically, it bore a significant number of markers of unreliability that can lead to wrongful convictions. The record indicates that the victim's opportunity to view her assailant during the crime was limited. The victim was grabbed from behind and was forced not to look at her assailant. The victim also experienced high levels of stress, the assailant possessed a weapon, and the victim and assailant were different races, three estimator variables that research has shown can impair the accuracy of identifications. The reliability of the victim's identification is further cast into doubt by the presence of a number of system variables that arose from law enforcement's use of suggestive identification procedures. Indeed, the identification procedures used in the present case violated every best practice identified by scientists, and adopted by the United States Department of Justice, a number of states (including North Carolina), and many law enforcement agencies in the decades since Long's conviction.

The Report and Recommendation adopted by the District Court nevertheless concluded that the victim's identification of Petitioner was strong, and that the

suppressed, exculpatory evidence in the case was not material, because it did not directly undermine "the strength of the victim's identification of Petitioner." *See Long v. Perry*, No. 16-CV-539, 2018 WL 2324093, at *18 (M.D.N.C. May 22, 2018). As this Court has recognized, however, in assessing the materiality of *Brady* violations, a court must "evaluate the whole case, taking into account the effect that the suppressed evidence, had it been disclosed, would have had on the evidence considered at trial." *United States v. Ellis*, 121 F.3d 908, 918 (4th Cir. 1997). Given the significance of the eyewitness identification to the evidence presented at trial—and the many indicia that this evidence is not reliable—a scientifically informed understanding of the relative weakness of the identification is directly relevant to the evaluation of the materiality of the *Brady* violations in this case.

The lower court's failure to evaluate the strength of the eyewitness identification evidence in light of forty years of robust, peer-reviewed scientific research fatally undermines the accuracy of its materiality inquiry under *Brady*. This Court should accordingly reverse the District Court's decision.

ARGUMENT

I. EYEWITNESS IDENTIFICATIONS ARE OFTEN UNRELIABLE AND ARE THE PRIMARY CONTRIBUTORS TO WRONGFUL CONVICTIONS ESTABLISHED THROUGH DNA

Eyewitness misidentification is the leading contributing cause of wrongful convictions established through DNA testing. No case better exemplifies the dangers of eyewitness misidentification than that of Ronald Cotton, a case which shares a striking number of similarities with the present case. In July 1984, an assailant broke into Jennifer Thompson's Burlington, North Carolina apartment. *See* Jennifer Thompson et al., *Picking Cotton* 11-12 (St. Martin's Press 2009). As here, the assailant was African-American and the victim, Thompson, was white; the assailant sexually assaulted Thompson at knifepoint, threatening to kill her if she screamed. *Id.* at 12. Thompson believed, like the victim here, that she was able to get a good view of her assailant during the assault. *Id.* 14-16. As here, Thompson identified Cotton in multiple identification procedures, throughout which she became increasingly confident. *Id.* at 33, 37. Thompson subsequently identified Cotton in court, at which time she expressed complete confidence in her identification. *Id.* at 64. Cotton was convicted at trial based almost exclusively on Thompson's identification of him. *Id.* at 33, 37, 68. After spending more than ten years in prison, however, Cotton was exonerated by DNA evidence. *Id.* at 212-14. Unlike Cotton's case, there exists no DNA evidence in the present case which can

conclusively establish Long's innocence, making it all the more important that the victim's identification be evaluated in light of all that is known about eyewitness identifications.

Of the 362 DNA exonerations in the United States since 1989, eyewitness misidentification contributed to wrongful convictions in 70 percent of cases (Cotton's being one of them). *See* Innocence Project, *DNA Exonerations in the United States*. And in cases where the exoneree was convicted of rape, the rate of victim misidentifications was especially prevalent, occurring in 93 percent of cases (159 of 171 cases). Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 51 (Harv. Univ. Press 2011). In most of these cases, we now know that there existed good reason to question the reliability of the identifications later shown to have been erroneous. In a review of available trial transcripts from the first 250 DNA exonerations, 78 percent involved "evidence that police contaminated the eyewitness misidentifications" or other indicia of unreliability in the trial record. *Id.* at 49.

Notwithstanding the well-established body of research dedicated to the fallibility of eyewitness identifications, jurors and judges alike continue to rely on them disproportionately at trial and remain unaware of factors that can make an identification more or less reliable.

A. Decades of Scientific, Peer-Reviewed Research Help Explain the Inadequacies of Memory, and the Resulting Pervasiveness of Eyewitness Misidentification

Even under ideal circumstances, eyewitness identification is imperfect, because memory is imprecise and malleable. Memory is not a "videotape, accurately and thoroughly capturing and reproducing a person, scene or event;" rather memory is "a constructive, dynamic and selective process." *Com. v. Gomes*, 22 N.E.3d 897, 911-13 (Mass. 2015) (citing sources); *see also Harker v. Maryland*, 800 F.2d 437, 439 (4th Cir.1986) (noting in the context of reliability of hypnosis, that the "theory that the memory holds a certain snapshot of the crime has now come into question"). And, much like trace evidence, memory can be contaminated if not properly handled.

Scientific consensus built upon decades of original peer-reviewed research and meta-analyses combining multiple scientific studies identifies circumstances and conditions under which eyewitness identifications become less reliable and more suspect.[2] The scientific literature has categorized those circumstances and conditions into what are referred to as estimator and system variables.

Estimator variables relate to those factors that inhere in the witness, the crime or the perpetrator, and are therefore out of the control of the criminal justice

[2] Courts around the country, including this Court, have accepted and relied upon scientific research related to eyewitness identification. *See, e.g.*, *Greene*, 704 F.3d at 306-08; *State v. Henderson*, 27 A.3d 872, 896-914 (2011).

system. Studies show that estimator variables have a significant impact on the quality of an eyewitness's observations and memories made at the time of the incident, before an identification procedure ever occurs. *See* Wixted & Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy* at 13-14. Common estimator variables—all of which were present here—include the eyewitness experiencing high levels of stress at the time of the observation, the visible presence of a weapon, whether the witness and assailant were of different races, and the duration between an eyewitness's observation of an assailant and the initial identification process. *Id.*

Robust research likewise shows that system variables (the processes and procedures within the control of the criminal justice system) affect the reliability of an eyewitness identification. System variables present in this case include all those conditions surrounding the identification process, such as who administers the process, the instructions provided to the eyewitness, and the type, number, and construction of identification procedures themselves. *Id.* at 14-15.

B. Despite Known Risks with Eyewitness Identification, the Criminal Justice System Continues to Place Disproportionate Weight on Positive Identifications

In the face of well-known variables that impact the reliability of eyewitness identifications, jurors continue to place disproportionate weight on positive identifications at trial. As the Supreme Court observed, "'[a]ll the evidence points

rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says That's the one!'" *See Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting Elizabeth Loftus, *Eyewitness Testimony* 19 (Harv. Univ. Press 1979). This is especially troublesome in the face of studies that show "mock jurors were unable to distinguish between correct and incorrect witnesses, believing them 80 [percent] of the time when they were correct and 80 [percent] of the time when they were incorrect." Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 Alb. L. Rev. 1105, 1148 (2010).

One reason that jurors tend to disproportionately rely on eyewitness identification evidence is that 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." *State v. Lawson*, 352 Or. 724, 761 (2012) (en banc). For example, even though jurors tend to believe that an eyewitness's high degree of confidence indicates identification accuracy, countless studies have disproved a correlation between confidence and accuracy, except in the small number of cases where the identification procedure was "pristine" and the witness provided an immediate, highly confident positive identification. Wixted & Wells, *The Relationship Between Eyewitness Confidence*

and Identification Accuracy at 22 (citing meta-analyses); *see also Greene*, 704 F.3d at 309 n.4 (4th Cir. 2013) (acknowledging "considerable research showing that an eyewitness's confidence and accuracy have little correlation" (citing sources)).

This misconception is not limited to jurors—other key figures within the criminal justice system, including law enforcement, prosecutors, and defense attorneys, also incorrectly believe there is a correlation between eyewitness confidence and accuracy. *See* Kevin Krug, *The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Area of Research*, 3 Applied Psychol. in Crim. Just. 7, 8 (2007) ("A survey conducted by Brigham and Wolfskeil (1983) found that 73% of law enforcement officers, 75% of prosecutors, and 40% of defense attorneys consider witness confidence and testimonial accuracy positively correlated.").

Trial judges are also not immune from misjudging the reliability of eyewitness testimony. One recent survey found that judges "showed little consensus on several important issues such as whether at trial, eyewitness confidence is a good indicator of eyewitness accuracy, and if jurors can distinguish accurate from inaccurate eyewitnesses." *See* Richard A. Wise & Martin A. Safer, *What U.S. Judges Know and Believe About Eyewitness Testimony*, 18 Applied Cognitive Psychol. 427, 438 (2004). Indeed, DNA exoneration cases offer insight

into the misperceptions that judges hold regarding eyewitness identifications. *See, e.g.*, Garrett, *Convicting the Innocent*, at 48 (recounting record from trial of Jerry Miller—an individual who was convicted but has since been exonerated by DNA evidence—where the trial "judge said, 'I have never heard that in my life, that a rape victim with a person who is unmasked says they can't identify him. I never heard that in my life.'" (quoting Trial Tr. 196, *Illinois v. Miller*, No. 81-C-7310 (Ill. Cir. Ct. Sept. 29, 1982)).

II. THE EYEWITNESS IDENTIFICATION IN THIS CASE WAS NOT STRONG EVIDENCE OF GUILT

The Report and Recommendation adopted by the District Court concluded that the suppressed, exculpatory evidence in the case was not material, because it did not directly undermine "the strength of the victim's identification of Petitioner." *See Long*, 2018 WL 2324093, at *18. But the law is clear that suppressed evidence need not directly undermine inculpatory evidence in order to be deemed material under *Brady*. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (rejecting a sufficiency of the evidence test for *Brady* materiality inquiry and noting that the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). Rather, a court must "evaluate the whole case, taking into account the effect that the suppressed evidence, had it been disclosed, would have had on the evidence considered at trial." *Ellis*, 121 F.3d at 918.

Given the significance of the eyewitness identification to the evidence presented at trial, a scientifically informed understanding of the relative weakness of the identification is directly relevant to the evaluation of the materiality of the *Brady* violations in this case.[3] And contrary to the lower court's conclusion, the record demonstrates that the eyewitness identification was not strong evidence of guilt.[4] Indeed, the victim's identification had numerous markers of unreliability. Not only were there significant barriers to the victim's opportunity to view her assailant at the time of the crime, the investigators subsequently used highly suggestive identification procedures that further degraded the reliability of the victim's identification.

A. The Presence of a Number of Estimator Variables Casts Doubt on the Reliability of the Victim's Identification

The presence of a number of estimator variables negatively affected the victim's memory prior to her initial identification, casting significant doubt on her

[3] The record also reflects the interconnectivity of the suppressed evidence and the unreliable identification. Following the victim's unreliable identification, officers sought corroborating evidence of Long's guilt in the form of forensic testing of hairs, fibers, paint, and matches from the crime scene and from the victim and Long's clothing. When all of these tests excluded Long, law enforcement ignored and suppressed the results. Had those reports been disclosed, jurors could have more credibly questioned and considered the reliability of the victim's identification in the absence of other evidence.

[4] While it is not uncommon for reviewing courts to express confidence in guilty verdicts, DNA exoneration cases demonstrate that such confidence is often misplaced. In a review of DNA exoneration cases, nearly 50 percent of courts reviewing challenges to a defendant's conviction referred to the likely guilt of the exoneree, with another 10 percent describing the evidence of guilt as "overwhelming." Garrett, *Convicting the Innocent*, at 201-02.

ability to make a reliable identification of her attacker, even under pristine conditions.

1. *The Eyewitness's Opportunity to View the Perpetrator was Severely Compromised*

The victim's opportunity to view her assailant was severely compromised by circumstances surrounding the crime. For one, the victim testified that the assailant was wearing a toboggan hat that covered his ears and went down to his neck. J.A. 201. Even "subtle disguises can . . . impair identification accuracy." Brian L. Cutler & Margaret B. Kovera, *Evaluating Eyewitness Identification* 43 (Oxford Univ. Press 2010). Research shows that a disguise as simple as a hat "covering most of [an assailant's] hair, reliably reduces identification accuracy." Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. Applied Psychol. 629, 635 (1987). In the present case, the victim's view was further obstructed by her assailant, who forcefully pushed her head to prevent her from looking at him, and repeatedly threatened her life anytime she tried to look at his face.[5] J.A. 197, 242, 245-46.

In addition, the victim's heightened stress and fear throughout the assault would likely have impaired her ability to encode an accurate memory of the assailant's face. Heightened stress is well-understood to have a deleterious effect

[5] Significantly, as discussed further below, the witness initial description of her assailant included no identification of any facial features.

on an eyewitness's ability to encode a memory and subsequently make an accurate identification. *See* Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & Hum. Behav. 687, 692, 694, 699 (2004) (reviewing 27 studies that tested impact of high levels of stress on eyewitness identification and finding "clear support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy"); *accord Lawson*, 352 Or. at 769-70 (describing studies showing the negative effect of stress on identification).

In this case, the victim testified that her assailant attacked her from behind, placed a knife to her throat, and repeatedly threatened her life. J.A. 195, 197, 202-03. She also testified that she was "frightened to death" during the encounter, and had "no idea [she]'d ever get out alive." J.A. 168, 208. Under such high-stress scenarios, one study found that correct identification rates dropped to 18 percent compared with 75 percent for identifications following low-anxiety scenarios. *See* Nat'l Res. Council of the Nat'l Acads., *Identifying the Culprit: Assessing Eyewitness Identification*, 95 (Nat'l Acads. 2014) (citing Kenneth A. Deffenbacher, *Estimating the Impact of Estimator Variables on Eyewitness Identification: A Fruitful Marriage of Practical Problem Solving and Psychological Theorizing*, 22 Applied Cognitive Psychol. 815, 22 (2008)).

Furthermore, the assailant's use of a weapon—in this case, a knife—likely further diminished the accuracy of the victim's identification. "[T]he presence of a weapon at the scene of a crime captures the visual attention of the witness and impedes the ability of the witness to attend to other important features of the visual scene, such as the face of the perpetrator." *Id.* at 93. One meta-analysis concluded that the presence of a weapon can reduce the accuracy of identification of an assailant, as well as the identification of an assailant's features, such as facial features and clothing. Nancy Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & Hum Behav. 413, 415-17 (1992).

Here, the victim testified that the victim threatened her with a knife that was five to six inches long and "extremely shiny." J.A. 201-202. As the research indicates, it is unsurprising that the victim had a vivid recollection of her assailant's weapon. Because it played such a central role in the victim's assault, the knife likely drew her attention away from the assailant, and made it more difficult for her to form an accurate memory of his face.

2. *Other Estimator Variables Cast Doubt on the Victim's Identification*

The reliability of the victim's identification of Long likely was further affected by the "cross-race effect": the notion "that people recognize people of their own race better than people of another race." *See* Robert K. Bothwell et al., *Cross-Racial Identification*, 15 Personality and Social Psychol. Bull. 19, 19 (1989).

Cross-race effect is widely understood to negatively impact an eyewitness's ability to accurately identify a person of a different race. Of the DNA exoneration cases to date that involved eyewitness misidentification, 41 percent involved cross-racial misidentification. *See* Innocence Project, *DNA Exonerations in the United States*. Moreover, a meta-analysis involving 91 independent samples and nearly 5,000 participants confirmed that participants were "1.4 times more likely to correctly identify a previously viewed own-race face when compared with performance on other-race faces" and "1.56 times more likely to falsely identify a novel other-race face when compared with performance on own-race faces." Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces: A Meta-Analytics Review*, 7 Psychol. Pub. Pol'y & Law 2, 15 (2001).

The victim in the present case was white and admitted to being unfamiliar with African-Americans. She testified that she neither knew many African-Americans nor socialized with them. J.A. 257-58. While the cross-race effect will always impact the reliability of an eyewitness identification when the eyewitness and assailant are different races, the victim's unfamiliarity with African-Americans may have further exacerbated the problem. *See* Meissner & Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces*, at 21 (concluding that a lack of interracial contact has "a small, yet significant" impact on cross-race effect).

Finally, the passage of time between the victim's first observation of her assailant and the initial courtroom identification (the "retention interval") casts further doubt on the reliability of her identification. A meta-analysis of 39 published studies consisting of more than 5,400 participants concluded that "there is indeed a statistically reliable association between longer retention intervals and decreased face recognition memory." Kenneth A. Deffenbacher et. al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. of Experimental Psychol.: Applied 139, 147-48 (2008).

In this case, the victim's identification of Long did not occur until 16 days after her initial observation of her assailant. J.A. 255-56. The decay of the victim's memory in that time period is well-understood. One study posits that even under ideal viewing conditions and a non-suggestive identification procedure, "the typical eyewitness viewing a perpetrator's face that was not highly distinctive would be expected to have no more than a 50 [percent] chance of being correct in his or her lineup identification (six-person lineup) *at a 1-week delay*." Deffenbacher et. al., *Forgetting the Once-Seen Face*, at 147 (emphasis added). A "trier of fact would still need to consider other specific facts of the case to decide how much less than 50 [percent], if any, the chance of a correct identification might be," *id.*, particularly in a case with less than optimal viewing conditions.

3. *The Victim's Initial Description of Her Assailant Was Vague and Did Not Match Long's Appearance*

The Court need look no further for evidence of unreliability in the victim's identification and the affect that estimator variables had on her memory than the initial description of her assailant to the police, which was vague and did not match Long's description in material ways. Studies show that more accurate initial descriptions are "significantly associated with greater accuracy in identification," and concomitantly, inaccurate eyewitness descriptions are "associated with greater inaccuracy in identification." Christian A. Meissner et al., *A Theoretical Review and Meta-Analysis of the Description-Identification Relationship in Memory for Faces*, 20 European J. of Cognitive Psychology 414, 437 (2008).

Here, the victim could not describe her assailant's eye color, haircut, or facial features, such as nose or head shape. Rather than identifying particular facial features or other characteristics of her assailant, she claimed immediately after identifying Long that she would "never forget his *profile*." J.A. 314 (emphasis added). And while the victim also mentioned that she remembered her attacker's mannerisms and walk, *id.*, she could provide no detail about either. Likewise, she recalled simply that her attacker just had "a black voice." J.A. 170. These vague descriptions are consistent with the victim's limited opportunity to view her attacker and likely reflects the fact that she was unable to encode a detailed memory of her attacker's face.

The victim did, however, offer a description of her assailant's distinctive skin color—describing him as "light, not colored real dark" and "yellow." J.A. 248, 314. But Long is a dark-skinned black man. Likewise, Long had facial hair at the time in question, J.A. 373, a detail that was not included in any description that the victim provided to the police. J.A. 293, 373.

B. The Suggestiveness of the Identification Procedures Undermines the Reliability of the Eyewitness's Identification of Long

Further compounding the unreliability of the victim's identification of Long was law enforcement's use of suggestive identification procedures. Because of the significant impact that suggestive identification procedures can have on the reliability of an eyewitness identification, the National Academy of Sciences identified a number of scientifically-supported best practices that can improve identification accuracy and avoid improperly influencing an eyewitness's memory. Recommendations included implementing double-blind lineup and photo array procedures, using standardized non-biased witness instructions, documenting witness confidence in identification, and videotaping the identification process. *See* Nat'l Res. Council of the Nat'l Acads., at 105-09. These best practices were also referenced and largely adopted by the United States Department of Justice in 2017. Memorandum from Sally Q. Yates, Deputy Attorney Gen., U.S. Dep't of Justice, on Eyewitness Identification: Procedures for Conducting Photo Arrays to Heads of Dep't Law Enf't Components, All Dep't Prosecutors 2-3 (Jan. 6, 2017).

Similarly, in 2007, North Carolina enacted legislation reforming eyewitness identification procedures which adopted many scientifically supported best practices. *See* 2007 N.C. Sess. Laws. § 15A-284.52(b) (requiring the use of an independent administrator, specific witness instructions, and inclusion of appropriate fillers).

None of these best practices were followed here. Rather, the investigators made a number of decisions that resulted in an unduly and unnecessarily suggestive identification process, with each error further undermining the reliability of the identification. Altogether, the identification procedures were unusual, suspect, and highly suggestive, resulting in an unreliable eyewitness identification.

First, a fairly composed in-person lineup or photo array in which the suspect does not stand out is considered the best practice because it offers the witness a true memory test. The officers instead requested that the victim sit in a courtroom to try to identify her assailant. J.A. 220-21. She was "nervous and scared to death" by the possibility of meeting her attacker, and, as a result, wore a disguise, including a wig. J.A. 153 & 221-22. The officers in this case had no explanation as to why they resorted to the courtroom identification procedure, especially since they had earlier used a photo array of another suspect, J.A. 306, and had a photo of Long available. J.A. 161. Moreover, the courtroom setting itself was enough to

prejudice the victim's identification of her assailant as it suggested to the victim that the parties present were already in legal trouble. J.A. 307.[6]

Second, the officers' instructions to the victim prior to the courtroom identification were biased, because they suggested that her assailant would be in the courtroom. J.A. 171 (victim testifying that officers instructed that "they had reason to believe that" her assailant might be present in court and hoped she would identify him). A meta-analysis has shown that biased instructions result in a "greater willingness to choose," regardless of whether the actual assailant is present, resulting in an increased rate of inaccurate identifications. Nancy Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. and Hum. Behav. 283, 283-297 (1997).

Third, the identification procedure was made more unreliable by failing to use a blind administrator. A fundamental principal of scientific research established across multiple disciplines is that the administrator be "blind" or "blinded"—that they not know who the suspect is so as to avoid "conscious or unconscious verbal or behavioral cues that could influence the eyewitness' identification." *See* Nat'l Res. Council of the Nat'l Acads., at 91-92.

[6] The fact that the victim did not identify Long as her assailant until he was called forward by the presiding judge for unrelated criminal charges—despite sitting in the courtroom with him for approximately 60 to 90 minutes—further suggests that her identification may have been improperly influenced by Long's unrelated charges.

Here, the same officers who were intimately involved in the investigation also administered the identification procedure. A neutral administrator would have avoided any risk associated with unconsciously cueing a potential suspect to the witness while a non-blind administrator could not do the same. *See, e.g.*, Sarah M. Greathouse et al., *Instruction Bias and Lineup Presentation Moderate the Effects of Adminstrator Knowledge on Eyewitness Identification*, 33 L. & Hum. Behav. 70, 79 (2009) ("[I]dentifications of the suspect obtained when the administrator does not know the identity of the suspect in the photo array provide better information about the true guilt of the identified suspect."). While there is nothing in the record that suggests that the officers overtly signaled Long's presence to the victim, the officers immediately noticed Long upon entering the courtroom, J.A. 310, and were within the victim's view for the entire 60 to 90 minute identification session. J.A. 311.

Fourth, the courtroom identification was highly suggestive because Long was wearing a brown leather jacket that day, *id.*, a similar article of clothing that the victim identified on her assailant. Distinct clothing can significantly increase inaccurate identifications. Jennifer E. Dysart et al., *Show-ups: The Critical Issue of Clothing Bias*, 20 Applied Cognitive Psychol. 1009, 1017 (2006). Although the victim testified that the jacket was not the same one that her assailant was wearing the night of her assault, J.A. 172-73, the similarity between the articles of clothing

alone likely made Long stand out from the other individuals in the courtroom and could have caused the victim to identify Long as her assailant.[7] Dysart et al., *Show-ups: The Critical Issue of Clothing Bias* at 1019 (concluding that "false identifications are as likely whether an innocent person is wearing identical distinct clothing to that worn by the perpetrator or merely similar clothing").

Nothing in the record suggests the other black men in the courtroom were wearing similar leather jackets. In fact, the victim could not recall any other individual from the courtroom that day who looked either like Long or like the initial description she provided of her assailant to the police. J.A. 172 (describing one black male in the courtroom as "very light and tall, and all stooped over," and several others "that had afros"). Therefore, the dark leather jacket Long was wearing could have significantly influenced the victim's identification of her assailant.

Fifth, the victim identified Long as her assailant after 60 to 90 minutes of viewing the individuals in the courtroom. J.A. 253. Research has shown that time to decision is strongly correlated with accuracy. *See, e.g.,* Melanie Sauerland et al., *Decision Time and Confidence Predict Choosers' Identification Performance*

[7] To prevent clothing from prejudicing an eyewitness's identification, the United States Department of Justice—relying on the National Academy of Sciences' recommendations—instructed that "[w]here the suspect has a unique feature, such as . . . distinctive clothing that would make him or her stand out in a photo array, filler photographs should include that unique feature." Memorandum from Sally Q. Yates, on Eyewitness Identification: Procedures for Conducting Photo Arrays at 2.

in Photographic Showups, 13 PLoS One 1, 5 (2018) (concluding that accurate eyewitness identification can decrease after seconds of viewing a lineup, and drops precipitously as more time passes). That the witness here observed Long and others in the courtroom for such a long period of time before making an identification undermines the conclusion that her identification was accurate.

Sixth, the second identification procedure used in this case—a photo array conducted only fifteen to twenty minutes after the courtroom identification, J.A. 175—was itself suggestive in many of the same ways as the in-court identification. It was conducted by the same, non-blind administrators whom the victim testified "could have" explicitly asked her to pick Long from the photos rather than to identify her assailant. J.A. 179. Moreover, Long stood out from the remaining lineup members (who did not match the witness's description) because he was the only person that the victim had previously viewed and was also the only person wearing a leather jacket the victim testified was "identical" to the one her assailant wore, J.A. 160-61. Dysart et al., *Show-ups: The Critical Issue of Clothing Bias*, at 1019 (observing that a suspect not matching an eyewitness's initial description in their study was not identified "unless he was wearing similar or identical clothing").

Even without these suggestive elements, the second photo array is unreliable. Absent a reliable initial identification procedure, subsequent

identification procedures are "inherently *suggestive*, in that a witness may discern which person is common to both procedures—the police suspect." Nancy Steblay et al., *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. of Applied Res. in Memory & Cognition 284, 285 (2016) (emphasis in original).

Finally, the second identification procedure likely served only to reinforce the victim's initial tainted identification of Long and falsely inflate her confidence in her identification.[8] *Id.* at 284 ("Repeated identification procedures increase suspect identifications but do not increase the likelihood that the identified person is guilty."). Indeed, in DNA exoneration cases in which eyewitness misidentification played a role "[m]ost witnesses viewed more than one type of procedure, and viewing multiple procedures may have reinforced false identifications." Garrett, *Convicting the Innocent*, at 52-53.

* * *

Suggestive identification procedures are well understood to lead to unreliable eyewitness identifications. This was a motivating factor in the scientific community developing best practices, many of which have been mandated by legislatures and voluntarily adopted by law enforcement agencies in the years since

[8] As noted elsewhere, the victim's confidence in her in-court identification at trial, J.A. 166, while not surprising, is not indicative of accuracy. *See* Krug, *The Relationship Between Confidence and Accuracy* at 8 (citing studies). Exposure to an identified suspect after an initial identification "can inflate an eyewitness's confidence . . . without increasing the accuracy of the initial [identification]." *See* Wixted & Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy* at 22.

Long's conviction. The record establishes that the officers' procedural choices bear all the markers of suggestiveness. The cumulative impact of these suggestive procedures establish that the eyewitness identification case in the present case was unreliable.

CONCLUSION

The lower court's failure to properly evaluate the quality of the eyewitness identification fatally undermines the accuracy of its materiality inquiry under *Brady*. For the foregoing reasons, *amicus curiae* the Innocence Project respectfully urges the Court to reverse the District Court's denial of Long's habeas petition.

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Respectfully submitted,

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