IN THE
COURT OF APPEALS OF VIRGINIA

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Record No. 0847-24-1

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MESSIAH JOHNSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

_____

MOTION OF THE INNOCENCE PROJECT, INC. AND PROFESSOR BRANDON L. GARRETT FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 5A:23 of the Rules of the Supreme Court of Virginia, the Innocence Project, Inc. (the "Innocence Project") and Professor Brandon L. Garrett hereby move this Court for leave to file the accompanying brief as *amicus curiae* in support of Petitioner Messiah Johnson in the above captioned matter. Movants have sought and obtained the consent of all parties to this matter.[1]

Amici are the Innocence Project and Professor Brandon L. Garrett. The Innocence Project is a non-profit organization providing pro bono legal services to indigent people whose innocence may be established through post-conviction DNA

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[1] Counsel for Petitioner contacted counsel for Respondent to request Respondent's consent to file the accompanying brief. Respondent communicated their consent to Petitioner's counsel. *See* Rule 5A:23(c)(2)-(3).

testing or non-forensic evidence. The Innocence Project also works to prevent wrongful convictions by identifying their underlying causes, advancing legislative and administrative reforms aiming to improve the truth-seeking function of the criminal justice system, and by participating as amicus curiae in cases of broader significance to the criminal justice system.

Professor Brandon Garrett is the L. Neil Williams Professor of Law and Faculty Director and founder of the Wilson Center for Science and Justice at Duke University School of Law. Professor Garrett was previously the Thurgood Marshall Distinguished Professor of Law and the White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law. Professor Garrett is the author of *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*—a first-of-its-kind analysis of the first 250 post-conviction DNA exonerations in the United States. Additionally, Professor Garrett has served on the National Academies of Science committee investigating eyewitness evidence, resulting in the landmark report, *Identifying the Culprit: Assessing Eyewitness Evidence*, published in 2014. Professor Garrett is currently co-authoring a new chapter on eyewitness evidence for the forthcoming Fourth Edition of the Federal Judicial Center's Reference Manual on Scientific Evidence.

Wherefore, for the reasons stated above, the Innocence Project and Professor Brandon L. Garrett respectfully request that the Court grant them leave to file the accompanying brief as *amicus curae* in the above captioned matter.

Respectfully submitted,

May 21, 2024

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CERTIFCATE OF SERVICE

I hereby certify that on May 21, 2024, I caused a true and correct copy of the foregoing to be electronically filed with the court using the VACES system in compliance with Rule 5A:1(c). I further certify that on May 21, 2024, I caused a copy of the foregoing to be served, via electronic mail, upon the following:

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BRIEF *AMICUS CURIAE* OF THE INNOCENCE PROJECT, INC. AND PROFESSOR BRANDON L. GARRETT IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

Amici are the Innocence Project, Inc. (the "Innocence Project") and Professor Brandon L. Garrett. The Innocence Project is a non-profit organization devoted to providing pro bono legal services to indigent people whose innocence may be established through post-conviction DNA testing or non-forensic evidence. In addition to post-conviction litigation, the Innocence Project works to prevent future miscarriages of justice by identifying the underlying causes of wrongful convictions, participating as amicus curiae in cases of broader significance to the criminal justice system, and advancing legislative and administrative reforms that aim to improve the truth-seeking function of the criminal justice system.

Because erroneous eyewitness identification is a leading cause of wrongful convictions—playing a role in nearly 70 percent of convictions later determined through post-conviction DNA testing to have been erroneous—the Innocence Project has a compelling interest in helping courts accurately assess the reliability of eyewitness identification testimony. *How Eyewitness Misidentification Can Send Innocent People To Prison*, THE INNOCENCE PROJECT (Apr. 15, 2020), https://innocenceproject.org/news/how-eyewitness-misidentification-can-send-innocent-people-to-prison/. That effort includes urging courts to recognize overwhelming consensus about the factors that can lead to miscarriages of justice caused by the admission of unreliable identification evidence at trial, as occurred in

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Messiah Johnson's prosecution. Critically, virtually all of the scientific research and accompanying legal developments discussed in this brief post-date Mr. Johnson's trial, sharpening the imperative that Virginia courts—in the interest of justice—consider these changes in the post-conviction context.

Professor Brandon L. Garrett is the L. Neil Williams Professor of Law and Faculty Director and founder of the Wilson Center for Science and Justice at Duke University School of Law.[1] Previously, Garrett was the Thurgood Marshall Distinguished Professor of Law and the White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law, where he taught from 2005 until 2018. Garrett's research and teaching interests include scientific evidence, eyewitness memory, wrongful convictions, habeas corpus, criminal procedure, and constitutional law. While teaching at the University of Virginia School of Law in 2011, Garrett published a book through Harvard University Press titled, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*—a first-of-its-kind analysis of the first 250 post-conviction DNA exonerations in the United

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[1] The views expressed herein reflect those of Professor Brandon L. Garrett and the Innocence Project, but not those of any academic institution with which they are associated, including Duke University. No person or entity—other than amici curiae, their members, or their counsel—directly or indirectly wrote this brief or contributed financially to its preparation.

States.[2] Since that time, Garrett also served on the National Academies of Science committee that investigated eyewitness evidence and produced a landmark report, *Identifying the Culprit: Assessing Eyewitness Identification*, in Fall 2014.[3] Garrett is currently coauthoring a new chapter on eyewitness evidence for the forthcoming Fourth Edition of the Federal Judicial Center's Reference Manual on Scientific Evidence.

Garrett also has helmed historic state-level reforms in Virginia post-dating Messiah Johnson's wrongful conviction, discussed in detail herein. These reforms exemplify Virginia's steps toward scientifically sound approaches to evaluating eyewitness testimony. Specifically, Garrett has led two studies of eyewitness identification procedures at Virginia law enforcement agencies, and contributed to the revised model policy on such procedures promulgated by the Department of Criminal Justice Services ("DCJS" or "the Department"). He also served on a Crime Commission task force studying eyewitness identification procedures, and provided informal feedback on the drafting of Virginia jury instructions addressing eyewitness evidence. *See* Brandon L. Garrett, *Eyewitness Identifications and Police Practices in Virginia*, 2 Va J. Crim. L. 1 (2014); Brandon L. Garrett, *Self Policing: Eyewitness*

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[2] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011).

[3] Nat'l. Rsch. Council ("NRC"), *Identifying the Culprit: Assessing Eyewitness Identification*, 15 (2014), http://nap.nationalacademies.org/18891.

Identification Policies in Virginia, VA. L. REV. ONLINE 96 (2019). Garrett has a strong interest in preventing wrongful convictions in Virginia, which have commonly occurred due to eyewitness misidentifications, and in the continued improvement of both law enforcement and judicial practices related to eyewitness evidence.

INTRODUCTION

In 1998, Messiah Johnson was wrongfully convicted of armed robbery. Three mistaken identifications—and those identifications alone—led to his wrongful conviction. Mr. Johnson presented alibi evidence substantiated through four separate witnesses, and—in 2013—another man confessed to committing the robbery. In 2018, after enduring two decades in prison for a crime he did not commit, he was granted a conditional pardon by former Governor Terry McAuliffe under Article V, Section 12 of the Virginia Constitution. Governor McAuliffe granted this extraordinary relief based on what he described as "credible evidence [supporting] Mr. Johnson's claims of being innocent." Jessica Larche, *Norfolk man with "credible evidence of innocence" seeks exoneration*, WTKR (Jan. 11, 2022), https://www.wtkr.com/investigations/norfolk-man-with-credible-evidence-of-innocence-seeks-exoneration.

Despite this important (and rare) step, Mr. Johnson continues to bear the burden of his wrongful conviction. Although Governor McAuliffe's conditional

pardon authorized Mr. Johnson's release from prison, it did not clear his criminal record. And this unjustified stain on Mr. Johnson's record—tying him to a crime he never committed—has significantly hindered his ability to reenter society and fully contribute to his community. *Id.* Mr. Johnson now seeks to "[move] on with [his] life," finally free from the unwarranted scar of a felony record. *Id.*

Mr. Johnson seeks a writ of actual innocence based on nonbiological evidence, in accordance with Va. Code Ann. § 19.2-327.10 *et seq*. Amici strongly support Mr. Johnson's application for all of the reasons he outlines. Amici write specifically to urge this Court to join a growing number of others across the country by considering expert agreement on the fallibility of eyewitness identifications— most notably codified through peer-reviewed studies arising after Mr. Johnson's wrongful conviction, discussed below. Scientific consensus on problems at the heart of Mr. Johnson's wrongful conviction has since transformed approaches at every level of the criminal legal process—from local law enforcement agencies to legislatures and courts.

In the context of Mr. Johnson's Petition, all of this information constitutes "previously unknown or unavailable evidence," Va. Code Ann. § 19.2-327.11 *et seq*., which Mr. Johnson could not marshal in his defense at trial. There is no doubt that Mr. Johnson's wrongful conviction hinged solely on what we now know, through the progress of science, was patently unreliable identification evidence. The

same evidence would be suppressed—or at the very least, contextualized with expert testimony and appropriate jury instructions—were Mr. Johnson tried today, based on scientific evidence addressing the limitations of eyewitness identifications.

Courts, legislatures, and law enforcement agencies alike now credit recent scientific studies and related expert recommendations in recognizing the factors that can make eyewitness identifications unreliable. Numerous courts have revised their tests for admissibility of eyewitness evidence accordingly. Every state now allows expert evidence addressing eyewitness memory, a far cry from the state of the law in 1998. And many jurisdictions, including the Commonwealth, have revised their model jury instructions to appropriately contextualize identification evidence for jurors. None of these guardrails were available to Mr. Johnson when he was tried— and wrongfully convicted—25 years ago.

The research and related consensus informing Amici's request is the product of peer-reviewed analysis spanning multiple decades. In particular, Amici have focused on a consensus view—established in 2020—identifying key measures whose implementation consistently and substantially mitigates the likelihood of wrongful convictions. None of these procedures were present throughout the investigation and trial leading to Mr. Johnson's wrongful conviction in 1998, nor did there exist a consensus view at the time that such efforts should be employed during criminal investigations. Had this consensus and the resulting legislative and judicial

reforms existed at the time of Mr. Johnson's arrest and trial, his subsequent wrongful conviction would likely have been avoided altogether.

This Court should recognize this sea change as the "previously unknown or unavailable evidence" that it is and grant Mr. Johnson's application for a writ of actual innocence based on nonbiological evidence. Va. Code Ann. § 19.2-327.10 *et seq*.

STATEMENT OF FACTS

Amici incorporate by reference the Factual Background included in Mr. Johnson's Petition for a Writ of Actual Innocence Based on Nonbiological Evidence ("Johnson Petition"), and provide only a brief recitation of key facts germane to the analysis set forth herein.

On a Friday night in December 1997, two men stormed into Reca's Beauty Salon in Norfolk. At least one of them pointed a firearm at the salon's staff and patrons, and both of them disguised their faces. *See* Johnson Petition Ex. 6 ("Trial Tr. Vol. 1") at 125:13–17; *see also id.* at 54:13–14. One of the robbers wore glasses.[4]

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[4] Eyewitness trial testimony conflicts as to the exact disguise worn by the robber in glasses, further demonstrating that victim stress, the presence of a weapon, and an assailant's disguise all undermine an eyewitness's ability to accurately recount crime scene details. The salon's owner, Fred Asbell, testified that the "part of the [robber's] face" that he could "see" was "[t]he glasses," Trial Tr. Vol. 1 at 159:15–19, and that the same individual wore a drawstring hoodie pulled tight around his face, *id.* at 158:23–159:1. Tracy Spence, an employee at the salon, testified that "the one who was wearing glasses" had a ski mask over his face. *Compare id.* at 130:9–10, *with id.* at 189:21–190:16 (showing Mr. Asbell's certainty that the same assailant

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The assailants cursed and shouted at victims, and forced them into a dimly lit back room. *See id.* at 87:16–20; *see also id.* at 158:12. They ordered that everyone in the salon lie face down and remove their jewelry. *See id.* at 46:17–21. One of the robbers fired his weapon at close range. *See id.* at 50:7–14. Victims were in shock. *See id.* at 63:18–25. Some were crying; others prayed. *See id.* at 66:10–22. At least one victim wondered whether she might die. *See id.* at 66:10–22. The robbery— every second of it deeply traumatic for the victims—unfolded in approximately 20 minutes or less. *See id.* at 49:19–22; *see also id.* at 172:15–19 ("Around 15 minutes.").

The robber wearing eyeglasses never removed his disguise, and he fled the scene before police were able to respond. Given the perpetrators' disguises, none of the victims could recall specific descriptions of their assailants' faces—and most were unable to identify either robber. *See id.* at 70:22–71:2; *id.* at 55:2–3; *id.* at

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was not wearing a ski mask, and explaining his understanding of the differences between "a hoody" and ski mask). The Commonwealth's third and final eyewitness, Joyce Richardson, mentioned nothing at all about eyeglasses when discussing the same purported assailant. *Compare* Johnson Petition Ex. 7 ("Trial Tr. Vol. 2") at 269:14–18 (describing the assailant, alleged to be Mr. Johnson, as wearing "a black jacket with a hood"), *with* Trial Tr. Vol. 1 at 135:1–4 (showing Tracy Spence's testimony that he was "sure" that Mr. Johnson was "the same person in the salon that night" because "[l]ooking at him now, I see his – the glasses"). Others at the salon that night—who testified that they could not identify either assailant because both wore disguises covering their faces—also provided inconsistent testimony. *See, e.g.*, Trial Tr. Vol. 1 at 54:11–20 (showing Tasha Floyd's testimony that she could not describe either assailants' appearance because each wore "ski masks," "so I didn't see their face").

64:13–14; *id.* at 66:6–7; *id.* at 71:1–2. Instead, victims generally described two Black males wearing masks or hooded attire. *See id.* at 53:23–54:5; *see also id.* at 97:6–15. Several remembered that one of the robbers wore eyeglasses. *See id.* at 129:15–16; *id.* at 139:21–25; *id.* at 160:4–6. But victims did vividly recall other details, like the gun that one of the perpetrators wielded. *See, e.g., id.* at 62:16–63:3. All of them could recount the chaos that ensued—shouting, gunshots, audible prayers, and overwhelming fear for their safety. *See, e.g., id.* at 49:10–15. Responding officers may have spoken with witnesses, but not a single victim statement was recorded. *See* Trial Tr. Vol. 2 at 309:9–18.

Approximately two weeks later, the Commonwealth's first eyewitness—salon owner Fred Asbell—saw someone he believed to be one of the robbers standing in front of a nearby nightclub. *See* Trial Tr. Vol. 1 at 176:4–77:1. It was dark at the time, and Asbell was a passenger in a moving vehicle with partially rolled-up windows, approximately "20 or 30 feet" away from the person of interest. *See id.* at 184:3–5. Like many of the other victims, Asbell had focused on the perpetrator's eyeglasses. *See id.* at 180:9–11. He phoned police that night to report his belief "that he had seen the person who had robbed him at gunpoint," *id.* at 216:7–10, but did so only after he had traveled back to Reca's, where he told employees and patrons—including his employee and the Commonwealth's second eyewitness, Tracy Spence—that he had just seen one of the robbers. *See id.* at 185:20–21

(showing Asbell's testimony that "I told them I saw who robbed me"); *id.* at 178:13–14 ("As a matter of fact, I ran back and told my people at work that I had saw the guy.").

Asbell then traveled with police back to the nightclub, Tailgators, where he allegedly identified Mr. Johnson again, before observing law enforcement draw their weapons and force Mr. Johnson to the ground. *See id.* at 216:12–20; 217:11–16. From there, Asbell returned to Reca's Salon with the same police officers, picked up Tracy Spence, and traveled back to Tailgators—each witness sitting side by side in the patrol car. *See id.* at 136:7–18; *see also id.* at 217:25–218:7.

By the time Spence provided his identification, Asbell had already instructed him that Mr. Johnson *was* their assailant. *Id.* at 185:20–21. Spence "knew [he was] going to look at somebody and attempt to identify that person as one of the robbers," *id.* at 143:6–10, and—before providing his identification—Spence likewise first observed Mr. Johnson "sitting on the sidewalk" where "police had handcuffs on him," *id.* at 145:10–16. At the time of his identification that night, Mr. Spence was still seated in the patrol car, windows "up," from a distance of at least 18 feet. *See id.* at 145:23–146:12.

The Commonwealth's third and only other eyewitness—Joyce Richardson—was trapped in the salon's bathroom for most of the robbery. *See* Trial Tr. Vol. 2 at 267:8–10. During a photo array procedure administered approximately one month

after the robbery, she refused to positively identify Mr. Johnson as one of the assailants. *See id.* at 284:12–15 ("I kept saying, I'm not sure. I said, I don't want to—I don't want to say, but I'm not sure. That's what I told him that day."). At trial, she recounted the stress of overhearing—but not seeing—the robbery unfold: shouting, praying, and gunfire. *See, e.g., id.* at 267:21–25. Ms. Richardson recalled exiting the bathroom after hearing gunshots, and testified that one of the two robbers pointed his firearm directly at her face. *See id.* at 268:3–15. That robber, she testified, wore a hoodie drawn tightly around his face, and shouted at her to not look directly toward him. *See id.* at 269:11–16. But despite that limited visibility and her inability to identify the assailant in the more immediate wake of the robbery, Richardson—for the first time ever and nearly a full year after the robbery occurred—identified Mr. Johnson at trial as one of the robbers.

Based solely on these three identifications—evidence that courts today would almost certainly discard as patently unreliable—Mr. Johnson was convicted and sentenced to 132 years in prison for a crime he did not commit. Because he is innocent, Mr. Johnson turned down multiple plea offers that would have provided for a sentence totaling a fraction of his eventual wrongful conviction—including one for just three years.[5] He was ultimately incarcerated for two decades before

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[5] Patrick Wilson, *Messiah Johnson spent 20 years in prison for a robbery he didn't commit; he hopes Northam will grant absolute pardon*, RICHMOND TIMES-DISPATCH (Jan. 12, 2022), https://richmond.com/news/state-and-regional/messiah-johnson-

Governor McAuliffe conditionally pardoned him based upon "credible evidence [supporting] Mr. Johnson's claims of being innocent." Larche, *supra* at 4.

SUMMARY OF THE ARGUMENT

The Commonwealth's entire case against Messiah Johnson relied on just these three eyewitnesses—nothing more. Scientific research conducted in the decades since Mr. Johnson's wrongful conviction explains why the circumstances surrounding each identification rendered them unreliable. Critical to Mr. Johnson's request for relief here, much of the inquiry was ongoing in 1998, and issues central to his wrongful conviction had not yet been researched and studied to a point of scientific consensus. Even where experts did agree on foundational concepts—like the unavoidable reality that human memory is inherently subject to influence—law enforcement agencies, legislatures, and courts did not embrace these understandings at the time of his trial. This fact is plainly evident through subsequent wholesale reforms at every level of our criminal systems—each of them overlapping with the expert consensus discussed herein.

A 2020 scientific review paper authored by leading scientists in the field of memory and perception, along with its 1998 predecessor, is key to understanding this consensus. *See* Gary L. Wells et al., *Policy and Procedure Recommendations*

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spent-20-years-in-prison-for-a-robbery-he-didnt-commit-he-hopes/article_10b3934d-b7a1-545b-ae1a-23e1e6478b10.html; Naomi Aoki, *Fewer Defendants Choosing Jury Trials*, THE VIRGINIAN PILOT (Aug. 28, 1999).

for the Collection and Preservation of Eyewitness Identification Evidence, 44 L. &

HUM. BEHAV. 3 (2020) ("2020 Consensus Paper"); Gary L. Wells et al., *Eyewitness*

Identification Procedures: Recommendations for Lineups and Photospreads, 22 L.

& HUM. BEHAV. 603 (1998) ("1998 Consensus Paper"). Each marked a watershed

moment for the advancement of scientific understanding of eyewitness accuracy and

procedures designed to incorporate this knowledge to prevent wrongful convictions.

But Mr. Johnson's defense could not have used any of this information at the time

of his wrongful conviction, nor could law enforcement agencies and courts have

benefitted from experts' guidance. Most of the consensus simply did not exist, and

even the 1998 Consensus Paper post-dates the investigation precipitating Mr.

Johnson's wrongful conviction.

By 1998, researchers had become steadily more concerned by "increasing

evidence that false eyewitness identification is the primary cause of the conviction

of innocent people." 1998 Consensus Paper at 603. On appointment by the

American Psychology-Law Society ("AP-LS"), a division of the American

Psychological Association that includes the leading experts studying the science of

eyewitness identifications, a committee of scientists was tasked with recommending

"the best procedures for constructing and conducting lineups and photospreads" to

help ensure that "lineup practices [] remove a great deal of the contribution that the

justice system itself contributes to the problem of mistaken identification." *Id.* at

603, 642. By 2020, sufficient time and study had passed to merit an "update [to] the influential 1998 scientific review paper on guidelines for eyewitness identification procedures." 2020 Consensus Paper at 3. Thus, the AP-LS again convened preeminent experts—including Dr. Amy Douglass, who appears in the present matter on Mr. Johnson's behalf—to update and supplement the 1998 Consensus Paper with the scientific research conducted over the intervening two decades. *See id.*

The 2020 Consensus Paper identified three key recommendations—among others—that are centrally relevant to explaining and rectifying Mr. Johnson's wrongful conviction. Specifically: (1) showup procedures should be avoided to investigators' best ability, and only should be conducted in tandem with procedural safeguards (*e.g.*, "a warning that the detained person might not be the culprit"), *id.* at 8–9, 26–28; (2) investigators must avoid repeated identification procedures, *see id.* at 8, 25–26; and (3) wrongful convictions are demonstrably less likely when investigators video record their identification procedures, *see id.* at 8, 23–24.

None of these steps were followed in Mr. Johnson's case. Investigators could not benefit, in 1998, from a scientific consensus that was not established until nearly two decades later. Further, Mr. Johnson's defense could not present (and the trial court could not consider) expert evidence addressing this consensus (and thus the flaws inherent to the Commonwealth's case-in-chief) because the evidence was not

then available. Today, both issues can be resolved. To the first issue, the very law

enforcement agency overseeing the Reca's investigation (as well as the DCJS more

broadly) has since reformed its standard policies in keeping with expert

recommendations outlined in the 1998 and 2020 Consensus Papers.[6] And to the

second issue, this Court is empowered to grant Mr. Johnson relief, under Va. Code

Ann. § 19.2-327.11 *et seq.*, because the evidence he marshals here was not

previously available. This Court would not be the first to so hold.[7]

Under the same charges and circumstances today, Mr. Johnson's defense

could present evidence that was unavailable at the time of his wrongful conviction.

For instance, Mr. Johnson's defense could present expert testimony explaining the

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[6] The DCJS updated guidance highlighted eyewitness misidentification as one of "many reasons to re-visit the traditional methods of identifying perpetrators of crime." DCJS, Model Policy on "Lineups/Eyewitness Identification" (Nov. 16, 2011), https://www.dcjs.virginia.gov/law-enforcement/model-policies-virginia-law-enforcement-agencies. In 2015. the Norfolk Police Department ("NPD") adopted an Operational General Order regarding eyewitness identifications closely tracking the DCJS Model Policy. *See* Norfolk Department of Police, Operational General Order – 423: Eyewitness Identification (Mar. 3, 2015), https://public. powerdms.com/NORFOLK/tree/documents/1600861.

[7] Evolving court treatment of eyewitness identifications is the subject of extensive analysis herein. Additionally, Virginia's Supreme Court recently recognized that existing tests for evaluating eyewitness reliability "were drawn from earlier judicial rulings and not from scientific research" and "include[d] factors that are not diagnostic of reliability." *Walker v. Commonwealth*, 887 S.E.2d 544, 551 (Va. 2023); *see also* Virginia Model Jury Instructions – Criminal (Sept. 2023), https://www.vacourts.gov/courts/circuit/resources/model_jury_instructions_crimin al.pdf (updating model jury instructions for Virginia courts to account for commensurately updated understandings of eyewitness fallibility).

consensus view, reached in 2020, that the identification of Mr. Johnson by eyewitnesses was the direct result of highly suggestive identification procedures (*i.e.*, "system variables," discussed *infra*), conducted contrary to nearly every contemporary best practice. Today, Mr. Johnson's defense could likewise present expert evidence showing how law enforcement's procedures compounded with eyewitnesses' experiences (*i.e.*, "estimator variables," also discussed *infra*) during and after the Reca's robbery to create a self-fulfilling investigation and the prosecution of an innocent man.

Amici urge this Court to acknowledge peer reviewed and well-reasoned consensus advancements in memory science—particularly those enumerated in the 2020 Consensus Paper and embraced by a growing body of courts and law enforcement agencies nationwide—as "previously unknown or unavailable evidence" that was not available to Mr. Johnson at the time of his wrongful conviction. Va. Code Ann. § 19.2-327.11 *et seq*. This Court should accordingly grant Mr. Johnson's application for a writ of actual innocence.

ARGUMENT

I. **CURRENT SCIENTIFIC RESEARCH DEMONSTRATES THE UNRELIABILITY OF THE UNDULY SUGGESTIVE EYEWITNESS IDENTIFICATION EVIDENCE ADMITTED AT MR. JOHNSON'S TRIAL**

There is no question that Messiah Johnson was wrongfully convicted. After serving 20 years in prison for a crime he did not commit, he was pardoned in April

2018 based on "credible evidence that he was not guilty at all." Press Release, Governor Terry McAuliffe, Governor McAuliffe Grants Conditional Pardons to Six Virginians Serving Unjust Sentences (Jan 12, 2018), https://web.archive.org/web/20180113163406/https://governor.virginia.gov/newsroom/newsarticle?articleId=24841. Not only did Mr. Johnson have an alibi substantiated by four testifying witnesses—he was shopping at a mall with three other people and then at his girlfriend's home—but in 2013, another man confessed to committing the robbery. *See* Johnson Petition at 28–29; 31–35.

Like so many other miscarriages of justice attributable to misidentification, Mr. Johnson's wrongful conviction occurred exclusively because the court and jury did not—and could not—consider key factors undermining the reliability of eyewitness identification evidence. *See* 2020 Consensus Paper at 4, 6, 28 (noting that "our understanding of eyewitness identification has matured well beyond where it was" when the 1998 Consensus Paper was published, observing that "exoneration cases involving mistaken eyewitness identification have continued to accumulate since" then, and remarking on the "numerous agencies, governing bodies, and organizations"—including the United States Department of Justice—that "have proposed guidelines for collecting and preserving eyewitness identification evidence" in the years since 1998); *see also* NRC, *Identifying the Culprit: Assessing Eyewitness Identification*, 15 (2014), http://nap.nationalacademies.org/18891

(explaining that "[r]ecent years have seen great advances in our scientific understanding of the basic mechanisms, operational strategies, and limitations of human vision and memory" and that such advancements now "inform our understanding of the accuracy of eyewitness identification").

These factors are commonly categorized by social scientists—and now courts—into two broad categories: *system variables* and *estimator variables*. *See State v. Henderson*, 27 A.3d 872, 895 (N.J. 2011). System variables affect how a person's memory is retrieved, and typically involve identification procedures that state actors can control, such as—in this case—showup procedures and photo arrays. *See* 2020 Consensus Paper at 6 (explaining that system variables are "factors that relate to the reliability of eyewitness identifications over which the justice system has (or can have) control"); *see also* NRC, *Identifying the Culprit* at 16–17. Estimator variables encompass factors that affect a witness's ability to correctly make and store a memory of an underlying event. These factors are not controlled by criminal justice system actors, and they shape every eyewitness identification. *See* Supreme Judicial Court Study Group on Eyewitness Evidence, *Report and Recommendations to the Justices* (2013), https://www.mass.gov/doc/supreme-judicial-court-study-group-on-eyewitness-evidence-report-and-recommendations-to-the/download ("SJC Report") at 59-71; NRC, *Identifying the Culprit* at 16–17; *see also* 2020 Consensus Paper at 6. Central to the case at hand, estimator variables

include the presence of a weapon, the perpetrator's distinctive features or use of a disguise, the lighting conditions under which the witness observed the perpetrator, the distance between the witness and perpetrator, and the amount of time between an event and identification. *See* SJC Report at 65–66; *see also* 2020 Consensus Paper at 6 (mentioning examples of estimator variables relevant to Mr. Johnson's wrongful conviction, like "stress during the witnessing of a crime" and "quality of view").

Because virtually all of the scientific research about these variables and resulting legal developments summarized in this brief post-dates Messiah Johnson's wrongful conviction, it necessarily was not available to his defense in 1998.

A. **The Scientific Consensus Regarding The Use Of Showups Has Shifted Since The Time Of Mr. Johnson's Trial.**

The Norfolk Police Department employed showup procedures to secure two of the Commonwealth's three eyewitness identifications in this case—Fred Asbell and Tracy Spence. Showup procedures are inherently suggestive, and—for decades—experts have studied their implications for wrongful convictions. *See, e.g.*, 1998 Consensus Paper at 631 ("[T]here is clear evidence that showups are more likely to yield false identifications than are properly-constructed lineups."). But expert consensus addressing appropriate safeguards in this context was not codified in a policy proposal until the 2020 Consensus Paper was published. Therein, experts provided this concrete recommendation ("Recommendation 9"):

> Showups should be avoided whenever it is possible to conduct a lineup (e.g., if probable cause exists to arrest the person then a showup should not be conducted.). Cases in which it is necessary to conduct a showup should use the procedural safeguards that are recommended for lineups, including the elimination of suggestive cues, a warning that the detained person might not be the culprit, video-recording the procedure, and securing a confidence statement.

2020 Consensus Paper at 8–9.

"There is no debate among eyewitness scientists about the fact that lineups produce better outcomes than do showups[.]" *Id.* at 7. "Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification." *Henderson*, 27 A.3d at 902. Because they do not include "fillers"— that is, known-innocent individuals included in a lineup to test a witness's memory—"inaccurate identifications from showups always fall on the innocent suspects, whereas in lineups such inaccurate choices tend to spread across known-innocent fillers." 2020 Consensus Paper at 26; *see also State v. Lawson*, 291 P.3d 673, 706–07 (Or. 2012). Showups also result in higher rates of misidentification than properly constructed lineups because their fundamental structure telegraphs a preordained outcome: law enforcement implicitly suggests to the eyewitness that the suspect presented to them is guilty. *See* 2000 Consensus Paper at 26 (describing showups as "extremely suggestive").

Showup procedures have contributed to approximately 15 percent of wrongful convictions involving faulty eyewitness evidence and subsequent DNA proof of

innocence. Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989-2014: Review of Data and Findings from the First 25 Years*, 79 ALBANY L. REV. 717, 741 (2016); s*ee also* Garrett, *Convicting the Innocent*, at 48, 52; Michael Cicchini & Joseph Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381, 389 (2010). In the years since Mr. Johnson's wrongful conviction, courts have scrutinized showups based on scientific evidence that was not available at the time of Mr. Johnson's trial. *See, e.g.*, *Young v. State*, 374 P.3d 395, 420 (Alaska 2016); *see also* 2020 Consensus Paper at 26–28.

Recent scientific research confirms the flaws inherent to showups. Cicchini & Easton, 100 J. CRIM. L. & CRIMINOLOGY at 389. By presenting an eyewitness with just one suspect, rather than actually testing their memory with innocent fillers, showups "fail to provide a safeguard against witnesses with poor memories or those inclined to guess." *Henderson*, 27 A.3d at 903. And in every showup procedure, there is no way for law enforcement to determine whether a witness actually is guessing because there will never be a false-positive response. *See Lawson*, 291 P.3d at 783 (explaining that "unlike lineups, showups have no mechanism to distinguish witnesses who are guessing from those who actually recognize the suspect" because during "unbiased lineup[s], an unreliable witness will often be exposed by a 'false positive' response identifying a known innocent subject" whereas during showups "every witness who guesses will positively identify the

suspect, and every positive identification is regarded as a 'hit'"). Additionally, and as was the case here, the suspect is typically displayed to the witness while in police custody, creating the impression that investigating officers already have evidence of their involvement in the crime. Cicchini & Easton, 100 J. CRIM. L. & CRIMINOLOGY at 388. Studies further establish that a witness's ability to differentiate between guilty and innocent suspects is "significantly worse in showups conducted immediately . . . compared to simultaneous lineups after a 2-day delay." Jeffrey Neuschatz, et al., *A Comprehensive Evaluation of Showups*, ADVANCES IN PSYCH & L. 53–54 (2016). Despite these risks, many law enforcement agencies lack consistent policies and training regarding showups. *See* NRC, *Identifying the Culprit* at 28 ("While some law enforcement agencies use a standard procedure with written instructions when conducting a showup, there is no indication that such procedures are used uniformly.").

The 2020 Consensus Paper pinpoints specific recommendations for law enforcement agencies whose tactics involve showups. None of these recommendations were followed in Mr. Johnson's case. For one, "showups should be avoided (and a lineup conducted instead), if at all possible." 2020 Consensus Paper at 27. This approach reinforces additional best practices because a lineup necessarily requires that investigators first develop probable cause before focusing witnesses toward a specific suspect. *See id.* (further noting that showups can proceed

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without probable cause and thus without "evidence-based suspicion"). Additionally, the suggestiveness necessarily attaching to every showup procedure can be mitigated through, for instance, a warning to the witness before viewing the showup that they may have additional opportunities to review suspects if they are not confident that the person shown to them is the culprit. *See id.* (further remarking that such a warning "can be effective in reducing mistaken identifications with little to no reduction in accurate identifications" (collecting studies)). The 2020 Consensus Paper authors further observed, as happened in Mr. Johnson's case: "Placing the detained person in handcuffs . . . for the showup can suggest to the witness" that law enforcement already and independently possess evidence of the suspect's guilt. *Id.*

The circumstances surrounding the showup in this case exemplify the grave concerns that social scientists and courts have since emphasized with respect to the risk of eyewitness misidentification. First, the showup here took place approximately *two weeks* after two men, both with their faces obscured, robbed Reca's Salon. Human memory decays exponentially over time, rather than in a linear fashion, and can easily be contaminated. *See* NRC, *Identifying the Culprit* at 60 (explaining that memory "cannot be treated as a veridical permanent record, like photographs stored in a safe" because, "[o]n the contrary, the fidelity of our memories for real events may be compromised by many factors at all stages of processing, from encoding through storage, to the final stages of retrieval"). As the

Connecticut Supreme Court observed when updating its test for admitting expert testimony about eyewitness identification evidence, "[c]ourts across the country now accept that . . . a person's memory diminishes rapidly over a period of *hours* rather than days or weeks." *State v. Guilbert*, 49 A.3d 705, 721–22 (Conn. 2012) (collecting cases) (emphasis added). Social scientists have demonstrated that a delay of just one week can cause the "typical eyewitness viewing a perpetrator's face that [is] not highly distinctive . . . to have no more than a 50% chance of being correct in his or her lineup identification." Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. EXPERIMENTAL PSYCH.: APPLIED 139, 143, 147 (2008); *see also Lawson*, 291 P.3d at 705 ("[T]he greatest proportion of memory loss occur[s] shortly after an initial observation, then level[s] off over time.").

Notably, the Norfolk Police Department's since-reformed policies reflect an understanding of these precise concerns. NPD's Operational General Order – 423: Eyewitness Identification—issued in February of 2015—provides that, in order for a showup to be used, "the length of time between the commission of the crime and the identification procedure of the suspect [should be] reasonable." Norfolk Department of Police, Operational General Order – 423: Eyewitness Identification at 6–7 (Mar. 3, 2015), https://public.powerdms.com/NORFOLK/tree/documents/1600861. Here, two *weeks* had elapsed "between the commission of the crime" and NPD's

slapdash showup with Asbell and Spence outside of Tailgators—far longer than the passage of mere *hours* that courts have recognized as irreparably damaging to an eyewitness's reliability. *Id.*; *see also Guilbert*, 49 A.3d at 722.

Second, the showup occurred after Mr. Asbell purportedly spotted Mr. Johnson from a moving vehicle, at night, from a significant distance, and through partially rolled up windows. Trial Tr. Vol. 1 at 176:4–25; 184:15–20; *see also infra* at 36–37 (explaining, *e.g.*, distance and lighting as estimator variables). Moreover, the showup took place only *after* Mr. Asbell had already instructed his employee and co-witness, Tracy Spence, that the man in question, Messiah Johnson, *was* the culprit. It is therefore unsurprising—in a scientific sense—that Tracy Spence corroborated Fred Asbell's misidentification. Mr. Spence did so after hearing Asbell's identification and *traveling with him* to the showup, only to then view Mr. Johnson already seated on a curb in handcuffs. *See infra* at 39–40 (explaining scientific consensus addressing co-witness contamination). Spence made his identification from the backseat of a police vehicle, at night, through a closed window, and from a scientifically relevant distance—18–20 feet away. Trial Tr. Vol. 1 at 136:25–137:1; 145:17–146:3; 178:9–14. Ultimately, and just as Asbell had told him at Reca's Salon moments prior to the showup, *see, e.g., id.* at 185:18–21, Spence later testified at trial with a focus on Mr. Johnson's eyeglasses, *id.* at 135:1–4. Scientific research conducted since the time of trial establishes that these factors

are a recipe for wrongful conviction. *See Lawson*, 291 P.3d at 707–08 (explaining

the scientific research establishing why showups are inherently suggestive and prone

to producing misidentifications); *Henderson*, 27 A.3d at 902–03 (same).

B. **Scientific Consensus Regarding The Administration Of Repeated Lineups With The Same Eyewitness Has Shifted Since The Time of Mr. Johnson's Trial.**

The Commonwealth's only remaining evidence was their third and final

eyewitness, Joyce Richardson, who—despite her initial unwillingness to provide an

identification much closer to the key events (*i.e.*, when her memory was

unquestionably stronger)—was subsequently subjected to repeated identification

procedures. From the 2020 Consensus Paper, "Recommendation 8" advises that

"[r]epeating an identification procedure with the same suspect and same eyewitness

should be avoided regardless of whether the eyewitness identified the suspect in the

initial identification procedure." 2020 Consensus Paper at 8. Contrary to this

recommendation, Ms. Richardson was asked to review multiple photo arrays

containing Mr. Johnson's photo before finally making an identification—nearly one

full year after the robbery, from the witness stand, in front of the jury, for the very

first time.[8]

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[8] The 2020 Consensus Paper authors recognized that photo arrays (*i.e.*, "photo lineups") "are far more common than live lineups in most U.S. jurisdictions," and—accordingly—addressed photo arrays as part of their recommendations on lineups generally. *See id.* at 7. The authors noted: "We do not include separate sections on these two common procedures [*i.e.*, live lineups and photo arrays] because we know

First, and yet still one month *after* the robbery, when studies demonstrate that a witness's memory has already faded to an irreversible extent, Ms. Richardson reviewed a photo array containing Mr. Johnson's photograph. At that time, however, she refused to provide an identification. *See* Trial Tr. Vol. 2 at 284:12–15 ("I said 'I'm not sure.' I kept saying, 'I'm not sure.' I said, 'I don't want to [] say, but I'm not sure.' That's what I told [the officer] that day."). Second, and despite her prior and complete uncertainty, Ms. Richardson later told jurors at trial that she was "[o]ne hundred percent sure" that Mr. Johnson was involved with the Reca's robbery. *Id.* at 276:1; *accord Lawson*, 291 P.3d at 698–99 (rightly rebuking a similar eyewitness account, wherein the witness "initially told the police that she had not seen the perpetrator's face and could not identify him" and yet, at the defendant's trial more than two years later, testified with complete confidence that she "always knew" the defendant was the assailant).

Ms. Richardson's first-time in-court identification is a testament to the mind's malleability. The science of memory and perception establishes unequivocally that memory does not improve over time. Just the opposite is true. *See, e.g., Henderson*, 27 A.3d at 907 ("[M]emory decay is irreversible; memories never improve." (internal quotation marks omitted)). Human memory decays with each passing day,

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of no evidence to indicate that the principles governing photo lineups and live lineups are different. In other words, every recommendation that we make about lineups applies equally to live and photographic displays." *Id.* (collecting studies).

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all the while becoming increasingly susceptible to contamination. *See* John T. Wixted et al., *Test a Witness's Memory of a Suspect Only Once*, PSYCH. SCI. IN THE PUB. INT. 22, 1S (2021) (noting "almost universal" understanding among social science experts that "an eyewitness identification in court does *not* provide direct evidence of guilt" and is not "independently sourced from the witness's memory" because "by the time of trial, an eyewitness's memory has almost invariably been contaminated by a variety of factors and is therefore prone to error" (emphasis in original)). This is partly why the 2020 Consensus Paper explained that "[t]he importance of focusing on the first identification test cannot be emphasized strongly enough." 2020 Consensus Paper at 25.

Scientific consensus over the years since Mr. Johnson's wrongful conviction further establishes that in-court identifications rank among *the most* suggestive of all scenarios for eyewitnesses. As the Virginia Supreme Court has acknowledged, "[t]here is no denying that an in-court identification *is* suggestive." *Walker*, 887 S.E.2d at 549 (emphasis in original). "The defendant is seated at counsel table, in the courtroom. A witness then points, sometimes with dramatic flair, to the defendant as the culprit." *Id.* In the words of the Connecticut Supreme Court:

> [W]e are 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) (emphasis in original); *see also Perry v. New Hampshire*, 565 U.S. 228, 244 (2012) (explaining that all in-court identifications "involve some element of suggestion"); *United States v. Greene*, 704 F.3d 298, 307 (4th Cir. 2013) (acknowledging that the courtroom environment can "present a suggestive situation in which it is not clear whether the witness's own recollections, or outside pressures, are driving the testimony.").

The inherently suggestive nature of the courtroom setting casts particular doubt on witness identifications that, as in this case, occur *for the very first time* at trial—usually long after an underlying incident has occurred. As explained above, eyewitness testimony becomes less reliable over time. A witness's first-time in-court identification can, at best, be only as reliable as her memory. And scientific study has confirmed "that self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy. *See* NRC, *Identifying the Culprit* at 108. Here, Ms. Richardson's independent memory plainly could not have improved in the roughly eleven months since she told investigators that she was unable to positively identify Mr. Johnson as her assailant. *See* Trial Tr. Vol. 2 at 284:12–15.[9]

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[9] Further to the same point, Tracy Spence testified that he was "[m]ore sure" from the witness stand than he was two weeks after the Reca's robbery, when he identified Messiah Johnson during law enforcement's showup procedure. *See* Trial Tr. Vol. 1 at 138:6–9.

Ms. Richardson's sudden confidence from the witness stand has also been revealed as misleading by social science in the decades since Mr. Johnson's wrongful conviction. A witness's self-confidence is often artificially inflated by the courtroom environment and pretrial processes. *See* 2020 Consensus Paper at 26 ("[T]here is good evidence that repeated testing of eyewitnesses leads to artificially elevated levels of eyewitness confidence."); *see also* Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 154–57 (2011). Leading up to their trial testimony, a witness considers their own recollection of what happened as well as what they have heard in the intervening months—and sometimes, years—from other witnesses and from law enforcement, and decide what they will say in court. "Witnesses talk to other witnesses, listen to media reports of their own actions, and tell their stories to others who appear to believe them, all of which is reinforcing of the original identification and gives the illusion of confirmation by independent sources." Thomas D. Albright, *Why Eyewitnesses Fail*, 114 PROC. NAT'L ACAD. SCI. 7758, 7763 (2017). This markedly increases the confidence of each witness, even when multiple misidentifications have the same root causes, and can create an inverse relationship between witness certainty and identification accuracy. *Id.*

As a result, witness "confidence on the day of trial is not a sound measure of accuracy[.]" Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV.

451, 489 (2012). Nonetheless, a large assortment of jury studies demonstrates that misguided eyewitness confidence strongly impacts jurors and can influence them to disregard other critical aspects of the testimony bearing on its reliability. Elizabeth F. Loftus, James M. Doyle & Jennifer E. Dysart, *Eyewitness Testimony: Civil and Criminal*, 120, 121 n.4 (5th ed. 2013). Hence, a first-time in-court identification—particularly one made after a prior lineup procedure involving the same suspect and witness—can unduly influence and mislead the jury, despite being far less reliable than properly regulated, non-suggestive, and documented identification procedures performed contemporaneously during the preceding criminal investigation. The risk of unfair influence is even greater where, as in Mr. Johnson's case, law enforcement **did** conduct an identification procedure with Ms. Richardson during the criminal investigation, and she could not positively identify Mr. Johnson as one of the Reca's robbers—which is unsurprising given the many estimator variables at issue.[10]

Today, a Virginia model jury instruction is available to help jurors understand that a witness's prior failure to make an identification grossly undermines the reliability of their subsequent, first-time in-court identification, regardless of the

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[10] That Ms. Richardson was previously unable to identify Mr. Johnson is unsurprising for the additional-but-not-exhaustive reasons that she observed the Reca's robbers under immense stress, at gunpoint, for only a fleeting moment, and while both robbers obscured their faces from clear view. *See infra* at 38–45 (discussing estimator variables, including disguises, weapon focus, stress, and duration).

witness's self-professed confidence. *See* Johnson Petition Ex. 41 (Virginia Model Jury Instructions – Criminal (Oct. 2014)). Model Instruction 2.800 cautions jurors both that they "may consider . . . whether the witness was ever presented with the defendant and failed to identify the defendant as the person who . . . was involved in the crime," and that "a witness's confidence in [their] identification does not mean that the identification is accurate." *Id*. at 2-77 (PDF p.6). Of course, at the time of Mr. Johnson's trial, neither admonition was available to guide jurors in assigning probative value to Ms. Richardson's first-time in-court identification.

C. The Scientific Consensus Concerning The Recording Of Identification Procedures Has Shifted Since The Time Of Mr. Johnson's Trial.

The 2020 Consensus Paper notes an additional, key recommendation—video recording investigation and eyewitness procedures—that was not followed in Mr. Johnson's case. Had it been, investigators, Mr. Johnson's defense, and the court and jury alike could have benefitted from concrete evidence reflecting both key procedures and eyewitness accounts following the Reca's robbery.

Specifically, the 2020 Consensus Paper advises that "[t]he entire identification procedure, including prelineup instructions and witness confidence statement, should be video-recorded." 2020 Consensus Paper at 8 ("Recommendation No. 7"). The authors further recommend that video recording should "capture[] all relevant information about the procedure, including the verbal

and nonverbal behaviors of the witness, the administrator, and the lineup members." *Id.* at 24. "[V]ideo-recording of an identification procedure that includes information about the witness, the administrator, and lineup members can provide a complete record of the procedure that documents suggestive practices when they are present and protects the police from unjustified and time-consuming claims of bias when the procedure was free from suggestion." *Id.*

If the investigators focusing on Mr. Johnson followed this advice, they would have "preserve[d] a faithful record of the conditions under which witnesses ma[de] their identifications," "provid[ed] a more precise and accurate accounting of what happened during the procedure," and—in turn—reduced the risks around mistaken recollections (*i.e.*, estimator variables) that necessarily impact both eyewitnesses and investigating officers. *Id.* at 23. Thus, video recording the full investigation procedure would have sharply mitigated inevitable issues involving estimator variables that plagued the mistaken identifications resulting in Mr. Johnson's wrongful conviction.

For example, a video recording would "confirm that proper procedures [were] being followed." *Id.* at 24. A video recording of the investigation leading to Mr. Johnson's wrongful conviction also would have enabled Mr. Johnson's defense to marshal a motion to suppress these unreliable identifications (the Commonwealth's only evidence), because "the judge could [have] review[ed] the video and

evaluate[d] the suggestiveness of the procedure[s]." *Id.* Additionally, video recording investigation and eyewitness procedures implicates due process concerns. "[I]n the United States, a suspect does not have the right to have an attorney present at a preindictment identification procedure and never has the right to have an attorney present at a photo lineup procedure." *Id.* (citing *United States v. Ash*, 413 U.S. 300 (1973)). "In the absence of an attorney to view the identification procedure, the video-recording could" have helped Mr. Johnson's counsel "to better represent their client[] following identification," and—today, unlike in 1998—an expert witness "could be asked to review the video-recording and either testify or prepare a written report about the identification procedure." *Id.* Furthermore, "the video-recording could [have been] introduced as evidence at [Mr. Johnson's] trial so that fact finders [could] judge for themselves whether the procedure was suggestive, whether the witnesses engaged in any behaviors that either enhanced or diminished their credibility, or whether the witness's confidence was inflated." *Id.*

This expert consensus simply did not exist in 1998, when Mr. Johnson was wrongfully convicted. *See generally* 2020 Consensus Paper. Accordingly, Mr. Johnson's defense could today introduce expert evidence that was unavailable at his trial. *Cf.* Va. Code Ann. § 19.2-327.11 *et seq*. More than just that, the entire investigation resulting in Mr. Johnson's wrongful conviction likely would have been preempted altogether had this expert consensus existed in 1998, because law

enforcement agencies—as they have done in the years since then—could have adopted approaches proven through scientific consensus to dramatically reduce instances of wrongful convictions based on mistaken eyewitness identifications. The Commonwealth's own reformed policies supply proof. *See* DCJS Nov. 2011 Model Policy on Eyewitness Identification at 5 ("Agencies are encouraged to video record the show-up procedure" because "[t]his assists agencies in demonstrating that they conducted the show-up at a neutral location without any additional suggestion."); 10 ("Agencies are encouraged to video record the identification procedure."); 11 ("Agencies are encouraged to video record the identification/ confidence statement procedure.").

D. Several Other Factors Diminished The Reliability Of Eyewitness Identification Evidence In Mr. Johnson's Case.

Mr. Johnson's defense also could not marshal scientific evidence concerning still other problems with the Reca's robbery investigation—including a host of estimator variables now understood to diminish eyewitness reliability. This consensus understanding simply did not exist at the time of his trial.

1. Environmental Conditions Undermined The Identifications From Asbell, Spence, And Richardson.

Scientific consensus further establishes that distance and poor lighting negatively affect a person's ability to perceive unfamiliar faces. Geoffrey R. Loftus & Erin M. Harley, *Why Is it Easier to Identify Someone Close than Far Away?*, 12

PSYCHONOMIC BULL. & REV. 43, 63 (2005); 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 L. & HUM. BEHAV. 1, 9–10 (2009). Similarly, "fog, heavy rain or other weather conditions, cracked or dirty windows, glare, reflection, shadow, or even physical obstructions within the witness's line of sight" can impair a witness's ability to accurately observe and remember facts about an event. *Lawson*, 291 P.3d at 687.

The foregoing scientific principles are directly relevant here. The eyewitness "identification" at the heart of the Commonwealth's case occurred at 9 o'clock at night, and from at least 20 feet away. Trial Tr. Vol. 1 at 176:4–25; 185:15–20. And Mr. Asbell was in a moving vehicle. *See id.* at 184:3–5. Studies credited by courts have shown that physical obstructions—such as a halfway rolled-down window and the fact that Mr. Asbell was in motion when he purportedly saw Mr. Johnson at Tailgators—negatively impact a witness's line of sight. *Lawson*, 291 P.3d at 687; *see also* Trial Tr. Vol. 1 at 145:17–146:1 (showing Tracy Spence's testimony that he identified Messiah Johnson from a distance of 15-20 feet away). These conditions only exacerbated the unreliability of Mr. Asbell's ultimate identification, in light of the conditions in which he first observed the perpetrator during the robbery itself.

2.   New Science Establishes That Where, As Here, A Perpetrator Is Disguised Or Has A Distinctive Feature, Identification Accuracy Diminishes.

The extremely stressful circumstances surrounding the Reca's robbery, coupled with the fact that both assailants wore disguises masking their faces, further undermines the reliability of eyewitness identifications used to wrongfully convict Mr. Johnson. "Simple disguises, even those as minor as covering the hair, result in significant impairment of eyewitness identification." Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 281 (2003); *see also* Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 327, 332 (2006) ("In data from over 1300 eyewitnesses, the percentage of correct judgments on identification tests was lower among eyewitnesses who viewed perpetrators wearing hats (44%) than among eyewitnesses who viewed perpetrators whose hair and hairlines were visible (57%)."). Counter to common intuition, distinctive features—such as a tattoo, a scar, a mole, or eyeglasses—can further reduce a witness's memory of the perpetrator's face and therefore *decrease* their identification's accuracy. *See* Curt A. Carlson, *Influence of a Perpetrator's Distinctive Facial Feature on Eyewitness Identification From Simultaneous Versus Sequential Lineups*, 7 APPLIED PSYCH. IN CRIM. JUST. 77 (2011); Alyssa R. Jones et

al., *"All I Remember is the Black Eye": A Distinctive Facial Feature Harms Eyewitness Identification*, 34 APPLIED COGNITIVE PSYCH. 1379–93 (2020).

Both factors are relevant here. First, the Reca's robbers wore disguises obscuring their faces. Second, Mr. Asbell and Mr. Spence focused their testimony on "[t]he glasses" worn by one of the perpetrators as a "distinctive" feature. Trial Tr. Vol. 1 at 159:18–19. For example, Mr. Spence repeatedly mentioned the robber's eyeglasses in his testimony—stating that he could "be sure" that Mr. Johnson was the person in the salon that night because "I see his—the glasses, his eyes, and his eyebrows." *Id.* at 135:1–4. Mr. Johnson's conviction thus rested upon evidence that contemporary science roundly rejects. This scientific consensus was unavailable to Mr. Johnson's defense, and likewise could not have been considered by the trial court in making admissibility decisions, nor by the jury—when considering what weight, if any—to assign each of the Commonwealth's three eyewitnesses.

3. Co-Witness Contamination Irreparably Tainted Mr. Spence's Identification.

By the time Mr. Spence identified Mr. Johnson as one of the men who robbed Reca's, Mr. Asbell—his employer and co-witness—had already told him that he "saw who robbed [him]." *Id.* at 185:6–186:3. At trial, Mr. Asbell emphasized that he did not merely tell his employee that he "thought" he had seen who robbed him— he was clear that he "told them I saw who robbed me." *Id.* at 185:18–21. In other

words, jurors at the time may have believed that co-witness communications *enhanced* identification reliability, when, in fact, scientific consensus post-dating Mr. Johnson's trial shows it greatly *diminished* any weight jurors should have given Mr. Spence's identification.

However, and since Mr. Johnson's trial in 1998, courts have recognized the pernicious effects of precisely this type of co-witness communication. *See e.g.*, *Lawson*, 291 P.3d at 710 ("[W]itness memory is equally susceptible to contamination by nonstate actors. One common source of third-party memory contamination is co-witness interaction."). "The way in which eyewitnesses are questioned or converse about an event can alter their memory of the event." *Id.* at 687. "When a witness is permitted to discuss the event with other witnesses or views another witness's identification decision, the witness may alter his or her own memory or identification decision to conform to that of the co-witness." *Id.* at 710 (citing Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 APPLIED COGNITIVE PSYCH. 489 (2007)). In that way, "co-witness feedback may cause a person to form a false memory of details that he or she never actually observed." *Henderson*, 27 A.3d at 908; *see also Young v. State*, 374 P.3d at 425.

4. Eyewitnesses Accuracy Was Tainted By Weapon Focus.

The presence of a weapon at the crime scene has been found to negatively impact witness perception and memory. Jonathan M. Fawcett et al., *Of Guns and*

Geese: A Meta Analytic Review of the 'Weapon Focus' Literature, 19 PSYCH. CRIME & L. 1 (2011). This "weapon focus effect," as researchers have termed it, creates a sort of tunnel vision—causing witnesses to focus on the weapon rather than the person behind it, thus decreasing the accuracy of any subsequent identification. *See* NRC, *Identifying the Culprit* at 93–94. Courts now accept and rely upon this research. *See, e.g.*, *Henderson*, 27 A.3d at 904–05. The *Lawson* Court, for example, observed that "[s]tudies consistently show that the visible presence of a weapon during an encounter negatively affects memory for faces and identification accuracy." 291 P.3d at 701 (citing Kerri L. Pickel, *Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect*, 2 THE HANDBOOK OF EYEWITNESS PSYCH. 339 (R.C.L. Lindsay et al. eds., 2007)). This phenomenon occurs because "witnesses tend to focus their attention on the weapon instead of on the face or appearance of the perpetrator, or on other details of the encounter." *Id.*

In Mr. Johnson's case, weapon focus clearly hindered the quality of eyewitness identifications. Joyce Richardson testified that one of the robbers trapped her in her hiding spot in the salon's bathroom and held a gun less than two feet away from her face. *See* Trial Tr. Vol. 2 at 268:7–22. And Tracy Spence's trial testimony reflected his focus on the perpetrators' weapons, as well as its negative impact on his ability to describe said perpetrators. *See* Trial Tr. Vol. 1 at 142:6–14

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(showing Spence's testimony that he "remember[ed] describing the guns" and "remember[ed] describing what they were wearing," but also that Spence did not "think I gave them an estimated height"). As predicted by scientific studies not credited by courts until well after Mr. Johnson's trial, Spence focused in on the weapons present during the Reca's robbery and on the perpetrators' disguises, instead of details that would actually be useful in an identification.

5.   Eyewitness Accuracy Was Undermined By Stress.

As to the second factor, a comprehensive meta-analysis undertaken since Mr. Johnson's trial demonstrates the "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & HUM. BEHAV. 687, 699 (2004). Studies conclude that high levels of stress induce a defensive mental state resulting in a diminished capacity to accurately process and recall events. For both victims and other eyewitnesses, high stress levels distort perceptions of time and details within events. This reduces their ability to accurately encode memories and later recall the appearance of a perpetrator. *See* NRC, *Identifying the Culprit* at 65–66; SJC Report at 59–61; Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memor*y; *Henderson*, 27 A.3d at 904; *Lawson,* 291 P.3d at 700–01. In light of this new understanding, courts

have identified high stress levels as one of the most significant estimator variables to consider in weighing eyewitness testimony. *See Henderson*, 27 A.3d at 904 ("Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification.").

By all accounts, the circumstances surrounding the Reca's robbery created an overwhelmingly stressful situation for all three of the Commonwealth's eyewitnesses. Joyce Richardson had a gun pointed in her face. Trial Tr. Vol. 2 at 268:7–22. Spence and Asbell testified they had never been a victim of robbery before, and Spence explained that he was understandably "nervous" throughout the incident. Trial Tr. Vol. 1 at 188:19–189:2; 144:19–24. For every victim of the Reca's robbery, this was undoubtedly an upsetting, anxiety-ridden situation. And, perhaps paradoxically, scientific research accepted by courts in the years since Mr. Johnson's wrongful conviction is clear that those circumstances make eyewitness identifications far *less* reliable.

6. Eyewitness Accuracy Was Weakened By Only Brief Exposure To The Actual Robber.

Similarly, courts now recognize that eyewitness accuracy corresponds directly with the duration of their exposure to an assailant. Thus, an eyewitness who only briefly views their aggressor is substantially less likely to render an accurate recounting of key events, including an assailant's appearance. *Lawson*, 291 P.3d at 687; Colin G. Tredoux et al., *Eyewitness Identification*, ENCYCLOPEDIA OF APPLIED

PSYCH. 875, 877 (Charles Spielberger ed., 2004); Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associates with Initial Memory Strength*, 18 PSYCH. CRIME & L. 473 (2012). Simply put, when a witness spends mere moments observing a perpetrator, they are less likely to correctly identify the perpetrator in the future.

As important, courts now recognize scientific research demonstrating that eyewitnesses routinely overestimate the length of time stressful events take to unfold. Studies have consistently confirmed this phenomenon, known as "Vierordt's Law." *See, e.g.*, A. Daniel Yarmey, *Retrospective duration estimations for variant and invariant events in field situations*, 14 APPLIED COGNITIVE PSYCH. 45–57 (2000); Erich K. Grommet et al., *Time Estimation Of Fear Cues In Human Observers*, 86 BEHAVIOURAL PROCESSES 88–93 (2011). Scientific research has also shown that potential jurors do not understand that eyewitnesses tend to overestimate the duration of short events. *See* Richard S. Schmechel et al.*, Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177 (2006). Numerous courts have recognized the importance of this research and its relevance in evaluating an individual's guilt at trial. *See People v. Oddone*, 3 N.E. 3d 1160, 1165–66 (N.Y. 2013); *Lawson*, 291 P.3d at 702; *Henderson*, 27 A.3d

at 905; *Benn v. United States*, 978 A.2d 1257, 1268 (D.C. 2009); *United States v. Graves*, 465 F. Supp. 2d 450, 457 (E.D. Pa. 2006).

Here, and in describing the mayhem that followed the masked gunmen's arrival at the salon, Mr. Asbell and Mr. Spence testified that they were either facing a wall or face-down on the floor when interacting with the robber they later believed to be Mr. Johnson. Trial Tr. Vol. 1 at 162:10–11 (Asbell); 127:5–9 (Spence). As for Ms. Richardson, she was locked in the bathroom when the robbery began, and confronted the hooded perpetrator only when he forced open the locked bathroom door, held a gun in her face, and shouted at her not to look at him. *See* Trial Transcript Vol. 2 at 267:8–269:13.

The presence of any one of the aforementioned factors—to list only a few: the chaos surrounding the robbery itself, its brief duration, the poor conditions under which Mr. Asbell first allegedly observed Mr. Johnson, the assailants' disguises and witnesses' corresponding focus on one assailant's eyeglasses, and co-witness contamination—on its own would indicate to an informed court or jury today that these eyewitness identifications were not reliable. Here, they were all present in combination. A court presiding over Mr. Johnson's trial today would be able to draw on both further developed scientific research (including the 2020 consensus recommendations) and persuasive holdings from sister courts to recognize the fundamental flaws in the Commonwealth's case against Mr. Johnson, and also could

impose key rights-protecting guardrails. *See generally Lawson*, 291 P.3d 673;

Henderson, 27 A.3d 872; *see also United States v. Brownlee*, 454 F.3d 131, 142 (3d

Cir. 2006); *Guilbert*, 49 A.3d at 721–22; *Brodes v. State*, 614 S.E. 2d 766, 770 (Ga.

2005).

Accordingly, it is highly unlikely that Messiah Johnson would be convicted

on the same facts today. The Commonwealth's only evidence—three highly

problematic identifications—would likely be suppressed or at least contextualized

for the jury. Indeed, nearly *every* system *and* estimator variable now known to

undermine eyewitness reliability were present in this case. At the very least, and if

tried today based upon the same facts, Mr. Johnson could marshal a defense

leveraging decades of near-unanimous scientific consensus on memory and

perception that was unavailable to him in 1998.

II. JUDICIAL AND LEGISLATIVE RESPONSES TO THESE SCIENTIFIC ADVANCEMENTS CONSTITUTE NEW EVIDENCE

In the decades since Mr. Johnson's wrongful conviction, most states—

including Virginia—have incorporated scientific advancements into the laws, rules,

and legal reasoning governing eyewitness identification procedures. As recently as

December 2023, for example, a court in Los Angeles vacated an individual's

convictions and declared him factually innocent in part based upon the scientific

consensus that has emerged surrounding the reliability of eyewitness identification

evidence.[11] And, courts in at least two states—Massachusetts and Connecticut—specifically recognize scientific research addressing the fallibility of human memory and eyewitness identifications as newly available evidence sufficient to support a motion for a new trial on grounds of actual innocence.

In Connecticut, for example, courts now recognize that expert testimony addressing eyewitness fallibility constitutes "newly discovered forensic scientific evidence" sufficient to justify a new trial. *Carmon v. State*, No. NNH CV206107902, 2022 WL 3593977, at *1–2 (Conn. Super. Ct. Aug. 22, 2022). The *Carmon* Court considered a 2022 petition for a new trial relating to a 1995 jury trial. *See Carmon*, 2022 WL 3593977, at *1. The petitioner argued, *inter alia*, that scientific consensus reached after his trial showed that the state's eyewitness evidence against him was unreliable. *See id.* at *2. The *Carmon* Court agreed, noting that it was "undisputed that the linchpin of the state's case against the defendant" was eyewitness testimony from just two witnesses. *Id.* In reaching its decision, the *Carmon* court credited the petitioner's expert, whose testimony addressed many of the same factors discussed by Amici here (*e.g.*, victim stress and weapon focus). *See id.* (summarizing the expert's testimony that "significant advances in the science of eyewitness identification had occurred since the

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[11] Maurice Possley, *Miguel Solorio*, NAT'L REGISTRY OF EXONERATIONS (Dec. 13, 2023), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6701.

defendant's trial in 1995" and noting that such consensus "did not exist in 1995" when the defendant faced trial); s*ee also Revels v. State*, Docket No. KNL-CV22-6056733-S, 2024 WL 163367, at *6 (Conn. Super. Ct. Jan. 9, 2024) (holding that advances in eyewitness identification science constitute newly discovered evidence because this evidence was not available at the time of trial).

Connecticut courts reflect just one of several examples. In Massachusetts, courts now will consider scientific consensus on eyewitness reliability when evaluating whether to order a new trial. *See Commonwealth v. Gaines*, No. 7584CR91203 at 18–23 (Suffolk Cnty. Super. Ct. Nov. 30, 2022) (discussing updates made with respect to handling eyewitness identification evidence by the Massachusetts Supreme Judicial Court and concluding that "new scientific evidence regarding the suggestiveness inherent in" the witness's identification of the defendant was sufficient to establish a due process violation warranting a new trial). Similarly, in Illinois, courts have considered advances in the scientific study of eyewitness identification as newly discovered evidence supporting an actual innocence claim. *See People v. Martinez*, 187 N.E.3d 1218, 1243–44 (Ill. App. 1 Dist., 2021).

Moreover, Virginia courts will already consider shifts in scientific understanding under the Commonwealth's actual innocence statutes. *See Haas v. Commonwealth*, 871 S.E.2d 257, 277–78 (Va. Ct. App. 2022) (finding that, where

expert opinions "changed because of a change in the general consensus in the medical community regarding the significance of the physical findings that did not finalize until" after trial, such revised expert views "constitute new evidence for the purposes of" Virginia's actual innocence statutes).

In response to the outsized role mistaken identifications have played in wrongful convictions, several states have also crafted alternative legal standards regarding the admission of eyewitness evidence. In the landmark case of *State v. Henderson*, for example, the New Jersey Supreme Court opined that the governing test for admissibility of eyewitness identifications as set forth in *Manson v. Braithwaite*, 432 U.S. 98 (1977), "does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony." *Henderson*, 27 A.3d at 918. Prior to the *Henderson* Court's decision, *Manson* had permitted identifications obtained through suggestive means to nonetheless be admitted if sufficient "indicia of [] reliability" were present. *Manson*, 432 U.S. at 118 (Stephens, J., concurring). Those supposed "indicia" included: "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Id.* at 114.

Because of dramatic shifts in scientific consensus—like those noted by Amici here—the *Henderson* Court revised its test for admitting eyewitness identifications into evidence based on non-exhaustive lists of system and estimator variables, and also added a requirement for "tailored jury instructions" when such identifications are admitted. *Henderson*, 27 A.3d at 920. The *Henderson* Court emphasized that the factors it delineated "are not exclusive" or "frozen in time," recognizing "that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977," when the *Manson* decision was issued, "and it will likely be quite different thirty years from now." *Id.* at 922. The court further explained that "to the extent the police undertake new practices, or courts either consider variables differently or entertain new ones, they must rely on reliable scientific evidence that is generally accepted by experts in the community." *Id.*

New Jersey has since been joined by Connecticut, Alaska, Oregon, and Utah in explicitly replacing the *Manson* framework for admitting eyewitness identifications with a scientifically sound totality-of-the-circumstances test focusing on reliability. *See State v. Harris*, 191 A.3d 119 (Conn. 2018); *Young v. State*, 374 P.3d at 413 ("Developments in the science related to the reliability of eyewitness identifications, and courts' responses to those developments, have significantly weakened our confidence in the [*Manson*] test as a tool for preventing the admission

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of unreliable evidence at trial."); *Lawson,* 291 P.3d at 688 ("[*Manson*] does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence[,] . . . [as] the reliability factors [are] . . . both incomplete and, at times, inconsistent with modern scientific findings."); Utah R. Evid. 617 (effective Nov. 1, 2019).

Federal courts have similarly accepted this evolving science. *See Greene*, 704 F.3d at 308 (citing *Henderson* and related research in deeming an in-court identification unreliable); *Young v. Conway*, 698 F.3d 69, 78–85 (2d Cir. 2012) (citing approvingly to scientific reports regarding eyewitness testimony); *Brownlee,* 454 F.3d at 141–44 (acknowledging the importance of scientific research establishing the inherent unreliability of human perception and memory).

Although courts in the Commonwealth have not yet followed this exact path, the Virginia Supreme Court recently acknowledged the evolution of scientific research regarding eyewitness identifications. In *Walker v. Commonwealth*, the Court recognized that existing tests for reliability fail to account for relevant scientific research, and that as a result, the tests "are not diagnostic of reliability." 887 S.E.2d at 551 (quoting NRC, *Identifying the Culprit*, at 6). The *Walker* Court further recognized "that authorities on eyewitness testimony universally view [the *Manson* test] as flawed[.]" *Id.*[12]

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[12] *See supra* note 7.

Beyond the courts, other advancements in Virginia demonstrate a growing recognition throughout the Commonwealth's criminal justice system of the fallibility of eyewitness identifications. As noted, Virginia's DCJS developed model eyewitness identification policies in 2011—more than a decade after Messiah Johnson's wrongful conviction—and has since updated those policies three times. *See* Brandon L. Garrett, *Eyewitness Identifications and Police Practices in Virginia*, 2 VA. J. CRIM. L. 1 (2014); Brandon L. Garrett, *Self-Policing: Dissemination and Adoption of Police Eyewitness Policies in Virginia*, 105 VA. L. REV. ONLINE 96 (2019), https://virginialawreview.org/articles/self-policing-dissemination-and-adoption-police-eyewitness-policies-virginia/. In doing so, the DCJS concluded that prior practice "did not incorporate the growing body of psychological study of eyewitness memory and behavior." *See* Model Policy at 1.

To better account for eyewitness fallibility, updated DCJS policies prioritize blinded administration of lineups, even devising a method to maintain blind administration when personnel are limited. *Id.* at 5–6. Updated DCJS policies further note that any time blind administration of a lineup is *not* feasible, "it is important to document why." *Id.* at 7. And, consistent with the importance of a lineup or photo array's construction in determining the reliability of any resulting identification, the DCJS policy provides explicit instructions, based on applicable research, explaining how these procedures should be structured. *See id.* at 5–9. Finally, the Model Policy

also requires that, before viewing any lineup or photo array, witnesses must at minimum be admonished that they will be asked to view a set of photographs and the alleged wrongdoer "*may or may not be contained in the photos he is about to see.*" *Id*. at 5–6 (internal quotation marks and citation omitted, emphasis added). And the Norfolk Police Department—the agency that investigated the Reca's robbery—adopted its own Operational General Order regarding eyewitness identifications, again many years after Mr. Johnson's wrongful conviction. As with the updated DCJS Policy, these well-informed revisions arrived too late for Messiah Johnson—nearly two decades after his wrongful conviction. *See* Norfolk Department of Police, Operational General Order – 423: Eyewitness Identification (Mar. 3, 2015), https://public.powerdms.com/NORFOLK/tree/documents/1600861.

Notably, there is no evidence to suggest that any of the procedures now recognized as best practices by DCJS and the NPD were employed during the investigation into the Reca's robbery. First, none of the identification procedures were performed blindly. Second, and rather than being told the alleged wrongdoer may or may not be present in the identification procedure, Mr. Spence was explicitly advised that the perpetrator *was* in fact present for the showup identification procedure. Virginia law enforcement agencies now recognize that the practices leading to Mr. Johnson's wrongful conviction were fundamentally unreliable, and Amici urge this Court to follow suit.

Virginia is hardly alone. Half of all states have passed legislation regulating eyewitness identification procedures.[13] Most of these policies and laws adopt scientifically supported best practices—including blind administration of identification procedures, proper witness instructions, proper filler composition, witness confidence statements, and procedures for maintaining lineup records—to minimize suggestive feedback from system actors while conducting identification procedures. *See* Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, 102 BOSTON U. L. REV. 511 (2022). Beyond legislative reforms, law enforcement agencies nationwide have similarly embraced revised identification practices, including through model policies adopted in 29 states, just as Virginia has done. *Id.* at 511. Policing organizations have incorporated scientific research into lineup policies and training.[14] And "[s]tate courts have adopted new

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[13] Those states are California (legislation effective 2020); Colorado (legislation effective 2015); Connecticut (legislation effective 2011); Florida (legislation effective 2017); Georgia (legislation effective 2015); Illinois (legislation effective 2015); Louisiana (legislation effective 2019); Maryland (legislation effective 2007; amended 2015); Massachusetts (legislation effective 2010); Minnesota (legislation effective 2020); Nebraska (legislation effective 2016); Nevada (legislation effective 2011; additional policies adopted 2014–15); New Hampshire (legislation effective 2019); New Jersey (legislation effective 2001); New Mexico (legislation effective 2020); New York (legislation effective 2017); North Carolina (legislation effective 2008; amended 2015); Ohio (legislation effective 2010); Oklahoma (legislation effective 2019); Texas (legislation effective 2011; amended 2017); Utah (legislation effective 2019); Vermont (legislation effective 2014); Virginia (legislation effective 2003; amended 2011); and Washington (legislation effective 2006).

[14] These efforts began in the late 1990s with the National Institute of Justice's Technical Working Group for Eyewitness Evidence. *See generally* U.S. DOJ, OFF.

jury instructions for eyewitness evidence, new standards for in-court identifications, and new admissibility standards, as well as required that pretrial reliability hearings be conducted." *Id.* at 519. Every state now permits expert evidence on eyewitness memory. *Id.*

Additionally, Virginia revised its model jury instructions in 2014 to include guidance for jurors on how to better evaluate eyewitness identifications. *See* Johnson Petition Ex. 41 (Virginia Model Jury Instructions – Criminal (Oct. 2014)). In issuing this guidance, the drafters noted that "[a]t present, the vast majority of federal circuits and over 20 states have adopted an instruction addressing eyewitness testimony." *Id.* at 2-75 (PDF p.4) (citing *Perry*, 565 U.S. at 247–48 n.7 (citing model eyewitness instructions in federal and state jurisdictions)). Model Instruction 2.800 invites jurors to consider many of the system and estimator variables that negatively impacted the reliability of the eyewitness identifications used to convict Mr. Johnson, including: the witness's opportunity to observe the perpetrator, the amount of time the witness observed the perpetrator, the distance between the witness and the perpetrator, lighting conditions, weather conditions, visual obstructions, the

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OF JUST. PROGRAMS & NAT'L INST. OF JUST., *Eyewitness Evidence: A Guide for Law Enforcement* (1999), www.ncjrs.gov/pdffiles1/nij/178240.pdf [https://perma.cc/U5TQ-CPBM] (putting forth recommendations to improve procedures for collection and preservation of eyewitness evidence).

extent to which the person's features were visible and undisguised, and whether a weapon was present. *See id.* at 2-76–2-78 (PDF pp.5–7).

The updated model instructions further advise jurors that they may consider "the amount of time that passed between the crime and the witness's later identification of the defendant"; "whether the witness made the identification after being exposed to any outside influences or information," including "any opinions, descriptions, or identifications given by others"; and "whether the witness was ever presented with the defendant and failed to identify the defendant" as the perpetrator. *Id.* at 2-77 (PDF p.6). Jurors are also permitted, according to the model instruction, to consider "whether the procedures used by law enforcement had any influence on the witness's identification." *Id.* Finally, the instruction cautions that "a witness's confidence in [his or her] identification does not mean that the identification is accurate," and acknowledges that "even if you believe the witness was trying to tell the truth," it remains possible that the witness "made an honest mistake." *Id.* at 2-76 (PDF p.5).

As with law enforcement's model policies, Virginia is not alone in these changes. A growing acknowledgement of the inherent unreliability of human memory is leading many state supreme courts to modify jury instructions and other traditional approaches to eyewitness identification evidence in accordance with scientific research. *See State v. Lujan*, 459 P.3d 992, 1000, 1002 (Utah 2020)

(explaining and applying the state's recently enacted Utah R. Evid. 617, which "draws on recent scholarship in social science journals and law journals of relevance to the reliability of eyewitness identification testimony" and noting that the rule's "nonexhaustive" list of system and estimator variables permitted courts in the state to consider additional factors "[a]s scientific research advances"); *Commonwealth v. Gomes*, 22 N.E.3d 897, 916–17 (Mass. 2015) (holding that scientific research on eyewitness identifications should be incorporated into model jury instructions); *State v. Cabagbag*, 277 P.3d 1027, 1039 (Haw. 2012) (same).

In sum, and in tandem with consensus-backed recommendations published after Mr. Johnson's trial, the Commonwealth's key criminal justice stakeholders have made clear that scientific advancements in understanding eyewitness fallibility merit substantial reform, both in terms of how identification procedures are conducted and how evidence generated from such procedures, if admitted at all, is presented and contextualized to the jury. These entities have changed how they operate based on hundreds of wrongful convictions attributable to unreliable identifications and on the contemporary scientific consensus. Among them is the very police department that arrested Messiah Johnson and placed him in grossly suggestive identification procedures in the first place. Many of these updates so closely track the facts of this case that it is difficult to imagine a neater fit for

purposes of comparing, under Va. Code Ann. § 19.2-327.11 *et seq.*, how a trial today would operate compared to years past.

But none of these advancements were available to Messiah Johnson's defense in 1998. Accordingly, he can only now present this evidence in support of his actual innocence. Importantly, and for these same reasons, this Court need not undertake wholesale revisions of its jurisprudence involving eyewitness testimony in order to grant the relief requested by Mr. Johnson and supported by Amici. Virginia's laws and precedent already can be harmonized with the reforms noted above and the arguments raised herein because all of these developments squarely address evidence that did not exist when Mr. Johnson was wrongfully convicted. *See* Va. Code Ann. § 19.2-327.11 *et seq*.

CONCLUSION

Courts around the country now agree: applying scientific research to eyewitness identification evidence at various stages of the criminal legal process—both pre-trial and post-conviction—is essential for protecting individual liberties and accurate outcomes. Amici urge this Court to follow in those well-reasoned footsteps and hold that new evidence of scientific consensus and courts' acceptance of this robust body of scientific research may constitute "previously unknown or unavailable evidence" for the purposes of an application for a writ of actual

innocence based on nonbiological evidence under Virginia Code § 19.2-327.11 *et seq*.

In 1998, Messiah Johnson could not point to any systemic recognition of scientific consensus regarding eyewitness fallibility. There was no persuasive case law, no revised rules or policies, and over a decade would pass before several groundbreaking studies on the topic would be conducted. Today, Mr. Johnson can point to all of those things. Each one demonstrates that the Commonwealth's prior case against him was based on eyewitness identifications so rife with known, significant indicia of unreliability that they should have been discounted entirely— or at the very least, carefully contextualized for any jury. The Court today can and should right past wrongs by acknowledging these scientific realities and permitting Mr. Johnson to raise them now, so that the Commonwealth might finally provide him with a measure of the justice he deserves.

Respectfully submitted,

Dated: May 21, 2024

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CERTIFICATION

I hereby certify that on May 21, 2024, I caused a true and correct copy of the foregoing to be electronically filed with the court using the VACES system in compliance with Rule 5A:1(c). I further certify that on May 21, 2024, I caused a copy of the foregoing to be served, via electronic mail, upon the following:

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Pursuant to Rules 5A:20 and 5A:23, Counsel for Amicus Curiae hereby certify that the brief contains 13,489 words. A Motion for Leave to File Excess Pages has been concurrently filed.

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