11-0830-pr

United States Court of Appeals

for the

Second Circuit

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RUDOLPH YOUNG,

Petitioner-Appellee,

– v. –

JAMES CONWAY,

Respondent-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* THE INNOCENCE PROJECT SUPPORTING PETITIONER-APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Innocence Project is an association dedicated to providing pro bono

legal and/or investigative services to prisoners. The Innocence Project does not

have a parent corporation, and there is no publicly-held corporation that has a 10%

or greater ownership interest in the Innocence Project.

<u>STATEMENT OF CONSENT TO FILING</u>

The parties have consented to the filing of this *amicus curiae* brief.

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Amicus Curiae The Innocence Project, by their attorneys, Paul, Weiss,

Rifkind, Wharton & Garrison LLP, submit this amicus brief in support of

Petitioner-Appellee Rudolph Young.[1]

INTEREST OF *AMICUS CURIAE*

The Innocence Project is an organization dedicated primarily to providing

pro bono legal and related investigative services to indigent prisoners whose actual

innocence may be established through post-conviction evidence. It has a specific

focus on exonerating long-incarcerated individuals through use of DNA evidence,

including newly-developed DNA testing methods. It also seeks to prevent future

wrongful convictions by researching their causes and pursuing legislative and

administrative reform initiatives designed to enhance the truth-seeking functions of

the criminal justice system—including identifying those who actually committed

crimes for which others were wrongfully convicted. Because wrongful convictions

destroy lives and allow the actual perpetrators to remain free, the Innocence

Project's objectives both serve as an important check on the awesome power of the

state over criminal defendants and help ensure a safer and more just society. As

perhaps the nation's leading authority on wrongful convictions, the Innocence

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[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the *amicus curiae*, other than its members or its counsel, contributed money that was intended to fund preparation or submission of this brief.

Project and its founders, Barry Scheck and Peter Neufeld are regularly consulted by officials at the state, local, and federal levels.

The Innocence Project pioneered the post-conviction DNA model that has led to the exoneration of 289 innocent persons to date, and the Innocence Project has served as counsel in many of these cases. The vast majority of individuals exonerated by DNA testing were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. As a result, in order to minimize the risk of wrongful convictions based on eyewitness misidentification, the Innocence Project has a compelling interest in ensuring that courts employ a legal framework that adequately protects criminal defendants from the use at trial of identification evidence that is so unreliable as to create a significant risk of misidentification.

SUMMARY OF ARGUMENT

The Supreme Court has long recognized the dangers of eyewitness testimony: "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor." *United States v. Wade*, 388 U.S. 218, 229 (1967). Because mistaken eyewitness identifications contribute so frequently to wrongful convictions, special care must be taken to assess the reliability of such evidence. This is particularly important where, as here, the testimony of a single eyewitness is the sole evidence of a defendant's guilt.

The in-court identification that is critical to the prosecution's case here is inherently unreliable. The witness was a victim of a violent, nighttime home invasion, during which her wheelchair-bound husband was threatened with an ax. RA74-75. The perpetrator wore a disguise that covered his entire body, and most of his face, except for his eyes. RA75. Immediately after the account, the witness was unable to describe the perpetrator in any but the most general terms, and she was entirely unable to assist the police in creating a composite image of the perpetrator. *Id.* She was then unable to make any identification from a photographic lineup (which contained a photograph of Mr. Young, who did not match the witness's initial general description of the perpetrator), further demonstrating her poor opportunity to view the perpetrator during the crime. *Id.* It

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was only after police conducted a lineup tainted by an illegal arrest that the witness

finally identified Mr. Young.

In these circumstances, the eyewitness's in-court identification had no

independent basis and could *only* have been based on the illegal lineup. The

district court correctly found that the state court erred in concluding that there was

an independent source for the identification, and that the state court's decision was

contrary to established federal law. The district court's finding is amply supported

by substantial scientific research that makes clear that an identification based on

this witness's opportunity to view the perpetrator during the crime is unlikely to be

accurate. Consequently, there is a substantial danger that the courtroom

identification was wrong. Such research has been accepted by the scientific

community and by state and federal courts in legal proceedings to determine the

admissibility of eyewitness testimony.

The scientific research confirms the district court's conclusion that the state

court decision (that Mrs. Sykes's in-court identification of Mr. Young was

independent of the unconstitutional lineup) was an unreasonable application of

federal law. This research strongly suggests that the illegal lineup contaminated

Mrs. Sykes's memories of the event. Indeed, Mrs. Sykes's inability to identify

Petitioner-Appellee during a photo array immediately after the event is a telling

indication that her later identifications were tainted. The scientific research also

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affirms that the particular circumstances surrounding the robbery here impaired

Mrs. Sykes's ability to accurately process and remember the event and the intruder.

These include the passage of time between observation and identification, the

perpetrator's disguise, the fact that the identification was cross-racial, the presence

of a weapon, and the highly stressful circumstances of the crime. The research

regarding the presence of these factors thus further confirms the district court's

decision that the state court erred in finding Mrs. Sykes had an independent basis

for giving her in-court identification.

In addition, the district court correctly determined that the state court's

admission of the in-court identification was not harmless error. Studies have

shown that eyewitness testimony affects jurors to an extent that may not be

warranted. Jurors overbelieve eyewitness testimony, overestimate the likely

accuracy of eyewitness testimony, and confound certainty and accuracy. Because

Mrs. Sykes's testimony was crucial to the prosecution and thus the jury verdict, the

admission of the tainted in-court identification was not harmless error.

Accordingly, this Court should affirm the district court's decision.

<u>**ARGUMENT**</u>

I.   SPECIAL CARE MUST BE TAKEN TO ENSURE THE RELIABILITY OF EYEWITNESS IDENTIFICATION EVIDENCE

The Supreme Court has long recognized the significant and unique dangers that the admission of unreliable eyewitness testimony can pose for the criminal justice system. Forty-five years ago, long before the era of exculpatory DNA evidence, the Supreme Court held that the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Wade*, 388 U.S. at 228.[2] *Accord United States v. Crews*, 445 U.S. 463, 472 (1980).

More recently, the Supreme Court has recognized that "given the vagaries of human memory and the inherent suggestibility of many identification procedures," illegal photographic and lineup identifications could affect "the reliability of the in-court identification and render it inadmissible as well." *Crews*, 445 U.S. at 472 (holding that the in-court identification in that case rested on an independent recollection of an initial encounter, uninfluenced by the pretrial identifications); *see United States v. Brownlee*, 454 F.3d 131, 140-44 (3d Cir. 2006) (holding that the district court should have admitted five categories of expert testimony

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[2] A 1932 study of 65 wrongful convictions found that "the major source of these tragic errors is an identification of the accused by the victim." Edwin M. Borchard, *Convicting the Innocent* xiii (1932).

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regarding eyewitness identification); *Perry v. New Hampshire*, No. 10-8974, 2012

WL 75048, at *6 (U.S. Jan. 11, 2012) (*Manson* test applies to suggestive and

unnecessary police procedures, but does not apply to illegal procedures like those

here).

The Supreme Court's concerns are underscored by the prevalence of

wrongful convictions predicated on misidentifications. A recent study of 250

DNA exoneration cases found that 76% featured convictions that were at least

partially supported by eyewitness testimony. Brandon L. Garrett, *Convicting the*

Innocent: Where Criminal Prosecutions Go Wrong 8-9 (2011); *see Fact Sheet:*

Facts on Post-Conviction DNA Exonerations, The Innocence Project,

http://www.innocenceproject.org/Content/351PRINT.php (last visited Jan. 27,

2012); U.S. Dep't of Justice, Nat'l Inst. of Justice, Pub. No. NCJ 161258,

Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA

Evidence to Establish Innocence After Trial 24 (1996) (In its study of 28

defendants who were later exonerated by DNA evidence, the DOJ found that

"eyewitness testimony was the most compelling evidence. Clearly, however, those

eyewitness identifications were wrong.").

The fact that such an overwhelming majority of these cases involved

mistaken identifications "lends support to the argument that eyewitness

identification evidence is among the least reliable forms of evidence and yet is

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persuasive to juries." Gary L. Wells et al., *Eyewitness Identification Procedures:*

Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603,

605 (1998). As the Third Circuit has pointed out, "jurors seldom enter a courtroom

with the knowledge that eyewitness identifications are unreliable." *Brownlee*, 454

F.3d at 142.

Because mistaken eyewitness identifications contribute so frequently to

wrongful convictions, special care must be taken to assess the reliability of such

evidence.

II.   AN EXTENSIVE BODY OF SCIENTIFIC LITERATURE ON THE UNRELIABILITY OF EYEWITNESS IDENTIFICATIONS SUPPORTS THE DISTRICT COURT'S FINDING

Where, as here, an eyewitness makes an in-court identification following an

illegal lineup, the prosecution carries the burden of demonstrating by clear and

convincing evidence that "the in-court identifications were based upon

observations of the suspect other than the [tainted] lineup identification." *Wade*,

388 U.S. at 240.[3] Applying the factors the Supreme Court articulated in *United*

States v. Wade, the district court determined that the state court erred in finding

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[3] In contrast, the factors set forth in *Neil v. Biggers,* 409 U.S. 188 (1972) apply
where an identification is a product of a suggestive identification procedure.
Manson v. Brathwaite, 432 U.S. 98, 107 (1977). *Accord Perry*, 2012 WL 75048,
at *6-7.

that Mrs. Sykes's in-court identification following an illegal lineup procedure had

an independent basis, one other than the tainted lineup identification.

Upon a review of the evidence, the district court found that "circumstances

of the original viewing during the crime and the subsequent identification

procedures overwhelmingly suggest that Mrs. Sykes' alleged independent

'recollection' of Petitioner's face was irrevocably tainted by her having viewed

defendant in the lineup and having heard him speak, with no independent basis

whatsoever." RA82.[4] The district court thus concluded that "it was an

unreasonable application of clearly established Supreme Court precedent, *e.g.*,

Wade, for the state court to conclude that the victim's in-court identification was

independently reliable." *Id.*

Overwhelming scientific research supports the district court's conclusion

that five of the *Wade* factors weigh in favor of Petitioner-Appellee, as well as the

district court's ultimate conclusion, as discussed below. This body of social

science research concerning the accuracy of eyewitness testimony is robust and

reliable. It has been reviewed, replicated, and retested, and is generally accepted in

the research community. *State v. Henderson*, 27 A.3d 872, 916 (N.J. 2011). It has

also been tested for external validity, which determines the extent to which a

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[4] "RA" refers to the Respondent-Appellant's Appellate Appendix, filed on October
24, 2011.

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finding can be generalized across different people and settings. Steven Penrod &

Brian H. Bornstein, *Generalizing Eyewitness Reliability Research*, *in* 2 Handbook

of Eyewitness Psychology: Memory for People 529, 532 (R.C.L. Lindsay et al.

eds., 2007). As a result, "social scientists, forensic experts, law enforcement

agencies, law reform groups, legislatures and courts" rely upon the research into

eyewitness accuracy during legal proceedings regarding eyewitness testimony.

Report of the Special Master at 73, *Henderson*, 27 A.3d 872 (No. 062218).[5]

It is difficult to imagine a case in which eyewitness testimony is more

crucial than this one: Mrs. Sykes's in-court eyewitness testimony is the sole

evidence of Petitioner-Appellee's alleged guilt in the robbery. As the district court

observed, "without Mrs. Sykes' identification of Young, the prosecution

essentially had no case." RA83. In considering the unreasonableness of the state

court's finding that Mrs. Sykes's in-court identification had an independent basis,

this Court can and should take account of this extensive body of research

identifying the many factors that bear upon the reliability of an eyewitness

identification.

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[5] Notably, not all scientific disciplines carry the same stamp of approval. The
National Academies of Science recently published a report that questioned "the
reliability and precision of results" of "forensic science disciplines' capability for
providing evidence that can be presented in court." Nat'l Research Council,
Strengthening Forensic Science in the United States: A Path Forward 127 (2009).

The scientific research not only affirms the district court's findings regarding five of the *Wade* factors, it also supports the district court's conclusion that the state court decision that Mrs. Sykes's in-court identification of Mr. Young was independent of the unconstitutional lineup was an unreasonable application of federal law. Accordingly, this Court should affirm the district court's judgment.

A.   *Wade* Factor No. 1: Scientific Research Confirms That Mrs. Sykes's Ability to Observe the Alleged Criminal Act Was Insufficient to Make a Reliable Identification

The district court determined that, given the facts of this case, the first *Wade* factor—the prior opportunity to observe the alleged criminal act—"clearly weighs against the prosecution." RA82. This factor addresses with how the eyewitness perceives the circumstances surrounding the incident, which is one of the physiological processes that influence the accuracy of eyewitness identifications. Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413, 413 (1992). Scientific research confirms that the circumstances of a crime may impair the eyewitness's ability to accurately observe the details of the crime. Here, circumstances that diminished Mrs. Sykes's ability to accurately observe, process, and recall details of the crime include: the disguise worn by the intruder; the fact that the intruder and Mrs. Sykes were members of different races; the presence of a weapon; and the stress Mrs. Sykes was under at the time of the crime.

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The perpetrator's disguise—which covered most of his face and body—likely hindered Mrs. Sykes's ability to accurately observe the perpetrator. Even "subtle disguises can . . . impair identification accuracy." Brian L. Cutler & Margaret Bull Kovera, *Evaluating Eyewitness Identification* 43 (2010). One scientific experiment that demonstrates the effect of even a minimal disguise demonstrated that, when the "perpetrator" wore a hat, participants only made accurate identifications 27% of the time; when the "perpetrator" did not wear a hat, participants made accurate identifications 45% of the time. Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 Law & Hum. Behav. 233, 240, 244-45 (1987). Here, the intruder wore much more than a simple hat: the disguise covered the majority of his face and body. RA75. Thus, as the district court concluded, where, as here, the perpetrator wears a disguise that covers much more than the intruder's hairline—and indeed, nearly the intruder's entire face—there is an increased risk of a mistaken identification. Cutler & Kovera, at 43-44; *see* RA75, 82.

The scientific research also makes clear that people make significantly more errors when trying to identify a person of another race than of the same race. "There is a considerable consistency across [scientific] studies, indicating that memory for own-race faces is superior to memory for other-race faces." Robert K. Bothwell et al., *Cross-Racial Identification*, 15 Personality & Soc. Psychol. Bull.

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19, 19, 23 (1989) (meta-analysis of 14 studies finding that own-race bias effect "occurs for both Black and White subjects in 79% of the samples"). Studies have thus found a "tendency for people to exhibit better memory for faces of [members of their own race] than for faces of [members of another race]." Tara Anthony et al., *Cross-Racial Facial Identification: A Social Cognitive Integration*, 18 Personality & Soc. Psychol. Bull. 296, 299 (1992). This phenomenon, known as "own-race bias" is especially pronounced where, as here, the person making the identification is Caucasian and the person being identified is African-American. Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 Fed. Cts. L. Rev. 1, 14 (2007). In light of the well-established scientific research, the district court correctly concluded that Mrs. Sykes's identification was not sufficiently reliable and that the state court erred in admitting it.

In addition, the presence of a weapon at the crime likely affected Mrs. Sykes's ability to accurately process and remember the event. It is well-settled in the scientific literature that the presence of a weapon "will draw central attention, thus decreasing the ability of the eyewitness to adequately encode and later recall peripheral details." Steblay, at 414. Indeed, an analysis of 19 weapon-focus studies involving 2082 identifications found that, on average, identification accuracy decreased 10% when a weapon was present. *Id.* at 415-17. Accordingly,

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the district court correctly concluded that Mrs. Sykes's ability to accurately recall

details of the alleged criminal event was negatively affected by the presence of a

weapon. *See* RA81-82.

High levels of stress have also been shown to induce a defensive mental

state that results in a diminished ability to accurately process and recall events.

Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High*

Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 687, 699 (2004). This

mental state leads to inaccurate identifications. *See id.* at 699. Indeed, a review of

16 studies involving 1727 participants found that accurate identifications decreased

22.2% under high stress conditions. *Id.* at 692, 694 ("overall proportion of correct

identifications for the high stress condition was .42; for the low stress condition, it

was .54"). There can be little doubt here that Mrs. Sykes was under a great deal of

stress during the event, which likely affected her ability to accurately process and

remember what she saw, including details about the intruder. RA75 (the

perpetrator invaded Mrs. Sykes's home and demanded money while brandishing a

sledgehammer and wielding an axe over her husband). This is confirmed by her

inability to provide more than the barest description of the perpetrator and her

inability to help create a composite of the intruder. RA82. Accordingly, the

district court correctly found that the high levels of stress she experienced at the

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time of the incident diminished Mrs. Sykes's ability to accurately recollect her

observation of the crime. *See* RA81-82.

In short, the scientific research suggests that the particular circumstances of

the incident impaired Mrs. Sykes's ability to accurately observe the crime,

including: the fact that the intruder wore a disguise, the fact that the intruder and

victim were members of different races, the fact that the intruder carried a weapon,

and the stress she was under at the time of the crime. Indeed, Mrs. Sykes was

unable to provide anything beyond a bare description of the perpetrator or to make

an identification of Petitioner-Appellee soon after the event. RA82. This confirms

that her original opportunity to observe the intruder was poor, leading to the

conclusion that her in-court identification must have been tainted by the illegal

lineup. Accordingly, the district court correctly held that the state court erred in

finding that Mrs. Sykes had an independent basis for giving her in-court

identification.

B.   *Wade* Factor No. 2: Scientific Research Confirms That the Discrepancies Between Mrs. Sykes's Description and Petitioner-Appellee Suggest That Her Identification Is Unreliable

The district court determined that the second *Wade* factor—the existence of

any discrepancy between any pre-lineup description and the defendant's actual

description—"clearly favors [Appellee]." RA82. This factor addresses both how

an eyewitness perceives an event, and also the eyewitness's memory of that event.

Steblay, at 413. Specifically, the reliability of any pre-lineup description depends on the eyewitness's earlier ability to observe the incident accurately, and also the eyewitness's ability to remember accurately details from the incident, including the perpetrator's appearance. For the reasons above, Mrs. Sykes's ability to observe the crime and the perpetrator accurately was compromised by these various factors.

Scientific research confirms that a witness's observations and memories of an event are often fallible, rendering eyewitness identifications unreliable. As discussed above, the presence of a disguise is likely to negatively impact the accuracy of an eyewitness's identification. Cutler et al., at 244-45.

Further, memories decay rapidly even over very short periods of time, and memories can easily be contaminated over time. *See* Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 139, 143, 148 (2008). The "[r]ate of memory loss for an unfamiliar face is greatest right after the encounter and then levels off over time." *Id.* at 139, 148 (conducting an analysis of fifty-three facial memory studies and finding a "highly reliable association . . . between longer retention intervals and positive forgetting of once-seen faces"). In addition, as time passes, memories are more likely to be contaminated by post-event information, identification procedures, and other external elements. Thus an eyewitness's earlier description is likely to be more accurate than a later one.

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Here, the only description Mrs. Sykes gave to police was immediately after the alleged crime, and that description did not match the Petitioner-Appellee's characteristics. RA76 (Mrs. Sykes said that the intruder was in his late-20s and 5'10" whereas Petitioner-Appellee was almost 34 at the time of the crime and is 6'0" or 6'1"). Mrs. Sykes's original description is likely to be more accurate than her later in-court identification, which followed an illegal lineup. Because the original description does not match Petitioner-Appellee, the district court correctly determined that the state court erred in finding that the State demonstrated that the in-court identification was independent of the illegal lineup.

C.   *Wade* Factor No. 3: This Factor Is Neutral

The district court determined that the third *Wade* factor—any identification prior to lineup of another person—favors neither party because "Mrs. Sykes did not identify anyone else as the perpetrator." RA82. This factor is closely connected with factor five, which addresses whether the eyewitness failed to identify the accused on a prior occasion. As discussed below, scientific research confirms the district court's conclusion that, in light of the circumstances leading up to Mrs. Sykes's identification of Petitioner-Appellee—including her inability to identify him from a photo array—the state court erred in finding that there was an independent basis for Mrs. Sykes's in-court identification.

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D. **_Wade_ Factor Nos. 4 & 5: Scientific Research Confirms That Mrs. Sykes's Failure to Identify Petitioner-Appellee in the Photo Array Renders Her In-Court Identification Unreliable**

The district court determined that the fourth _Wade_ factor—whether the eyewitness made a photo identification of the defendant prior to the lineup—"strongly disfavors the prosecution" because Mrs. Sykes was unable to identify Petitioner-Appellee from the photo array shown to her before the suppressed lineup. RA82. Indeed, the prosecution did not dispute that "[d]espite carefully looking into the eyes of each man set forth in the photo array, Mrs. Sykes could not pick out Young's picture" from the photo array. _Id_. The district court also determined that the fifth _Wade_ factor—failure to identify the defendant on a prior occasion—which is closely related to the fourth _Wade_ factor, "weighs heavily in Petitioner's favor." _Id._ The district court also concluded that Mrs. Sykes's in-court "'recollection' of Petitioner's face was irrevocably tainted by her having viewed defendant in the lineup." _Id._

Scientific research supports the district court's determination. As an initial matter, research demonstrates that "false identification rates increase, and accuracy on the whole decreases, when there are multiple identification procedures." Ryan D. Godfrey & Steven E. Clark, _Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value_, 34 Law & Hum. Behav. 241, 241, 256 (2010) (explaining that this effect is a result of "misplaced familiarity due

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to the memory of the suspect" from the earlier identification procedure or due to "heightened expectations and suggestiveness"). Here, the in-court identification was the last in time of the three identifications in this case. The first identification was the photo array, from which Mrs. Sykes chose no one. The second identification was the unconstitutional lineup, during which Mrs. Sykes identified Petitioner-Appellee. That procedure was tainted and therefore excluded. The final identification was the in-court identification. The in-court identification, the one on which the prosecution's case relied, is thus the least reliable.

More importantly, scientific research confirms that Mrs. Sykes's failure to identify Petitioner-Appellee during the initial identification procedure reduces the likelihood that her in-court identification was truly independent from any tainted identification. *See id.* at 247; *Perry,* 2012 WL 75048, at *9 ("[m]ost eyewitness identifications involve some element of suggestion," and "[i]ndeed, all in-court identifications do"). Mrs. Sykes's in-court identification was likely tainted by the prior identification procedures due to the mugshot exposure effect, also known as "unconscious transference." Where, as here, the witness initially makes no identification from a photo array, but then selects someone whose picture was included in the photo array at a later identification procedure, the witness is likely to have selected that person based on their prior familiarity from the photo array. Godfrey & Clark, at 247.

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This phenomenon occurs because "the witness [is] unable to partition his or her memory in such a way as to know that the suspect's increased familiarity is due to the exposure [in the photo array], rather than the suspect's presence at the time of the crime." *Id.*; *see People v. Santiago*, 17 N.Y.3d 661, 673 (N.Y. 2011) (recognizing unconscious transference); *Henderson*, 27 A.3d at 900 ("[S]uccessive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure."). Indeed, an analysis of seventeen experiments showed that while only 15% of witnesses made an incorrect identification when the suspects in the lineup were viewed for the first time in the lineup, 37% of the witnesses made an incorrect identification when they had seen a suspect in a prior mugshot. Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 Law & Hum. Behav. 287, 299 (2006).

In addition, where, as here, Mrs. Sykes identified Petitioner-Appellee during the unconstitutional lineup prior to her in-court identification, her memory is likely to be tainted by that process due to the "mugshot commitment effect." The mugshot commitment effect occurs when the eyewitness, having identified a person as the perpetrator, becomes attached to that prior identification. As a result, the eyewitness becomes more likely to identify the same person again in a

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subsequent identification procedure, even if the person is innocent. *See* Charles A. Goodsell et al., *Effects of Mugshot Commitment on Lineup Performance in Young and Older Adults*, 23 Applied Cognitive Psychol. 788, 789 (2009). In one study, 72% of persons that made an inaccurate identification from a mugbook later made the same mistaken identification in a lineup. *Id.* at 795.

This phenomenon occurs even when the actual culprit is present in the second identification procedure and the previously selected innocent person is absent. In one such experiment, 60% of participants indicated that the culprit was not present in the lineup while only 12% correctly identified the actual culprit from the lineup. *Id.* at 798. This research demonstrates that "[m]ugshot choosers will select their prior mugshot choice if given the opportunity and will reject a lineup that does not contain it" even when the opportunity to select the actual culprit was available. *Id.* Here, it is likely that Mrs. Sykes's in-court identification is due to her prior choice of Petitioner-Appellee during the illegal lineup. Accordingly, the district court correctly held that the state court erred in finding that there existed an independent basis for Mrs. Sykes's in-court identification.

In sum, it is unlikely that Mrs. Sykes's in-court identification was independent of her earlier identification in the suppressed lineup. Because she was unable to identify him in a photo array immediately after the event, her later identifications of Petitioner-Appellee were likely due to her misplaced familiarity

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with him from the photo array. In addition, having selected Mr. Young in the

illegal lineup, Mrs. Sykes became more likely to identify him again whether or not

he was actually the perpetrator. Accordingly, the district court correctly held that

the state court erred in finding that the in-court identification was not tainted.

> **E.**   ***Wade* Factor No. 6: Scientific Research Confirms That the Lapse of Time Between the Alleged Act and the In-Court Identification Renders Mrs. Sykes's Identification Unreliable**

The district court determined that the sixth *Wade* factor—the "lapse of time

between the alleged act and the lineup identification"—also weighs in favor of

Petitioner-Appellee because there was a "delay of over a year" between the crime

and the in-court identification. RA82. The district court also noted that Mrs.

Sykes relied on "the intruder's voice, as well as his face" to make the

identification. *Id.* But "there is no indication in the record that Mrs. Sykes had the

opportunity to have [Mr.] Young speak at trial before she made her in-court

identification of him." *Id.* The district court thus determined that "[a]t best, the in-

court identification relied on the suppressed, illegal pre-trial identification where

Mrs. Sykes saw [Mr. Young] *and* heard his voice." *Id.*

 Scientific research supports the district court's determination. The passage

of time both degrades correct memories and heightens confidence in incorrect

memories. Deffenbacher et al., *Forgetting*, at 148. Even a delay of just one week

can cause the "typical eyewitness viewing a perpetrator's face that [is] not highly

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distinctive . . . to have no more than a 50% chance of being correct in his or her

lineup identification." *Id.* at 147. Here, the delay of over a year between the crime

and the in-court identification suggests that Mrs. Sykes's later recollection was

likely to be inaccurate. Accordingly, the district court correctly held that the state

court's finding that the in-court identification had an independent basis was an

unreasonable application of federal law.

Scientific research also supports the district court's conclusion that, to the

extent that Mrs. Sykes relied on hearing Petitioner-Appellee's voice at the

suppressed lineup, her "earwitness" identification is unreliable. Identifications

based on voice recognition are even less reliable than identifications based on

facial recognition. A. Daniel Yarmey, *The Psychology of Speaker Identification

and Earwitness Memory*, *in* 2 Handbook of Eyewitness Psychology: Memory for

People 101, 105, 106 (R.C.L. Lindsay et al. eds., 2007) (correct identifications in

photo showups and lineups occurred 57% and 46% of the time whereas correct

identifications in *voice* showups and lineups occurred only 28% and 9% of the

time). Moreover, studies have shown that "having the face [of the speaker] present

[is] strongly detrimental to the voice-recognition memory." Susan Cook & John

Wilding, *Earwitness Testimony 2: Voices, Faces and Context*, 11 Applied

Cognitive Psychol. 527, 536 (1997); *see* Sarah V. Stevenage et al., *Interference in

Eyewitness and Earwitness Recognition*, 25 Applied Cognitive Psychol. 112, 117

(2011) ("voice identification is significantly and negatively affected, such that performance is reduced down to the level of a mere guess"); Yarmey, at 106. In addition, numerous other factors reduce the reliability of voice identification, such as: (1) the delay of time before identification,[6] (2) post-event information,[7] (3) post-event verbal descriptions of the perpetrator's voice,[8] (4) the perpetrator's emotional arousal or stress at the time of the event,[9] and (5) efforts by the perpetrator to disguise his/her voice.[10]

In short, Mrs. Sykes based her in-court identification at the first trial on a recollection of an event that was colored by a variety of factors that have been shown to lead to unreliable identifications. Mrs. Sykes had a poor opportunity to observe the event; the event occurred more than a year before her in-court identification; her memory was contaminated by a prior photo array; and her memory was based on a recollection of the perpetrator's voice. Scientific studies

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[6] *See, e.g.*, Kenneth A. Deffenbacher et al., *Relevance of Voice Identification Research to Criteria for Evaluating Reliability of an Identification*, 123 J. Psychol. 109, 116 (1989).

[7] *See, e.g.*, Yarmey, at 106 ("Earwitnesses also are significantly more vulnerable to post-event information than are eyewitnesses.").

[8] *Id.* at 112-13.

[9] *Id.* at 114-15.

[10] *Id.* at 118.

have proven that the existence of each of these circumstances lead to unreliable

identifications. Accordingly, the district court correctly determined that the state

court erred in finding that Mrs. Sykes's in-court identification had an independent

basis.

III.   SCIENTIFIC RESEARCH CONFIRMS THE DISTRICT COURT'S FINDING THAT THE ERROR WAS NOT HARMLESS

The district court held that the trial court's admission of Mrs. Sykes's tainted

in-court identification evidence was not harmless error because "there is no doubt

in the Court's mind that 'the error influenced the jury's deliberations.'" RA83.

According to the district court, the admission of the unreliable in-court

identification had a "substantial and injurious" influence on the jury's

deliberations. *Id.*

Scientific research supports this conclusion. Studies have shown that jurors

routinely overbelieve eyewitness testimony. Jennifer N. Sigler & James V. Couch,

Eyewitness Testimony and the Jury Verdict, 4 N. Am. J. Psychol. 143, 146 (2002)

(conviction rate by mock juries increased from 49% to 68% when a single, vague

eyewitness account was added). Indeed, identification evidence "has been shown

to be comparable to or more impactive than physical evidence . . . and even

sometimes confession evidence." Melissa Boyce et al., *Belief of Eyewitness*

Identification Evidence, *in* 2 Handbook of Eyewitness Psychology: Memory for

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People 501, 505 (R.C.L. Lindsay et al. eds., 2007).[11] Moreover, "[t]he existence of eyewitness identification evidence increases the perceived strength of the other evidence presented." Boyce, at 505.

Jurors also tend to overestimate "the likely accuracy of eyewitness evidence." John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 28 (1983). Jurors may make this mistake because they "rely heavily on eyewitness factors that are *not* good indicators of accuracy." Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System?: A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, *in* 2 Handbook of Eyewitness Psychology: Memory for People 453, 484 (R.C.L. Lindsay et al. eds., 2007).[12] Social scientists theorize that jurors rely heavily on factors that are not correlative of accuracy because many of the scientific principles

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[11] *See* Lauren O'Neill Shermer et al., *Perceptions and Credibility: Understanding the Nuances of Eyewitness Testimony*, 27 J. Contemp. Crim. Just. 183, 196 (2011) ("[C]are should be taken not to dismiss the impact of the eyewitness . . . .").

[12] *See* Tanja Rapus Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115, 116 (2006) (lay knowledge of eyewitness behavior is "highly inaccurate."); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 204 (2006) (substantial number of jurors at trial have "basic misunderstandings about the way memory works in general and about specific factors that can affect the reliability of eyewitness identifications").

underlying the reliability of eyewitness testimony are counter-intuitive or do not comport with common sense. Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 Psychol. Pub. Pol'y & L. 909, 921 (1995). Whatever the cause, the effect is that jurors cannot accurately discriminate between correct and mistaken eyewitnesses, and that jurors frequently rely on the testimony of mistaken eyewitnesses. *Id.* at 925.

In addition, jurors are compelled by a witness's certainty in her identification. "[M]ock-juror studies have found that confidence has a major influence on mock-jurors' assessments of witness credibility and verdicts." Neil Brewer & Gary L. 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, 11 (2006). The impact of Mrs. Sykes's confidence in her in-court identification cannot be underestimated, because jurors tend to confound certainty and accuracy. *State v. Romero*, 922 A.2d 693, 702 (N.J. 2007) ("Jurors likely will believe eyewitness testimony 'when it is offered with a high level of confidence . . . .'").

Moreover, "[w]hen witnesses are briefed or coached about cross-examination, as they almost always are in an actual trial, they maintain their confidence under cross-examination and thereby sustain (or increase) their incriminating effect on jurors." Leippe, at 923. Yet scientific research has shown

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that "eyewitness confidence is a poor postdictor of accuracy." Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed?*, 85 J. Applied Psychol. 542, 548 (2000).

Because eyewitnesses sincerely believe their testimony and are unaware of the factors that may have contaminated their memories, they are more likely to be certain about their testimony. As the Seventh Circuit put it, one "problem with eyewitness testimony is that witnesses who think they are identifying the wrongdoer—who are credible because they believe every word they utter on the stand—may be mistaken." *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009). And because jurors confound certainty and accuracy, cross-examination is less likely to be effective in discrediting eyewitnesses. *Henderson*, 27 A.3d at 888-89; Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 772 (2007).

It is likely that Mrs. Sykes's in-court testimony had an unwarranted impact on the jury, that the jurors lacked even a "basic" understanding of the factors that could have affected Mrs. Sykes's credibility, and that the jurors erroneously relied on Mrs. Sykes's certainty as an indicator of accuracy. Accordingly, the district court correctly determined that the "in-court identification and lineup evidence

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were crucial to the jury's verdict," and the state court's admission of the tainted in-court identification was not harmless error. RA83.

IV.   OTHER COURTS HAVE ADOPTED SCIENTIFIC PRINCIPLES IN DETERMINING ADMISSIBILITY OF EYEWITNESS TESTIMONY

The Supreme Court's decisions in *United States v. Crews* and *United States v. Wade* make clear that deciding whether eyewitness testimony has been contaminated—for example by an illegal lineup procedure—requires determining if there are "independent origins" for the evidence. *Crews*, 445 U.S. at 473 & n.18; *Wade*, 388 U.S. at 240-42. In assessing eyewitness testimony under these holdings, federal and state courts have looked to the scientific principles and research described here, and affirmed the admissibility of such studies in determining whether the eyewitness testimony was tainted.

For example, the New York Court of Appeals has confirmed that testimony regarding scientific research is admissible in assessing eyewitness identifications. In *People v. LeGrand*, 8 N.Y.3d 449 (N.Y. 2007), the court confirmed that testimony regarding generally accepted social science studies was admissible in considering eyewitness identifications. *Id.* at 458. Specifically, the court noted that the scientific research relating to the correlation between confidence and accuracy, the effect of post-event information on accuracy, and confidence malleability is "generally accepted by social scientists and psychologists working in the field." *Id.* Similarly, the court held in *People v. Abney*, 13 N.Y.3d 251

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(N.Y. 2009), that a hearing must be held as to the admissibility of testimony regarding scientific research on event stress, weapon-focus, and cross-racial identification. *Id.* at 266-68. Likewise, the court held in *People v. Santiago* that the trial court should have given greater consideration to testimony regarding scientific research on the effects of post-event information on memory and cross-racial identification to assess the reliability of eyewitness identifications. 17 N.Y.3d at 672. In addition, at least two New York state courts assessing eyewitness testimony have relied on scientific research that stress and weapon-focus affect a viewer's ability to observe and recall information.[13]

The Supreme Court of New Jersey relied on the scientific research regarding eyewitness testimony in its landmark decision issued last year, *State v. Henderson*. In that case, the court relied on some of the same studies discussed above. *Henderson*, 27 A.3d at 894, 905, 907. Specifically, a Special Master appointed by the court "presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies." *Id.* at 877. After reviewing the entirety of the research before him, the

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[13] *See, e.g.*, *People v. Drake*, 188 Misc. 2d 210, 214-15 (N.Y. Sup. Ct. N.Y. County 2001) (stress, weapon-focus, assimilation of post-event information, delay, no correlation between confidence and accuracy, and cross-racial identifications); *People v. Beckford*, 141 Misc. 2d 71, 74 (N.Y. Sup. Ct. Kings County 1988) (stress, delay, no correlation between confidence and accuracy, and the assimilation of post-event information).

Special Master concluded, in an eighty-six page report, that such scientific research

on the reliability of eyewitness testimony was sound, and the New Jersey Supreme

Court held that the research "proves that the possibility of mistaken identification

is real." *Id.* at 877-78; *see* Report of the Special Master at 72.

In addition, the Third Circuit has held that testimony as to scientific studies

regarding eyewitness identification evidence is admissible. *Brownlee*, 454 F.3d at

144. In *Brownlee*, the Third Circuit noted that scientific research is important

because "while science has firmly established the 'inherent unreliability of human

perception and memory,' this reality is outside 'the jury's common knowledge,'

and often contradicts jurors' 'commonsense' understandings." *Id.* at 142.

Accordingly, the Third Circuit held that scientific testimony concerning weapon-

focus, time delay, and cross-racial identification was admissible to assess the

reliability of eyewitness testimony. *Id.* at 137, 144.

In sum, this Court should consider scientific research regarding eyewitness

testimony to assess the state court's decision that Mrs. Sykes's in-court

identification had a source or basis for her identification of Mr. Young independent

of the illegal lineup. This research confirms the district court's findings and

conclusion that the state court's finding that the in-court identification had

independent basis was an unreasonable application of Supreme Court precedent.

Accordingly, this Court should affirm the district court's decision.

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CONCLUSION

For the foregoing reasons, the Innocence Project respectfully requests that

this Court affirm the district court's judgment.

Dated: January 27, 2012

Respectfully submitted,

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Dated: January 27, 2012

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