

No. 05-6901

---

---

In the Supreme Court of the United States

---

TONY EGBUNA FORD

v.

DOUGLAS DRETKE, Director,  
Texas Department of Criminal Justice,  
Institutional Division

---

**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit**

---

**BRIEF *AMICUS CURIAE*  
OF THE CENTER ON WRONGFUL CONVICTIONS  
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

---

TERRI L. MASCHERIN\*  
DAVID E. WALTERS  
ANDREW W. VAIL  
*Jenner & Block LLP*  
*One IBM Plaza*  
*Chicago, Illinois 60611*  
*(312) 222-9350*

STEVEN A. DRIZIN  
ALISON R. FLAUM  
*Center on Wrongful Convictions*  
*Northwestern University School of Law*  
*357 East Chicago Avenue*  
*Chicago, Illinois 60610*  
*(312)503-3100*

\*Counsel of Record

*Attorneys for Amicus Curiae*

---

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT**TERROR! BOOKMARK NOT DEFINED.**

ARGUMENT .....2

I. Courts and Researchers Have Long Recognized That Mistaken Eyewitness Identifications Are A Leading Cause Of Wrongful Convictions. ....2

II. Scientific Research Demonstrates That Contextual Conditions Have A Dramatic Effect On A Witness’s Ability To Identify The Perpetrator.....6

III. In The Absence Of Expert Testimony, Juries Are Not Able To Appreciate The Context Of An Identification Or Recognize Complicating Factors That Affect The Reliability Of Eyewitness Testimony.....13

IV. Wrongful Conviction Case-studies Demonstrate The Need For Expert Testimony Regarding The Psychology Of Eyewitness Identifications.....15

CONCLUSION .....19

## TABLE OF AUTHORITIES

### Cases

<i>Neil v. Biggers</i> , 409 U.S. 188 (1972) .....	4
<i>United States v. Wade</i> , 388 U.S. 218 (1967).....	4
<i>United States v. Smithers</i> , 212 F.3d 306 (6th Cir. 2000).....	4
<i>United States v. Moore</i> , 786 F.2d 1308 (5th Cir. 1986).....	
.....	10, 11,12
<i>United States v. Downing</i> , 753 F.2d 1224 (3rd Cir. 1985).....	
.....	9, 10, 11, 12
<i>United States v. Smith</i> , 736 F.2d 1103 (6th Cir. 1984).....	
.....	8, 9, 12
<i>Bloodsworth v. State</i> , 512 A.2d 1056 (Md. Ct. App. 1986)....	
.....	16, 17
<i>State v. Cotton</i> , 407 S.E.2d 514 (N.C. 1991) .....	17, 18
<i>State v. Cotton</i> , 394 S.E.2d 456 (N.C. Ct. App. 1990).....	18
<i>People v. Beckford</i> , 532 N.Y.S.2d 462 (N.Y. Gen. Term 1988).....	4
<i>Jordan v. State</i> , 928 S.W.2d 550 (Tex. Crim. App. 1996)....	7

### Other Authorities

Edwin M. Borchard, <i>Convicting the Innocent</i> (1932).....	3
James M. Doyle, <i>True Witness</i> (2005) .....	2, 14, 17, 18
Samuel R. Gross et al., <i>Exonerations in the United States 1989 through 2003</i> (2004).....	16
Elizabeth F. Loftus & James M. Doyle, <i>Eyewitness Testimony, Civil and Criminal</i> §§ 2-3 (3d ed. 1997). 6, 8, 9	
National Institute of Justice, <i>Eyewitness Evidence: A Guide to Law Enforcement</i> (1999).....	16
Barry Scheck et al., <i>Actual Innocence</i> (2001) .....	16
Patrick M.Wall, <i>Eyewitness Identification in Criminal Cases (3d. ed. 1975)</i> .....	3, 14
Rob Warden, Center on Wrongful Convictions, <i>The Snitch System</i> (Winter 2004-05).....	1, 16

John H. Wigmore, <i>The Science of Proof</i> § 252 (3d ed. 1937) .....	3
Amy L. Bradfield et al., <i>The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy</i> , 87 <i>J. Applied Psychol.</i> 112 (2002) .....	12, 13
Bruce W. Behrman & Lance T. Vayder, <i>The Biasing Influence of a Police Showup: Does the Observation of a Single Suspect Taint Later Identification?</i> , 79 <i>Perceptual &amp; Motor Skills</i> 1239 (1994). .....	11
Robert Buckhout, <i>Psychology &amp; Eyewitness Identification</i> , 2 <i>Law &amp; Psychol. Rev.</i> 75 (1976).....	5
Frederick E. Chemay, <i>Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases</i> , 45 <i>La. L. Rev.</i> 721 (1985) .....	6
Kenneth A. Deffenbacher et al., <i>A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory</i> , 28 <i>Law &amp; Hum. Behav.</i> 687 (2004).....	8
David B. Fishman & Elizabeth F. Loftus, <i>Expert Psychology Testimony on Eyewitness Identifications</i> , 4 <i>Law &amp; Psychol. Rev.</i> 87 (1978) .....	5, 10
Saul M. Kassin and Kimberly A. Barndollar, <i>The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors</i> , 22 <i>J. Applied Psychol.</i> 1241 (1992). 15	
Saul M. Kassin et al., <i>The “General Acceptance” of Psychological Research on Eyewitness Testimony: A Survey of Experts</i> , 44 <i>Am. Psychologist</i> 1089 (1989).....	15
Felice J. Levine & June L. Tapp, <i>The Psychology of Criminal Identification: The Gap From Wade to Kirby</i> , 121 <i>Pa. L. Rev.</i> 1079 (1973).....	5
Elizabeth F. Loftus et al., <i>Some Facts About “Weapon Focus,”</i> 11 <i>Law &amp; Hum. Behav.</i> 55 (1987).....	7
C.A. Elizabeth Luus & Gary L. Wells, <i>The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects</i> , 79 <i>J. Applied Psychol.</i> 714 (1994) .....	13

A. Maas & G. Kohnken, <i>Eyewitness Identification: Simulating the “Weapon Effect,”</i> 14 <i>Law &amp; Hum. Behav.</i> 397 (1989) .....	8
Christian A. Meissner & John C. Brigham, <i>Eyewitness Identification: Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review,</i> 7 <i>Psychol. Pub. Pol’y &amp; L.</i> 3 (2001) .....	12
Charles Morgan III et al., <i>Accuracy of Eyewitness Testimony for Persons Encountered During Exposure to Highly Intense Stress,</i> 27 <i>Int’l J.L. &amp; Psychiatry</i> 265 (2004) .....	9
Steven Penrod & Brian Cutler, <i>Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation,</i> 1 <i>Psychol., Pub. Pol’y &amp; L.</i> 817 .....	13, 14, 15
John S. Shaw et al., <i>Co-Witness Information Can Have Immediate Effects on Eyewitness Memory Reports,</i> 21 <i>Law &amp; Hum. Behav.</i> 503 (1997) .....	10
Nancy Mehrkens Steblay, <i>A Meta-Analytic Review of the Weapon Focus Effect,</i> 16 <i>L. &amp; Hum. Behav.</i> 413 (1992) .	8
Gary L. Wells, <i>Eyewitness Identification Evidence: Science and Reform,</i> 29 <i>The Champion</i> 12 (2005).....	6, 7, 12
Gary L. Wells, <i>Scientific Study of Witness Memory: Implications for Public and Legal Policy,</i> 1 <i>Psychol. Pub. Pol’y &amp; L.</i> 726 (1995) .....	5, 6, 7
Gary L. Wells & Amy L. Bradfield, <i>“Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience,</i> 83 <i>J. Applied Psychol.</i> 360 (1998).....	13
Gary L. Wells & Eric P. Seelau, <i>Eyewitness Identification: Psychological Research and Legal Policy on Lineups,</i> 1 <i>Psychol. Pub. Pol’y &amp; L.</i> 762 (1995) .....	12
Gary L. Wells et al., <i>Eyewitness Identifications Procedures: Recommendations for Lineups and Photospreads,</i> 22 <i>Law &amp; Hum. Behav.</i> 603 (1998).....	5, 16

Daniel B. Wright et al., <i>Memory Conformity: Exploring Misinformation Effects When Presented by Another Person</i> , 91 Brit. J. Psychol. 189 (2000) .....	10
Elizabeth F. Loftus, <i>Incredible Eyewitness</i> , Psychol. Today, 117 (1974) .....	14
<b>Rules</b>	
Fed. R. Evid. 702.....	8, 9, 11, 12

## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Center on Wrongful Convictions (“Center”) was organized in 1999 as a program of the Bluhm Legal Clinic at Northwestern University School of Law. The Center is partially funded by the School of Law but relies on private funding for more than half of its operating expenses.

Dedicated to identifying and rectifying wrongful convictions and other serious miscarriages of justice, the Center investigates possible wrongful convictions and represents imprisoned clients with claims of actual innocence. The Center or members of its staff have been instrumental in the exoneration of ten men who were sentenced to death in Illinois under the state’s current capital punishment law.

The Center has a well-established tradition of researching the prevalence, causes, and social costs of wrongful convictions, and advocating reforms designed to improve the accuracy and fairness of the criminal justice system. In that regard, the Center has engaged in research and advocacy concerning the role that mistaken eyewitness identifications play in the conviction of innocent persons.

Recently, the Center conducted a survey of 111 wrongful capital convictions and reported that erroneous identifications served as the basis for conviction in 25.2% of those cases. Rob Warden, Center on Wrongful Convictions, *The Snitch System* 14 (Winter 2004-05).<sup>2</sup> (A0014.)<sup>3</sup> The Center’s

---

<sup>1</sup> No person or entity other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

<sup>2</sup> The criteria for the survey were that the defendant was convicted after 1973 and subsequently was exonerated. See [www.law.northwestern.edu/wrongfulconvictions/documents/snitchsystembooklet.pdf](http://www.law.northwestern.edu/wrongfulconvictions/documents/snitchsystembooklet.pdf).

<sup>3</sup> Cites that appear in this brief as (A\_\_) refer to the materials that the Center has prepared and compiled for lodging with this Court. The

analysis of the issue of mistaken eyewitness identifications provides a perspective unique from that of the parties and offers information that is not currently before this Court, but is directly applicable to this case.

### SUMMARY OF ARGUMENT

In cases like this one, where eyewitness identifications are the primary evidence against the defendant, “the memory of the witness is the crime scene - the witness’s memory holds the key information, but that information is difficult to recover and easy to contaminate.” James M. Doyle, *True Witness* xiii (2005). (A0021.) This brief examines the well-established body of scientific evidence demonstrating that psychological factors greatly influence eyewitnesses’ ability to perceive and remember events accurately and to identify offenders. Expert psychological testimony is critical to aid the jury in understanding how psychological factors affect the reliability of eyewitness identifications. Here, the trial court’s denial of Mr. Ford’s motion to appoint an eyewitness expert and his counsel’s failure to hire an expert prevented Mr. Ford from showing how factors present in this case may have affected the eyewitness identifications and thereby significantly increased the risk of a wrongful conviction.

### ARGUMENT

#### **I. Courts and Researchers Have Long Recognized That Mistaken Eyewitness Identifications Are A Leading Cause Of Wrongful Convictions.**

Nearly seventy-years ago, Northwestern University Law School Professor John H. Wigmore noted that eyewitness identifications “call[] for caution, in that testimonial

---

Center has requested permission to lodge those materials, but the Court has not granted permission at this time. All parties to the petition have consented by letter to lodging of these materials with the Court. Those consent letters are submitted with this *amicus curiae* brief.

assertions to identity must be accepted only after the most careful considerations.” Wigmore, *The Science of Proof* § 252 (3d ed. 1937). (A0044-A0045). Historically, courts and researchers have recognized that certain factors commonly compromise the reliability of eyewitness identifications. Those “compromising factors” began as common sense principles but have now been confirmed by scientific observations about how the human mind perceives, processes and recalls events. Courts and researchers consistently have emphasized that if identifications are not scrutinized with careful attention to relevant compromising factors, they may lead to wrongful convictions.

The idea that eyewitness misidentification is one of the most common causes of wrongful convictions is not new. *See, e.g.*, Edwin M. Borchard, *Convicting the Innocent* 13 (1932). (A0072.) However, early academic literature on the topic was largely ignored by the legal community. Then in 1966, in a book titled *Eye-Witness Identification in Criminal Cases*, Patrick M. Wall made several observations regarding misidentification by eyewitnesses, including: a number of witnesses may identify a suspect erroneously; even trained observers may be in error; the effect that fear may have upon the witness is uncertain; erroneous identifications occur even in capital cases; and juries are often unduly receptive to evidence of identification. *See* Wall, *Eye-Witness Identification in Criminal Cases* 11-24 (3d. ed. 1975). (A0082-A0095.) Wall also suggested that misidentification is aggravated by certain police practices and certain rules of evidence. *Id.* at 24. (A0095.) The “compromising factors” that Wall identified were based on rational principles and common sense ideas that many jurors might apply with little or no scientific knowledge.

In light of Wall’s book, courts began to recognize the importance of the work of researchers in discerning the

factors necessary to scrutinize eyewitness identification. The Supreme Court and other federal and state courts frequently cited Wall's book to support the proposition that there was a need for greater care in obtaining and employing eyewitness identifications in *criminal* cases. See, e.g., *United States v. Wade*, 388 U.S. 218, 229-34 (1967); *United States v. Smithers*, 212 F.3d 306, 311-12 (6th Cir. 2000); and *People v. Beckford*, 532 N.Y.S.2d 462, 465 (N.Y. Gen. Term 1988). In *Wade*, this Court, citing Wall, recognized that "identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." 388 U.S. at 228.

In 1972, in *Neil v. Biggers*, this Court expanded on previous case law and commentary and set forth "factors to be considered in evaluating the likelihood of misidentification," including: "the opportunity of the witness to view the criminal at the time of the crime; the witness's degree of attention; . . . and the length of time between the crime and the confrontation." 409 U.S. 188, 199-200 (1972). The Court stated that courts should consider those factors in evaluating the reliability of eyewitness testimony under a totality of the circumstances test. In establishing those factors, the Court recognized the importance of scrutinizing eyewitness identifications carefully. *Id.*

In the decades following *Biggers*, the factors developed by this Court were widely applied in judging the reliability of eyewitness identification testimony. At the same time, researchers began studying the psychology behind eyewitness identifications. In the 1970s, several peer-reviewed psychological research studies were undertaken to analyze the effect of the inner-workings of the human mind on eyewitness misidentifications. See, e.g., David B. Fishman & Elizabeth F. Loftus, *Expert Psychology*

*Testimony on Eyewitness Identifications*, 4 Law & Psychol. Rev. 87 (1978) (A0097-A0113); Felice J. Levine & June L. Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 Pa. L. Rev. 1079 (1973). (A0114-A0166.) The findings of those studies confirmed common sense: “[r]esearch on perception and memory suggests strongly that any eyewitness report should be evaluated cautiously and skeptically.” Robert Buckhout, *Psychology & Eyewitness Identification*, 2 Law & Psychol. Rev. 75, 75 (1976). (A0167.)

Those studies also provided additional information regarding the causes of eyewitness misidentification. For example, in the mid-1970s, Robert Buckhout, a psychologist, began focusing on the “application of psychology to the problem of eyewitness identification in courts of law [as] an extension of ongoing basic research in human perception and memory.” *Id.* at 75. (A0167.) After extensive analysis, Buckhout reported “factors” that are likely to cause an unreliable identification due to their psychological effect on a witness. *Id.* at 77-88. (A0169-A0180.) Those factors include stress, the physical condition of the witness, suggestive identification procedures, conformity and unconscious transfer. *Id.* at 78-88. (A0170-A0180.) Buckhout emphasized that fact-finders must be aware of those additional “factors” when assessing the credibility of identifications. *Id.* at 77, 91. (A0169, A0183.) Over time, Buckhout’s findings have been reaffirmed in subsequent peer-reviewed research and by studies of mistaken identifications that contributed to known wrongful convictions. *See, e.g.*, Gary L. Wells, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603 (1998). (A0183-A0232.)

During the 1980s, psychological research continued to expand the scope of analysis of eyewitness identifications. *See, e.g.,* Frederick E. Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 La. L. Rev. 721, 730 (1985). (A0239.) Researchers began to make use of complex stimulus events to approximate the experiences of actual witnesses. Gary L. Wells, *Scientific Study of Witness Memory: Implications for Public and Legal Policy*, 1 Psychol. Pub. Pol’y & L. 726, 726-27 (1995) (citations omitted). (A0259-A0260.) Researchers also continued to study the retrieval of information from the human memory, and how external conditions like lighting and time affect the mind’s ability to perceive and remember. *See, e.g.,* Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony, Civil and Criminal* § 2-3 (3d ed. 1997). (A0269.)

Thus, as both case-law and scientific research recognize, factors inherent in human psychology cause eyewitness identifications to be prone to unreliability. Courts must scrutinize eyewitness testimony carefully. As we explain more fully below, cross-examination is not sufficient to put identification testimony in context for the jury and to expose the factors that lead an eyewitness to identify mistakenly an innocent defendant.

## **II. Scientific Research Demonstrates That Contextual Conditions Have A Dramatic Effect On A Witness’s Ability To Identify The Perpetrator.**

During the last two decades, researchers, led by Professor Gary Wells, have reported that their “understanding of mistaken identification has matured greatly, so that we now have a rather large body of peer-reviewed, scientific literature that forms an increasingly coherent picture of how mistaken identifications occur.” Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, 29 *The*

Champion 12 (2005). (A0232-A0339.) This peer-reviewed scientific literature has developed and expanded the factors recognized by the Court in *Wade* and *Biggers*. Those factors now extend beyond common sense, practical or simulated experience, and even the study of the human memory process. This literature also demonstrates that the psychological phenomena underlying eyewitness testimony are controlled by the ability of human beings to make use of cognitive processes, including reasoning and decision-making. Researchers also have determined that a witness's "memory testimony" is distinct from the actual memory itself and that "memory testimony" is affected by the witness's compliance with demand characteristics of a situation, guessing behaviors, confusions of real and imagined memories and other related phenomena. *See, e.g., Wells, Scientific Study of Witness Memory*, at 727. (A0260.)

Psychological research shows that contextual conditions are not obvious to a lay cross-examiner, and have a dramatic effect on a witness's ability to identify the perpetrator. These contextual conditions, or complicating factors, include: the presence of a weapon; the stress or violence associated with an event; the passage of time before the identification; suggestions by others; police tactics in conducting identifications; differences in race between the witness and the accused; and the confidence of the witness. Expert review of scientific research examining the impacts of these complicating factors substantially improves the jury's ability to assess the correctness of eyewitness testimony. All of these factors were present in Mr. Ford's case.

First, scientific studies have demonstrated that the presence of a weapon during the crime reduces the witness's ability to recall other details and correctly identify the perpetrator. Elizabeth F. Loftus et al., *Some Facts About "Weapon Focus,"* 11 *Law & Hum. Behav.* 55 (1987)

(A0340-A0347); A. Maas & G. Kohnken, *Eyewitness Identification: Simulating the “Weapon Effect,”* 13 Law & Hum. Behav. 397 (1989) (A0348-A0359); Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect,* 16 Law & Hum. Behav. 413 (1992) (analyzing the data and results of twelve tests conducted since 1976) (A0360-A0371.) Courts have recognized “weapon focus” as a proper subject for expert testimony. *See Jordan v. State,* 928 S.W.2d 550, 552 (Tex. Crim. App. 1996) (expert testimony on the unreliability of eyewitness identification based on “weapon focus” was relevant); *United States v. Smith,* 736 F.2d 1103, 1106 (6th Cir. 1984) (weapon focus is a “proper subject” for eyewitness expert testimony).

In this case, the eyewitnesses testified that a gun was pointed at them from the moment they encountered the perpetrators. (Ford Petition at 11-12.) The eyewitnesses testified that the perpetrators used the gun to kill their family members and that the perpetrators threatened to kill them as well. *Id.* One of the eyewitnesses was even shot during the course of the incident. *Id.* Those facts demonstrate that “weapon focus” was present in this case.

Second, scientific research has shown that highly stressful or violent events increase the likelihood that the witness will misidentify the perpetrator. Witnesses to very violent crimes and victims of highly emotional, traumatic events are less able to recall details of those events correctly than are those who view nonviolent and less emotional events. Loftus & Doyle, *Eyewitness Testimony* at § 2-8. (A0279-A0283). Studies have shown that memory of highly stressful events is less accurate than memory of less stressful events and that high stress specifically reduces the accuracy of identifications. Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory,* 28 Law & Hum. Behav. 687 (2004) (reviewing and

analyzing twenty-seven tests on the effects of heightened stress on eyewitness identification). (A0372-A0391). Courts have recognized the value of expert testimony about the effect of stress on memory. *See, e.g., United States v. Downing*, 753 F.2d 1224, 1230 (3rd Cir. 1985) (proffered expert testimony about stress in an identification is sufficiently “helpful” to satisfy Fed. R. Evid. 702); *Smith*, 736 F.2d at 1106 (stress is a “proper subject” for expert testimony about the reliability of eyewitness identification).

Research shows that highly stressful situations increase the risk of “false-positive” identifications. In a study of military trainees who were subjected to either highly stressful or non-stressful interrogations, false-positive identifications occurred among the high-stress group more than twice as often as among those subjected to non-stressful interrogations. Charles Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 265, 272 tbl.1 (2004). (A0399.) The researchers concluded that “contrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 minutes, a large number of subjects in this study were unable to correctly identify their perpetrator.” *Id.* at 274. (A0401). Information about the impact of stress on perception and memory was relevant in Mr. Ford’s case, because the eyewitnesses claimed, contrary to this research, that the stress of the situation helped them to remember the perpetrators. (Ford Petition at 13.)

Third, research shows that a witness’s ability to identify a perpetrator correctly decreases rapidly over time. Scientific literature has termed this the “forgetting curve.” *See Loftus & Doyle, Eyewitness Testimony*, at 49-52 (discussing the classic “forgetting curve” and memory for faces) (A0306-

A0309); Fishman & Loftus, 4 L. & Psychol. Rev. at 90-92 (citing a study using a staged crime to test eyewitness identification after seven weeks). (A0100-A0102). Courts have also acknowledged the “forgetting curve.” See *Downing*, 753 F.2d at 1230 (proffered testimony about the “forgetting curve” may be admitted); *United States v. Moore*, 786 F.2d 1308, 1311-12 (5th Cir. 1986) (expert testimony on the effect of the “forgetting curve” may be admitted). The rapid decrease in the ability of a witness to remember details as time passes has sharp implications for the reliability of eyewitness testimony. If months, weeks, or even days pass between the crime and the lineup, the eyewitness’s ability to identify the perpetrator correctly is significantly reduced. In this case, one of the eyewitnesses identified Mr. Ford from a photo array nearly a day after the incident. (Ford Petition at 12.) The other eyewitness did not identify Mr. Ford until nine days after the shooting. *Id.* at 12-13.

Fourth, scientific research has shown that memories can be altered by later exposure to outside information and subtle suggestions regarding the identity of the perpetrator. Witnesses who receive information regarding what another person saw often incorporate that information into their own reports, even when that information is inaccurate. The literature suggest this as an “asymmetry” or an “assimilation factor.” See, e.g., John S. Shaw et al., *Co-Witness Information Can Have Immediate Effects on Eyewitness Memory Reports*, 21 Law & Hum. Behav. 503 (1997) (finding that witnesses who received information regarding what a co-witness incorrectly saw were likely to give that information in their own reports) (A0407-A0427); Daniel B. Wright et al., *Memory Conformity: Exploring Misinformation Effects When Presented by Another Person*, 91 Brit. J. Psychol. 189, 199 (2000) (finding that most subjects who viewed a staged crime that did not involve an accomplice would state that there was an accomplice after

they discussed the crime with someone who saw the same crime staged with an accomplice because of “asymmetry”). (A0431). Courts have also acknowledged an “assimilation factor.” *See Moore*, 786 F.2d at 1311-12 (admission of testimony on the “assimilation factor” may be proper); *Downing*, 753 F.2d at 1230 (“assimilation factor” is among the types of proffered testimony that would be sufficiently “helpful” to satisfy Fed. R. Evid. 702).

More disconcerting, one study found that exposing witnesses to photographs of an individual described as a suspect has a highly biasing effect on later identification. Bruce W. Behrman & Lance T. Vayder, *The Biasing Influence of a Police Showup: Does the Observation of a Single Suspect Taint Later Identification?*, 79 *Perceptual & Motor Skills* 1239 (1994). (A0442-A0451.) In that study, subjects viewed video of a crime. Half the subjects were shown a photograph of an individual who was not in the video and told he had been apprehended by the police, and after five to seven days all the subjects viewed a photo array. *Id.* at 1240-43. (A0443-A0046.) Those who had previously seen the photograph of the innocent individual were significantly more likely to choose him from the array, and approximately 40% of those who had seen the suspect’s photograph identified him as the perpetrator. *Id.* at 1243-44. (A0046-A0047.) Significant to this case, one of the eyewitnesses in Mr. Ford’s case did not view a photo array until nine days after the incident. (Ford Petition at 12-13.) By that time, she admitted she had seen photographs of Mr. Ford, who had been arrested, in the local newspapers. *Id.* at 13.

Fifth, recent studies have focused on improper influence that the police may have on eyewitness identifications. Researchers have carefully examined police identification tactics and have called for “systemic reform in how police

investigate and make decisions in eyewitness cases.” Wells, *Eyewitness Identification Evidence, Science and Reform*, at 20 (A0332). The police procedures used to construct and administer photo arrays can limit the reliability of any subsequent identification. For example, witnesses are subject to suggestibility; the reliability of an identification is questionable when the lineup administrator knew which member of the array was the suspect. Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol. Pub. Pol’y & L. 762, 775-78 (1995). (A0462-A0465.) Courts also have recognized a “feedback factor” which involves police encouraging an identification by positive feedback. *See Downing*, 753 F.2d at 1230 (recognizing the “feedback factor”); *Moore*, 786 F.2d at 1312 (the “feedback factor” is among the types of expert testimony on identification that may be admitted properly). Here, both eyewitnesses identified Mr. Ford by photo array. (Ford Petition at 12-13.) At trial, no expert reviewed the circumstances surrounding the identification or the content of the photos in the array.

Sixth, studies have shown that witnesses of one race are likely to falsely identify a person of another race. Christian A. Meissner & John C. Brigham, *Eyewitness Identification: Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol. Pub. Pol’y & L. 3 (2001) (analyzing data from thirty-nine research articles and ninety-one samples). (A0479-A0511.) Courts have recognized that expert testimony about cross-racial identification can be helpful to a jury. *See, e.g., Smith*, 736 F.2d at 1106 (testimony about the unreliability of eyewitness identifications based on racial misidentification was a “proper subject” for expert testimony). In Mr. Ford’s case, expert testimony on cross-racial identifications would have aided the jury because the eyewitnesses were Mexican-

American and Mr. Ford is African-American. (See Ford Brief at 30-31.)

Finally, studies have shown that post-identification confidence bears little relation to accuracy and that eyewitness confidence can be manipulated. Amy L. Bradfield, et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. Applied Psychol. 112 (2002) (A0512-A0520); Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 Psychol. Pub. Pol’y & L. 817, 822-30 (1995) (A0526-A0534); Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. of Applied Psychol. 360 (1998). (A0550-A0566.) Witnesses also express more confidence in an identification after receiving feedback that a co-witness identified the same person. C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. Applied Psychol. 714 (1994). (A0567-A0576.) Here, the eyewitnesses expressed extraordinary confidence that they had correctly identified Mr. Ford. (Ford Petition at 13).

All of these complicating factors recognized in the scientific research are present in Mr. Ford’s case.

**III. In The Absence Of Expert Testimony, Juries Are Not Able To Appreciate The Context Of An Identification Or Recognize Complicating Factors That Affect The Reliability Of Eyewitness Testimony.**

Without testimony from a scientific expert to identify and explain the complicating factors that may impact the accuracy of eyewitness testimony, juries tend to perceive that eyewitness testimony must be correct. A lay cross-examiner cannot properly elicit these factors or the context in which

identification testimony is given because this information is not obvious to someone who has not studied the scientific research.

As early as 1918, researchers and social commentators noted that “‘positive recognition by well intended uninterested persons is commonly accepted unless the alibi is convincing,’ and that evidence of identification, however untrustworthy, is ‘taken by the average juryman as absolute proof.’” Wall, *Eye-Witness Identification in Criminal Cases*, at 19 (A0090) (quoting commentary from 1918). In the 1960s and 1970s, as researchers explored the sources of identification errors, Patrick Wall pointed to the overemphasis on eyewitness identification as “one of the principal causes of convictions based upon erroneous evidence of identification - the fact that, in general, juries are unduly receptive to identification evidence and are not sufficiently aware of its dangers.” *Id.* Wall based that observation on numerous cases and studies demonstrating that juries convict on the basis of eyewitness identifications, even when the identification evidence is incredible or far outweighed by evidence of innocence. *Id.* at 19-23 (A0090-A0094). Since that time, researchers have confirmed that jurors rely heavily on eyewitness identification and are apt to ignore circumstances that cast serious doubt on the identification. *See, e.g.*, Elizabeth F. Loftus, *Incredible Eyewitness*, *Psychol. Today*, 117 (1974) (finding that an eyewitness identification substantially increased the percentage of mock jurors voting to convict, and that presenting evidence that the lone eyewitness was virtually blind caused only a minimal reduction in the percentage of jurors voting to convict). (A0578.)

Studies have also shown that in overestimating the accuracy of identifications, jurors rely heavily on witnesses’ expressions of confidence in their own identification. Penrod

& Cutler, *Witness Confidence and Witness Accuracy* at 818-22. (A0522-A0526.) Research indicates that mock jurors believe a confident but mistaken eyewitness at the same rate as a confident and correct one. Doyle, *True Witness* at 44. (A0038.) In Mr. Ford's case, one of the eyewitnesses testified that she believed she had been "spiritually" protected from death so that she could bring the perpetrator to justice. (Ford Petition at 13.) In the absence of expert testimony, jurors likely gave undue credence to the witness's identification of Mr. Ford based on her invocation of a spiritual purpose.

Studies also demonstrate that jurors are not aware generally of complicating factors that are widely known and accepted by experts. Saul M. Kassin and Kimberly A. Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. Applied Psychol. 1241, 1245-47 (1992) (A0583-A0584); Saul M. Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony: A Survey of Experts*, 44 Am. Psychologist 1089, 1097 (1989). (A0594.)

Without the assistance of expert testimony, jurors are likely unable to recognize and appreciate the significance of these complicating factors in the absence of expert testimony. In Mr. Ford's case, the jury needed expert testimony to educate them as to the presence of multiple factors complicating the eyewitness identifications. Without that testimony, the risk that the jury would wrongfully convict Mr. Ford was significantly increased.

#### **IV. Wrongful Conviction Case-studies Demonstrate The Need For Expert Testimony Regarding The Psychology Of Eyewitness Identifications.**

Several researchers have studied cases in which defendants were wrongfully convicted but later exonerated

based on DNA evidence. These case-studies show empirically that eyewitness identification is a significant cause of wrongful convictions, including convictions in capital cases. Samuel R. Gross, et al., *Exonerations in the United States 1989 through 2003* (2004) (study of 328 exonerations based on D.N.A. evidence between 1989 and 2003, concluding: “[t]he most common cause of wrongful convictions is eyewitness misidentification”) (A0596-A0631); Barry Scheck et al., *Actual Innocence* (2001) (study reconstructing 62 exonerations determined that mistaken eyewitnesses were a factor in 84% of the convictions) (A0631-A0650); Rob Warden, Center on Wrongful Convictions, *The Snitch System* 14 (Winter 2004-2005) (study of 111 wrongful convictions in capital cases in the United States since 1973 revealed that 28 people were convicted and sentenced to death based on eyewitness misidentifications) (A0014); Wells et al., *Eyewitness Identifications Procedures* (study of 40 exonerations based on D.N.A. evidence in the 1990’s found that 36 cases, or 90%, involved misidentification). (A0183-A0232.) In a report aimed at understanding the reasons for wrongful convictions, even the National Institute for Justice observed that in the majority of the 28 cases of wrongful convictions studied, “[t]he most compelling evidence . . . was the eyewitness testimony presented at trial.” National Institute of Justice, *Eyewitness Evidence: A Guide to Law Enforcement* 3 (1999). (A0665.)

That empirical data emphasizes the need for expert testimony to explain the factors that affect the reliability of eyewitness identification testimony. Two recent cases highlight this conclusion. In these examples, innocent individuals were convicted on the basis of unreliable eyewitness testimony, only to be exonerated later by DNA evidence. In each case, the court refused to permit expert

testimony that would have helped jurors better understand the context and limitations of eyewitness testimony.

In 1993, DNA evidence exonerated Kirk Bloodsworth of the rape and murder of nine-year-old Dawn Hamilton – a crime for which he had been convicted and sentenced to death. The principal evidence upon which Bloodsworth was convicted was the testimony of five eyewitnesses. The two primary eyewitnesses were children, one of whom identified Bloodsworth in court despite having been unable to make an identification from a photo array and having made an incorrect identification from a lineup. *Bloodsworth v. State*, 512 A.2d 1056, 1057-58 (Md. Ct. App. 1986).

At his first trial, Bloodsworth sought to present the testimony of an eyewitness identification expert who would have testified about memory issues affecting eyewitness identifications. The trial judge denied that request, stating “such testimony is of little value in aiding the jury in this case.” *Id.* at 1063 (internal quotations omitted).

The Maryland Court of Appeals reversed and remanded the conviction on *Brady* grounds, but affirmed the trial court’s exclusion of the expert testimony, stating that it could not possibly be “of real appreciable help to the trier of fact.” *Id.* at 1062-67 (citations and internal quotations omitted). The Court of Appeals said “[c]ertainly, effective cross-examination is adequate to reveal any inconsistencies or deficiencies in the eye-witness testimony.” *Id.* at 1065 (internal quotations omitted). The court was not correct, as DNA evidence later showed that eyewitness testimony to be unreliable. *See Doyle, True Witness* at 127. (A0039).

In 1995, DNA evidence exonerated Ronald Cotton from convictions of rape and burglary. Cotton’s convictions were based almost entirely on in-court eyewitness identifications by two victims. None of the physical evidence linked Cotton with the attacks. *State v. Cotton*, 407 S.E.2d 514, 518-19

(N.C. 1991). Both witnesses viewed their attacker only during the course of a sexual assault carried out in very limited light. *State v. Cotton*, 394 S.E.2d 456, 457 (N.C. Ct. App. 1990). The first witness, who was nearsighted and not wearing her glasses during the attack upon her, stated at both the photo array and lineup only that Cotton “looks the most like him.” *Id.* at 461. The second witness was unable to make an identification from a photo array two days after the event and identified a different individual at the live lineup. *Id.* at 457, 461.

At trial, Cotton sought to present the testimony of an expert in eyewitness identification. The trial court denied that request and the North Carolina Court of Appeals affirmed, agreeing with the trial court that “the factors effecting [sic] eyewitness identification are not so . . . misapprehended by lay persons as to make expert testimony concerning their application of more than minimal value and assistance to a jury.” *Id.* That jury nonetheless failed to divine what DNA later established – and what the expert witness would have explained – that the witnesses’ identification of Cotton was unreliable. *See Doyle, True Witness* at 6. (A0027).

As the case-studies show, eyewitness misidentification is one of the leading causes of wrongful convictions. Mr. Ford was convicted primarily based on eyewitness identification testimony. The case-studies emphasize that expert testimony was necessary in this case to explain the factors affecting the reliability of identifications.

**CONCLUSION**

For the foregoing reasons, the Center for Wrongful Convictions urges this Court to grant Mr. Ford's Petition for *Certiorari*.

Respectfully submitted,

TERRI L. MASCHERIN\*  
DAVID E. WALTERS  
ANDREW W. VAIL  
*Jenner & Block LLP*  
*One IBM Plaza*  
*Chicago, Illinois 60611*  
*(312) 222-9350*

\*Counsel of Record

STEVEN A. DRIZIN  
ALISON R. FLAUM  
*Center on Wrongful*  
*Convictions*  
*Northwestern University*  
*School of Law*  
*357 East Chicago Avenue*  
*Chicago, Illinois 60610*  
*(312)503-3100*

November 21, 2005