No. 09-1052 CAPITAL CASE

Supreme Court of the United States

KEVIN KEITH,

Petitioner

v.

STATE OF OHIO,

Respondent

BRIEF OF MEMORY EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF MEMORY EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICI CURIAE*

This *Amicus Curiae* brief is submitted on behalf of 13 current and former professors of psychology who are experts on memory and eyewitness identification. *Amici* teach, research and write about memory as evidence as applied by the state and federal courts of the United States. As experts on memory and eyewitness identification, they have a strong professional interest in the issues presented by this case. Further, they have particular insight into the degree to which faulty eyewitness evidence may have unfairly prejudiced the outcome of Kevin Keith's capital murder trial.

The *Amici* on whose behalf this brief is submitted are:

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[1] No counsel for a party authored this brief in whole or in part. Counsel for the Petitioner paid for the copying and mailing of this brief. No other monetary contributions have been made by any person. Rachel Troutman, attorney for Mr. Keith, consented to the filing of this brief. Matthew Kanai, Senior Assistant Attorney General, consented to the filing of this brief.

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SUMMARY OF ARGUMENT

No one can determine, without independent corroboration, whether an eyewitness has correctly identified the perpetrator of the crime or has misidentified an innocent person. Eyewitness identification experts are no exception. However, the scientific study of memory has identified risk factors that increase the likelihood of mistaken identification and undermine the probative value of identification evidence. Many of these risk factors were present in the case against Kevin Keith.

- Richard Warren's description of the perpetrator was vague due to extreme stress, weapon focus, and the

perpetrator obscuring the bottom half of his face with a turtleneck. Nancy Smathers only viewed a man fleeing the scene from a distance and encoded only the grossest (general) characteristics about this man.

- The police presented the last name Keith to Richard Warren.
- Nancy Smathers selected Kevin Keith from the lineup only after viewing him on TV. This identification had great prejudicial value and no probative value.
- The lineup was highly biased toward Kevin Keith. Over 75% of individuals with no memory for the crime select Kevin Keith as the individual in the lineup that most resembles the description.
- Quanita Reeves indicated that although #5 (Kevin Keith) resembled the perpetrator, he was not the perpetrator. Quanita Reeves' nonidentification provided evidence in favor of Kevin Keith's innocence.

ARGUMENT

I. Limitations of the scientific investigation of eyewitness identification

Physical evidence like fingerprints or blood samples can be tested and retested without changes to that evidence, but eyewitness evidence exists only in the mind (memory) of the witness. This unique nature necessitates an emphasis on the methods used to extract what is in a witness' memory. Moreover, every time a witness' memory is tested, the memory evidence can be changed by the context of the retrieval attempt (e.g., a biased procedure, being pressed for details by another detective, describing the events to a friend). Memory is very malleable and highly reconstructive (e.g., Loftus, 1997; Schacter, 2002). As evidence, it must be evaluated very carefully. Despite that, it is among the most convincing evidence to a jury (Brigham & Bothwell, 1983). In the words of former Supreme Court Justice William J.

Brennan, there is "nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" These eyewitnesses are not lying, but their memory can easily trick them.

The advent of DNA testing has revealed that faulty eyewitness identification is the single most likely factor to result in wrongful conviction. Of course, that fact not only means that the life of an innocent man is destroyed but it also means that the life of the guilty man continues unimpeded. The scientific literature investigating eyewitness identification consists largely of laboratory-based studies involving mock crimes presented on video. This obviously differs in *many* ways from what a witness experiences during an actual crime. However, it is wrong to dismiss this research because it does not involve real crimes or because it only involves college students. The control of the laboratory allows causal factors to be isolated from extraneous ones to reveal how memory operates. This is the goal of the scientific investigation of memory. Psychology researchers conduct laboratory-based studies because it would be unethical to expose participants to actual violence. When opportunities for more realistic depictions are available, the results are similar regarding the poor accuracy of eyewitness identifications. For example, the participants in a study by Morgan et al. (2004) were soldiers undergoing prisoner-of-war training. The soldiers were subjected to low-stress or high-stress interrogations. Despite interacting with their interrogators for more than 30 minutes, the soldiers had great difficulty subsequently identifying their interrogator from a photo lineup. For the soldiers subjected to the low-stress interrogation, they correctly selected their interrogator 76% of the time when he was in the photo lineup, but falsely selected an innocent man 38% of the time. For those subjected to the high-stress interrogation, accuracy was much poorer. The correct identification rate dropped to 34% and the false identification rate rose to 68%.

II. Theoretical framework for understanding memory

The 251 exonerated individuals reported by the Innocence Project are testament to the fact that eyewitnesses make mistakes. Importantly, the primary evidence leading to more than 75% of these wrongful convictions was faulty eyewitness identification. But it is critical to note that these eyewitnesses were not lying. In fact, their memory tricked them. By reviewing how our memory operates, we will see how these errors can arise, and how they fool us despite an eyewitness' best efforts to be careful, precise, and accurate.

Memory for a past event is dependent on three phases: encoding, maintenance and retrieval. Although these phases are relevant to any memory situation, we will illustrate these phases by first describing how they apply to a generic eyewitness identification situation and then how they apply to the Kevin Keith case.

A. Phase I-Encoding. The first phase of any memory situation involves the encoding of an event. In the case of a crime, the events to be encoded include the face of the perpetrator, a description (face, clothing, gait, voice, etc.), the weapon, plus other relevant details (e.g., where the crime took place, who else was present).

There is an overabundance of information available in every situation. We cannot encode everything due to limitations on our cognitive capacity (Engle, Kane, & Tuholski, 1999; Miller, 1956). Anyone who has ever sat behind someone at a green light while the driver in front happily chats on the cell phone is aware of these limitations. Heightened stress can reduce the availability capacity that we have, which can harm memory. The Morgan et al. (2004) study reported above illustrated that high stress has a very strong and negative impact on eyewitness identification accuracy. A meta-analysis by Deffenbacher et al (2004) examined 30 years of research on the effect of stress on the fidelity of eyewitness

memory. Across 27 different empirical tests, these authors found support for the hypothesis that "high levels of stress negatively impact...eyewitness memory."

Another indication of the relationship between our limited cognitive capacity and memory involves the weapon-focus effect. The weapon-focus effect demonstrates that when a perpetrator is observed with a weapon, a witness's attention is drawn to the weapon and away from the person carrying that weapon (Loftus, Loftus, & Messo, 1987; see Steblay, 1992, for a review of this literature). Because our cognitive capacity is limited, if someone is paying attention to a weapon, that means that they have taken attention away from other aspects of the event. That means that details about the perpetrator are not being encoded. However, weapon-focus effects may be smaller if the witness sees the perpetrator both with, and without, the weapon.

Knowledge and experience influence what we encode. For example, cross-race identifications are less accurate than same race identifications. Meissner and Brigham (2001) collected every cross-race study ever conducted to demonstrate the robustness of the cross-race deficit. Although many explanations have been offered for the cross-race bias, and no single explanation may be sufficient, one contributing factor might be that a lack of experience with individuals of a different race influences what features an eyewitness encodes about a perpetrator (e.g., Malpass & Kravitz, 1969; Platz & Hosch, 1988).

We can only remember what we have encoded. That means that information that is *not* encoded is *not* in memory and therefore *cannot* be remembered. Moreover, the accuracy of eyewitness identification is reduced if the perpetrator wears a disguise or hides his or her appearance by wearing a hat (Cutler, Penrod, & Martens, 1987) or sunglasses (Hockley, Hemsworth, & Consoli, 1999). Unfortunately, other mechanisms can operate to make an eyewitness "remember"

something that they never encoded. Therefore, it important to distinguish between information retrieved from memory because it was actually experienced versus information that is reconstructed and incorrectly reported as a memory. Unfortunately, this is a distinction that people have difficulty making. In normal day-to-day life, it matters little if someone is confused whether a friend stated that President Bush had a shoe thrown at him, they saw it on TV, or read about in the paper. But we have a dilemma when an eyewitness is unable to ascertain whether the person they selected from a lineup was selected because the witness saw the accused on TV or because the person selected from the lineup was the person that shot the victim.

B. Phase II-Maintenance. The second phase of this memory framework involves the maintenance of an encoded event during a retention interval. Two primary changes can happen to an event during the period between encoding and retrieval. One is that the encoded event weakens: Memory does NOT get better with time. The decreasing strength of a memory representation is well summarized by an exponential decay or power function (Wixted & Ebbesen, 1991). What that function shows is that information about an event is lost very quickly at first (a steep downward decline). Over time this rate of information loss slows.

The other change that can occur during maintenance is that the memory for an original event can be modified. A suggestion by another witness, the police, or the media, or an inference made by the witness, can modify or influence memory for an existing event (Schacter, 1999, 2002). For example, a witness might misremember that the perpetrator was wearing a Cleveland Cavaliers cap upon overhearing that reported by another witness. There are countless studies that demonstrate this phenomenon (e.g., Loftus, 1997; Loftus & Ketcham, 1994; Loftus & Palmer, 1974). The consequences of this phenomenon for retrieval will be discussed next.

C. Phase III-Retrieval. Events or details that never happened during a crime can be reported as memories. As mentioned above, these faux events or details can enter the memory system during the encoding or maintenance phases as a result of hearing about a detail on TV, being told something by the police or another witness, or by the witness him or herself making an inference about what happened. An eyewitness then makes this piece of added information part of his or her narrative about the event in question.

This process is a natural result of the way our memory works: People have poor memory for the source of a given memory (Mitchell & Johnson, 2000). This happens for at least two reasons. One, it is cognitively expensive to encode information about the source of a memory, and as was indicated above, people have limited cognitive capacity (e.g., Engle et al., 1999). A second reason is that the source of a memory is seldom relevant. Consequently, our memory system has not evolved to readily encode source information. For example, it is not important that a juror remember whether she learned that the perpetrator's fingerprints were on the knife from the FBI agent, the police officer, or from the DA's closing arguments. What matters is that she knows it to be true.

Current theory posits two mechanisms that underlie the memory decisions we make: familiarity and recollection (Clark & Gronlund, 1996; Yonelinas, 2002). Familiarity is an undifferentiated feeling that an event or detail has been experienced before (Mandler, 1980). Imagine that you see a familiar face at the mall but can't remember the name or from where you know the person. They are familiar but you cannot recollect the details. Recollection is required to retrieve the source of a memory (Yonelinas, 1999), which might allow you remember that this person works in your building. Recollection (often referred to as recall) involves the extraction from memory of a specific detail attached to the memory being sought that provides its source (that's

Christine because she wore that same red sweater at work last week).

Familiarity is an effortless and automatic process (Jacoby, 1991). That means that it requires no cognitive capacity and it is obligatory (we can't help but assess the familiarity of the things in our environment). Recollection, on the other hand, is effortful and under strategic control. That means that it consumes cognitive capacity and is optional. As a result of the operation of these mechanisms, certain events related to the crime or the perpetrator can be familiar to a witness without the witness being able to distinguish between those events or details that he or she actually experienced and those events or details suggested by the media, the police, or their own thought processes. The problem with eyewitness identification evidence is that we are asking our memory system to do something that it is ill-equipped to do.

The most important factor affecting the retrieval phase in an eyewitness situation is the lineup. The lineup is akin to a multiple-choice test except that the correct answer is not necessarily present. In psychology, signal detection theory provides the framework for understanding these situations (Swets, 1964). Signal detection theory distinguishes between sensitivity and bias. Sensitivity is determined by the quality of an eyewitness' memory. If the eyewitness encoded many details about the perpetrator and if the retention interval is short, sensitivity (the ability of a witness to correctly select the guilty suspect from a lineup) should be high. If the witness encoded few details or there is a long delay between the crime and the lineup, sensitivity is poor. Bias refers to an eyewitness' willingness to make a choice. One witness may believe that his job is to select someone from the lineup, no matter what. Another witness may be more conservative and be unwilling to choose anyone unless she is certain that this individual is the perpetrator. A lineup administrator also can influence the willingness of a witness to choose given the

instructions or prompts that they give to the witness (Clark, 2005; Clark, Marshall, & Rosenthal, 2009).

The fairness of a lineup can affect both sensitivity and bias (Lindsay & Wells, 1980). The criminal justice system learns little when a suspect is selected from a biased lineup in which the suspect stands out from the other lineup members (i.e., the suspect is the only individual in the lineup who matches the description). A biased lineup also can enhance the willingness of an eyewitness to make a choice, as well as enhance the confidence of an eyewitness in that choice. Eyewitness' confidence, as well as other aspects of an eyewitness' memory (e.g., how good a look they report getting of the perpetrator), is inflated by any confirming feedback they receive about the choice they made (Bradfield, Wells, & Olson, 2002).

A final factor to consider is the grain size of the memory that is reported (Goldsmith, Koriat, & Pansky, 2005). Grain size refers to a memory's level of precision. People tend to adjust the grain size of what they report to maximize the accuracy of that report. Therefore, another source of inaccuracy arises when the police request a more detailed grain size than what a witness has available. For example, an eyewitness might report that the perpetrator was a big, fat guy. If that is all the eyewitness can remember, investigators that press for more precise answers risk getting inaccurate information. Granted, 6'3" and 275 lbs. is more precise, and therefore might be deemed more helpful to the police. However, this would not be the case if the "big, fat guy" was actually 5'10" (which is still a lot taller than a 4'11" eyewitness).

III. Application to the Kevin Keith case

We now have set the foundation of peer-reviewed scientific research so that we can comment on the eyewitness identification issues as they relate to the Kevin Keith case. In particular, we will view the eyewitness evidence bearing on

this case through the lens of the encoding, maintenance and retrieval framework laid out above.

Nancy Smathers and Richard Warren were the primary eyewitnesses and we primarily will deal with them. Nancy Smathers possessed circumstantial evidence regarding the perpetrator's identity. She observed someone, believed to be the perpetrator, fleeing the scene of the crime. Richard Warren possessed direct evidence regarding the perpetrator. He was present during the commission of the crime.

According to our reading of the evidence, the primary factors to consider are:

- The relatively vague initial description of the perpetrator by both primary witnesses
- Issues surrounding the first and last name of the perpetrator (involving Richard Warren)
- The lineup

Note that the first factor relates to the encoding phase, the next relates to the maintenance phase, and the final factor relates to the retrieval phase.

A. Encoding of the perpetrator. Both Smathers and Warren report vague descriptions of the perpetrator (e.g., big fat guy, could recognize by his build). This is not surprising for Smathers given that she was some distance from the person who fled the crime scene (probably the perpetrator). Although this individual did get his car stuck in the snow bank for an extended period of time, the lack of a dome light in the car and the generally poor illumination and distance from Smathers to this incident provided little opportunity to encode details about the individual driving the car.

Somewhat surprisingly, Warren's description also was vague, despite Warren having viewed and talked with the perpetrator in advance of the crime (before any weapon was present). Why was that? Upon first encountering the perpetrator,

Warren reported watching a basketball game on TV. During this time, Warren's attention was focused on the basketball game and not on the perpetrator. Due to our limited cognitive capacity, attention directed at the basketball game was attention NOT directed at encoding the perpetrator. Also, Warren reported that the bottom half of the perpetrator's face was covered by a shirt or turtleneck (Tr. 348). Clearly one cannot encode what one cannot see: Disguises harm memory (Cutler et al., 1987; Hockley et al., 1999). The next problem was that once the situation escalated, Warren's stress level increased substantially at exactly the time that Warren was giving his full attention to the perpetrator. As reported by Deffenbacher et al. (2004), heightened stress adversely affects memory. There was a weapon involved, which naturally becomes the focus of attention and a priority perceptually (weapon focus, Steblay et al., 1992). In other words, the weapon serves as a visual magnet; it is more important for one's survival to look at the weapon. Warren provided a very detailed description of that weapon (pp. 11-13 of Warren's statement to the police), which is an indication of where his attention was during this stage of the crime. Again, due to our limited cognitive capacity, attention directed at the gun is attention NOT directed at encoding the perpetrator. Finally, the perpetrator was black and Warren is white so this was a cross-race identification. A cross-race identification is slightly more difficult than a same-race identification (Meissner & Brigham, 2001).

All these aforementioned factors contributed to Warren having a poor encoding of the perpetrator. Warren reported (Tr. 352) that he only could recognize the perpetrator by his build and size. Warren probably acted appropriately regarding his initial reports to the police of what the perpetrator looked like; adjusting his grain size so that the report he gave was accurate (albeit vague: big fat black guy). Unfortunately, that was about all that Warren (and Smathers) encoded about the perpetrator.

In sum, the poor initial encoding of the perpetrator by both Smathers and Warren did not bode well for the validity of subsequent eyewitness identifications.

B. Name of the perpetrator. There appears to be some controversy regarding where Warren got the name of the perpetrator. In his testimony, Warren reported that Marichell (one of the children) referred to the perpetrator as Kevin several times during the crime (e.g., Tr. 338). However, it seemed surprising that Warren failed to report the name Kevin to the patrons at Ike's restaurant as he chased the perpetrator or to the police at the scene. Moreover, Captain Stanley reported that the nurse from the hospital where Warren's gunshots wounds were treated told him the name Kevin, but Nurse Amy Petryk denied that in her affidavit. Warren subsequently reported being unable to recall whether he mentioned the name to the police or they mentioned it to him (Tr. 372).

Kevin Keith's name was prominent with the police as a possible suspect. In Warren's psychological evaluation, the doctor reported that Warren reported that "law enforcement theorized that shooting may have been drug related involving Marcel's brother." Linda Chatman also had told Warren that someone named Kevin involved in a drug bust was the same size as the perpetrator (Tr. 369). As a result of these connections, Keith was one of the names the police presented to Warren while Warren was in the hospital. If the police suspected Kevin Keith from the start, they would fail to consider other possible suspects. Chief of Police James Smith (Crestline) told Capt. Stanley of two Kevins that fit the description, Kevin Keith and Kevin Thomas. Kevin Thomas was considered a suspect by Captain Stanley (Tr. 220). But when Capt. Stanley instructed Officer Koepke to make the photo lineup, he told Koepke to include Kevin Keith but not to include Kevin Thomas (Tr. 225).

In sum, police considered only Kevin Keith as a suspect, resulting in his photo being the only suspect ever placed into a lineup.

Our expertise does not lie in the domain of trying to sort out the issue about how the name Kevin became connected to the perpetrator. However, we can consider what could have happened to Warren's memory if the police provided him with the name Kevin. Warren could have incorporated that information into his own memory due to poor monitoring of the source of the memory (Mitchell & Johnson, 2000). Furthermore, people often rely on familiarity to make a determination about whether an event occurred, or to determine if they previously had seen a particular person. Once Warren heard the name Kevin, the name can become part of Warren's memory even if the police suggested it to him.

There is no question that the last name, Keith, was provided to Warren. While recovering in the hospital, the police told Warren 4 to 5 last names because Warren signaled that he might recognize the last name if he heard it again. Upon hearing Keith, Warren reported that he was 75% sure that Keith was the last name. Unfortunately, what he might have meant was that the last name Keith was *familiar* to him but for reasons other than the crime at Bucyrus Estates. After all, given the relationship between Linda Chatman, her brothers Rudel and Dameon, and Kevin Keith (as a result of an earlier drug bust), it is possible that Warren previously had heard the name Kevin Keith in another context. If that was the case, it would be difficult for Warren to keep track of from where the name was familiar. Therefore, just because Keith's name was familiar does not mean that Keith was the name that Warren reported hearing during the crime.

In sum, it is possible that Warren may NOT have properly attributed the familiarity of the name Kevin Keith to the crime at Bucyrus Estates but rather to some prior exposure to this name.

C. The lineup and its administration. Given the poor encoding of the perpetrator by Smathers, how is it possible that she could overcome this and select Kevin Keith from the lineup? The fact that she did so did not mean that her memory somehow got better with time. Memory does not work like that. On March 18, 1994, Smathers spoke with Captain Corwin and told him that she saw Keith's picture on the television (Tr. 391). We do not know the context of why Kevin Keith was on TV, but we assume it was because he had been arrested in connection with the crime at Bucyrus Estates. If that is true, once Smathers saw his face on TV, that face could become part of Smathers' memory as a result of poor memory for the source of Keith's likeness. Seeing someone on TV does NOT help refresh someone's memory.

In sum, prior research provides an explanation for how the face Smathers saw on TV could become her selection from the lineup.

Richard Warren viewed the lineup shortly after the crime. His memory would still be relatively strong at that point. However, for reasons noted above, he appeared to remember very few details about the perpetrator. His initial descriptions described the perpetrator as a big black guy who Warren could recognize by his build and size. Despite that poor encoding, Warren picked Kevin Keith from the lineup. How did he do that? There are four possible reasons.

1) One reason could have been that Kevin Keith was the perpetrator and Richard Warren identified him. Obviously that was what the police and jury believed.

2) A second reason Warren could have selected Kevin Keith was because the lineup was biased toward

Kevin Keith. One of the children described the perpetrator as having very little hair. Kevin Keith is the only individual in the lineup without hair. An informal study was conducted to evaluate this issue. Eleven individuals with no knowledge of the crime were approached and told: "Pretend that you were robbed and all you remembered about the perpetrator was "big black guy." Who would you choose?" Obviously, these individuals have no knowledge of who committed this crime. They can only respond randomly. If the lineup was fair, their choices should have been spread among all (or at least most) of the lineup members. Instead, 8 of these 11 individuals chose #5, Kevin Keith (two chose #1 and one chose #3). To reiterate, if the lineup was fair, chance responding would result in Kevin Keith being selected about $1/6^{th}$ of the time (about twice by these 11 individuals). According to Malpass and Lindsay's (1999) measure of lineup bias, the probability of Kevin Keith being selected 8 times out of 11 if this lineup was fair was .000057 (i.e., less than 6 times out of 100,000). We have since presented the lineup to over 100 people and asked them to "choose the big black guy." Over 75% choose Kevin Keith.

In sum, Buckhout (1974) showed that an individual in a lineup is more likely to be identified when his photograph stands out and is different from the other photographs in the lineup.

3) A third reason that Kevin Keith could have been selected from the lineup was because he was familiar to Warren from some other situation. Given the connection between the Chatman family and Kevin Keith (a prior drug bust), it was possible that Warren had seen Keith around Bucyrus Estates. As we have argued throughout this report, an eyewitness (in fact,

everyone, all the time) has difficulty specifying the source that makes an event or person familiar.

In sum, Richard Warren could have selected Kevin Keith from the lineup because his face was familiar for reasons unrelated to the crime.

4) Ironically, the final reason that Warren could have selected Kevin Keith was because Warren actually had a good memory for the perpetrator. As a result, Warren eliminated the other five individuals in the lineup, whose facial features he could distinguish. But the poor quality of the photograph of Kevin Keith in position #5 made it impossible to identify who that was with any assurance. Having eliminated the other five, but being unable to carefully examine #5, why did Warren go ahead and make any selection at all? Warren's willingness to choose might have been influenced by what the police told him; the police encouraged Warren to make a choice from the lineup. On p. 22 of Warren's statement to the police, the police say: "we're going to see if you can pick him out." The implication of this statement was that the police had the perpetrator and Warren should select him, and we just argued that Kevin Keith was the only face that Warren could NOT exclude. Therefore, Kevin Keith's photo was the only one he could choose.

Instructions given prior to the lineup can affect the witness's willingness to make an identification. If instructions explicitly state or implicitly suggest that the perpetrator is in the lineup and that the witness' job is to pick that person out, the witness will be more likely to make an identification than if the witness was instructed that the perpetrator may or may not be present (Clark, 2005; Steblay, 1997). Research shows that this increase in the willingness to make an identification occurs with no increase in accuracy. Both correct and false

identification rates increase and the probative value of a suspect identification decreases.

In sum, the statement by the police encouraged Richard Warren to make a selection from the lineup.

D. Nonidentification by Quanita Reeves. One of the children who was shot, Quanita Reeves, said that Daddy's friend Bruce shot her (Tr. 715). She excluded a picture of Kevin Keith as the man she knew as Bruce (Tr. 721). Although typically ignored by the criminal justice system, disconfirming evidence has probative value regarding a suspect's innocence (Wells & Lindsay, 1980). Clark, Howell, and Davey (2008) examined a large pool of eyewitness experiments. Across these 94 experiments with lineups that contained either a guilty or an innocent suspect, the probability that the guilty suspect was chosen given that a suspect (guilty or innocent) was chosen, was .77. However, the probability that a suspect was guilty given that a nonidentification was made (i.e., everyone in the lineup was rejected, as Quanita did), was only .38.

In sum, Quanita Reeves' nonidentification provided evidence *against* Kevin Keith's guilt.

CONCLUSION

The scientific study of memory has identified risk factors that increase the likelihood of mistaken identification and undermine the probative value of identification evidence. Many of these risk factors were present in this case.

- Despite interacting with the perpetrator before the shooting, Richard Warren's description of the perpetrator was vague. Once the gun was drawn, extreme stress and weapon focus would adversely affect encoding. The perpetrator also obscured the bottom half of his face with a turtleneck. Nancy

Smathers only viewed a man fleeing the scene from a distance and encoded only the grossest characteristics about this man.

- There was some question regarding whether the police suggested the name Kevin to Richard Warren. There was no question that the police presented the name Keith to Warren. These names could have been familiar to Warren for other reasons. Also, once these names were suggested, it was difficult for Warren to keep them from becoming part of his memory.
- Smathers initially reported being unable to identify the man fleeing the crime scene and only made a lineup identification of Kevin Keith after viewing him on TV.
- The lineup was highly biased toward Kevin Keith.
- Kevin Keith could have been selected from the lineup because his face was familiar from a prior interaction between Warren and Keith.
- Warren was able to clearly see the faces of all the people in the lineup except Kevin Keith. Whatever memory of the perpetrator Warren had might have allowed him to exclude these other individuals as not looking like what he remembered. However, he could not exclude #5 (Kevin Keith) because he could not see what this person looked like. Because #5 best matched the general description (big black guy), and because the police told Warren to "...see if you can pick him out," Kevin Keith was chosen.
- Quanita Reeves indicated that although #5 resembled the perpetrator, he was not the perpetrator. Quanita Reeves' nonidentification provided evidence in favor of Kevin Keith's innocence.

In sum, based on our training and understanding of the eyewitness memory literature, the eyewitness evidence presented against Kevin Keith was very weak. Nancy Smathers' identification after viewing Kevin Keith on TV cast serious doubt on its reliability. Richard Warren's identification was tainted by many factors. Quanita Reeves nonidentification provided evidence in favor of Kevin Keith's innocence.

Respectfully submitted,

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