

No. WR-64,654-02
In the Texas Court of Criminal Appeals at Austin, Texas

Trial Cause No. F98-02133
Writ Cause No. W98-02133-N(B)

In the 195th District Court of Dallas County, Texas

EX PARTE CHARLES DON FLORES

BRIEF FOR AMICUS CURIAE THE INNOCENCE PROJECT, INC.
IN SUPPORT OF APPLICANT

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INTEREST OF AMICUS CURIAE¹

The Innocence Project, Inc. (the “Innocence Project”) is a non-profit organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. The Innocence Project also seeks to prevent future wrongful convictions by researching their causes and pursuing legal, legislative, and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system—including identifying those who actually committed the crimes for which others were wrongfully convicted. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration of 362 individuals by post-conviction DNA testing.

Eyewitness misidentification is the leading contributing cause of these wrongful convictions, playing a role in 70% of the 362 wrongful convictions identified through post-conviction DNA testing. The Innocence Project, *DNA Exonerations in the United States*, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>. Many of the characteristics associated with eyewitness misidentifications in DNA exoneration cases are present in this case: according to a study of the first 250 DNA exoneration cases, 40% of the

¹ No fee has been paid or will be paid for preparing this brief, and no person or entity other than the amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

misidentification cases involved a witness who did not initially identify the suspect, but later misidentified that innocent suspect as the perpetrator; 78% of the cases involved suggestive identification procedures; 62% of the cases involved eyewitness descriptions that materially differed from the (innocent) suspect's appearance at the time of the crime; and five cases involved hypnotized witnesses. Brandon Garrett, *Convicting the Innocent* 64, 55, 68-69 (2011).

The Innocence Project has a compelling interest in ensuring that defendants are given proper opportunities to present relevant scientific evidence on the factors that erode the reliability of eyewitness identification evidence, and its experience with this issue can aid the Court in consideration of the questions presented in this case.

STATEMENT OF FACTS

The Innocence Project refers the Court to the Applicant's submissions for a comprehensive recitation of the facts. We summarize here relevant aspects of the hypnotized eyewitness's observations, the identification procedures that were conducted, and the eyewitness's post-hypnotic testimony.

Jill Barganier, the sole witness to identify Applicant Charles Flores in this case, was in her own home when she saw two men getting out of a car in her neighbors' driveway around 6:45 a.m. on January 29, 1998. The sun had not risen, and there were no street lights on her block. Around 9:00 a.m., police responded to

a 911 call reporting that Betty Black, Barganier's neighbor, had been murdered inside her house. When interviewed by a police officer at the scene, Barganier stated she had seen two men getting out of a yellow Volkswagen bug earlier that morning and described the driver as a large white male, about 30 years old, with long brown hair. She described the passenger as a white male with almost black, longer hair. After she created a computer-aided composite of the driver, the police showed her several photographic lineups. Barganier identified someone as the driver but could not identify anyone as the passenger. The State failed to preserve the record of these lineups, and it is unclear when Barganier was first shown pictures of Flores.²

Barganier claims that, six days later, she asked to be put under hypnosis to help her relax and "do a good composite" of the passenger; the police officer who hypnotized her later testified that the purpose of the hypnosis session was to elicit "any additional information pertaining to the suspect's identity." 36 RR 289-91; 4 EHRR 81-82; AppX27.³ By then, investigators had come to believe that Flores was the passenger based on his link to the vehicle seen at the crime scene. AppX8. During the hypnosis session, Barganier described the passenger's hair as "a lot like"

² In addition to these two lineups that the state failed to preserve, the record does not contain all photos that Barganier was shown: she admitted to having been shown "a lot of pictures" but did not recall how many or in what form. 4 EHRR 79-80.

³ Citations to "EHRR" are to the Reporter's Record for this writ proceeding. For instance, "5 EHRR 50" refers to volume 5, page 50 of the Reporter's Record. Citations to "RR" are to the Reporter's Record at trial. Citations to "AppX" refer to the Applicant's exhibits admitted during the evidentiary hearing.

the driver's, which she described as "long and wavy" and had previously emphasized as "dirty." Despite this fact, the officer conducting the hypnosis session proceeded to ask if the passenger's hair was neatly cut or trimmed, as Flores's was. 4 EHRR 220. The officer also encouraged her at different points during the hypnosis session by stating that she was "doing good" and "doing fine." AppX26.

After she was hypnotized, Barganier generated a composite sketch of the passenger. The composite sketch does not resemble Flores in any way; it instead largely resembles the earlier sketch she had assisted with, which purportedly depicted the driver of the vehicle. *Compare AppX19 with AppX28.*

She was then shown yet another photographic lineup, which included a recent mugshot of Flores, a very large Hispanic man with short, cropped hair. Barganier did not pick out Flores as either of the men she had seen; indeed, she did not recognize anyone in the lineup. However, the same mugshot of Flores was subsequently distributed to the media and appeared in the local newspaper several times. Barganier later acknowledged that she saw this mugshot of Flores in the media at least once.

Thirteen months later, Barganier appeared in court to testify at Flores's trial. Before testifying, but after seeing Flores sitting at the defense table, Barganier informed the prosecution team that she could now—for the first time—positively identify Flores as the passenger that she had seen thirteen months before. Because

she had undergone a hypnosis session, a *Zani* hearing was held the next morning. During that hearing, Barganier asserted that she was “over 100 percent” confident that she could now identify Flores as the passenger. 36 RR 87. The trial court ruled that her testimony was admissible, and, for the first time, Barganier identified Flores before the jury as the passenger she had seen get out of a car next door on the morning of the murder.

ARGUMENT

Eyewitness identification evidence is uniquely compelling to a jury but can be highly unreliable. As such, it has played an outsized role in wrongful convictions, contributing to 70% of the 362 wrongful convictions identified through post-conviction DNA testing. The Innocence Project, *DNA Exonerations in the United States*, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>. Research over the last two decades has identified a number of specific factors that erode the reliability of eyewitness evidence, many of which are present in this case. Additionally, scientific research newly demonstrates that hypnotized witnesses pose unique reliability problems.

The interplay between the already unreliable eyewitness evidence and the use of hypnosis in this case casts grave doubt on Barganier’s identification of Flores as the passenger of the vehicle she saw. First, Barganier’s ability to form a strong memory of what she saw outside her house was necessarily limited by critical factors

such as lighting, distance, and exposure duration. Second, the law enforcement officers investigating this case used a number of highly suggestive identification practices that are now known to contaminate eyewitness memory: a hypnosis session, multiple identification proceedings conducted by those who already knew the identity of the suspect, and an array that was biased in its construction. Third, the record establishes that, by the time she testified at trial, Barganier had been exposed to much contaminating information that discernibly influenced and changed her account of what she had seen. And finally, despite having failed to identify Flores in an out-of-court identification proceeding shortly after the incident, Barganier finally made the identification in a highly suggestive in-court identification procedure many months after the crime. Each of these factors interacted with each other to significantly erode the reliability of her identification of Flores as one of the people she saw outside her house thirteen months before. For all these reasons, this Court should reject the district court's findings and grant relief in this case.

- I. The Use of Hypnosis, a Highly Suggestive and Discredited Method of Soliciting Identification Evidence, Compounded the Already-Severe Risk of Misidentification in This Case.**
 - A. Barganier Did Not Have an Opportunity to Properly Observe the Suspect's Physical Features That Would Enable a Reliable Identification.**

The quality and reliability of an eyewitness identification “critically depends on the conditions in which the criminal was observed.” Marloes de Jong et al.,

Familiar Face Recognition as a Function of Distance and Illumination: A Practical Tool for Use in the Courtroom, 11 *Psychol., Crime & L.* 87, 87 (2005). The ability to accurately observe visual details is profoundly affected by “encoding” conditions, such as lighting and the duration of the observation; thus, the circumstances under which an eyewitness observes the perpetrator of a crime heavily influence the accuracy of subsequent identifications. *See, e.g.*, Ryan J. Fitzgerald et al., *Change Detection Inflates Confidence on a Subsequent Recognition Task*, 19 *Memory* 879, 879-80 (2011) (“A face viewed under good encoding conditions”— such as longer duration and brighter lighting—“is more likely to be remembered than a face viewed under poor encoding conditions.”). This is because memory does not function like “a videotape, accurately and thoroughly capturing and reproducing” an image; “[m]emory is, rather[,] a constructive, dynamic” process. *Commonwealth. v. Gomes*, 22 N.E.3d 897, 911 (Mass. 2015); *accord State v. Henderson*, 27 A.3d 872, 894-95 (N.J. 2011) (“retained memory can be unknowingly contaminated by post-event information”). In other words, the fidelity of our memory may be compromised by many factors, including encoding conditions. Without realizing it, we regularly perceive events in a biased manner and subsequently forget, reconstruct, and distort the things we believe to be true. National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 60 (2014) (hereinafter “*Identifying the Culprit*”) (citing J. T. Wixted, *The Psychology and Neuroscience of Forgetting*, 55 *Ann. Rev.*

Psychol. 235 (2004); Y. Dudai, *Reconsolidation: The Advantage of Being Refocused*, 16 *Current Opinion in Neurobiology* 174 (2006); E. F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 *Learning & Memory* 361 (2005)).

Here, numerous factors diminished Barganier's ability to reliably encode what she saw from inside her house: she observed two individuals from a fair distance, under poor lighting conditions, for a brief amount of time, and at a time when she had no reason to believe that the strangers she saw would later be important for her to remember. Meanwhile, her testimony reveals that her focus was divided between the two individuals and some unusual objects.

Barganier was inside her home during the predawn hour when she saw two strangers in her neighbor's driveway on the other side of her house; she had no reason to know that a crime was about to be committed or to pay close attention to these men. 5 EHRR 50-51. There were no street lights, and sunrise was still forty minutes away. 5 EHRR 40. Though the record does not establish the precise distance from which she made her observation, Barganier testified that she was at least the length of a room, some grass and a driveway away from where the suspects got out of the car. 5 EHRR 50-51. Barganier made her observations, in other words, under poor lighting conditions and from a fair distance. Scientific studies have established "a systematic decrease of [facial] recognition performance" with decreasing

illumination. Marloes de Jong et al., *Familiar Face Recognition as a Function of Distance and Illumination: A Practical Tool for Use in the Courtroom*, 11 *Psychol., Crime & L.* 87, 87 (2005). In particular, in a study analyzing the impact of distance and lighting on the ability to identify faces that are either familiar or unfamiliar, researchers found a “steep drop” in facial recognition of *familiar* faces beginning at a distance of 40 feet. The researchers also concluded that they could characterize as “reliable” only recognitions of *familiar* faces based on observations of no more than 40 feet and *only if* the light level was “at least 30 lux,” equivalent to a room with bad illumination. de Jong et al. at 95. Barganier’s observation of two strangers occurred before the sun was up, with no external lighting, and from a distance that was likely farther than the point at which recognition of *familiar*, let alone unfamiliar, faces has been found to steeply drop off. These factors all indicate that her later identification of Flores as the passenger was rendered highly unreliable by poor encoding conditions.

Additionally, Barganier’s attention was focused away from the strangers’ faces. Her first statement to the police focused heavily on a beer bottle that the driver was holding; during the hypnosis session, she again focused on the beer bottle and the unusual paint job of the car. 4 EHRR 40-44, 131; AppX26.⁴ Scientific literature

⁴ As further explained below, Barganier’s description of the car changed from “yellow” to an unusual paint job involving “waves,” yet another indication that her memory had already been

confirms that an eyewitness's focus on unusual objects decreases the accuracy of image details falling outside that focus: because memory is a finite resource, focusing on an object being held by a person results in less accurate memory of visual features of everything else. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 *Law & Hum. Behav.* 1, 10–11 (2009); Kerri L. Pickel, *Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect*, in 2 *The Handbook of Eyewitness Psychology: Memory for People* 339, 353-54 (R.C.L. Lindsay et al. eds., 2007) (discussing experiments involving witnesses focusing on unusual, rather than threatening, items). Here, that the driver—not the passenger, who Barganier later identified as Flores—was holding a beer bottle at 6:45 am caught Barganier's attention, decreasing the attention she would have paid to the passenger's (or, for that matter, the driver's) facial details.

Moreover, research has indicated that memory for an unfamiliar face is severely reduced if it is seen alongside a second person. *See, e.g.*, Ahmed M. Megreya & A. Mike Burton, *Recognising Faces Seen Alone or With Others: When Two Heads Are Worse Than One*, 20 *Applied Cognitive Psychol.* 957 (2006). The

contaminated by the media coverage, and that she was recalling information that was not part of her original memory. AppX26; *see also infra* Section I.C.

presence of an unusual object and multiple strangers at the same time therefore further reduced the witness's ability to reliably encode what she saw.

Barganier's opportunity to observe the suspect was also brief: she simply saw two men exiting a vehicle, without any notable delay. 4 EHR 44-48. Shorter durations of time spent looking at the perpetrator generally result in less accurate identifications. Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial Memory Strength*, 18 *Psychol., Crime & Law* 473 (2012). Here, the combination of a short exposure time, the lighting conditions, distance, and her focus on a beer bottle and the unusual paint job of the car makes it highly likely that Barganier's initial encoding was too weak to produce a reliable identification later, as was the case in a large majority of the first 250 DNA exonerations that involved eyewitness misidentifications. *See* Garrett at 70.

B. The Identification Proceedings Used in this Case Were Highly Suggestive, Significantly Undermining the Reliability of the Resulting Identification

Poor encoding conditions not only render one's original memory weak, but also have cascading effects through the entire process of storing and retrieving that memory. When an eyewitness's original memory is vague, it is especially susceptible to alteration by suggestive identification procedures that have been shown to influence and change what the witness believes he or she has seen. In other

words, suggestive procedures may plant information in the eyewitness's memory that would prompt the witness to "recall" things never experienced, and eyewitnesses whose initial memory is poor are most vulnerable to these external influences in identification procedures. *Identifying the Culprit* at 63; see also Thomas D. Albright, *Why Eyewitnesses Fail*, 114 Proc. of the Nat'l Acad. of Sci. 7758, 7761 (2017) ("Without awareness, we regularly encode information in a prejudiced manner and later forget, reconstruct, update, and distort the things we believe to be true. Uncertain memories of witnessed events may thus be biased readily by information subsequently gathered from numerous sources, including law enforcement."). If a procedure "induces pressure on the eyewitness to make a lineup identification," "fails to relieve pressures on the witness to make a lineup selection," "cues the witness as to which person is the suspect, or cues the witness that the identification response was correct or incorrect," the procedure is likely to influence the outcome of an identification proceeding and therefore to produce unreliable evidence. Wells & Quinlivan, *supra* at 6.

In recognition of the scientific findings on suggestive law enforcement practices that gravely impact the reliability of eyewitness identification evidence, state law enforcement systems and courts around the country have embraced scientifically sound approaches to gathering and preserving eyewitness evidence. In particular, the Texas Legislature has required law enforcement agencies to adopt

standard identification procedures, including the use of blind administration where practicable and fair composition of photo arrays. *See* TEX. CODE CRIM. PROC. Art. 38.20 (2017); *Model Policy of Eyewitness Identification*, Law Enforcement Management Institute of Texas, http://www.lemitonline.org/resources/documents/ewid_final.pdf (last updated 2017) (hereinafter “Texas Model Policy”).⁵

The identification procedures used in this case deviated significantly from these scientifically-supported, statewide standard line-up protocols. Barganier participated in multiple identification procedures, and was exposed to Flores on multiple occasions; the identification procedures were non-blind—*i.e.*, they were administered by law enforcement officials who were aware that Flores was a suspect in the case; the photo array she viewed was biased in that Flores’s photo stood out; and finally, Barganier ultimately identified Flores for the first time at an inherently-suggestive and unreliable in-court identification procedure.

The fact that the eyewitness in this case was hypnotized—a highly suggestive and thoroughly discredited method of eliciting eyewitness evidence—plainly compounded these grave problems. Scientific studies, building upon one another over the last 20 years, have found the use of hypnosis to be unduly suggestive and

⁵ The Texas Legislature has mandated that each state law enforcement agency either adopt and implement the Texas Model Policy developed by the Bill Blackwood Law Enforcement Management Institute of Texas, or develop their own policy that, at a minimum, includes procedures to ensure the fair composition of arrays and line-ups, pre-procedure instructions, documentation of the procedure, blind or blinded administration where practicable, and collection of a contemporaneous confidence statement. *See* TEX. CODE CRIM. PROC. § 38.20 (2017).

to produce unreliable eyewitness identification testimony. In other words, the hypnosis session that the witness underwent only exacerbated the other profound flaws in the identification procedures conducted in this case.

Each of these is associated with an elevated risk of misidentification, and each is addressed in turn.

1. Hypnosis

The hypnosis session that law enforcement conducted right before showing Barganier pictures of Flores was highly suggestive, creating a significant risk of memory contamination and magnifying the contaminating impact of the flawed identification procedures that followed. Hypnosis as a memory retrieval tool is deeply prone to suggestion and therefore fraught with errors. Since 1999, it has been thoroughly discredited by empirical research as an inherently suggestive pre-trial procedure and abandoned by twenty-seven jurisdictions as untrustworthy. 5 EHRR 84; 6 EHRR 117. As discussed below, Barganier, who could not make any identification before the hypnosis session, was exposed to key information during the session regarding Flores's appearance. Though she failed to identify Flores right after the hypnosis session, she was encouraged during the session to "remember more" as time went on. Then, suddenly, she was willing to implicate Flores as the passenger for the first time thirteen months after she had seen two strangers outside her home before sunrise.

Critically, using hypnosis as a memory retrieval tool is based on the misconception that memory works like a video recorder that can be played back. In reality, memory is prone to contamination both during the encoding stage and between encoding and recollection. During a hypnosis session, the witness is led to believe that he or she can conjure up a memory that in fact never existed in reality or was contaminated with false details from other sources. Scott Lilienfeld et al., *Myth #12: Hypnosis is Useful for Retrieving Memories of Forgotten Events*, in *50 Great Myths of Popular Psychology: Shattering Widespread Myths and Misconceptions About Human Behavior* 69 (2d ed. 2010) (dispelling the common misconception that hypnosis eases the ability for people to recall forgotten events); Jeffrey S. Neuschatz et al., *Hypnosis and Memory Illusions: An Investigation Using the Deese/Roediger and McDermott Paradigm*, 22 *Imagination, Cognition, & Personality* 3 (2003) (finding no support for the assertion that hypnosis is an appropriate memory enhancement procedure); Elisa Krackow et al., *The Death of Princess Diana: The Effects of Memory Enhancement Procedures on Flashbulb Memories*, 25 *Imagination, Cognition, & Personality* 197 (2005) (explaining results of experiments showing that recall of memory was more accurate when hypnosis was not used); 5 EHRR 86. This misunderstanding, combined with the witness's desire to help the investigation and the pressure created by the proceedings to make an identification, renders post-hypnosis eyewitness testimony highly unreliable.

Moreover, during hypnosis, the witness is typically asked to imagine things, which in turn increases the risk that the witness will incorporate and believe imagined details to be part of his or her true memory. This process also artificially inflates the confidence level of the witness, because false memories can be as vivid as real memories, and there is no easy way to distinguish between the two. *See* S. J. Lynn et al., *Hypnosis and Memory in the Forensic Context*, Wiley Encyclopedia of Forensic Science (2013) (finding that hypnosis increases the sheer volume of recall, including false memories that can override real ones, as well as increasing recall confidence even when memories are false); Alan Scoboria et al., *Effects of Misleading Questions and Hypnotic Memory Refreshment on Memory Reports: A Signal Detection Analysis*, 54 Int'l J. Clinical & Experimental Hypnosis 340 (2006) (finding that, where individuals expect that hypnosis will increase the volume and accuracy of their memories, this expectation increases motivation to search for memories that can lead to imagined or vaguely recalled events); Alan Scoboria et al., *Immediate and Persistent Effect of Misleading Questions and Hypnosis on Memory Reports*, 8 J. Experimental Psychol. 26 (2002) (finding that hypnosis and misleading questions significantly increase memory errors); *Identifying the Culprit* at 63; 6 EHRR 53-54.⁶

⁶ Almost all of the sources cited in this paragraph were part of the record during the writ proceeding. The court does not appear to have addressed this scientific evidence in its findings of facts.

The hypnosis session that law enforcement conducted here exhibited these same problems, and rendered Barganier highly suggestible as a witness. During the hour-long session, Officer Alfredo Roen Serna, the hypnotist, instructed Barganier to imagine “you’re going to be seeing a documentary, you’re going to be seeing a film of the events that occurred on that day, on that morning.” AppX26. The officer repeatedly told Barganier she would remember everything that happened during the hypnosis session and the session would help her recall memories about the incident as time went on, including after the session was over: “You will also remember everything that you’ve said in this session and you might find yourself being able to recall other things as time moves on”; “You’ll be able to recall more of these events as time goes on”; “You might be at home doing an everyday chore and something might come to you about that incident or anything else. It’s almost a phenomenon the way that it happens, so it’s not uncommon to just remember something after the fact, after the session.” *Id.* The officer also repeatedly encouraged Barganier to focus on imagining her “film of events,” telling her “you’re doing good” and “you’re doing fine” as she tried to offer new details. *Id.*

Moreover, Officer Serna asked questions that included substantive details about Flores, who had been identified as a suspect. Importantly, the details included in the questions were not part of Barganier’s original description of the passenger or her responses to questions during the hypnosis session. This is troubling because

research has shown that merely suggesting answers in questions can lead subjects to come to “remember” seeing things that they did not actually see. *See, e.g.*, Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 *Learning & Memory* 361 (2005). For example, the officer asked, “[d]oes [the passenger] have [his hair] neatly cut or is it trimmed?” even after Barganier had already described his hair as “[a] lot like his friend’s” and “[d]ark, long.” AppX26. Unlike the passenger Barganier described, Flores had very short, closely cropped hair. AppX57 at 1626-28. Thus, this procedure not only falsely created the impression that hypnosis would enhance Barganier’s ability to recall forgotten events, but supplied her with this critical piece of information that would, eventually, steer her towards Flores.⁷

2. Use of Multiple Proceedings

The suggestibility created by the hypnosis session in this case only compounded severe problems with the other identification procedures that were then

⁷ The *Zani* hearing conducted to determine whether Barganier’s post-hypnosis identification was admissible considered some of these factors, including whether the hypnosis session provided any “cues” about her identification. However, the trial court credited the State’s fact testimony that no description of Flores was given to the eyewitness during the hypnosis session (in spite of the fact that she was prompted to say that the passenger’s hair was “neatly cut” or “trimmed” – like Flores’s – after having already described the passenger’s hair as “[d]ark, long”). 36 RR 117. Because the hypnosis session was incorrectly described to the court and vouched for by an expert, the trial court found that hypnosis did not render Barganier’s in-court identification of the defendant untrustworthy. 36 RR 118. The trial court did not consider whether and how the fundamental flaws of hypnosis as a memory enhancement tool—such as imparting the idea to witnesses that hypnosis would help them recover memories at a later time even though no such memory existed shortly after the event—affected Barganier’s identification.

used and were themselves unduly suggestive for independent reasons. First, Barganier was repeatedly exposed to Flores, both by law enforcement and other sources. Research has shown that exposing an eyewitness to the same suspect multiple times over the course of an investigation confuses the witness and adversely affects the reliability of an identification. This is because people often have difficulty discerning the source of their memory: when a witness has viewed a suspect in contexts other than the incident that he or she is trying to remember, the witness is likely to mistakenly believe that the familiarity of a face comes from the incident, rather than a later viewing. *Henderson*, 272 A.3d at 900 (finding that “successive 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.”). Moreover, it is impossible for the witness or anyone else to determine whether the witness’s familiarity with a face comes from any number of viewings or the original observation during the incident. *State v. Lawson*, 291 P.3d 673, 686-87 (Or. 2012). Recent research has shown that this can happen in a number of ways.

For example, prior exposure to an innocent suspect’s mugshot makes it likely that the witness will subsequently misidentify the suspect as the perpetrator, based on the witness’s sense of recognition generated by the previously viewed picture. Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive*

Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference, 30 *Law & Hum. Behav.* 287 (2006). This risk increases when the suspect is the only one who appears in multiple proceedings. *Lawson*, 291 P.3d at 708; *Henderson*, 27 A.3d at 255–56; Deffenbacher, *supra* at 299. Because memory can be easily contaminated, repeatedly asking the witness to make an identification, even after the witness fails to make any identification, confuses the witness and obscures where the purported memory of the repeatedly-viewed suspect came from. See Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 *J. Applied Res. Memory & Cognition* 284, 285 (2016) (finding that “exposure to new faces (*e.g.*, an innocent suspect) at the first identification task may prompt carry-over effects that damage the fidelity of eyewitness evidence at the next identification task.”).

Unsurprisingly, multiple identification procedures and/or exposures to the suspect appear with alarming regularity in the DNA exoneration cases. *Garrett* at 59. In response to this fact and the research cited above, the Texas Model Policy on eyewitness identifications discourages the use of “multiple identification procedures in which the same witness views the same suspect more than once,” due to concerns about contamination. *Texas Model Policy* at 4.

In this case, Barganier participated in multiple identification proceedings. Barganier could not identify any of the men as the passenger during the initial

identification proceeding in which she participated. The State failed to preserve the record of most of these initial lineups, other than the two that included different pictures of the driver. It is, therefore, unclear whether she was shown Flores's mugshot before the hypnosis session or only right afterwards. Barganier testified that she saw "a lot of pictures" but could not remember how many or in what form. 4 EHRR 79-80. After she completed the hypnosis session and created the composite sketch that did not resemble Flores,⁸ Barganier was shown yet another photographic lineup. This post-hypnosis lineup included a recent mugshot of Flores along with five other Hispanic men, even though she had never described the passenger as a Hispanic male, or as a man notably larger than the driver, or as a person with very short hair. AppX39. Barganier again could not identify anyone in the lineup as the passenger at that time. Even though no eyewitness had identified Flores, and Barganier's composite sketch did not resemble Flores, the same mugshot shown to Barganier was distributed to the media and appeared in the *Dallas Morning News* several times. AppX57 at 1626-28, 1726-29. Barganier acknowledged that she saw this image outside of police proceedings on at least one occasion. Then, thirteen

⁸ The process of creating a composite may also distort the eyewitness's memory, prompting the eyewitness to identify suspects that resemble the composite image, rather than the actual memory. This is because (1) composites tend not to actually resemble the perpetrator because our mind processes faces holistically, rather than feature-by-feature; and (2) creating a composite image can make a face seem familiar even though the face does not resemble who the eyewitness saw at the crime scene. See Gary Wells & Lisa E. Hasel, *Facial Composite Production by Eyewitnesses*, 16 *Current Directions in Psychol. Sci.* 6 (2007). Barganier admitted during the hearing that she found the process of making a composite sketch quite difficult and stressful. 4 EHRR 82.

months later, Barganier participated in an in-court identification procedure at which she identified Flores, the defendant sitting in the courtroom, as the passenger she saw, despite having failed to identify Flores during any of the previous procedures. The multiple exposures to Flores influenced and tainted her identification.

3. Non-Blind Identification Procedures

It is well established that non-blind administration of identification procedures erodes the reliability of any identifications that result from those procedures. Scientific research has consistently shown that test subjects are influenced by the expectations of those who perform the tests, and that witnesses are susceptible to unspoken, sometimes subconscious cues from law enforcement officers during identification proceedings that compromise the reliability of identification evidence. *See, e.g.,* Ryauu M. Haw & Ronald P. Fisher, *Effects of Administrator–Witness Contact on Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1110 (2004) (“[W]itnesses were more likely to make decisions consistent with lineup administrator expectations when the level of contact between the administrator and the witness was high than when it was low.”). A prominent meta-analysis⁹ conducted at Harvard University combined the findings of 345 previous studies and concluded that in the absence of a blind administrator, individuals typically tailor their

⁹ “A meta-analysis is a synthesis of all obtainable data collected in a specified topical area. The benefits of a meta-analysis are that greater statistical power can be obtained by combining data from many studies. The more consistent the conclusions from aggregated data, the greater confidence one can have in those conclusions.” *Henderson*, 27 A.3d at 893.

responses to meet the expectations of the administrator and that “[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero.”¹⁰

Blind administrators are especially important for eyewitness identification procedures, as eyewitnesses’ memories are easily contaminated by outside influences. The most likely source of such influence is the traditional (non-blind) identification procedure administrator who is aware of the suspect’s identity. Specifically, and as in this case, a non-blind administrator may lead the eyewitness (often unintentionally) to choose a particular suspect or provide post-identification feedback to the eyewitness, which influences the eyewitness’s confidence in his or her selection and recollection of the original viewing conditions. *See* Garrioch & Brimacombe, *Lineup Administrators’ Expectations: Their Impact on Eyewitness Confidence*, 25 *Law & Hum. Behav.* 299 (2001); Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 *J. Applied Psychol.* 940 (1999).

Courts around the country have acknowledged that blind identification proceedings are essential to safeguarding the integrity of the identification procedures. *See, e.g., Lawson*, 291 P.3d at 705 (noting that “administrator

¹⁰ Robert Rosenthal & Donald Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 *Behav. & Brain Sci.* 377, 377 (1978).

knowledge [of the suspect] significantly affects reliability”). In *Henderson*, after a review of the scientific research, the New Jersey Supreme Court found that “a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect” and therefore endorsed the testimony that blind lineup administration is “the single most important characteristic that should apply to eyewitness identification” procedures. *Henderson*, 27 A.3d at 878. The *Henderson* court explained that “[i]ts purpose is to prevent an administrator from intentionally or unintentionally influencing a witness' identification decision.” *Id.* at 896.

Relying on this research, many law enforcement agencies across the country have mandated the use of blind administration, where the identification procedure administrator does not know the identity of the police suspect. Texas’s model policy itself states that, “[b]ecause witnesses may be influenced, however unintentionally, by cues from the person administering the procedure, a blind administrator should be used. This can be achieved through the use of a blind procedure or a blinded photo array procedure.” Texas Model Policy at 3. Article 38.20 of the Texas Code of Criminal Procedure mandates that law enforcement agencies either adopt the model policy, or develop a policy that, *inter alia*, requires the use, where practicable, of a

blind or blinded administrator in a photographic or live lineup identification procedure. TEX. CODE CRIM. PROC. Art. 38.20 § (3)(c)(2)(E), (F) (2017).

In this case, Officer Callaway conducted all of the photographic lineups, despite being in charge of the investigation and knowing that Flores was the police suspect. 36 RR 32; 36 RR 105-06; 36 RR 289. Therefore, there was a significant risk that Officer Callaway influenced Barganier to focus her attention on Flores—particularly because, as explained below, his photo stood out from the others included in the array. The failure to use a non-blind administrator not only made the procedure unduly suggestive, but also undermined the reliability of Barganier’s ultimate identification by increasing the likelihood of misidentification.

4. Suggestive Composition of Photographic Lineup

As researchers and courts around the country have noted, the way a photographic lineup is constructed can significantly affect the reliability of an identification: poorly constructed lineups that are biased towards the suspect are more likely to produce misidentifications, whereas a properly-constructed lineup will test a witness’s actual memory, decrease the chance that a witness is simply guessing, and minimize the risk of contaminating the witness’s memory. *See Henderson*, 27 A.3d 898. As the court in *Henderson* noted, “mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup.” *Id.* (citing Roy S. Malpass et al., *Lineup Construction and Lineup*

Fairness, in 2 *The Handbook of Eyewitness Psychology: Memory for People*, at 155, 156 (R.C.L. Lindsay et al. eds., 2007)). When a suspect’s photograph stands out in some way from the rest of the lineup, the procedure is in fact guiding the eyewitness towards that suspect. *Lawson*, 291 P.3d at 706 (finding that an identification fails if “the suspect stands out from the other subjects in any way that might lead the witness to select the suspect based on something other than her own memory”). Unsurprisingly, over 33% of the first 250 DNA exonerations that featured eyewitness testimony involved biased lineup procedures. *Garrett* at 55.

Here, Flores’s mugshot was the only picture out of the six photographs that did not have a white strip covering the bottom portion, making it stand out among the other photographs. AppX30; AppX39. Meanwhile, despite the fact that Barganier described the passenger as a white male with long hair, all the six photographs were of Hispanic individuals (including Flores) with short, cropped hair. *Id.* Both of these flaws in the photographic lineup, conducted after Barganier’s hypnosis session at which she was provided with information about the suspect’s “neatly cut” or “trimmed” hair, guided the eyewitness towards the suspect—Flores—that the police already had in mind. Notably, Texas law now requires law enforcement agencies to develop or adopt procedures ensuring that photographs or participants in identification proceedings “are consistent in appearance with the

description of the alleged perpetrator” and “do not make the suspect noticeably stand out.” TEX. CODE CRIM. PROC. Art. 38.20 § (3)(c)(2)(A) (2017).

The fact that Barganier failed to identify Flores despite these suggestive procedures is a powerful indicator of Flores’s innocence. As researchers have explained, “non-identifications are not merely ‘failures’ to identify the suspect, but rather carry important information whose value should not be overlooked.” Steven Clark et al., *Regularities in Eyewitness Identification*, 32 *Law & Hum. Behav.* 187, 211 (2008). For example, in a 1980 study, non-identifications were shown to be *more* probative of innocence than suspect identifications were of guilt. R. C. L. Lindsay & G.L. Wells, *What Price Justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy*, 4 *Law & Human Behavior* 303 (1980). Moreover, the study showed that as between the two possible non-suspect selections (a foil selection and a “none of the above” responses), the “none of the above” response was more predictive of innocence. *Id.* Simply put, the fact that Barganier failed to identify Flores multiple times up until her courtroom appearance, despite the highly suggestive identification procedures that she was subject to, strongly suggests Flores was misidentified.

C. Barganier’s Memory Was Further Contaminated by External Information to Which She Was Exposed Over Time

Weak encoding conditions and suggestive proceedings made Barganier’s memory highly vulnerable to contamination, *i.e.*, infused with details from external

sources that were not part of her actual memory. Those factors were further exacerbated by the substantial amount of time between her observations and her identification and evidence of her exposure to extraneous information during the interim, both of which signal additional grave reliability issues.

Over thirteen months passed between Barganier's pre-dawn observations and her announcement that she was prepared, for the first time, to identify Flores—and only after seeing him in court. This passage of time is highly significant. The scientific research demonstrates that the fidelity of memory and the accuracy of any given identification is “likely to be greater when [memory] retrieval occurs closer to the time of the witnessed events.” *Identifying the Culprit* at 65; *see also* 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, 148 (2008) (“Rate of memory loss for an unfamiliar face is greatest right after the encounter and then levels off over time.”). Memory erodes precipitously and never improves, and a witness's ability to recognize a face weakens over time. *Henderson*, 27 A.3d 908. Thus, over the course of the thirteen months between her observations and her identification of Flores, Barganier's memory was naturally subject to significant deterioration; her identification of Flores occurred when her memory was at its weakest and least reliable.

Additionally, the evidence demonstrates that, over the course of those thirteen months, she was exposed to a significant amount of contaminating information, even beyond the suggestive police practices described above. “A witness’s inevitable interactions with law enforcement and legal counsel, not to mention communications from journalists, family, and friends, have the potential to significantly modify the witness’s memory of faces encountered and of other event details at the scene of the crime.” *Identifying the Culprit* at 65. Here, the evidence shows that Barganier was indeed not only exposed to, but *actually influenced* by such interactions and extraneous information: her descriptions of what she had seen changed substantially over time, and her confidence level in her identification was suddenly inflated, even though many months had passed since the event and she had not identified Flores as the passenger when shown his picture earlier.

A key reason to conclude that Barganier was influenced by contaminating information over time (both by law enforcement and other sources) is that her earliest description of the passenger simply did not match Flores. Studies have shown that the more a witness’s description of a perpetrator fails to match the suspect, the greater the likelihood that the later identification of that suspect as the actual perpetrator is inaccurate. See Christian A. Meissner et al., *A Theoretical Review and Meta-Analysis of the Description-Identification Relationship in Memory for Faces*, 20 Eur. J. Cognitive Psychol. 414, 431, 435 (2008). Many exoneration cases based

on eyewitness misidentification also have a substantial mismatch between the witness's initial description of the suspect and the defendant: for example, a study of 250 DNA-based exonerations showed that over 60% of the cases involving eyewitness misidentifications had a substantial disparity between the eyewitness description and the defendant who was later convicted based on the eyewitness identification; in other words, the data shows that wrongful conviction cases often involve "evolving" descriptions given by the same eyewitness. Garrett at 68-69.

Here, Barganier's initial description of the passenger she saw was substantially different from what Flores looked like at the time of the event. A few hours after her observation, she described the passenger to the police as "also a white male with darker hair than the driver," with "longer" hair. 4 EHRR 44-48. At no point did she describe the passenger as Hispanic, as especially large, or as having short, close-cropped black hair, which is what Flores had at the time. The composite sketch created based on Barganier's description further illustrates that her description of the passenger changed significantly: the sketch she created within a week after her observations looked nothing like the mugshots of Flores, whom she identified thirteen months later as the passenger with "100 percent" confidence. 36 RR 87; *Compare* AppX28 with AppX32, AppX39, AppX40, AppX41, AppX42. The sketch, however, did resemble the first composite sketch she had done a few days earlier of the driver, identified as Rick Childs, which matches her original

explanation that the driver and the passenger were both white males of similar size with dark, longer hair. Compare AppX19 with AppX28. At the outset of the investigation, in other words, Barganier's memory of the passenger did not point towards a man who looked like Flores.

After describing someone who did not resemble Flores, and failing to identify Flores in at least one highly suggestive identification proceeding, Barganier saw photographs of Flores in the news, all of which described him as the suspect in the murder of her neighbor. In all of the photographs, Flores was depicted as a large Hispanic male with short, cropped black hair. 36 RR 108; 4 EHRR 68. Barganier testified that she saw Flores's picture in the news media on at least one occasion. 36 RR 108; 4 EHRR 68. She also admitted during the writ hearing that she saw a similar picture or the same picture in the photographic lineup that she was shown at the Farmers Branch Police Department. 4 EHRR 77-78; AppX30. As explained above, there is no way to know whether her ultimate claim to familiarity with Flores's face came from actually seeing him on the morning of the crime, or stemmed from seeing (but not picking out) his photograph in the suggestive lineup, or from her exposure to his photograph in the news coverage. The fact that she was repeatedly exposed to his face as the suspect in the case makes it highly likely that her later identification was unreliable.

This cavalcade of contaminating information does not simply pose an abstract risk of influence in this case; indeed, there is clear evidence that Barganier’s memory was *in fact* contaminated by the external information to which she was exposed. A few hours after the event, when her memory would have been at its freshest, she told the police that the Volkswagen she saw was yellow; by the time she testified at trial, thirteen months later, she told the jury that it “was like purple and pink and divided by like waves”—a description that matched the description of the car that had appeared in the police bulletin and the *Dallas Morning News*. 36 RR 281; AppX10. Whether or not Barganier was correct in her first description of the car is beside the point; what is critical is that this dramatic shift in her description of the vehicle demonstrates precisely how Barganier seems to have unwittingly incorporated details she learned later into her memory of what she had seen.

Barganier’s inflated confidence in her ability to identify Flores at trial—despite the fact that she had failed to make an identification thirteen months earlier in a highly suggestive procedure—is also powerful evidence that her memory was contaminated in the intervening time. A correlation between one’s confidence level in making an identification and the accuracy of that identification exists only when the proceedings have been conducted with robust safeguards against suggestion—including blind administration, the use of pre-procedure instructions, fair

composition, and contemporaneous collection of a confidence statement.¹¹ John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. Pub. Int. 10, 11 (2017). But when suggestive identification procedures, such as hypnosis, are involved, or if there were other opportunities for the eyewitness's memory to be contaminated, high confidence levels are no longer associated with higher accuracy. *Id.* at 47. Rather, when a witness who initially expressed low confidence or inability to identify a suspect later professes to have a high confidence level, such an inflation is typically evidence of contamination, because even the slightest encouragements or suggestion can significantly boost eyewitnesses' confidence in their *mistaken* identifications. Nancy K. Steblay et al., *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 Psychol., Pub. Pol. & L. 1, 5 (2014); see also 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, 115 (2002) (confidence in inaccurate identifications increased from an average of 49 percent certain to an average of 67 percent certain after receiving confirming feedback, while the same feedback increased accurate witnesses' certainty only from an average of 80 percent to 85 percent). Not

¹¹ These safeguards are now all included in the Texas Model Policy and required by TEX. CODE CRIM. PROC. Art. 38.20 (2017); none of these safeguards were used in this case. *See supra*.

surprisingly, many cases of mistaken identifications involve initially low confidence level identifications that over time “morph[] into a high-confidence ID.” Wixted & Wells, *supra* at 13.

Moreover, as discussed earlier, hypnosis—during which a witness is repeatedly encouraged to imagine things—also inflates the eyewitness’s confidence in his or her ability to reconstruct accurate “memories,” even though in reality, memory dissipates substantially over time. *See supra* Section I.B.1; 6 EHRR 42 (expert testimony citing his 2012 study that shows hypnosis increasing “confidence relative to nonhypnotic memories of events that [the subjects] earlier denied occurred when they were not hypnotized”); 5 EHRR 85-86 (expert testimony that hypnosis makes it difficult for the witness to distinguish between things that are imagined and things that were actually experienced).

Here, despite her failure to identify Flores multiple times thirteen months earlier, Barganier testified in court that she was “100 percent” certain that he was the passenger she had seen getting out of the Volkswagen. 36 RR 87. When the trial judge skeptically observed that it was not difficult to see who the Hispanic male was sitting at the defense table, she insisted that she was “over a 100 percent sure.” 36 RR 109. She also doubled down on her sudden confidence by stating that “if I didn’t pick him out of [photographic lineups] I assume I wasn’t shown one with him in there,” even though the State’s records showed that a picture of Flores was in at least

one of the photographic lineups and she failed to identify him as the passenger. *Id.*; AppX30. The inflation of Barganier’s confidence in her identification of Flores does not signal accuracy; instead, it signals a high likelihood of contamination.

D. In-Court Identifications Are Highly Suggestive and Unreliable But Have an Enormous Prejudicial Impact on Juries

1. In-Court Identifications Are Inherently Unreliable

The first and only identification made in this case took place in court, during Flores’s trial. This identification was unreliable because it was made in the aftermath of weak encoding conditions, suggestive identification procedures, and exposure to contaminating information. But additionally, such in-court identifications are in and of themselves highly suggestive and inherently unreliable, particularly where there has been no properly-administered identification procedure at which a positive identification was made prior to the in-court identification.

In-court identifications, such as the one made in this case, are suggestive and unreliable for a number of reasons. First, in-court identification procedures present the eyewitness with only one choice: there are no fillers to test an eyewitness’s memory. As the Connecticut Supreme Court recently explained, one is “hard-pressed to imagine how there could be a more suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the

witness if he can identify the person who committed the crime. If this procedure is not suggestive, then no procedure is suggestive.” *State v. Dickson*, 141 A.3d 810, 822-23 (Conn. 2016), *cert. denied*, 137 S. Ct. 2263 (2017). Second, the quality of the witness’s memory dissipates significantly over time, and an in-court identification typically occurs months, sometimes years, after the witnessed event—when the witness is likely to have been exposed to contaminating information (as was the case here). Third, there is significant pressure for a witness to identify the “right” person—*i.e.*, the defendant—in an in-court identification procedure: the “pressure[] to help solve a heinous crime,” the witness’s “eager[ness] to be of assistance,” and a sense of “duty” all make in-court identifications especially unreliable. *United States v. Greene*, 704 F.3d 298, 306 (4th Cir. 2013). And fourth, there is no possibility of blind administration at an in-court identification, and witnesses are likely to “regard the defendant’s prosecution as confirmation that the defendant is the ‘right’ person and, as a result, may develop an artificially inflated level of confidence in their in-court identification” and believe that their memory of the crime at trial will improve. *Commonwealth v. Collins*, 21 N.E.3d 528, 534-35 (Mass. 2014). While it is certainly *possible* that an in-court identification stems from an actual memory, in-court identifications are more often a result of (1) an error of familiarity because the suspect’s face has been shown in other contexts, such as media coverage or in previous lineup procedures, and/or (2) “simple deduction on

the part of the witness,” because the witness could tell who the defendant is in the courtroom. Steblay & Dysart, *supra* at 287; *see also Commonwealth v. Crayton*, 21 N.E.3d 157, 166-67 (Mass. 2014) (“Eyewitnesses may identify the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is reliable”). Researchers have therefore cautioned that “an attempt by an eyewitness to identify the perpetrator in court based on ‘memory of the crime’ should be viewed with skepticism.” *Id.* Unsurprisingly, more than half of the first 250 DNA exoneration cases featured an incorrect in-court identification. The Innocence Project, *Courtroom Identifications: Unreliable and Suggestive*, July 14, 2017, <https://www.innocenceproject.org/courtroom-identifications-unreliable-suggestive/>.

Courts around the country have recognized the severe limitations of in-court identifications. In *United States v. Rogers*, 126 F.3d 655 (5th Cir. 1997), the Fifth Circuit noted that “it is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant,” because even the “best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime.” *Id.* at 658-59; *see also Greene*, 704 F.3d at 306-07 (quoting the same); *United States v. Archibald*, 734 F.2d 938, 941 (2d Cir. 1984) (finding that in-court identifications are “obviously suggestive”). The Massachusetts Supreme Court has

held that first-time in-court identifications and in-court identifications that follow a less-than-unequivocal positive identification of the defendant are so suggestive and unreliable that they are presumptively inadmissible. *Crayton*, 21 N.E.3d at 170; *Collins*, 21 N.E.3d at 536-37. The Connecticut Supreme Court has held that first-time in-court identifications, and those preceded by an unduly suggestive out-of-court procedure, must be prescreened. *Dickson*, 141 A.3d at 835-36.

The in-court identification in this case is especially unreliable because Barganier had *never* made any positive identification of Flores up until the day of her trial testimony, thirteen months after she had seen two men getting out of a car in pre-dawn lighting. In the courtroom during his trial, Barganier saw Flores seated at defense counsel's table. In this highly suggestive setting, Barganier told the prosecutors that she could now identify Flores, even though she had not been able to do so for over a year preceding that day in the courtroom. 4 EHRR 118-19. This identification had all the hallmarks of an unreliable in-court identification: given the poor encoding conditions, her initial memory was already weak; her memory had been eroded by the passage of time; she failed to identify Flores at any previous time, even when she was shown a mugshot of him during a photographic lineup; her description of the scene and the passenger during the trial diverged significantly from what she told the police only a few hours after she saw the passenger outside her home; the hypnosis session provided details of Flores's appearance, including

his hair, that she did not see and was not aware of before; and the heavy media coverage of the crime and the investigation had broadcasted Flores's mugshot. Where she had made no positive identification of Flores prior to trial, this inherently suggestive in-court identification procedure had little to no probative value.

2. Eyewitness Identification Evidence Has a Disproportionately Prejudicial Impact on the Jury

Despite the ways in which eyewitness identification evidence can be deeply unreliable, researchers have found that juries generally assign it a disproportionately high probative value based on the widespread belief that memory works like a video recording that an eyewitness can simply play back and accurately recall. *See* Claudia X. Alvarez & Scott W. Brown, *What People Believe about Memory Despite the Research Evidence*, 37 *Gen. Psychologist* 1 (2002) (a considerable portion of the American public believes that the brain permanently stores accurate records of memories); R. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 *Jurimetrics J.* 177, 204 (2006) (jurors generally have a tenuous grasp on how memory works, believing that a witness on the stand is effectively narrating a video recording of events that had been captured perfectly in his or her memory). As many courts around the country and studies have noted, factors that make eyewitness evidence unreliable—for example, the fact that high levels of stress, frequently experienced while witnessing crimes, impede rather than

promote strong memory formation—are in fact counterintuitive to most lay people, and jurors’ knowledge regarding how memory works is often inaccurate. *Young v. Conway*, 715 F.3d 79, 81 (2d Cir. 2013) (“Many of these factors are counterintuitive and therefore cannot be deduced by the application of the ‘common sense’ that juries are customarily instructed to employ.”); *State v. Guilbert*, 49 A.3d 705, 723 (2012) (“Although these findings are widely accepted by scientists, they are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive.”); Tanja R. Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 *Applied Cognitive Psych.* 115, 126 (2006).

As a result, eyewitness identification evidence can be perceived as so powerful that jurors often credit unreliable eyewitnesses over other, more reliable forms of evidence. Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in *Handbook of Eyewitness Psychology: Volume II: Memory for People* 501, 505 (R. C. L. Lindsay et al. eds., 2007); *see also* Elizabeth Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 8 *Psychology Today* 116 (1974); Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 *N. Am. J. Psychol.* 143, 146 (2002) (finding that conviction rates by mock juries increased from 49% to 68% when a single eyewitness account was added). In other words, eyewitness identification evidence has such a tight grip on jurors’

notion of reliability that traditional mechanisms for undermining unreliable testimony, such as cross-examination, are not effective in discrediting unreliable eyewitness testimony—not least because mistaken eyewitnesses often sincerely believe that they are right and are therefore immune to trial practices designed to uncover dishonesty rather than unreliability. *Lawson*, 291 P.3d at 695 (“courts around the country have recognized that traditional methods of informing factfinders of the pitfalls of eyewitness identification [including cross-examination]—frequently are not adequate to inform factfinders of the factors affecting the reliability of such identifications”); *Henderson*, 27 A.3d at 924 (declining to solely rely on defense summation and cross-examinations of eyewitnesses for jurors to “divine rules themselves” on the reliability of eyewitness evidence).

An eyewitness’s high confidence level, misplaced or otherwise, also has a highly prejudicial effect on the jury, as was the case here. Even though a witness’s confidence in his or her identification is not related to accuracy unless the identification is made at a “pristine” identification proceeding, *see, e.g.*, Nancy K. Steblay et al., *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 *Psychol., Pub. Pol. & L.* 1, 5 (2014), juries are highly likely to believe a confident eyewitness: eyewitness confidence is the most influential factor in juror determinations regarding the accuracy of an eyewitness identification, and jurors are generally unaware of the fact that

confidence is not necessarily correlated with accuracy. *See, e.g.*, Michael R. Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 *Law & Hum. Behav.* 194, 194 (2009) (summarizing prior studies on effects of eyewitness evidence on juries). One study found that the confidence level of an eyewitness in a mock trial negated the effect of factors—such as lighting, distance, or angle at which the observation was made—making the same evidence unreliable, noting that “sensitivity to the variation in the opportunity to observe was wiped away for witnesses who expressed high confidence.” Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 *Alb. L. Rev.* 1105, 1149 (2011); *see also 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, juries are also generally unaware of how memory is susceptible to even subtle manipulation, feedback from law enforcement proceedings, and other sources of contamination. *See, e.g.*, Tanja R. Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 *Applied Cognitive Psych.* 115, 120 (2006) (finding that only 50% of jurors recognized that witnesses’ confidence can be manipulated). This

means that jurors are highly likely to use confidence as a proxy for accuracy of the identification evidence, rather than as an indication of contaminated memory.

These research findings illustrate that Barganier's testimony, despite its grave flaws, was likely highly influential on the jury and its guilty verdict. This is all the more probable because of her professed high confidence level and the fact the jury was likely to not understand that an in-court identification without any preceding out-of-court identification is highly unreliable, or that suggestive identification proceedings, including a hypnosis session, are likely to contaminate any eyewitness's memory; at trial, no experts explained the highly malleable nature of memory and risk factors for producing unreliable eyewitness evidence. In addition, there was no other credible evidence linking Flores to the crime scene, making it probable that Barganier's identification evidence was profoundly prejudicial and played a substantial role in the jury reaching a guilty verdict.

II. The Evidence Regarding the Impact of Hypnosis on Eyewitness Accuracy is Newly Available Evidence Under Texas Code of Criminal Procedure Art. 11.073(c).

Scientific research showing that the eyewitness identification evidence in this case was inherently unreliable was not available at the time of the Applicant's trial in 1999 and therefore should be considered newly available evidence under the Texas Code of Criminal Procedure Art. 11.073(c). The developments in research, consensus in the scientific community on the reliability of hypnosis in particular,

and the shift in the law enforcement and judicial response to the eyewitness identification evidence, all illustrate that at the time of Flores’s trial, there was no scientific consensus, as there is now, that (1) a person who has been hypnotized is more likely to believe that their post-hypnosis recall is a true memory when in fact no memory was encoded in the first place, or that (2) hypnosis conducted by law enforcement gives the process an aura of legitimacy that induces false confidence in “memories” created after the fact.

A. Shift in Research

At the time of Flores’s trial in 1999, there was no widespread consensus among the scientific community that hypnosis is not conducive to producing accurate recall nor is it reliable as a memory improvement tool. Although concerns regarding hypnosis existed when the *Zani* case was decided, there is now a much greater consensus that the dangers associated with hypnosis—such as suggestibility, false memory, and false confidence—cannot be overcome with procedural safeguards. 6 EHRR 114. For example, as the hearing testimony indicated, Dr. Martin Orne, one of the world’s foremost forensic psychologists and an expert in hypnosis and memory, upon whom courts had previously relied to craft procedural safeguards like the *Zani* factors, thereafter changed his mind: Dr. Orne ceased to believe that procedural safeguards cannot reduce the risk associated with hypnotically enhanced memory. 6 EHRR 116-17. As expert testimony in the

evidentiary hearing shows, that change was supported by empirical studies whose results gradually shifted the scientific consensus. 6 EHRR 51-57.

A consensus has also formed since Flores's trial that hypnosis is an inherently unreliable procedure in three specific ways. First, hypnosis implies that memory works like a video recording that can be played back, an understanding of memory that has been thoroughly discredited by the scientific community. Second, the witness under hypnosis is repeatedly asked to imagine things, making it hard for the witness to distinguish between things that are imagined during hypnosis and things that were actually experienced. Third, hypnosis misleads the witness into believing that memory will later "come back," even though memory generally deteriorates over time, and materials that are "remembered" as a result of hypnosis are often not accurate. 5 EHRR 84-87. In other words, while concerns regarding hypnosis existed at the time of the trial, the level of consensus among experts regarding its fundamental lack of reliability has significantly increased.

B. Shift in Judicial and Law Enforcement Responses

Along with the developments in research, courts and law enforcement agencies around the country have started recognizing the pitfalls of hypnotically-enhanced testimony and eyewitness identification evidence since 1999. Following this trend, twenty-seven jurisdictions have now decided to bar hypnotically enhanced testimony as untrustworthy. 6 EHRR 117. Of particular note, in 2006, the

New Jersey Supreme Court revisited and expressly overruled *State v. Hurd*, 432 A.2d 86, 95-97 (N.J. 1981), the case that the Texas Court of Criminal Appeals relied on in *Zani v. State*, 758 S.W.2d 233 (Tex. Crim. App. 1988), to establish procedural safeguards for using hypnosis as a means for “refreshing memory reliable enough to be vetted in the criminal adversarial process.” *Id.* at 237. In *State v. Moore*, 902 A2d 1212 (N.J. 2006), the New Jersey Supreme Court held that due to intervening advances in scientific understanding, the *Hurd* guidelines for admitting hypnosis-enhanced testimony were no longer tenable, as they could not be effective in controlling for the “harmful effects of hypnosis on the truth-seeking function that lies at the heart of our system of justice.” *Id.* at 1213. The court also noted that while the *Hurd* guidelines were supported and recommended at the time by a leading expert in the field, Dr. Martin Orne, by 2006 the degree of consensus that existed was enough to roundly reject hypnotically enhanced testimony as an unreliable source of evidence. *Id.* at 1228-29 (“[T]here is a lack of empirical evidence supporting the popular notion that hypnosis improves recall. . . . The theory that hypnosis is a reliable means of improving recall is not generally accepted in the scientific community.”).

In addition, procedures to ensure non-suggestive and accurate eyewitness identifications—such as blind administration of lineups and avoiding multiple exposures—have been widely adopted by courts and law enforcement agencies as

noncontroversial across the country, including in Texas. *See, e.g.*, TEX. CODE CRIM. PROC. § 38.20 (2017) (mandating each law enforcement agency in Texas to adopt and implement eyewitness identification policy based on a statewide model policy); *see also Tillman v. State*, 354 S.W.3d 425, 437 (Tex. Crim. App. 2011) (noting that “law enforcement and reform agencies throughout the country have taken note of the scientific community’s findings, forming task forces and developing new procedures to improve the reliability of eyewitness identifications.”); *Lawson*, 291 P.3d at 685-697 (recognizing specific factors that undermine reliability of eyewitness identification evidence and establishing a new framework for evaluating the admissibility of any given eyewitness evidence); *Henderson*, 27 A.3d at 919-23 (same); *Dickson*, 141 A.3d at 835-36 (holding that in-court identifications that were not preceded by a reliable out-of-court identification in a nonsuggestive setting must be prescreened); *Crayton*, 21 N.E.3d 157 (holding that first-time in-court identifications are admissible only upon a showing of good reason).

These significant shifts in law enforcement and judicial responses to hypnotically enhanced testimony, eyewitness evidence, and the scientific research on hypnosis illustrate that the evidence presented during the writ hearing constitutes new scientific evidence that was not available at the time of Flores’s trial or initial habeas application.

III. Conclusion

For the foregoing reasons, the Innocence Project urges the Court to reject the district court's findings that fail to discuss the relevant eyewitness identification evidence presented during this proceeding. The evidence shows important shifts in the scientific consensus since 1999 that could not have been presented previously. Flores should therefore be granted a new trial so that he can present the previously unavailable evidence illustrating the circumstances that made the sole eyewitness identification highly unreliable.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. Pro. 73.1, undersigned counsel certifies that this document complies with:

1. The length limitation of Tex. R. App. Pro. 73.1(d) because this document contains 10,772 words.
2. The typeface requirements of Tex. R. App. Pro. 73.1(e) because this document has been prepared in 14-point Times New Roman font.

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