IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	Case No. B1100377 Judge Beth A. Myers
vs.	:	
RICARDO WOODS,	:	
Defendant.	:	

MOTION OF *AMICUS CURIAE* THE INNOCENCE PROJECT IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION EVIDENCE

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INTRODUCTION

The Innocence Project[1] submits this *amicus curiae* brief in support of Mr. Woods' motion to suppress the out-of-court identification of Mr. Woods by David Chandler in *State v. Woods*, Case Nos. B1007430, B1100741, B1100377.[2] We further request that the Court permit the Innocence Project to participate in the evidentiary hearing on this motion[3] to assist the Court in considering the application of a robust body of scientific research on eyewitness identification not previously presented to the facts of this case. The scientific research, as applied to the facts, including new evidence not previously heard by the court, including (1) the statement of an eyewitness that the murder was committed by a man named Carlos, also known as "Los," who was recently released from prison following an aggravated murder conviction and (2) transcripts of police interviews with the two eyewitnesses who were with Mr. Chandler in his car on the night of the murder, compels the conclusion that Mr. Chandler's identification is so unreliable as to present a "very substantial likelihood of irreparable misidentification" requiring suppression. *State v. Jells*, 53 Ohio St.3d 22, 27, 559 N.E.2d 464 (1990) (internal citations omitted). *Accord State v. Bates*, 110 Ohio St. 3d 1230, 2006-Ohio-3667, 850 N.E.2d 1208, ¶8 (Ohio 2006) (O'Connor, J., dissenting) ("The admission of impermissibly suggestive identification evidence obtained by unnecessary measures violates a defendant's constitutional due process rights in cases where the totality of the circumstances does not support the reliability of the identification.").

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[1] 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 Project and affiliated organizations has led to the exoneration of 301 individuals who post-conviction DNA testing has shown were wrongly convicted for crimes they did not commit.

[2] On Mr. Woods' initial motion to suppress the identification, the Court properly found that the identification procedure used was unduly suggestive and in violation of Ohio G.C. § 2933.83 because it involved a photographic showup and suggestive statements by law enforcement. The Court further found that the identification elicited was nevertheless reliable. 9/22/11 Op. 21:15-21.

[3] On December 21, 2012, Karen A. Newirth, Esq., filed her application to appear *pro hac vice* in this matter.

THE INTEREST OF THE INNOCENCE PROJECT

While perhaps best known for our work using DNA to free the wrongly convicted, the Innocence Project is also dedicated to preventing future wrongful convictions by researching the causes of wrongful convictions and pursuing initiatives designed to enhance the truth-seeking functions of the criminal justice system. Eyewitness misidentification is the leading contributing cause of wrongful convictions, occurring in nearly 75 percent of the 301 wrongful convictions identified through post-conviction DNA testing conducted by the Innocence Project and affiliated organizations. In Ohio, the prevalence of eyewitness misidentification is even higher: nine out of Ohio's ten wrongful convictions proved by post-conviction DNA testing involved eyewitness misidentification as a contributing cause of the original conviction. Inasmuch as eyewitness misidentifications are the principal cause of wrongful convictions, the Innocence Project seeks leave to appear as *amicus* to further its compelling interest in ensuring that courts adequately protect criminal defendants from the use at trial of identification evidence that is so unreliable as to create a significant risk of misidentification.

For over 20 years, the Innocence Project has researched and litigated cases involving the use of suggestive law enforcement procedures and of unreliable eyewitness identification evidence across the country. We are unaware of any identification procedure that presents as grave a risk of irreparable misidentification as that present in this case. The danger of this uniquely and unduly suggestive procedure is compounded by the fact that this is a case involving a single eyewitness identification with no direct evidence corroborating Mr. Wood's involvement in the crime. While this case does not involve DNA evidence that could definitively prove Mr. Woods' innocence or guilt, we are nonetheless very concerned that any verdict resting on Mr.

Chandler's identification would bear all of the hallmarks of known cases of wrongful conviction based on eyewitness misidentification.[4]

The Court's decision on the defendant's motion to suppress the identification in this case goes to the heart of the Innocence Project's mission, and, we believe the Innocence Project can provide important assistance to the Court in considering defendant's motion by identifying scientific research and legal arguments that might not otherwise be presented.

PROCEDURAL HISTORY

On September 15, 2011, the Court held a hearing[5] on Mr. Woods' initial motion to suppress the alleged identification of him by David Chandler.[6] At that hearing, the videotape recording of the identification procedure conducted with Mr. Chandler on November 2, 2010 was admitted in evidence and Detectives David Gregory and Howard Grant, who conducted and recorded the identification procedure, testified. On September 22, 2011, the Court issued its decision[7] denying Mr. Woods' motion to suppress the identification, finding that the identification procedure was unduly suggestive[8] but that the identification was nevertheless reliable and there was not a substantial likelihood of irreparable misidentification.[9] In so ruling, the Court considered the five "reliability factors" set forth by the United States Supreme Court in

[4] While a full discussion is beyond the scope of this brief, we do believe it is noteworthy that the only non-identification evidence disclosed by the state in this case is that of an informant who alleges that Mr. Woods confessed his guilt to him while both men were incarcerated. The testimony of informants is among the most common contributing causes of wrongful convictions; nearly 15 percent of the Innocence Project's exonerations involved informant testimony. *See* The Innocence Project, *Understanding the Causes: Informants*, http://www.innocenceproject.org/understand/Snitches-Informants.php (accessed December 20, 2012). *See also* Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf (accessed December 20, 2012); Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice, New York University Press (2010).

[5] A copy of the 9/15/11 hearing transcript is attached hereto as Exhibit A.

[6] In its ruling on the admissibility of Mr. Chandler's identification, the Court accepted that Mr. Chandler's blinking was a method of reliable communication. In light of the findings of the defendant's neurological expert, we do not believe that this finding is correct; nevertheless, we accept the Court's findings in this regard for the purpose of this motion only.

[7] A copy of the Court's 9/22/11 opinion is attached hereto as Exhibit B.

[8] 9/22/11 Op. 16:6-7.

[9] *Id.* 21:14-20.

Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct 2243, 53 L. Ed. 2d 140 (1977) (adopted by the Ohio Supreme Court in *Jells, supra*) and relied upon several more recent Ohio decisions[10] to reach the following conclusions:

1. Mr. Chandler's opportunity to view the perpetrator is unknown;[11]
2. Mr. Chandler's degree of attention at the time of the crime is unknown;[12]
3. Mr. Chandler provided no description of the perpetrator prior to the alleged identification;[13]
4. Mr. Chandler "expresses no uncertainty. In fact, he confirms the identification, the photograph of Mr. Woods twice. He shows no uncertainty to that identification."[14]
5. There were a few days between the crime and confrontation.[15]

After the Court's decision was issued, however, defense counsel received additional discovery that reveals information directly relevant to the reliability of Mr. Chandler's identification not previously presented to the Court (and in some cases contradictory to evidence previously heard by the Court), and which ought to be considered by the Court in ruling on the ultimate reliability – and admissibility – of Mr. Chandler's identification.

FACTS[16]

The facts of this case are truly unique.[17] On November 2, 2010, David Chandler, paralyzed and on a ventilator as a result of an October 28, 2010 shooting, was shown a single

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[10] *See* 9/22/11 Op. 17-19, relying on *State v. Curry*, 10th Dist. No. 99AP-1319, 2000 WL 1220160 (Aug. 29, 2000); *State v. Levingston*, 1st Dist. No. C-090235, 2011 WL 1331883 (Apr. 8, 2011); *State v. Griffin*, 9th Dist. No. 25308, 2011 WL 3484445 (Aug. 10, 2011).
[11] 9/22/11 Op. 20:1-5.
[12] *Id.* 20:6-9.
[13] *Id.* 20:19-21.
[14] *Id.* 20:25-21:1-4.
[15] *Id.* 21:5-8.
[16] The facts recited herein are drawn from the testimony of Detectives Gregory and Grant at the September 15, 2011 hearing (hereinafter "9/15/11 Tr.") and from the transcripts of the October 28, 2010 witness interviews of William Smith (hereinafter "Smith Int.") and James Spears (hereinafter "Spears Int."), attached hereto as Exhibit C.

photograph of Ricardo Woods[18] during a police-arranged identification procedure at his hospital bed. He was informed that Mr. Woods was the person the police suspected of shooting him and asked if he also believed that Mr. Woods had shot him. As previously recognized by this Court, the identification procedure was conducted in an unduly suggestive manner and contrary to Ohio law. Perhaps most perilous to the ultimate reliability of Mr. Chandler's identification, the officers showed Mr. Chandler a single photograph of Mr. Woods rather than include his photograph as required in a six person photographic lineup. They did this despite the fact that they had in their possession at least one of the two previously composed lineups containing Mr. Woods' photograph.[19] Indeed, had law enforcement shown Mr. Chandler a lineup rather than ask him to spell the perpetrator's name, the identification procedure would have been clearer and more reliable, and also less onerous for Mr. Chandler. Ten days after the identification procedure was conducted, Mr. Chandler died as a result of a stroke. Mr. Chandler never testified under oath and was never subject to cross-examination about his identification of Mr. Woods.

In their police interviews, Messrs. Spears and Smith, the two witnesses to Mr. Chandler's shooting, offered substantially similar accounts of the events surrounding that shooting, accounts unavailable to this Court at the previous suppression hearing. Mr. Chandler was shot multiple times in the early morning hours of October 28, 2010[20] while he sat in the passenger seat of his

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[17]A national search of published cases reveals only one involving the admission of an identification by a deceased witness predicated upon a police arranged hospital corporeal show-up in only one case *People v. Mendez*, 155 Misc.2d 368, 589 N.Y.S.2d 268 (Sup. Ct. 1992) (reversing for failure to hold *Wade* hearing) and *no cases* involving a deceased witness who made an identification based on a police arranged single photograph show-up at the hospital.

[18] As previously noted, it was recently disclosed that one eyewitness identified the shooter as a person named Carlos. This is yet another piece of new evidence that undermines the testimony of Detective Gregory at the first suppression hearing. There, Detective Gregory testified that he had developed Ricardo Woods as a suspect based on the protected eyewitness' statements. However, it is not now clear how Ricardo Woods became a suspect given that *the witness identified a suspect of another name with identifying characteristics not shared by Mr. Woods. See* 9/15/11 Tr. 14:25-15:9.

[19] 9/15/11 Tr. 29:18-23 (Gregory Dir.).

[20] Spears Int. 38:22-24.

parked car near the intersection of Linn Street and York Street in downtown Cincinnati.[21] At the time of the shooting, Mr. Chandler's longtime partner, James Spears, was in the driver's seat, and his friend, William "Troy" Smith, was in the rear *passenger* seat.[22] Mr. Smith's location in the car is important new evidence that contradicts Detective Gregory's testimony at the suppression hearing that Mr. Smith was sitting behind the driver (and, presumably, not in a position to observe the shooter).[23]

According to Messrs. Spears and Smith, in the early morning hours of October 28, 2010, Messrs. Chandler and Smith came to Mr. Spears' home to ask him to drive them in Mr. Chandler's car to buy crack. Mr. Spears believes that Messrs. Chandler and Smith had been using crack all night prior to their arrival at his home.[24] At Mr. Chandler's request, Mr. Spears first drove to the Delhi home of Father Phillip Seher, a priest who handled Mr. Chandler's finances.[25] Mr. Chandler went inside Father Seher's home for approximately half an hour, and then returned to the car with money.[26] Thereafter the three men proceeded downtown to purchase crack.[27] According to Messrs. Spears and Smith, Mr. Chandler suffered from a longtime addiction to both heroin and crack[28] and, during 2010 alone, had gone downtown to purchase drugs on "more than hundreds"[29] of occasions from "twenty or so" different drug dealers.[30]

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[21] 9/15/11 Tr. 12:10-11 (Gregory Dir.).
[22] Spears Int. 8:5-9:6; Smith Int. 5:16-19.
[23] 9/15/11 Tr. 13:4-6 (Gregory Dir.).
[24] Spears Int. 5:10-15.
[25] *Id.* 6:6-21.
[26] *Id.* 7:14-24, 6:6-9.
[27] Spears Int. 9:2-3; Smith Int. 5:16-19. *Compare* 9/22/11 Op. 8:1-5 (The Court found that, when asked by Detective Gregory just prior to the identification procedure if he had gone downtown to purchase crack, he responded that he did not.).
[28] Spears Int. 5:19-21; Smith Int. 5:7-8.
[29] Spears Int. 17:3-17:10.
[30] *Id.* 16:5-16:12.

Once they arrived in the vicinity of Linn and York Streets in Downtown Cincinnati, various individuals called Mr. Chandler by name.[31] Mr. Smith concluded that the people on the street who called out to Mr. Chandler had recognized his car.[32] According to Mr. Smith, after they parked the car on York Street just north of Linn Street in a location determined by Mr. Chandler, Mr. Chandler left the car for about 30 seconds.[33] He walked behind the car towards Linn Street while remaining on the same side of the street as the car and spoke with a black man in a red shirt who was standing with at least three other people (possibly two women) before returning to the car.[34] Mr. Spears did not recall that Mr. Chandler got out of the car.[35] Both Messrs. Spears and Smith remember that shortly after they parked, a red car pulled in front of their car and that Mr. Chandler stated, in substance, that the person they were waiting for was in the red car.[36] Both men recall that a woman got out of the passenger side of the red car and stood next to the car, talking and/or "fumbling in the seat of the car."[37] Both men also recall that at about the same time, the shooter approached the passenger side of the car from the rear, stated that Mr. Chandler owed him money and quickly began shooting at Mr. Chandler.[38] Mr. Smith informed police that he "hit the back floorboard" as soon as the shots were fired.[39] After three or more shots had been fired, Mr. Smith yelled for Mr. Spears to drive and Mr. Spears drove to the hospital.[40]

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[31] Spears Int. 10:11-18 (various people calling "Chandler"); 16:19-22 and 24:3-24 (girl with gunman knew Mr. Chandler).
[32] Smith Int. 27:1-5.
[33] Smith Int. 7:8-10; 28:18-32:25.
[34] *Id.* 29:10-32:3.
[35] Spears Int. 14:10-15:1.
[36] Spears Int. 11:11-17; Smith Int. 9:16-10:4.
[37] Spears Int. 11:13-15; Smith Int. 12:1-13:6 34:10-13.
[38] Spears Int. 12:4-12:12; Smith Int. 13:12-15:14.
[39] Spears Int. 23:4-7.
[40] Spears Int. 13:12-14:3.

The shooting occurred at around 2:30 in the morning on Linn Street within the first block north of York Street in Downtown Cincinnati. A snapshot of the shooting's location available on Google Earth reveals a single street light at least half a block away from where the car was parked.[41] Mr. Spears told law enforcement that the shooter stood so close to the car that, from his position in the driver's seat, he was unable to see the shooter's face; Mr. Smith told law enforcement that he had never seen the shooter before.[42] Mr. Spears described the shooter as wearing a white shirt while Mr. Smith described him wearing a black hooded sweatshirt, black sweatpants and a black knit cap.[43] Despite having immediately "hit the floorboards" once the shooting started, Mr. Smith provided police with a general description of the shooter: black; mid-thirties; about five foot nine and a half inches to five foot ten inches tall and 180 to 185 pounds; solid build; darker complexion; full, well-groomed beard.[44] Mr. Spears described the gun used by the shooter as black and rectangular and not a revolver, and Mr. Smith described it as a "Glock type" gun, possibly a nine millimeter[45]

In addition to providing new information concerning the events of October 28, 2010, Mr. Spears' interview with law enforcement on the same date provided relevant background information about Mr. Chandler which should be considered by this Court in evaluating the reliability of his identification of Ricardo Woods. Mr. Spears was aware that Mr. Chandler often stole drugs from drug dealers and, on one occasion, had even been present when Mr. Chandler did this.[46] As a result of these thefts, Mr. Chandler received threatening telephone calls and text

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[41] *See* https://maps.google.com/maps?q=linn+and+york+street+cincinnati&ie=UTF-8&hq=&hnear=0x8841b40687576be9:0xa42de40d7bdf4ab1,Linn+St+%26+York+St,+Cincinnati,+OH+45214&gl=us&ei=H3S2UNvMB8K82wX0voDIBg&ved=0CC8Q8gEwAA (last visited November 28, 2011).
[42] Spears Int. 26:7-11; Smith Int. 16:13-14.
[43] Smith Int. 20:21-21:22; Spears Int. 12:24-25.
[44] Smith Int. 18:6-20:15.
[45] Spears Int. 13:2-3; Smith Int. 16:19-25.
[46] Spears Int. 17:13-22.

messages from drug dealers Mr. Chandler stole drugs from in which they "threatened . . . to kill him and stuff like that."[47] Mr. Spears specifically provided law enforcement with the names of two individuals ("Joe" and "Mark") from whom Mr. Chandler had recently stolen drugs and who lived or sold drugs Downtown (the area where Mr. Chandler was shot).[48] Indeed, while Mr. Spears did not believe that the shooter was Joe, his description of Joe's age (mid-30s) comports with Mr. Smith's estimation of the shooter's age.[49] Most significantly, neither Mr. Spears nor Mr. Smith ever mentioned a person named Ricardo Woods or "O".

During his interview with law enforcement, Mr. Spears also disclosed that he and Mr. Chandler had been working with Cincinnati Police Department's District 3 Task Unit as confidential informants on criminal activity occurring in and around the Price Hill neighborhood but also involving individuals from Downtown.[50] According to Mr. Spears, "[s]ome of the people that have been arrested because of cases that we have worked with []live . . . downtown."[51] Mr. Spears explained why Mr. Chandler could no longer buy drugs in Price Hill and had to, instead, purchase his drugs Downtown:

> The crack dealers in Price Hill have – David has been marked as a snitch. And it's got around by somebody and it's gotten out of control.
>
> I mean, as far as it spreading around and no one will deal with him up there, so he didn't have anywhere to go. So he went downtown because the person he had in Price Hill now will not deal with him because they are afraid that he's working for the police.[52]

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[47] *Id.* 18:1-8.
[48] Spears Int. 18:12-20:20.
[49] *Id.* 19:11-19:13; Smith Int. 18:11-18.
[50] *Spears Int.* 29:24-30:24.
[51] *Id.* 30:19-24.
[52] *Id.* 34:4-14.

In short, Mr. Chandler's friends make it clear that he had many enemies who, one could reasonably conclude, were motivated to kill him. The person who ultimately shot Mr. Chandler could have been any one of these individuals, their agents or their allies.

According to Detective Gregory, both Mr. Spears and Mr. Smith were shown at least one photographic lineup containing Mr. Woods' photograph together with five fillers.[53] The state provided the defense with the two photographic arrays that were shown to Mr. Smith on October 28, 2010, each of which contained a photograph of Mr. Woods.[54] Mr. Woods' photograph was the only photograph repeated in the two procedures. Nevertheless, Mr. Smith did not identify Mr. Woods as the shooter. The state has not yet provided the defense with the lineup or lineups shown to Mr. Spears, who also did not make an identification.[55]

LEGAL FRAMEWORK

In order to determine the admissibility of eyewitness identification evidence in the face of a due process challenge, Ohio courts follow the legal framework set forth by the United States Supreme Court in *Neil v. Biggers,* 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401(1972) and formally adopted in *Manson*, 432 U.S. 98, 97 S. Ct. 2243. *See Jells*, 53 Ohio St.3d 22 at 27, 599 N.E.2d 464. Under this two-part test, a court must first determine whether an identification procedure was unnecessarily or unduly suggestive. *Id.* The focus then shifts to reliability – whether the suggestive procedure created a very substantial likelihood of misidentification. *Id., see also Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). In

[53] 9/15/11 Tr. 29:18-23 (Gregory Dir.).
[54] The photographic arrays are attached hereto as Exhibit D.
[55] 9/15/11 Tr. 32: 7-16.

reaching this conclusion, courts must consider the "totality of the circumstances" and are directed to consider the following non-exhaustive factors:

1. The opportunity of the witness to view the perpetrator at the time of the crime;
2. The witness' degree of attention;
3. The accuracy of the witness' prior description of the perpetrator;
4. The level of certainty demonstrated by the witness at the time of the confrontation; and
5. The time between the crime and confrontation.

Jells, 53 Ohio St.3d at 27, 599 N.E.2d 464 (*quoting Biggers, supra*). As the Supreme Court explained, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 113-14, 97 S.Ct. 2243.

While the focus of the inquiry is "upon the reliability of the identification, *not* the identification procedure" *Jells*, 53 Ohio St.3d 22 at 27 (internal citations omitted), showups require additional scrutiny. As this Court recognized in its September 22 decision,[56] courts in Ohio and throughout the country agree that showups are inherently suggestive and should not be used except in very limited circumstances, generally within two hours of a crime's occurrence and when exigent circumstances require the immediate detention of a suspect. *Stovall v. Denno* 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.") *Accord State v. Broom*, 40 Ohio St. 3d 277, 284, 533 N.E.2d 682 (1988); *United States v. Baylor*, N.D. Ohio No. 1:06CR168, 2006 WL 2899940 (Oct. 10, 2006). *See also State v. Lawson*, Or. Sup. Ct. No. CF080348, 2012 WL 5955056, *10 (Nov. 29, 2012); *State v. Henderson,* 208 N.J. 208, 259-61, 27 A.3d 872, 902-03 *holding modified by State v. Chen*, 208

[56] 9/22/11 Op. 17:22-25 (citing *State v. Curry, supra* n.8).

N.J. 307, 27 A.3d 930 (2011); *Com. v. Martin*, 447 Mass. 274, 295, 850 N.E.2d 555 (2006); *People v. Brisco*, 99 N.Y.2d 596, 599, 788 N.E.2d 611 (2003); *State v. Dubose*, 285 Wis. 2d 143, 150, 699 N.W.2d 582 (2005). When circumstances justify the use of a showup, an identification that results from that procedure will be admitted if, under the totality of the circumstances, it bears strong indicia of reliability.

Photographic showups are even more strongly disfavored[57] than corporeal showups, because the very use of a photograph demonstrates the lack of exigency normally required to justify the use of a corporeal showup. *State v. Padgett*, 2nd Dist. No. 99 CA 87, 2000 WL 873218 (June 30, 2000) (single photograph identification inherently suggestive and was unnecessary since there were no exigent circumstances and a photo array could easily have been prepared and presented to him by his fellow officers.) Additionally, while a corporeal showup can be justified on public safety grounds because law enforcement has detained a potentially dangerous suspect, a photographic showup cannot be similarly justified – a photographic showup will not mitigate any potential threat to public safety. *Id.*

In the parlance of the Supreme Court's jurisprudence, a photographic showup is not only inherently suggestive, it is unnecessarily so. *See Biggers*, 409 U.S. at 198, 93 S. Ct. 375 ("Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.") *Accord Manson,* 432 U.S. at 99, 97 S. Ct. 2243 (single photo identification by undercover police officer both suggestive and unnecessary); *State v. Battee,* 72 Ohio App.3d 660, 662, 595 N.E.2d 977 (11th Dist. 1991)

[57] Photographic showups are used infrequently. In 2008, the Dallas Police Department officially prohibited the use of photographic showups after an innocent man was mistakenly identified in a photographic showup. http://crimeblog.dallasnews.com/2008/10/innocent-mans-identification-i.html/.

(finding single-photo identification procedure was both suggestive and unnecessary and that it has been widely condemned, citing *Stovall*, 388 U.S. at 302, 87 S.Ct. 1967; *State v. Smith,* 2nd Dist. No. C.A. 13908, 1994 WL 95213 (Mar. 23, 1994) (recognizing an element of suggestiveness in presentation of single photograph of suspect to police officer who purchased drugs from suspect while working undercover). *Compare State v. Booker,* 2nd Dist. No. 17709, 1999 WL 1062215 (Nov. 24, 1999) (not suggestive where undercover police officer procures single photograph for himself); *State v. Wogenstahl*, 1st Dist. No. C-930222, 1994 WL 686898 (Nov. 30, 1994) (single photo identification that follows a tentative identification from photo array was not impermissibly suggestive).

ARGUMENT

The Court's September 22, 2010 holding that the single photographic showup procedure employed by Detectives Gregory and Grant was unduly suggestive under the law of the State of Ohio and of the Supreme Court of the United States is amply supported by the evidence.[58] As the Court explained, law enforcement conducted a photographic showup, which was exacerbated by the suggestive nature of the detective's remarks.[59] The Court's finding is also supported by factors not explicitly mentioned in the September 22, 2010 ruling, but nevertheless important because increased suggestion in the identification procedure is strongly correlated with decreased reliability.[60]

The Court's finding that the identification was nevertheless reliable, however, was in error as demonstrated by the scientific research discussed below and in the attached affidavit of

[58] 9/22/11 Op. 15:11-16:5.
[59] 9/22/11 Op. 15:22-16:6.
[60] Wells and Quinlivan, *Suggestive eyewitness identification procedures and the Supreme Court's reliability test in light of eyewitness science: 30 Years later*, 33 LAW AND HUMAN BEHAVIOR 1–24 (2009).

Jennifer A. Dysart, Ph.D.[61], a leading psychological researcher in the area of eyewitness memory and identification.

I. Ohio Law and Scientific Research Support the Court's Finding of Undue Suggestion in the Identification Procedure

The Ohio legislature has identified minimum requirements for identification procedures conducted by law enforcement and further mandates that "any law enforcement agency or criminal justice entity in this state that conducts live lineups or photo lineups shall adopt specific procedures for conducting the lineups" that, at a minimum, comport with those requirements.[62] *State v. Sails*, 2012-Ohio-4453, 2012 WL 4480712 (September 28, 2012). While Senate Bill 77 does not directly address showup identifications, the minimum requirements contained therein also make those procedures more reliable.[63] The fact that these practices were not followed in this case supports the Court's September 22, 2010 finding that the identification procedure was unduly suggestive.

The statute's minimum requirements – which are supported by decades of robust scientific research – include blind or blinded administration "unless impracticable"[64] and a written record of the identification procedure (to include all results of the procedure, the witness' confidence statements made immediately at the time of the identification, the names of all present at the procedure, the sources of all photographs used).[65] The statute also emphasizes the importance of pre-lineup instructions, which state in substance that the perpetrator may or may

[61] Hereinafter "Dysart Aff.", attached hereto as Exhibit E.
[62] R.C. § 2933.83 ("Senate Bill 77").
[63] It is generally not practicable to use a blind administrator for a corporeal showup.
[64] "When it is impracticable for either a blind or blinded administrator to conduct the live lineup or photo lineup, the administrator shall state in writing the reason for that impracticability." R.C. § 2933.83(B)(3).
[65] R.C. § 2933.83(B)(1)-(4).

not be present in the lineup,[66] and the recording of "a statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of the photographs as being of the person the eyewitness saw that is taken immediately upon the reaction of the eyewitness to viewing the photograph . . . "[67] Finally, Senate Bill 77 mandates that the "administrator shall not say anything to the eyewitness or give any oral or nonverbal cues as to whether or not the eyewitness identified the 'suspect photograph' until the administrator documents and records the results of the procedure . . . and the photo lineup has concluded."[68] Each of these requirements was violated during the identification procedure conducted with Mr. Chandler. These violations are significant not only because they are violations of the law that demonstrate the suggestive nature of the proceeding, but also because they undermine the ultimate reliability of the identification.

The scientific support for Ohio's statutory requirements is as extensive as it is rigorous, and has formed the basis of identification procedure protocols required or recommended by other legislatures,[69] courts[70] and law enforcement agencies[71] across the country. This scientific research explains why Ohio law requires these procedures and further elucidates how suggestion

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[66] R.C. § 2933.83(A)(6)(e).
[67] R.C. § 2933.83(A)(6)(h).
[68] R.C. § 2933.83(A)(6)(i).
[69] N.C.G.S.A. § 15A-284, available at: http://www.ncga.state.nc.us/Sessions/2007/Bills/House/PDF/H1625v0.pdf; Texas C.C.P. Art. 38.20 available at: http://www.capitol.state.tx.us/tlodocs/82R/billtext/html/SB00121E.htm; CT PA 11-252 available at: http://www.cga.ct.gov/2011/ACT/PA/2011PA-00252-R00HB-06344-PA.pdf.
[70] In the last fifteen months, two state supreme courts – that of New Jersey and Oregon – have issued lengthy opinions which describe the scientific research and find that the research requires that the traditional *Manson*-based balancing test be rejected. *See State v. Henderson*, 208 N.J. 208, 219, 27 A.3d 872, 878 *holding modified by State v. Chen*, 208 N.J. 307, 27 A.3d 930 (2011) and *State v. Lawson*,CF080348, 2012 WL 5955056 (Or. Nov. 29, 2012).
[71] *See, e.g.,* U.S. Department of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999), available at http://www.ncjrs.gov/pdffiles1/nij/178240.pdf and U.S. Department of Justice, Eyewitness Evidence: A Trainer's Manual for Law Enforcement (2003), available at: http://www.innocenceproject.org/docs/NIJ%20training%20manual.pdf; New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures 1 (Apr. 18, 2001), available at http://www.state.nj.us/lps/dcj/agguide/photoid.pdf; Wisconsin Department of Justice, Model Policy and Procedure for Eyewitness Identification, available at http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf.

in the identification procedure can undermine the reliability of any identification that is that product of an unduly suggestive procedure.

A. A Non-Blind Administrator Can Influence Both the Witness' Selection and His Certainty About His Choice[72]

In this case, the identification procedure administrator – Detective Gregory – was also the lead investigator on the case; he was a "non-blind" administrator because he knew that Mr. Woods was the police suspect. Scientific research has consistently shown that test subjects are influenced by the expectations of those who perform the tests.[73] A prominent meta-analysis[74] conducted at Harvard University combined the findings of 345 previous studies and concluded that in the absence of a blind administrator, individuals typically tailor their responses to meet the expectations of the administrator and that "[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero."[75] Blind administrators are especially important for eyewitness identification procedures, as eyewitnesses' memories are easily contaminated by outside influences. The most likely source of such influence is the traditional (non-blind) identification procedure administrator who is aware of the suspect's identity. Specifically, and as in this case, a non-blind administrator may lead the eyewitness (often unintentionally) to choose a particular suspect and/or provide post-identification feedback to the

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[72] *See* Dysart Aff. ¶¶ 49-50.

[73] *See, e.g.*, Adair & Epstein, *Verbal cues in the mediation of experimenter bias*, 22 PSYCHOL. REP. 1045–1053 (1968); Aronson et al., *On the avoidance of bias*, 2 METHODS RES. IN SOC. PSYCHOL. 292–314 (1990).

[74] "A meta-analysis is a synthesis of all obtainable data collected in a specified topical area. The benefits of a meta-analysis are that greater statistical power can be obtained by combining data from many studies.' The more consistent the conclusions from aggregated data, the greater confidence one can have in those conclusions." *Henderson*, 208 N.J. at 243.

[75] Rosenthal & Rubin, *Interpersonal expectancy effects: The first 345 studies.* 3 BEHAVIORAL AND BRAIN SCIENCES 377-386 (1978).

eyewitness, which influences the eyewitness's confidence in his selection and recollection of the original viewing conditions. These conclusions are supported by scientific research.[76]

In *Henderson*, after a review of the scientific research, the New Jersey Supreme Court found that "a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect" and therefore endorsed the testimony of one psychological scientist that blind lineup administration is "the single most important characteristic that should apply to eyewitness identification" procedures. *Henderson*, 208 N.J. at 248-49, 27 A.3d 872. The *Henderson* court explained that "[i]ts purpose is to prevent an administrator from intentionally or unintentionally influencing a witness' identification decision." *Id.* at 249.

The level of overt cuing and suggestion[77] identified by this Court is rare and troubling. Whether or not Detective Gregory understood the detrimental effects of the procedure he used (including telling Mr. Chandler immediately prior to showing him Mr. Woods' photo that he, as the investigating officer, believed that Mr. Woods shot Mr. Chandler) those effects are clearly indicated by the science. It is therefore highly probable that Detective Gregory strongly influenced Mr. Chandler to affirm law enforcement's suspicion by "identifying" Mr. Woods and

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[76] Haw & Fisher, *Effects of administrator-witness contact on eyewitness identification accuracy.*, 89 J. APPLIED PSYCHOL. 1106-1112 (2004) ("[W]itnesses were more likely to make decisions consistent with lineup administrator expectations when the level of contact between the administrator and the witness was high than when it was low.") Eyewitness identification administrators' power of influence is similarly documented in a number of other studies. *See, e.g.,* Garrioch & Brimacombe, *Lineup administrators' expectations: Their impact on eyewitness confidence.* 25 LAW AND HUM. BEHAV. 299–315 (2001); Phillips et al. *Double-blind photoarray administration as a safeguard against investigator bias*. 84 J. APPLIED PSYCHOL. 940–951 (1999).

[77] Because most members of law enforcement act are well intentioned and try to remain neutral during a non-blind identification procedure, most advocates of blind administration are concerned with inadvertent cuing and suggestion.

inflated Mr. Chandler's confidence in his identification, as reflected in his affirmative response when Detective Gregory subsequently asked if he was "sure" of his identification.[78]

Finally, as Detective Gregory acknowledged at the September 15, 2010 hearing, any one of "a thousand other police officers" could have conducted an identification procedure with Mr. Chandler; the use of a blind administrator in this case was *practicable* within the meaning of the law.[79] In light of this evidence, this Court should find that the failure to use a non-blind administrator not only made the procedure unduly suggestive, but also undermined the ultimate reliability of Mr. Chandler's identification and increased the likelihood of misidentification.

B. The Failure to Provide Pre-lineup Instructions Makes a Witness More Likely to Make a Selection, Regardless of the Suspect's Actual Guilt or Innocence[80]

Immediately before showing Mr. Chandler the mugshot of Mr. Woods, Detective Gregory stated, "If I showed you a picture of the person that I believe to be O, would you be able to identify the person who shot you?" As the Court found, this statement was highly problematic because it telegraphed to the witness that the person whose photograph was being shown to him is actually the perpetrator.

Prophylactic pre-lineup instructions are designed to ensure that witnesses understand the role of the identification procedure in the investigative process and to decrease the pressure witnesses may feel to make a selection, which has been shown to contribute to misidentifications. Instructions can take many forms, but perhaps paramount in protecting the innocent is the instruction that the perpetrator "may or may not be present" in the identification procedure. This "unbiased" instruction can be contrasted with a "biased" directive, in which the

[78] 9/22/11 Op. 14:24-15:4.
[79] 9/15/11 Tr. 39:22-40:3.
[80] *See* Dysart Aff. ¶¶ 51-57.

witness is told that the administrator believes that the perpetrator's photograph is the one, or among the ones, being shown to the witness. Detective Gregory's statement to Mr. Chandler concerning his belief that Mr. Woods was the person who shot Mr. Chandler is a classic example of a "biased directive."

"There is a broad consensus" that identification procedures should be preceded by prophylactic witness instructions. *Id.* at 250. A meta-analysis combining results from twenty-two individual studies on the effects of procedure instructions found that when biased instructions are provided to witnesses, a higher level of choosing occurred.[81] Thus, in identification procedures where the perpetrator is absent (and therefore any identification would be incorrect), the type of instructions provided – "biased" or "unbiased" – has a significant effect on eyewitness's accuracy. When "unbiased" instructions are given, the number of (necessarily incorrect) identifications decreased. When "biased" instructions are given, the number of (necessarily incorrect) identifications increases. In other words, in cases in which the perpetrator is not in the lineup, and thus the innocent suspect is more vulnerable, unbiased instructions lead to fewer false identifications, whereas biased instructions lead to an increased rate of false identifications.[82] Research demonstrates that correct identifications remain constant regardless of the type of instruction offered, and the only effect of implementing an unbiased, or cautionary, set of instructions is a decrease in guessing.[83]

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[81] Steblay, *Social influence in eyewitness recall: A meta-analytic review of lineup instruction effects,* 21 LAW AND HUM. BEHAV. 283-298 (1997) (Research included 2,588 participant witnesses and found that when unbiased instructions were provided to witnesses, correct identifications (including correct rejections of lineup members when the suspect was absent) occurred 56 percent of the time. On the other hand, when biased instructions were provided, correct identifications fell to 44 percent.)

[82] Malpass & Devine, *Eyewitness identification: Lineup instructions and the absence of the offender.* 66 J. OF APPLIED PSYCHOL. 482-489 (1981).

[83] Steblay, *Reforming eyewitness identification: Cautionary lineup instructions; weighing the advantages and disadvantages of showups versus line-ups,* 4 CARDOZO PUB. LAW, POL'Y AND ETHICS J. 341-354 (2006).

A biased instruction like the one in this case creates an even greater risk of misidentification in the showup context, where the witness has only two options – to identify or not identify the suspect – as opposed to a proper lineup, where the witness would have at least seven options – to identify or not identify the suspect or to identify one (or more) of the fillers. Thus, the risk of increased choosing presented by biased instructions places more innocents at risk in the showup context then in the lineup context. Courts throughout the country have recognized this and found that the importance of providing instructions is particularly critical in the case of a showup procedure, *See State v. Ledbetter*, 275 Conn. 534, 881 A.2d 290 (2005) (when a positive identification is made at a showup in the absence of an instruction to the eyewitness that the perpetrator may not be present, the jury must be warned that this failure increased the probability of a misidentification); *State v. Dubose*, 285 Wis.2d 143, 699 N.W.2d 582 (2005) (where showup is necessary, lineup administrators should tell witnesses that the real suspect may or may not be present and that the investigation will continue regardless of the result of the impending lineup procedure).

We respectfully submit that the Court should now find that Detective Gregory's use of a biased directive and the correlating absence of prophylactic pre-lineup instructions not only made the procedure unduly suggestive, but also undermined the ultimate reliability of Mr. Chandler's identification and increased the likelihood of misidentification. *See Henderson,* 208 N.J. at 250, 27 A.3d 872 (The scientific research shows that "[w]ithout an appropriate warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members" and, as a result, "[t]he failure to give proper pre-lineup instructions can increase the risk of misidentification.") *Accord Lawson*, 2012 WL 5955056 at *19 ("The likelihood of misidentification is significantly decreased when witnesses are instructed prior to

an identification procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone.")

C. Pre- and Post-Identification Feedback Can Alter a Witness' Memory for the Event and Inflate Confidence[84]

The biased instruction provided by Detective Gregory, indicating that Mr. Woods was the police suspect, was a form of pre-identification feedback that likely affected Mr. Chandler's memory for the event and, to the extent it can be gleaned by interpreting eye blinking, his confidence in his identification of Mr. Woods. There is a substantial body of scientific research cataloging the ways in which information provided to witnesses both before and after an identification can affect their memory for the original event and inflate their confidence in the resulting identification (some of this research also supports the requirement of blind administration).[85]

One study that examined the effects of feedback found that post-identification feedback produced "strong effects" on the witnesses' reports of a range of factors, from overall certainty to clarity of memory.[86] This study was affirmed by a meta-analysis of twenty studies encompassing 2,400 identifications which found that witnesses who received feedback "expressed significantly more . . . confidence in their decision compared with participants who received no feedback" and that "those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and

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[84] *See* Dysart Aff. ¶¶ 69-71.
[85] *See, e.g.*, Loftus & Pickrell, *The Formation of False Memories*, 25 PSYCHIATRIC ANNALS 720 (1995); Loftus & Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC'Y 86 (1975); Wells & Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998).
[86] *Id.* 360-376.

sharper memory abilities in general."[87] *Accord Henderson*, 208 N.J. at 253, 27 A.3d 872 ("[C]*onfirmation can reduce doubt and engender a false sense of confidence in a witness.* Feedback can also falsely enhance a witness' recollection of the quality of his or her view of an event.")

In light of the research demonstrating that confirmatory feedback – whether before or after an identification – inflates a witness' confidence,[88] scientific researchers have recommended, and lawmakers (including those in Ohio), courts and members of law enforcement have adopted a requirement that a witness' confidence statement in his or her own words be recorded at the time of the confrontation, in order to preserve for the record the witness' confidence before it could be subject to external influences.

The Court should find that law enforcement's failure to avoid feedback and record a confidence statement (rather than simply asking Mr. Woods if he was "sure"[89]) not only rendered the procedure unduly suggestive but also undermined the reliability of the identification and increased the likelihood of misidentification.

II. The Evidence Does Not Support The Court's Finding That Mr. Chandler's Identification Was Reliable Despite The Unduly Suggestive Nature Of The Procedure

We respectfully submit that, particularly in light of the scientific research and new evidence, the Court erred when it concluded that Mr. Chandler's identification was sufficiently reliable to warrant admission in evidence at his criminal trial. In fact, the identification is so unreliable that its admission in evidence will result in a violation of Mr. Woods' constitutional

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[87] Douglass & Steblay, *Memory Distortion in Eyewitnesses: A Meta–Analysis of the Post-identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864–65 (2006).

[88] As discussed in greater detail *infra*, witness confidence has only a weak correlation with accuracy and therefore is not a good indicator of reliability.

[89] While numeric scales are generally disfavored for obtaining a witness' certainty, at a minimum Detective Gregory could have had Mr. Chandler identify a level of certainty in his identification, rather than simply affirming whether he was "sure."

right to due process. This conclusion is supported by scientific research not previously before the Court as well as new evidence concerning the statements and non-identifications of Mr. Woods by *three* eyewitnesses. Taken together, this information compels the conclusion that Mr. Chandler's identification must be suppressed, as it presents a substantial likelihood of irreparable misidentification.

A. The *Manson-Jells* Reliability Factors Demonstrate that Mr. Chandler's Identification is Not Reliable

In reaching its conclusion that Mr. Chandler's identification was reliable, the Court found that only one of the five enumerated[90] reliability factors (certainty) weighed in favor of reliability and that another (description) was irrelevant since the Court concluded that Mr. Chandler knew the shooter. As an initial matter, a review of Ohio's eyewitness identification cases show that where courts find an identification reliable despite suggestiveness in the procedure, they do so only where a majority of the reliability factors support such a finding. Research discloses no case where a majority of factors are either neutral or weigh against reliability (as here) but that a court nevertheless admits the identification. *See, e.g., State v. Stetz*, 11th Dist. No. 2011-A-0008, 2011-Ohio-6516, 2011 WL 6339844 (Dec. 19, 2011) (Affirming lower court's suppression of a showup-based identification, finding that "the circumstances surrounding [the] identification failed to lend such reliability to the exercise so as to overcome the inherently suggestive nature of a showup," noting "the very general nature of [the witness's] description of the individual she observed, the lack of evidence related to the length of time she observed him or level of attention she paid to her observation, her failure to observe the individual's face, and the less than clearly assured confirmation of identification she provided"); *State v. Martin*, 2nd Dist. No. 16619, 127 Ohio App. 3d 272, 276-77, 712 N.E.2d 795 (Apr. 17, 1998) (Affirming lower court's

[90] The Court is free to consider other measures of reliability. *Jells*, 53 Ohio St.3d at 30, 559 N.E. 2d 464.

suppression of an identification based on a show-up occurring within ten minutes of the crime, because "there is no evidence that the eyewitness even had an opportunity to observe the perpetrator's face, let alone that that opportunity was extensive, and of good quality . . . the victim had given the police no description beyond a clothing description . . . the victim gave no reason for his confidence in his identification" and "perhaps most importantly, in the case before us there was not only a strong suggestion, through the circumstances being communicated over the radio, which was overheard by the victim, that the police had caught the perpetrator and were holding him for the victim to identify, but also reason to believe that the victim was unusually susceptible to suggestion."). *Compare State v. Bates,* 110 Ohio St. 3d 1230, 1233-34, 850 N.E.2d 1208 (O'Connor, J. dissenting) (Finding that, of the five reliability factors, *only one* did not support a finding of reliability and noting that "[c]ourts have regularly upheld the reliability of identification testimony even in light of the weakness of *one* of the factors) (internal citations omitted and emphasis added); *State v. Allen*, 73 Ohio St. 3d 626, 634, 653 N.E.2d 675 (1995) (single photo may have been suggestive but the identification was nevertheless reliable because the defendant was seen under good light, for seven minutes, and physical evidence in the defendant's possession corroborated the identification).

The cases relied upon by the Court (*State v. Curry,*[91] *State v. Levingston,*[92] and *State v. Griffin*[93]) in reaching its decision are also instructive. In *State v. Curry*, the Tenth District Court of Appeals *reversed* the lower court's admission of an identification that was the product of a showup because defense counsel did not have the opportunity to fully cross-examine the witness and police informed the witness that the subject of the showup had been involved in another robbery and "conveyed the impression" that he was the perpetrator in this case. *Curry,* 2000

[91] 9/22/11 Op. 17:8-18:9.
[92] *Id.* 18:13-19:12.
[93] *Id.* 19:13-22.

WL 1220160 at *2. The Tenth District Court of Appeals' rationale for finding that the witness' identification[94] was so unreliable that it had to be suppressed applies with equal force in this case and urges the suppression of Mr. Chandler's identification. In *Curry*, the court found that the procedure was impermissibly suggestive as a result of statements by law enforcement that "conveyed the impression" that the suspect was in fact the perpetrator. In this case, Detective Gregory did more than "convey the impression" that Mr. Woods was guilty – he unequivocally told Mr. Chandler that police believed that Mr. Woods was the person who shot him. Thus, the procedure in this case was more suggestive than the procedure in *Curry*. Turning to reliability, the court in *Curry* found that the "trial court's refusal to allow defense counsel to question the witness concerning the circumstances surrounding the witness' observation of the robbery makes a complete application of the *Neil* factors impossible and the trial court could not determine whether a substantial likelihood of irreparable misidentification occurred." *Id.* Because the trial court could not have reached a conclusion on the second part of the inquiry, the Tenth Circuit found that the identification should have been suppressed. In contrast to the limited opportunity for cross-examination in *Curry*, in this case the defense has *no* opportunity to cross-examine the witness about the identification, making it similarly impossible for the court to determine whether a substantial likelihood of irreparable misidentification occurred. Following *Curry*, this Court should now suppress the identification of Mr. Woods.

In *State v. Levingston*, the First District upheld the lower court's denial of the defendant's motion to suppress an identification stemming from a single photographic identification procedure, finding that "[a]lthough one-photograph identification procedures are generally suggestive, we conclude that there was not a substantial likelihood of irreparable

[94] In *Curry*, the identification in question was based on a profile view of the perpetrator for fifteen to twenty seconds, after which she provided a very general description of his clothing.

misidentification in this case because [the witness] had known [the perpetrator] before the shooting and identified him by name before she saw his photograph." 2000 WL 1220160 at *2. The distinctions between *Levingston* and this case are critical. In *Levingston*, the witness knew both of the shooters from her apartment complex and identified them to police by their actual first names. In addition, she had a good opportunity to witness the crime, as she observed it from an apartment that overlooked the parking lot where the shooting took place. Finally, as the First District noted, defense counsel had the opportunity to cross-examine the witness regarding her identification. *Id.* at *4. In contrast, in this case, Mr. Chandler identified the shooter by a name ("O") that is not Mr. Woods' name. Likewise and as discussed more fully below at subsection 3, whether Mr. Chandler actually knew the shooter is an open question and there is no evidence that Mr. Chandler and Mr. Woods knew each other.

Finally, although the Court cited *State v. Griffin*, 2011 WL 3484445 in its September 22 opinion, that case is inapposite as it did not involve any police-orchestrated identification procedures but rather an investigation of a shooting during which multiple witnesses identified those involved by name.

These cases demonstrate that well-established law in Ohio requires that Mr. Chandler's identification be suppressed because it fails the second prong of the *Jells* test. We now evaluate each of the reliability factors in light of the scientific research and the facts in this case.

1. Mr. Chandler's Limited Opportunity to View the Perpetrator at the Time of the Crime Undermines a Finding of Reliability

The Court found that "Mr. Chandler's opportunity to review Mr. Woods was or the person who shot him at the time of the crime . . . is unknown to the Court. There's not any testimony in the record about Mr. Chandler's opportunity to view the person who shot him at the

time of the crime."[95] New evidence about the events surrounding Mr. Chandler's shooting provide important information about Mr. Chandler's opportunity to view the person who shot him. Taken together with scientific research, this new evidence shows that this factor is not neutral but rather demonstrates the fundamental unreliability of Mr. Chandler's identification.

New information provided through Messrs. Spears and Smith's witness statements demonstrates that Mr. Chandler could not have had a good opportunity to view the perpetrator. The witnesses consistently describe the shooter as coming from behind the car such that neither was able to see him before he was standing next to the front passenger side of the car, firing a gun at Mr. Chandler. As Mr. Spears told police, the perpetrator stood so close to the car that he was unable to see above his neck. Mr. Smith stated that the shooter wore a knit winter cap. There is no reason to believe, or evidence that suggests, that Mr. Chandler would have had a better viewing experience than Mr. Spears or Mr. Smith. Likewise, both witnesses informed police that the perpetrator began shooting almost immediately. This brief and violent encounter occurred at 2:30 in the morning on a block that had only one light at least a half a block away. This new information makes clear that Mr. Chandler would have had a few seconds at most to see the perpetrator's face – if at all – under conditions that scientific research has conclusively shown to undermine the reliability of later identifications.

For example, scientific research has found, not surprisingly, that low levels of illumination significantly reduce the ability of witnesses to accurately observe and identify perpetrators.[96] One study found that identification accuracy for witnesses who had viewed the

[95] 9/22/11 Op. 19:22-20:5.
[96] *See, e.g.*, Yarmey, *Verbal, Visual, and Voice Identification of a Rape Suspect Under Different Levels of Illumination*, 71 J. APPLIED PSYCHOL. 363 (1986).

perpetrator at the end of twilight was no greater than chance.[97] The same study found that recall of details regarding the perpetrator and victim were worse when the observations were made at the end of twilight or at night than during daylight or at the beginning of twilight.[98] Another study found that the total amount of extractable information was effectively reduced when luminance was sufficiently low.[99]

Research has also demonstrated that there is reliable relationship between the length of time that a witness observes someone and the accuracy of a subsequent identification[100]: limiting exposure time generally reduces accuracy.[101] *Accord Henderson*, 208 N.J. 208 at 264, 27 A.3d 872 ("Not surprisingly, the amount of time an eyewitness has to observe an event may affect the reliability of an identification." A "brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure.") One study found an accuracy rate of 85% to 95% when subjects were exposed for 45 seconds to the image of the perpetrator during a videotaped reconstruction of robbery, and a subsequent photo array contained the perpetrator. But that rate fell to between 29% and 35% when the exposure lasted only twelve seconds.[102]

Finally, and perhaps surprisingly, scientific research demonstrates that the presence of a hat – as Mr. Smith recalled the shooter wore – can dramatically undermine the reliability of a

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[97] *Id.* at 366.
[98] *Id.* at 368.
[99] Loftus, *Picture Perception: Effects of Luminance on Available Information and Information-Extraction Rate*, 114 J. EXPERIMENTAL PSYCHOL.: General 324, 354 (1985).
[100] Dysart Aff. ¶¶ 30-35.
[101] *See* Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULLETIN 140, 150 (1986) (conducting a meta-analysis of 128 existing studies involving nearly 17,000 subjects, and finding a linear trend in the relationship between exposure duration and identification accuracy).
[102] *Id.* Real world application of these findings is complicated by the long-recognized finding that witnesses generally overestimate the temporal length of events. *See Henderson*, 208 N.J. 208 at 264, 27 A.3d 872 ("witnesses consistently tend to overestimate short durations [of time], particularly where much was going on or the event was particularly stressful.") (Internal citations omitted.)

later identification and result in an increased risk of a mistaken identification.[103] One study examined the effects of a hat on subsequent identification accuracy by conducting an experiment in which the perpetrator either did or did not wear a knit cap covering his hair and hairline. They found that identification accuracy was appreciably reduced from 45% accuracy in the no-hat condition to 27% in the hat condition.[104]

Given all of these factors, it is clear that Mr. Chandler's opportunity to view the person who shot him was limited and compromised by many external factors, so that he could not have produced a reliable identification. Therefore, this factor weighs against reliability and admissibility.

2. Mr. Chandler's Attention Was Sufficiently Compromised as to Negate a Finding of Reliability

The Court found that Mr. Chandler's degree of attention is unknown.[105] While it is true that Detective Gregory did not obtain any information from Mr. Chandler about his degree of attention at the time of the crime, scientific research strongly suggests that Mr. Chandler's attention would have been negatively affected by a variety of factors that would have made it difficult, if not impossible, for him to form a good memory of the shooter's face sufficient to make an accurate identification after the fact.

First, for the few seconds that Mr. Chandler had to see the perpetrator's face, he was under an extraordinary amount of stress as he was in a life-threatening situation. Scientific research has demonstrated that there is a reliable relationship between a witness's high level of

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[103] Cutler & Kovera, *Evaluating eyewitness identification.* 40, 43-44 Oxford: Oxford University Press (2010).
[104] Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Context into Context*, 72 J. APPLIED PSYCHOL. 629 (1987).
[105] 9/22/11 Op. 20:6-9.

stress and a lack of accuracy of identifying a perpetrator.[106] *See id.* at 261. ("Even under the best viewing conditions, high levels of stress can diminish an eyewitness's ability to recall and make an accurate identification."). A recent meta-analysis examined two sets of studies (27 studies in one set and 36 in the other) on the relationship of high stress to accuracy in identifications and found that high stress reduced correct identification rates by one-third, from 59% to 39%, compared to identification rates involving low stress.[107] The researchers concluded, accordingly, that there is considerable support for the hypothesis that high levels of stress can negatively impact accurate recall and correct identification rates.[108] High levels of stress and fear experienced by witnesses ensure that they will not forget the event itself, but it does not follow that they will remember details better. *See Henderson*, 208 N.J. 208 at 261-262, 27 A. 3d 872. In this case, Mr. Chandler undoubtedly experienced extreme stress in the moments before he was shot, which would have negatively affected his ability to make an accurate identification while increasing the likelihood of a misidentification.

The negative effect of high stress is exacerbated by the presence of a weapon. 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.[109] 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.[110] As with

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[106] *See* Dysart Aff. ¶¶ 36-38; Tredoux et al., *Eyewitness Identification*, ENCYCLOPEDIA OF APPLIED PSYCHOL. 875, 878 (Charles Spielberger ed., 2004).
[107] Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687 (2004).
[108] *See also* Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265 (2004) (Comparing study participants who experienced high and low stress and finding that those in the high stress conditions were both substantially less likely to make a correct identification and substantially more likely to make an incorrect identification.)
[109] *See* Dysart Aff. ¶¶ 39-41.
[110] Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 415–17 (1992).

stress, studies on weapon focus effect also demonstrate an increase in misidentifications in a weapon present condition as compared with a weapon absent condition.[111] *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.")

Finally, the witnesses told law enforcement that they had gone downtown to purchase crack, and Mr. Spears told law enforcement that he believed Mr. Chandler and Mr. Smith had been using crack throughout the evening leading up to the shooting. The use of hard drugs has serious negative consequences for cognitive functioning, including memory.[112] Eyewitness-specific experiments addressing alcohol's effects on memory show that alcohol slightly impairs performance in target-present arrays, but significantly increases errors in target-absent arrays; low alcohol intake produces fewer false identifications than high alcohol intake.[113]

In light of the scientific research and new evidence not previously before the Court, we submit that Mr. Chandler could not have paid sufficient attention to the face of the shooter sufficient to support a finding of reliability of his later identification. Accordingly, that identification should be suppressed.

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[111] 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.)

[112] *See, e.g.,* Washton et al., *Survey of 500 callers to a national cocaine helpline*, 25 PSYCHOSOMATICS 771-775 (1984) (The possibility that cocaine may cause impairment of cognitive functioning is suggested by a survey of 500 cocaine abusers who reported significant problems in concentration (65%) and memory (57%)).

[113] Dysart et al., *The Intoxicated Witness: Effects of Alcohol on Identification Accuracy From Showups*, 87 J. APPLIED PSYCHOL. 170 (2002).

3. Mr. Chandler's Lack of Any Description Cannot Support a Finding of Reliability

The Court correctly noted that Mr. Chandler did not provide a description of his shooter.[114] In addressing this factor, however, the Court found that "this is not a stranger identification case. There's evidence that Mr. Chandler knew Mr. Woods previously. This is borne out by his answers to the detective's questions that he could identify the person who shot him. So I find that this is not a stranger identification case." In reaching this ultimate finding, the Court made several underlying findings of fact: first, that, while Mr. Chandler's response to Detective Gregory's question, "do you know the person's name who shot you" was "not as clear...as some of the other responses" but nevertheless "establishes that Mr. Chandler did blink three times";[115] second, that Mr. Chandler indicated that the second letter of the shooter's name was not A;[116] and that Mr. Chandler did not owe the shooter money.[117] Because Mr. Chandler did not identify Mr. Woods by name and instead indicated a letter that is not connected to Mr. Woods[118], the Court should reverse its finding that this case is not a stranger identification case.

Some courts have applied what is known as a "confirmatory identification exception" for cases in which the witness provides information that demonstrates a prior relationship with the perpetrator. This exception is applied where the nature of the relationship between witness and perpetrator is such that, "due to the familiarity . . . there is little or no risk that police suggestion can lead to mis-identification. The exception may confidently be applied where the protagonists are family members, friends or acquaintances; at the other extreme, *it clearly does not apply when the familiarity emanates from a brief encounter.*" *People v. Yara*, No. 9479/00, 2002 WL

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[114] 9/22/11 Op. 20:19-21.
[115] *Id.* 9:1-10:1.
[116] *Id.* 12:4-6.
[117] *Id.* 13:15-19.
[118] 9/15/11 Tr. 18:23-19:8.

31627019 *4 (N.Y. Sup. Ct. Nov. 6, 2002) (unpub.) (emphasis added). *Accord People v. Collins,* 60 N.Y.2d 214, 219, 456 N.E.2d 1188 (1983) ("But in cases where the prior relationship is fleeting or distant it would be unrealistic to ignore the possibility that police suggestion may improperly influence the witness in making an identification. Thus they should avoid conveying their beliefs or otherwise suggesting the defendant's guilt to the potential witness.") Thus, while known as an "exception," courts have generally considered prior knowledge together with the established *Manson* reliability factors in evaluating the likelihood of irreparable misidentification or have considered it as part of an "independent source" inquiry to determine whether the witness had a source independent of the tainted procedure to make an identification of the defendant. The Supreme Court's recent decision in *Perry v. United States* makes clear that any identification that is the product of a suggestive police procedure must be scrutinized under the framework set forth in *Manson.* 132 S.Ct. 716, 724, 181 L.Ed.2d 694 (2012). *Accord State v. Liverman*, 398 S.C. 130, 140-41, 727 S.E.2d 422 (2012) (overruling prior holding by South Carolina Supreme Court which permitted circumvention of a *Manson* hearing based on prior knowledge).

Levingston, supra, relied on by this Court, provides a good example of the minimum knowledge required by courts to overcome the danger of suppression: in that case, the victim knew the perpetrator from the neighborhood and identified him by his first name. *Levingston,* 2011-Ohio-1665 at 2. A review of cases demonstrates that, at a minimum, a witness must identify the perpetrator by a name actually used by the perpetrator, and courts often require that evidence of additional identifying information and/or favorable reliability factors. In this case, Mr. Chandler did not identify Mr. Woods by name and, as discussed herein, none of the reliability factors support the identification. *Compare, e.g., State v. Taylor,* 594 N.W.2d 158,

162 (Minn. 1999) (witness knew perpetrator by his nickname, which he acknowledge was his nickname; she had been introduced to him previously and had seen him in her building on at least 10 prior occasions); *Dang v. United States*, 741 A.2d 1039, 1042 (D.C. Cir. 1999) (witnesses identified perpetrators by name, had known them for several years; one had cut perpetrators' hair; and, at the time of the crime, both witnesses were in close contact with the perpetrators for an extended time, under adequate lighting, with a full opportunity to observe them); *State v. Tann*, 302 N.C. 89, 97-98, 273 S.E.2d 720 (1981) (witness identified perpetrator, who she knew from the neighborhood, by nickname and address; witness provided an accurate description of the perpetrator's clothing, which the defendant was wearing when he was picked up within an hour of the crime); *Butler v. State*, 191 Ga. App. 620, 620, 382 S.E.2d 616 (Ga. Ct. of App. 1989) (witness identified the perpetrator by his last name, address and employer; the perpetrator "had visited [the witness'] apartment in the past, she knew him from his place of employment, she recognized his voice, and got a glimpse of his face when it was lighted by the street light.").

Scientific research supports the judicial requirement of substantial evidence of prior knowledge before discounting the effects of a suggestive identification procedure. First, scientific research has identified a phenomenon known as "source confusion," which occurs when a witness mistakenly identifies a familiar face as the perpetrator of a crime.[119] This can occur when a witness sees repeated photographs of the suspect in different identification procedures (resulting in phenomena known as "mugshot exposure" and "mugshot commitment"); when the witness is familiar with the suspect from an innocent setting but transfers the face in his memory to the face of the perpetrator ("unconscious transference")

[119] Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287 (2006).

including where the misidentified person was an innocent bystander at the time of the crime ("bystander effect"). One meta-analysis which included 17 studies found that source confusion significantly increased the likelihood of identification errors.[120]

Second, as a recent study found, an eyewitness's report that he can recognize a perpetrator because he has seen him casually in the past is of "limited forensic value."[121] In that study high school students from two small private high schools viewed yearbook pictures of (a) graduated students who were seniors when participants were freshman ("familiar") or (b) unfamiliar individuals, and responded whether each target individual was familiar. A full 28 percent of unfamiliar individuals shown were misidentified as familiar. Only 45 percent of participants accurately identified individuals as either familiar or unfamiliar so that, "in all conditions, the overall miss rate was higher than the hit rate."[122] New evidence in the form of Messrs. Spears and Smith's witness statements and the statement of the unknown eyewitness casts even more doubt on whether or not Mr. Chandler actually knew or recognized the shooter. [123] Messrs. Spears and Smith's statements confirm that, just prior to shooting Mr. Chandler, the perpetrator stated in substance that Mr. Chandler owed him money.[124] These statements directly contradict Mr. Chandler's assertion that he did not owe the shooter money and suggest one of three possible explanations: 1. Mr. Chandler was mistaken about the shooter's identity; 2. the shooter was mistaken about Mr. Chandler's identity; 3. Either Mr. Chandler or the shooter made

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[120] *Id.*

[121] Pezdek & Stolzenberg, *Are Individuals' Familiarity Judgments Diagnostic of Prior Contact?* (under review) (attached hereto as Exhibit F).

[122] *Id.* at 11.

[123] Notably, Detective Gregory testified that Messrs. Spears and Smith indicated that Mr. Chandler knew the shooter or the defendant. In fact, a review of the transcripts of both interviews reveals that neither witness had ever seen the shooter and had no information – beyond the shooter's statements that Mr. Chandler owed him money – that connected the two men. 9/15/11 Tr. 14:7-13 (defense objection sustained).

[124] Indeed, during his interview with Mr. Spears, Detective Gregory rejected Mr. Spears' speculation that the shooter might have been someone who was arrested as a result of Mr. Chandler's work as a confidential informant, stating "I think [the perpetrator] made it pretty clear that David owed him money." Spears Int. 30:25-31:1.

an untruthful statement about whether a debt was owed. In addition, the state has informed defense counsel that an unknown eyewitness identified the shooter as a person named Carlos or Los, which must affect the reliability of Mr. Chandler's alleged blinking on the letter "O." Importantly, Mr. Woods has no connection to any of the names, nicknames or letters provided by either Mr. Chandler or the unknown witness (Carlos, Los, and O).

Because Mr. Chandler has died, it is impossible to conclusively resolve the contradictory evidence concerning the relationship between Mr. Chandler and the perpetrator. This of course does not make the identification admissible. There is, moreover, no evidence of any prior interaction between Mr. Chandler and the perpetrator that is sufficient to create the familiarity necessary to render this a non-stranger identification or to weigh against the overwhelming indicia of unreliability present in this case. Accordingly, Mr. Chandler's lack of any prior description cannot support a finding of the reliability of the identification and, based on the contradictory and inconclusive evidence, the Court should not make any finding of fact about whether a prior relationship existed between Mr. Chandler and the perpetrator.[125]

4. Mr. Chandler's Perceived Confidence or Certainty Cannot Support a Determination that the Identification is Reliable[126]

The Court found, based on its review of the videotape, that Mr. Chandler "expresses no uncertainty. In fact, he confirms the identification, the photograph of Mr. Woods twice. He shows no uncertainty to that identification."[127] But Mr. Chandler's affirmations in these instances may be the identification itself, not an expression of certainty. Nevertheless, to the extent that the Court judges Mr. Chandler's blinks in these instances to be an expression of his

[125] Detectives Gregory and Detective Grant testified as to their belief that a lineup was not required because the defendant and the perpetrator knew each other. There is no exception from the required procedures set forth in Senate Bill 77.
[126] *See* Dysart Aff. ¶¶ 58-68,
[127] 9/22/11 Op. 20:25-21:4.

certainty, that perceived certainty cannot support a finding of reliability. Well-settled scientific research[128] demonstrates (1) there is a statistically weak correlation between a witness' confidence or certainty and the accuracy of his or her identification[129] and (2) that a witness' confidence is inflated by suggestive or biased procedures and confirmatory feedback.[130] In this case, the identification procedure used to elicit Mr. Chandler's identification was suggestive *and* biased *and* involved statements that were the functional equivalent of confirmatory feedback. *Accord Lawson*, 2012 WL 5955056 at *31 ("Despite widespread reliance by judges and juries on the certainty of an eyewitness's identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy." In addition, the weak correlation "appears only within the small percentage of extremely confident witnesses who rated their certainty at 90 percent or higher, and even those individuals were wrong 10 percent of the time.") (*Citing* Wells & Olsen, Eyewitness Testimony, 54 ANN. REV PSYCHOL 277, 283 (2003)).

In addition to the lack of correlation between confidence and accuracy, there is consistent evidence to indicate that the confidence that an eyewitness expresses in his or her identification during testimony is the most powerful single determinant of whether or not observers of that testimony will believe that the eyewitness made an accurate identification.[131] *Accord Henderson*

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[128] In his dissent in *Manson*, Justice Thurgood Marshall recognized this phenomenon well before more than thirty years of scientific research proved the point: "the witness' degree of certainty in making the identification is worthless as an indicator that he is correct." *Manson*, 432 U.S. 98 at 130, 97 S. Ct. 2243 (Marshall, J. dissenting).

[129] *See, e.g.*, Brewer & Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates*, 12 J. EXPERIMENTAL PSYCHOL.: APPLIED 11, 15 (2006); Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 315-19, 322 (1995).

[130] *See, e.g.*, Wells & Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998).

[131] *See, e.g.*, Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUMAN BEHAV. 185 (1990); Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Condition*, 33 LAW & HUM. BEHAV. 194 (2009); R.C.L. Lindsay et al., *Can People Detect Eyewitness Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79 (1981); Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identifications*, 64 J.

208 N.J. 208 at 274, 27 A.3d 872. Thus, admission of the videotape of Mr. Chandler's highly unreliable identification runs a significant risk of being overly persuasive to jurors who view it.

In light of the well-settled scientific research concerning the confidence-accuracy relationship,[132] courts across the country have rejected the use of certainty or confidence in the *Manson* reliability analysis – except when that confidence is reflected in a recorded statement in the witness' own words taken at the time of the confrontation. [133] In order to prevent a violation of Mr. Woods' constitutional right to due process, this Court should do the same. Because Mr. Chandler received suggestive feedback prior to making his identification, any expression of certainty was inflated and therefore not even weakly predictive of accuracy. In light of the suggestive nature of the procedure, the scientific research concerning the malleability of confidence and the weak relationship between confidence and accuracy, this factor should not be considered at all in the reliability analysis.

5. The Time Between the Crime and Confrontation Cannot Support a Finding of Reliability

Mr. Woods made his identification five days after he was shot after undergoing major surgery and while heavily medicated. The Court did not make an explicit finding regarding this factor but noted that the time between the crime and confrontation was "just a few days."[134]

APPLIED PSYCHOL. 440 (1979); *Eyewitness Testimony: Psychological Perspectives* (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

[132] *See, e.g.,* Brewer & Wells, *The Confidence–Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target–Absent Base Rates*, 12 J. EXPERIMENTAL PSYCHOL.: APPLIED 11, 15 (2006); Sporer et al., *Choosing, Confidence, and Accuracy: A Meta–Analysis of the Confidence–Accuracy Relation in Eyewitness Identification Studies,* 118 PSYCHOL. BULL. 315, 315–19, 322 (1995); *see also* Wells & Olson, *Eyewitness Testimony,* 54 ANN. REV. PSYCHOL. 277, 283–84 (2003) (noting complexity of issue).

[133] *Henderson,* 208 N.J.208 at 254 ("eyewitness confidence is generally an unreliable indicator of accuracy"); *Brodes v. States*, 279 Ga. 435, 614 S.E.2d 766 (2005) (in light of scientific research, trial courts should not consider certainty in evaluating identification evidence); *Com. v. Santoli*, 424 Mass. 837, 680 N.E.2d 1116 (Mass. 1997) (same). As Justice Brennan recognized in 1981, "the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all." *Watkins v. Sowders,* 449 U.S. 341, 352, 101 S.Ct. 654, 661, 66 L.Ed.2d 549, 558 (1981) (Brennan, J., dissenting) (quoting Elizabeth F. Loftus, *Eyewitness Testimony,* 237-247 (1979)).

[134] 9/22/12 Op. 21:5-8.

While common sense holds that memories decay over time, perhaps one of the most counterintuitive of all scientific research findings in the area of eyewitness identification is just how quickly memory decays. A meta-analysis of 53 studies found that the longer the time period between a witness seeing a face and being asked to identify the face, the less likely the witness was to recognize the face and the lower their accuracy rate and – perhaps most surprising – that the majority of memory loss happens during the first day; memory drops to 80% after about two hours, decreases to 70% over a 24-hour period, and then falls to 50% after one month.[135] Another meta-analysis also found an association between longer retention intervals and fewer correct identifications.[136] *Accord Henderson*, 208 N.J. 208 at 267, 27 A.3d 872 ("[m]emories fade with time . . . memory decay 'is irreversible'; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability. That basic principle is not in dispute."); *Lawson*, 2012 WL 5955056 at *12 ("Memory generally decays over time. Decay rates are exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation, then leveling off over time.")

Time delay and memory decay is critical in the context of a showup procedure. A field experiment that analyzed results from more than 500 real identifications revealed that photo showups performed within minutes of an encounter were just as accurate as lineups but that two hours later, 58% of witnesses failed to reject an "innocent suspect" in a photo showup, as compared to 14% in target-absent photo lineups.[137]

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[135] Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCHOL. APPL., 139-150 (2008).
[136] Shapiro & Penrod, *Meta Analysis of Facial Identification Studies*, 100 PSYCHOL. BULLETIN 140, 140 (1986).
[137] Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464 (1996).

Thus, while five days may not seem like a terribly long time period between the crime and confrontation, scientific research shows that five days can have a detrimental effect on the strength of a memory, particularly where a photographic or live showup is used. Given all of the other factors that likely affected Mr. Chandler's ability to perceive the suspect's face and form a strong memory of that face, the Court should find that this delay further undermines the reliability of the ultimate identification such that it should be suppressed.

B. Scientific Research Has Identified Other Factors, Present in this Case, that Undermine the Reliability of Mr. Chandler's Identification

Both *Manson* and *Jells* make it clear that a court evaluating the reliability of identification evidence can consider indicia of reliability beyond the five enumerated reliability factors. *Accord Henderson*, 208 N.J. at 292, 27 A.3d 872 (finding that scientific research is evolving and must be treated as such by courts); *Lawson*, 2012 WL 5955056 at *9 (same). Scientific research has identified a number of other indicia that can assist in a reliability determination. Several of these are present here, and should be considered by this Court in evaluating whether Mr. Chandler's identification should be suppressed.

1. The Unnecessary Use of a Non-Blind Photographic Showup Undermines the Reliability of the Ultimate Identification

Showups present an increased likelihood of misidentification because, by their very nature, showups implicitly indicate a belief that a suspected perpetrator has been identified. One commentator has described the showup as "the most grossly suggestive identification procedure now or ever used by the police." Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 28 (1965). Scientific research confirms this.[138] A meta-analysis of 12 studies

[138] *See* Dysart Aff. ¶¶ 42-48.

including more than 3000 participants concluded that "false identifications are more numerous for showups [compared to lineups] when an innocent suspect resembles the perpetrator."[139]

The relative unreliability of a showup procedure is evident when compared with an unbiased lineup procedure, which is a true test of the match between the suspect's appearance and the witness's memory of the perpetrator. *Accord Henderson,* 208 N.J. 208 at 902, 27 A.3d 872. ("Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification.") In a properly carried-out lineup, an innocent suspect is falsely identified only if, by chance, he matches the witness's memory of the perpetrator better than the five fillers. In a showup procedure, by contrast, a positive identification of the suspect can result from irrelevant factors, including the witness's expectation that the showup's subject is the perpetrator, pressure on the witness to make a positive identification, a natural proclivity to say "yes" or "no" in such a situation, and a victim's desire for an arrest.[140] *See Henderson,* 208 N.J. at 260, 27 A.3d 872 ("Experts believe the main problem with showups is that – compared to lineups – they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect. In essence, showups make it easier to make mistakes.")

In light of this research and all of the other sub-optimal conditions in this case, the use of a photographic showup to elicit Mr. Chandler's identification presents a very real danger of misidentification. Given this, the identification should be suppressed.

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[139] Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta–Analytic Comparison*, 27 LAW & HUM. BEHAV. 523, 523 (2003).

[140] Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & HUM. BEHAV. 459, 461-470 (1996); Gonzalez et al., *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525 (1993).

2. The Non-Identification of Mr. Woods By the Other Two Witnesses Undermines the Reliability of Mr. Chandler's Identification

The two eyewitnesses in this case, Messrs. Spears and Smith, were shown photographic lineups[141] which included Mr. Woods' photograph and neither witness identified Mr. Woods as the shooter. Mr. Smith, who was sitting behind Mr. Chandler, would have seen the perpetrator at nearly the same angle as Mr. Chandler viewed him in the seconds before he was shot. Scientific research demonstrates that these non-identifications can be substantial evidence that Mr. Woods is not guilty.

As early as 1980, researchers have questioned the criminal justice system's policy of treating eyewitness identifications of suspects as highly probative while treating non-identifications[142] as non-probative.[143] In that study, non-identifications were shown to be more probative of innocence than suspect identifications were of guilt.[144] Moreover, the study showed that as between the two possible non-suspect selections (a foil selection and a "none of the above" responses), the "none of the above" response was more predictive than innocence.[145] A 2002 study found that no choice responses, filler identifications, and "don't know" responses all have probative value with respect to the suspect's innocence, and sometimes no choice and filler identifications have more probative value for innocence than positive identifications of the suspect have for guilt.[146]

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[141] While we have not conducted an independent analysis to determine whether these photographic lineups were in fact unbiased, we can be sure that they are less biased than the single photograph shown to Mr. Chandler.
[142] A non-identification may take the form of a witness making no choice or of a witness choosing an innocent filler.
[143] Wells &Lindsay, *On Estimating the Diagnosticity of Eyewitness Nonidentifications*, 88 PSYCH. BULLETIN 776 (1980).
[144] *Id.*
[145] *Id.*
[146] Wells and Olson, *Eyewitness Identification: Information Gain from Incriminating and Exonerating Behaviors*, 8 J. OF EXPERIMENTAL PSYCHOL.: APPLIED 155 (2002)

A recent meta-analysis of 94 comparisons showed that that suspect identifications were more diagnostic regarding a suspect's guilt or innocence than other responses, but that non-identifications were also diagnostic of the suspect's innocence. Importantly given the facts of this case, the researchers found that a suspect identification is less informative *if the lineup is biased* and that the probative value of a suspect identification is undermined if suggestive lineup instructions increase the willingness of witnesses to make an identification.[147] They note: "Non-identifications also are straightforward. They are diagnostic of the suspect's innocence. We reiterate the point made by Wells and Lindsay (1980) that non-identifications are not merely "failures" to identify the suspect, but rather carry important information whose value should not be overlooked."[148] They further note that foil identifications appear to be diagnostic of innocence when foils are selected based on their match to the description of the perpetrator given by a witness, but not when foils are selected on their match to the suspect.

In addition, the scientific research has shown that multiple viewings of a suspect increases the likelihood that the witness will select the suspect's photograph.[149] *See Henderson*, 208 N.J. 208 at 900-01, *citing* Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 LAW & HUM. BEHAV. 287, 299 (2006) (Finding that "although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, that percentage increased to 37% if the witness had seen the innocent person in a prior mugshot.") In this case, Mr. Smith (and perhaps Mr. Spears as well) viewed two lineups, both of which contained Mr. Woods' photograph, and did not identify him as the shooter. In light of the fact that witnesses who view a suspect

[147] Clark et al., *Regularities in Eyewitness Identification*, 32 LAW AND HUM. BEHAV. 187 (2008)
[148] *Id.* at 211.
[149] *See* Dysart Aff. ¶¶ 72-74.

multiple times show an increased likelihood of selecting that photograph on subsequent viewings, Mr. Smith's continued non-identification further supports the notion that his non-identification is more probative of Mr. Woods' innocence than Mr. Chandler's identification is of Mr. Woods' guilt.

The scientific research concerning the diagnosticity of non-identifications as applied to the facts of this case leads to the conclusion that the non-identifications by Messrs. Spears and Smith are more probative of Mr. Woods' innocence than the alleged identification of Mr. Woods by Mr. Chandler. This supports the conclusion that Mr. Chandler's identification is not reliable and should not be admitted in evidence as it presents a risk of irreparable misidentification.

III. CONCLUSION

David Chandler's death is a tragedy and the perpetrator must be brought to justice. Justice will not, however, be served if it is predicated upon unreliable identification evidence elicited through highly suggestive and unnecessary identification procedures. The risk of wrongful conviction based on misidentification is very high in this case, where the only evidence offered by the state is a questionable identification that bears not one indicia of reliability. We submit that the admission in evidence of Mr. Chandler's identification of Mr. Woods will result in a violation of Mr. Chandler's due process rights and make constitutionally indefensible any conviction that follows. In light of the scientific research and the new evidence now available to the Court, the Court should now grant Mr. Woods' motion to suppress or, in the alternative, hold an evidentiary hearing to allow for the full consideration of this new material and the examination of all witnesses whose information bears on the reliability of the identification in question.

Respectfully submitted,

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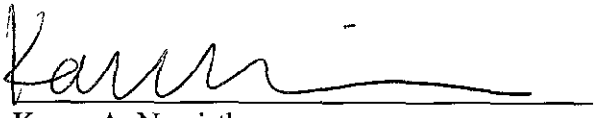
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* the Innocence Project has been served upon the office of Hamilton County Prosecutor, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, via personal service on this 21st day of December, 2012.



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