
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CRIMINAL SECTION TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :
v. : CP-51-CR-0001160-2011
INDIA SPELLMAN : CP-51-CR-0001161-2011

RESPONDENT COMMONWEALTH’S ANSWER TO PCRA PETITION

TO THE HONORABLE SCOTT DICLAUDIO

LAWRENCE KRASNER, the District Attorney of Philadelphia County, by and through his assistants Michael Garmisa, and Graham Sternberg answers that India Spellman (“Spellman”) is entitled to relief on the *Brady* violation enumerated in her Post Conviction Relief Act (“PCRA”) petition.

The petitioner is entitled to relief based on new information that sounds in *Brady*: previously undisclosed information about Detective Pitts’ misconduct;¹ new evidence provided by testifying co-defendant Von Combs that establishes a nexus between Pitts’ misconduct and this case; and a handwritten note memorializing that a witness told the DAO that she did not see the perpetrator’s face, which would have raised substantial doubts about that witness’s suggestive

¹ On March 19, 2021, the Commonwealth filed papers opposing claims related to Pitts’ misconduct. The Commonwealth withdraws that position now because of subsequent events and investigation. First, Pitts was subsequently arrested and charged with Perjury and Obstruction, following a Presentment by an Investigating Grand Jury for engaging in physically assaultive interrogation techniques that led an innocent man to confess to a crime he didn’t commit. Second, the CIU interviewed Spellman’s testifying co-defendant, who established a nexus between Pitts’s habitual misconduct and significant evidence used to convict Spellman.

identification of Spellman that occurred for the first time during her jury trial, two years and 5 months after the incident.²

Although not presented as a claim in this PCRA, trial counsel was incompetent when he permitted two eyewitnesses to have the opportunity make in court identifications of Spellman that were both highly and unnecessarily suggestive, when neither had participated in a prior identification procedure that would have determined whether they were actually recognizing the perpetrator. One witness identified Spellman at the bar of the court, inside the security-courtroom during the preliminary hearing five months after the incident, while the other witness made an identification for the first time at a jury trial almost two and half years after the incident.³

OVERVIEW AND SHORT FACTUAL SUMMARY

1. Spellman was convicted of Second-Degree Murder and two counts each of conspiracy, robbery, carrying firearms without a license, and carrying firearms on the streets of Philadelphia. She received a sentence of 30 years to life in prison. Her convictions stemmed from a pair of gunpoint robberies, one of which resulted in the victim's death.

² Petitioner's Amended Petition for Relief Under the Post Conviction Relief Act ("PCRA") also included a claim related to a letter sent by Stephan Massenburg, an inmate at SCI Frackville, who confessed to killing Greaves. Petitioner has omitted this claim in her two subsequent Amended Petitions, and advised that the claim has been abandoned. The CIU has concluded this claim is without merit. Massenburg appears to suffer from mental illness, and has confessed to many crimes for which other individuals have been convicted. There is nothing about his statement or the CIU's subsequent investigation that would lead the CIU to conclude he had any role in this crime.

³ The petitioner is entitled to an evidentiary hearing on her ineffective assistance of counsel claim stemming from her trial attorney's failure to call available alibi witnesses, and to utilize phone records provided by the Commonwealth in discovery, which would have corroborated that alibi testimony. In the interest of judicial economy, however, the Commonwealth asks the court to decide the case on the other dispositive issues before it.

2. Spellman challenges her conviction in this timely,⁴ counseled, thrice amended PCRA petition.

3. Spellman was convicted based primarily on three pieces of evidence.

4. First, testimony from her co-defendant Von Combs (“Combs”), which described a pair of gunpoint robberies committed by Spellman and Combs. That testimony named Spellman as the person who killed Greaves.

5. Second, a confession taken by Detectives Henry Glenn (“Detective Glenn”) and James Pitts (“Detective Pitts”), which was generally consistent with Combs’s testimony, but differed in several material respects. In particular, Spellman said that Combs was the person who killed Greaves. Spellman signed the confession after being interrogated by Detective Pitts. Since then, however, she has maintained her innocence, claiming that the confession was written by the detectives who interviewed her, including Detective Pitts, and that she was coerced into signing it.

6. Finally, unreliable eyewitness identification testimony from two witnesses. One witness, Shirley Phillips (“Phillips”), was the victim of the first of the two gunpoint robberies for which Spellman was convicted. Phillips first identified Spellman as one of the perpetrators while Spellman was at the bar of court for her preliminary hearing. The other, Kathy Mathis (“Mathis”), was neighbor to the deceased victim in the other gunpoint robbery, and saw two individuals fleeing the scene of the murder. Mathis first identified Spellman as one of the fleeing individuals at the bar of the court, during Spellman’s jury trial.

⁴ During an initial PCRA, Spellman sought and obtained reinstatement of her appellate rights *nunc pro tunc*. After those direct appeal rights were reinstated, she challenged the admissibility of her confession and the denial of trial counsel’s motion for a mistrial following a witness’s unexpected in-court identification, both claims were denied by the trial court and affirmed by the superior court on January 9, 2017. *Commonwealth v. Spellman*, No. 3781 EDA 2015, 2017 WL 75875 (Pa. Super. Ct. Jan. 09, 2017). This PCRA follows.

7. None of the evidence was particularly strong standing-alone, and based on what we now know, much weaker than the information the jury heard.

8. The CIU conducted an interview with Von Combs—the Commonwealth’s chief witness at trial, and Spellman’s alleged co-conspirator—in which he recanted his trial testimony. During that interview, Combs stated that he had no knowledge of the crimes prior to his arrest, and that the substance of his statement to detectives and his subsequent in-court testimony had been fed to him by Detective Pitts. Combs explained that by the time he was brought to court for Spellman’s trial, he felt he had to testify based on his statement—at that point he had unsuccessfully challenged the voluntariness of his statement at his own trial in juvenile court; was serving an indeterminate period of detention at a juvenile facility; and was compelled to testify with a use immunity order, but without transactional immunity.

9. Spellman was a child when she was arrested and interrogated. She was questioned outside the presence of a concerned, interested adult in an interrogation that lasted at least four hours.⁵ Spellman’s confession did not provide any details of the crime that were not already known to interrogators at the time of her confession. The squad of detectives that investigated this crime would routinely interrogate suspects one at a time, and would leave the interrogation room during interrogations before finalizing the interrogation with a 75-483. In particular, detectives would leave the room to check information being provided by other witnesses. Custodial interrogations of suspects are now recorded start to finish by PPD, but at the time, they were not.

10. Since Spellman’s trial, the CIU revealed to the defense that Detective Pitts had an extensive history of sustained Internal Affairs investigation. These investigations include sustained

⁵ As a point of reference, for many years, interrogations of adults that lasted more than six hours were presumptively inadmissible. *See Commonwealth v. Perez*, 845 A.2d 779, 787 – 88 (pa. 2004) (abandoning six-hour rule for totality of circumstances test).

findings of abuse of authority during witness interrogations, but had not been disclosed to the defense. Additionally, Detective Pitts has been held for court on charges of perjury and obstruction in connection with providing false testimony about a physically coercive interrogation that led an innocent man to confess to a crime he did not commit, the Presentment is attached as Exhibit A.

11. Further, while reviewing the Commonwealth's trial file as part of its investigation, the CIU discovered a handwritten note. That note showed that one of the witnesses who identified Spellman at trial, Kathy Mathis ("Mathis"), called the District Attorney's Office ("DAO") prior to Spellman's preliminary hearing, and informed the DAO that she never saw the perpetrator's face, which contradicted her surprise, mid-trial identification of Spellman.

12. Considered, together, this information casts Spellman's case in such a different light as to undermine confidence in the verdict.

THIS COURT HAS JURISDICTION TO GRANT RELIEF

13. This Court has jurisdiction to review Spellman's claims pursuant to 42 Pa. C. S. §§ 9542 *et seq.*

14. To be eligible for relief under the Post Conviction Relief Act ("PCRA") a petitioner must file a petition within one year of their conviction becoming final. Spellman filed her first PCRA petition on June 28, 2014, alleging that her trial counsel was ineffective for failing to file a direct appeal. This resulted in her direct appeal rights being restored *nunc pro tunc*.

15. The Superior Court subsequently affirmed Spellman's judgment of sentence on January 9, 2017.

16. The Pennsylvania Supreme Court denied Spellman's Petition for Allowance of Appeal on July 27, 2017. Her judgment of sentence became final on October 26, 2017.

17. The only claims litigated on direct appeal were whether the trial court erred in denying Spellman’s motion to suppress her statement and whether the trial court erred in denying Spellman’s motion for a mistrial following Mathis’s unexpected in-court identification.

18. Spellman’s current PCRA petition was filed, in the first instance, on November 14, 2017. Because Spellman’s initial PCRA petition was timely, her amendments are also properly filed. *Commonwealth v. Crispell*, 193 A.3d 919 (Pa. 2018). The claims raised in the PCRA have not been previously litigated.

19. As a result, the instant petition is timely.

RELIEF IS WARRANTED BASED ON THE LAW AND THE UNDISPUTED FACTUAL RECORD

20. “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” Explanatory Comment 1, Pa. R. Prof. Conduct 3.8. The prosecutor has the responsibility to “seek justice within the bounds of the law, not merely to convict.” *Commonwealth v. Clancy*, 648 Pa. 179, 193 – 94 (Pa. 2018) (citations omitted). “The prosecutor must ensure that the defendant is accorded procedural justice.” *Id.* (citations omitted). “This role, and the responsibilities attendant to it, extend into the appellate and collateral stages of a criminal case.” *Commonwealth v. Robinson*, 651 Pa. 190, 224 (Pa. 2018) (Donohue, J., opinion in support of reversal) (Equally Divided Court).

21. As described below, the Commonwealth believes that petitioner’s constitutional rights were violated and is therefore “obligat[ed] to see that [Petitioner] is accorded procedural justice[.]” Explanatory Comment 1, Pa. R. Prof. Conduct 3.8. Consistent with that obligation, the Commonwealth agrees that Spellman is entitled to relief.

22. However, the Commonwealth recognizes that agreement alone cannot obligate a court to set aside a verdict in a criminal case. *See Commonwealth v. Brown*, 196 A.3d 130, 145 – 46 (Pa. 2018) (noting that “the PCRA requires judicial merits review favorable to the petitioner before any relief may be granted”).

23. The Commonwealth urges this Court to grant Spellman relief because it believes the record establishes that her constitutional rights have been violated. *Brown*, 196 A.3d at 145 (noting that in cases where prosecutors believe that relief is warranted, they are limited to “attempts, through the exercise of effective advocacy, to persuade the courts to agree that error occurred as a matter of law”); *see also Commonwealth v. Cox*, 204 A.3d 371, 387 (Pa. 2019) (“[C]onfessions of error by the Commonwealth are not binding on a reviewing court but may be considered for their persuasive value.”).

24. In his concurrence in *Brown*, Justice Wecht outlined a framework for post-conviction courts resolving uncontested PCRA petitions:

The PCRA court is tasked with considering the facts before it and resolving factual disputes. If there is no factual dispute because the Commonwealth and the petitioner are in agreement regarding the petitioner’s entitlement to relief, then the role of the PCRA court is to resolve the legal implications of these facts.

Brown, 196 A.3d at 196 (Wecht, J., concurring).

25. As Justice Wecht described, there is no factual dispute here and the Parties agree that Spellman’s rights have been violated. The ultimate decision whether to grant relief—i.e., whether the facts and circumstances of this case amount to a constitutional violation—rests with this Court.

Joint Stipulations of Fact

26. In order to facilitate this Court's review (consistent with its ethical duties), the Commonwealth has entered into and filed Joint Stipulations of Fact with Spellman. *Commonwealth v. Mathis*, 463 A.2d 1167, 1171 (Pa. Super. Ct. 1983) (noting that "[i]t is axiomatic that parties may bind themselves by stipulations" in criminal proceedings) (quoting *Marmara v. Rawle*, 399 A.2d 750 (Pa. Super. Ct. 1979)).

27. The stipulations represent the relevant facts as disclosed during the Parties' review of the case and the CIU's independent, as well as collaborative, investigation of Spellman's claims. Where parties stipulate as to particular facts, the stipulation does away with the necessity for introducing evidence of the fact stipulated. *In re Shank's Estate*, 161 A.2d 47 (Pa. 1960). This is so even if the evidence contains otherwise inadmissible hearsay statements. *Jones v. Spidle*, 286 A.2d 366 (Pa. 1971).

28. A stipulation is part of the evidentiary record and "binds the Commonwealth, and the Court[.]" *Commonwealth v. Phila. Elec. Co.*, 372 A.2d 815, 821 (Pa. 1977); *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2001) (noting that stipulations "become the law of the case") *abrogated on other grounds by Commonwealth v. Freeman*, 573 Pa. 532, 827 A.2d 385 (2003); *Park v. Greater Delaware Valley Savs. & Loan Ass'n*, 523 Pa. 771, 773 (Pa. Super. 1987) ("[S]tipulated facts are binding upon the court as well as the parties"); *Tyson v. Commonwealth*, 684 A.2d 246, 251 n.11 (Pa. Cmmw. Ct. 1996).

29. This Court need not conduct an evidentiary hearing prior to granting relief because no material facts remain in dispute as to the claims discussed below. Pa. R. Crim. P. 907(2); *Commonwealth v. Morris*, 684 A.2d 1037, 1042 (Pa. 1996) ("when there are no disputed factual issues, an evidentiary hearing [on a PCRA petition] is not required under the rules"); *see Commonwealth v. Martinez*, 147 A.3d 517, 524 (Pa. 2016) (affirming grant of relief where "[t]he

trial court held a hearing” at which “[n]o evidence was offered . . . as the Commonwealth was willing to stipulate to the facts as stated in Martinez’s petition”).

THE COMMONWEALTH’S CASE WAS WEAK

The In-court Identifications of Spellman were Unreliable

30. The CIU reviewed the two eyewitness identifications that played a role in Spellman’s conviction using both contemporary standards for assessing reliability, including consultation with an expert in the field of eyewitness identification, as well as long standing factors that have been relied-on for half a century.

31. “The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

32. Both eyewitness identifications were unreliable. The descriptions that the witnesses provided to police closest-in-time to the incidents bore little similarity to Spellman’s appearance. The discrepancies between the witnesses’ descriptions to police and Spellman’s actual appearance were not insignificant.

33. In a Radio Memorandum prepared by police immediately following Phillips’s robbery, Phillips described the woman who robbed her as: 30-35 years old, 5’5”, 180 lbs., heavy build, wearing long black religious garments. Then, in a 75-483 prepared an hour-and-a-half later, she described the female assailant as: 25 to 30, heavy, 180 pounds, size 18, dark-skinned, 5’6”, wearing all-black Muslim clothing.

34. In a 75-483 prepared three hours after the incident, Mathis described the woman she saw fleeing as “thick” and wearing Muslim head garb.

35. Spellman was 5’6” tall, but unlike the suspect-description, she is light-skinned, 125 pounds, and was seventeen years old.⁶

36. Both witnesses also had a limited opportunity to observe the perpetrators.

37. Mathis was never directly asked how long she observed the perpetrators; however, her observations were limited to the amount of time it took for them to run past Mathis (it is also uncertain whether this included an opportunity to view the perpetrator’s face at all).

38. In Phillips’s first 75-483, she told police that it “all happened so fast.” Then, at the preliminary hearing, she testified that the robbery took place in the “blink of an eye.” Of additional concern, Phillips testified at trial that she was “blind as a bat” and “can’t see nothing” without her glasses. N.T. 02/14/2013 at 27.

39. At the time of trial, Pennsylvania applied a per se rule prohibiting expert testimony to educate jurors about factors that affect the reliability of an identification. *See, e.g., Commonwealth v. Spence*, 627 A.2d 1176, 1182 (Pa. 1993); *Commonwealth v. Simmons*, 541 Pa. 211, 662 A.2d 621 (1995). Yet also at the time of trial, forty-four states, the District of Columbia,

⁶ The Commonwealth is also troubled by the fact that a search of the PennDOT photo registry revealed that Shawn Combs—the mother of Combs—who made Spellman a suspect by suggesting to police that Spellman was involved, more closely matches the initial descriptions that Phillips and Mathis provided than does Spellman. Shawn Combs is 5’3” tall, but was 42 years old at the time of the incident, and has brown eyes and a heavy stature. Shawn Combs also provided unsolicited information to police about how Spellman (who was Episcopalian) was sneaking into Shawn Combs’s bedroom at night to steal her khimars. Yet, when police asked Shawn Combs for assistance identifying “India” by picture, she identified a different person named India who was known to police. Police would later say they did not credit this. Additionally, Shawn Combs, also known as Shawn Wyatt-Combs has a 2007 conviction for False Reports to Law Enforcement at MC-51-CR-0017209-2007. The CIU therefore looks skeptically on the information Shawn Combs provided to police.

and all the federal circuit courts of appeals permitted such expert testimony under some circumstances. *Walker*, 92 A.3d at 782.

40. In 2014, the Pennsylvania Supreme Court reversed decades of precedent, and began permitting experts to educate the jury about the factors that lead to less-reliable identifications, many of which are present in Spellman’s case. *See Commonwealth v. Walker*, 92 A.3d 766, 770 (Pa. 2014).

41. While *Walker* represented a sea change in this area of Pennsylvania law, at the time of Spellman’s 2013 jury trial, competent defense lawyers in Philadelphia knew the tide was turning. On April 19, 2011, Pennsylvania’s Supreme Court granted allocatur to reconsider the blanket prohibition on expert testimony.⁷ Numerous amici filed briefs urging the Supreme Court to overrule its prior precedents, while no amici advocated for maintaining the prohibition.⁸ Following oral argument on March 7, 2012, the case was submitted. During the period of time between the grant of allocatur and the Court’s decision—when Spellman went to trial—many defense attorneys were granted continuances in Philadelphia, pending the outcome of *Walker*.

42. Even without expert assistance, the *Biggers* factors should have instructed defense counsel that allowing Mathis and Philips to make in-court identifications would not produce reliable identification testimony.

⁷ 610 Pa. 8 per curiam order granting allowance of appeal on the following:

- a. Should not the trial court have had the discretion to permit Petitioner to present the testimony of a nationally recognized expert in the field of human memory, perception and recall where the sole evidence to establish his guilt was the testimony of a victim who was under extreme duress when assaulted at gunpoint by a stranger of another race?
- b. Should not the court permit expert scientific testimony, whether it be for the defense or prosecution, on how the mind works as long as such testimony has received general acceptance within the scientific community?

⁸ The Philadelphia District Attorney’s Office advocated for maintaining the prohibition.

43. Both witnesses had a limited opportunity to observe the perpetrators during the course of a high-stress, violent street crime. Significantly, Spellman does not match the descriptions of the perpetrator that witnesses initially gave to police. While the long delay between the crime and the in-court identifications (five-and-a-half months for Phillips, two-and-a-half years for Mathis) makes the identification less reliable.⁹

44. The CIU consulted with an expert in the field of eyewitness identification, Dr. Jennifer Dysart, PhD. (“Dr. Dysart”), who reviewed various materials related to this case, which are identified in her report. *See* Exhibit B. Dr. Dysart is a tenured professor at John Jay College of Criminal Justice of the City University of New York. She holds a PhD in Social Psychology from Queen’s University, Kingston, Ontario. She has been a researcher in the field of eyewitness identifications since 1998, and has been qualified as an expert witness in more than a dozen jurisdictions. Dr. Dysart has published more than two-dozen scholarly articles, book chapters, and law review articles in peer-reviewed publications, and has given more than 175 presentations (10 in Pennsylvania) attended by judges, lawyers, police officers, and investigators.

45. Given the wide breadth of Dr. Dysart’s professional experience, the CIU was extremely concerned to learn that Dr. Dysart had “never before seen a stranger eyewitness case where *no* out of court identification procedures were conducted with the witnesses,” (emphasis in original), and the CIU gives great weight to her conclusion that “there are legitimate reasons to be skeptical of the reliability of both witnesses who selected Ms. Spellman for the first time in these suggestive in-court proceedings”

46. Consistent with her field of study, Dr. Dysart approached this case by looking at the “estimator variables,” which are the variables that can decrease the reliability of an eyewitness

⁹ *See also* B. L. Cutler, S.D. Penrod, T.E. O’Rourke & T.K. Martens, *Unconfounding the effects of contextual cues in eyewitness identification accuracy*, 1 (2) *Social Behavior* 113 – 134 (1986).

identification that cannot be controlled by law enforcement, and the “system variables,” which are the variables that can be controlled by law enforcement.¹⁰

47. She identified three estimator variables and eight system variables that may have impacted the reliability of the eyewitness identifications.

48. Concerning the estimator variables, Dr. Dysart observed several factors that make the identifications in this case less reliable: the crimes themselves were of short duration; Mathis described her ability to observe, as “never saw faces;” and Phillips said she was “blind as a bat” and that the robbery took place in a “blink of an eye.” Additionally, there was likely a weapons-focus phenomenon due to the proximity of the handgun to Phillips’s face, while the perpetrator wore a disguise. Further, this was a high stress event, which negatively impacts the ability to accurately recall an event.

49. Both Mathis and Phillips likely had their memories of the incident contaminated by information that they received afterward. Memory contamination occurs when information learned after the original event alters an individual’s memories of that event. The record contains several junctures at which each witness’s memories might have been influenced by outside information, but no steps were taken to determine what contamination—if any—had occurred.

50. Both witnesses spoke with another witness immediately following the incident. In Mathis’s case, it was Celestine Bullock (“Bullock”). Phillips spoke with Andre Wooden (“Wooden”). It is also unclear from the record whether either witness saw any of the media coverage for this case that identified Combs and Spellman as the perpetrators between the time of the incident and the time they made their identifications. Dr. Dysart observes that Phillips’s changing description of the woman who robbed her—from 25-30 years old in her initial

¹⁰ Some of these include the *Biggers* factors, which were themselves based on the science of the time. *See* 409 U.S. at 199-200

description of police, to a “girl” at the time of the preliminary hearing—is consistent with someone who learned additional information from others after giving an initial description to police.

51. Second, Dr. Dysart noted that Wooden failed to identify Spellman as a perpetrator. Wooden, who told police that he had seen the two perpetrators in his store on the day of the incident, failed to appear at the first scheduled lineup, citing health issues. He then told the Commonwealth that he had seen photographs of Spellman and Combs on the news, and that he recognized Combs as the individual who came into his store on the day of the incident. He did not say that he recognized Spellman. Dr. Dysart describes this as a non-identification by Wooden, which is particularly significant given the suggestive context of the media coverage in which Wooden viewed Spellman’s picture.

52. An analysis of the system variables shows the identification testimony in this case was not treated as the important evidence it was, worthy of protection and preservation so that the parties, and ultimately the jury, could have the best possible information about the reliability of Mathis’ identification. There was a substantial mismatch between the description of the perpetrator and Spellman on important features that are not easily altered (e.g. weight and age). There were also substantial delays between the crime and the identification, which research has shown greatly increases the chances of a false identification. Further, individuals with weak or poor memories based on the negative effects of estimator variables, are more likely to be influenced by suggestive identification procedures.

53. Regarding the in-court identifications, Dr. Dysart wrote:

In summary, as stated above, I have never before seen a case where all of the identifying witnesses were asked to make their first identification attempt of the suspect in court at a hearing or at trial.

Dr. Dysart noted there is no record of pre-identification warnings or instructions before the in-court identification, which would have explicitly informed the witnesses that the perpetrator may not be present.¹¹ Further, after the identification occurred, there was post-identification feedback, which effectively caused the witness to alter their perception of their confidence in their identification, and caused them to believe their opportunity to observe was better than it actually was. This is exemplified by the cognitive dissonance displayed by Phillips, who, when confronted with the mismatch between Spellman's appearance and Phillips' description, argued that Spellman must have been wearing makeup to make her complexion seem darker than it actually is when she committed this crime.

54. The defense attorney in this case was incompetent for either not proceeding with the lineups for both Phillips and Mathis (or securing a concession from prosecutors that neither would make an in-court identification under the extremely suggestive circumstances that ultimately occurred in this case). The defense attorney is deceased and could not be interviewed, but his unavailability does not prohibit the CIU from concluding his decisions lacked a strategic basis. First, defense counsel treated the identifications by Mathis and Phillips discordantly, asking to suppress Mathis' identification mid-trial but not seeking to suppress Phillips's equally problematic identification. Moreover, his shifting arguments about whether he ever wanted a lineup—first, moving for a lineup for all witnesses, then cancelling the lineups, and finally, claiming he never asked for a lineup despite record evidence to the contrary—establish there was no planned strategy at work. Although prosecutors had the ability to move for a lineup, even over

¹¹ The Commonwealth notes that the defendant argues in her PCRA that Mathis received suggestive information before entering the courtroom to testify at the jury trial. The Commonwealth agrees an evidentiary hearing would be warranted on this claim, but asks the court, in the interest of judicial economy, to decide the matter on the other dispositive issues.

objection of the defense, they took a more cavalier path towards the handling of this evidence. This is inconsistent with the best-practices currently recognized,¹² and only exacerbated the Brady violation concerning the Mathis-Note discussed below.

The Purported Confessions are Unreliable

55. In assessing the voluntariness of a juvenile’s confession, courts consider the “juvenile’s youth, experience, comprehension, and the presence or absence of an interested adult.” *Commonwealth v. Williams*, 504 Pa. 511, 521 (1984) (discussing factors and abandoning the per se rule that applied a rebuttable presumption that a juvenile is incompetent to waive his constitutional rights without first having an opportunity to consult with an interested and informed adult). Here, informed, interested adults were at the PAB, but not present in the interrogation room

¹² The most recent guidelines on conducting reliable in-court identifications provided by experts in the field state the following:

[T]here is a common courtroom procedure known as an in-court identification (or a dock identification) in which an eyewitness on the stand is asked if she or he can identify the culprit in the courtroom. The defendant typically is sitting at the defense counsel table rather than embedded among known-innocent fillers who fit the description of the culprit. Hence, an in-court identification is closely analogous to a showup. In terms of suggestiveness, the in-court identification is arguably even more suggestive than a typical showup because it is clear to the witness that the defendant has already been indicted. Moreover, it is usually the case that the eyewitness has already identified the defendant in a precourt procedure, which means that the in-court identification is a repeated identification that goes directly against Recommendation 8 (e.g., avoid repeated identifications) [Recommendation 8 is: Repeating 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.]. And, **if the eyewitness has not already identified the defendant in a proper precourt procedure, the showup nature of an in-court identification should not be considered an acceptable alternative to a properly constructed and conducted lineup.** The low probative value of an in-court identification raises serious concerns that its prejudicial value exceeds its probative value.

Wells, et al., Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence, 44(1) *Law and Human Behavior* 3 – 36 (2020) (emphasis added).

when Detective Pitts interrogated Spellman for four hours. While Spellman was 17, she had no prior experience in the criminal justice system.

56. In addition to the concerns that Spellman's age and lack of support raise, Spellman's *confession* does not contain any of the hallmarks generally associated with a reliable confession.¹³

57. The reliability of a confession can be assessed by looking at whether the confession contains any information that was unknown to detectives at the time the confession was taken, but which was later confirmed through subsequent investigation.

58. Spellman's *confession* contained no facts that were not already known by investigators. By the time Spellman was being interviewed, homicide detectives had in their possession statements from Mathis and Phillips that described both robberies, as well as photographs and written descriptions of the scene of Greaves's murder.

59. Together, these sources contain nearly every discrete fact that was included in Spellman's *confession*. Those facts that are part of Spellman's *confession*, but not found in the sources available to detectives, can be inferred from information contained within those sources. The information contained in Spellman's *confession* also uses similar language to that found in Phillips's and Mathis's statements. Spellman's *confession* does not add any additional detail to the facts that were already known to detectives. Instead, it presents the facts in their barest possible form, without any extra details that would likely be known to the perpetrator.

60. For example: When asked to describe the gun that was used to kill Greaves, Spellman says: "[i]t was [a] black little gun." In the 75-483 she provided to police shortly after the incident, Phillips tells them the gun "was small and black."

¹³ Combs's *confession* also contains many of the shortcomings of Spellman's confession.

61. Similarly, when asked to describe Greaves's shooting, Spellman's *confession* says that, after Greaves was shot, Spellman and Combs "ran down the sidewalk and made a left." In her 75-483, Mathis told police that the two individuals she saw fleeing Greaves's house "ran up the 7900 block of Pickering and turned left."

62. Spellman's statement lacks the kind of significant new information that subsequent investigation could have potentially corroborated, and which would have increased the ability to assess the reliability of the *confession*.

63. None of the questions that the detectives recorded appear to be directed toward obtaining such information. For example, the murder weapon was never recovered. Yet Spellman was never asked what happened to the murder weapon, or where it came from in the first place. Further, no question was asked about the caliber or type of firearm (revolver or semiautomatic), when an answer might have been confirmed or contradicted by ballistic evidence.

64. Spellman's *confession* is less reliable because it lacks these corroborating details.

65. Combs's statement implicating Spellman is also unreliable.

66. Of particular concern is Combs' age at the time of this interrogation. He was fourteen years and eight months old. While witnesses fourteen and older are presumptively competent, courts have an obligation to conduct a searching judicial inquiry into the competency of a child witness under the age of 14. *Commonwealth v. Delbridge*, 859 A.2d 1254 (2004) (judicial competency evaluation necessary because child's memory is uniquely susceptible to falsely implanted suggestions, which may cause difficulty in child distinguishing facts when testifying); *see also Commonwealth v. Judd*, 897 A.2d 1224, 1229 (Pa. Super. 2006) (recognizing that "the age of fourteen is somewhat arbitrary" the concerns about competency become less relevant as a witness' age increases).

67. It is also troubling that Combs's *confession* uses a distinctive turn of a phrase that Combs purportedly used to describe Spellman, but which Detective Pitts would later use when he testified about Combs's mother. When asked about robbing Phillips, Combs purportedly said that Spellman was "the type of person that does what she wants." At Combs's juvenile adjudication, while testifying during a motion to suppress Combs's statement, Detective Pitts described Combs's mother the same way, saying "She was – she was – well you'll meet his mom. She did what she wanted to do." (N.T. 09/20/2011 at 130).

68. Combs's *confession* also contains information that was contradicted by subsequent investigation. In his *confession*, Combs says that Spellman used Phillips's stolen cell phone to make calls after she robbed Phillips. According to Spellman's *confession*, police showed Spellman records taken from Phillips's phone and asked whether she had used that phone to make any calls. The *confession* reflects that Spellman denied making any calls with Phillips's phone.

69. Cell carrier records show three outgoing calls from Phillips' phone made after it was stolen, which police investigated by using a database, which yielded information that the calls were made to two individuals who had no known connection to Spellman.

70. Combs testified at trial that Spellman made several calls using Phillips's phone, but the Commonwealth subsequently introduced Spellman's *confession* as substantive evidence—including the portion in which she denies making any calls on Phillips's phone—and made no effort to corroborate Combs's contrary testimony afterward.¹⁴

¹⁴ The Commonwealth did not introduce these cell carrier records into evidence, nor was any testimony elicited about the police investigation into the phone numbers listed in the records, which is consistent with a recognition that the information was not corroborative.

71. In a recent interview,¹⁵ Combs explained why he signed a false confession and testified the way he did against Spellman. Combs's now says that Detective Pitts employed coercive interrogation techniques. This information is similar to the prior sustained IA findings, which were withheld from the defense. The nexus between these two facts is more fully discussed below.

THE COMMONWEALTH VIOLATED BRADY

72. The Commonwealth has an obligation to disclose information that is favorable to the defendant and material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). This obligation requires the Commonwealth to disclose information that is exculpatory as well as impeaching. *Giglio v. U.S.*, 405 U.S. 150 (1972); *Smith v. Cain*, 565 U.S. 73 (2012).

73. It also extends to evidence that could be used to “attack . . . the thoroughness and even the good faith of the investigation.” *Kyles v. Whitley*, 514 U.S. 419, 445 (1995). It encompasses information possessed by law enforcement in the same jurisdiction as the prosecutors. *Id.* at 437-38; *Commonwealth v. Burke*, 781 A.2d 1136, 1142 (2001).

74. A petitioner must be afforded a new trial when the evidence is: 1) favorable to the accused; 2) suppressed by the Commonwealth; and 3) material to either guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 281 – 82 (1999).

75. Suppressed evidence is material when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Cone v. Bell*, 556 U.S. 449, 470 (2009).

¹⁵ This recantation from Combs could represent a stand-alone claim of new evidence, the factual basis of which is contained in the Joint Appendix of Stipulations. The Commonwealth would not object to an amendment to the PCRA so that the petitioner's claims conform to the evidence in the stipulations.

76. A reasonable probability does not mean the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Kyles*, 514 U.S. at 434.

77. Additionally, “[t]he question under *Brady* is whether ‘disclosure of the suppressed evidence to *competent* counsel would have made a different result reasonably probable.’” *Wilson v. Beard*, 589 F.3d 651, 664 (quoting *Kyles*, 514 U.S. at 441) (emphasis in original).

78. Pennsylvania law is clear that “admissibility at trial is not a prerequisite to a determination of materiality under *Brady*.” *Commonwealth v. Willis*, 616 Pa. 48, 84 (2012). Rather, non-disclosed evidence is material where it “adversely affect[s] the presentation of the defense at trial . . . such that the result of the proceeding would have been different.” *Id.* Put another way, inadmissible evidence may lead “to concrete, derivative evidence” that is “both admissible and outcome-changing” and therefore material under *Brady*. *Willis*, 616 Pa. at 91 (Castille, C.J., concurring).¹⁶ The Commonwealth’s obligation to disclose applies to impeaching or exculpatory material in police personnel files. *U.S. v. Dent*, 149 F. 3d 180, 191 (1998); accord *Commonwealth v. Burke*, 566 Pa. 402, 413 (2001) (“The prosecution’s *Brady* obligation clearly extends to exculpatory evidence in the files of police agencies of the same government bringing the prosecution.”).

79. This obligation applies even if the investigation has not concluded. *Shands*, 487 A.2d at 978. On the other hand, “pure speculation that exculpatory information might exist [in

¹⁶ Admissibility is a separate question from the Commonwealth’s obligation to disclose. Trial courts have discretion based on the individual facts of a case to determine whether evidence of police misconduct is admissible. Compare *Commonwealth v. Shands*, 487 A.2d 973 (Pa. Super. 1985) (collecting cases with an evidentiary nexus between the police misconduct and the facts of the case, and finding defendant should have been permitted to impeach an officer with the fact that he was part of a group of police officers who were racially biased, made false arrests, and perjured themselves in criminal prosecutions) with *Commonwealth v. Bozyk*, 987 A.2d 753, 757 (Pa. Super 2009) (finding prior police misconduct inadmissible because it was not related to defendant’s underlying criminal charge).

another agency's investigative file] is insufficient to sustain a *Brady* claim." *U.S. v. Georgiou*, 777 F.3d 125, 142 (3d Cir. 2015). While every "fruitless lead" need not be disclosed to comply with *Brady*, "documents containing internal markers of credibility" must be disclosed where they "could have been used to impeach the police investigation." *Dennis v. Penn. Dept. Corr.*, 834 F.3d 263, 279 (3d Cir. 2016).

80. When more than one piece of evidence has been suppressed, the potential impact of all the evidence must be viewed cumulatively to determine whether the evidence is material. *See Kyles*, 514 U.S. at 436.

The Mathis Note

81. The CIU discovered a hand-written note in the DAO's trial file, which memorializes a September 13, 2010 call from Mathis and reads: "Got my letter. Never Saw faces. Didn't see the face. Did not see a picture."

82. Mathis did not make an identification of Spellman until she appeared face-to-face with Spellman at the bar of the court, during the jury trial. The trial prosecutor stated at the time that he did not know whether Mathis would make an in-court identification, but nonetheless asked a question that was in itself suggestive.

83. Despite Mathis's in-court identification being extremely and unnecessarily suggestive, Judge Minehart did not suppress the identification because he found that Mathis had an independent basis for identifying Spellman. But, Judge Minehart did not know about the Mathis Note.

84. After the motion was denied and the trial resumed, Spellman's attorney cross-examined Mathis about the 75-483 police took from her on the day of the incident, in which she said she did not see the fleeing woman's face. Mathis now claimed that she told police she had

seen both perpetrator's faces, but that whoever interviewed her incorrectly omitted it from the 483 she signed. The jurors were left with Mathis's explanation for her inconsistent testimony being unimpeached. However, the note the CIU discovered in the DAO trial file establishes that shortly before being instructed to appear at an in-person lineup identification procedure, Mathis told prosecutors that she "Never saw faces. Didn't see the face. Did not see a picture." This statement substantially impeaches Mathis's testimony about her identification, and corroborates her statement to police in which she also said she didn't see the perpetrator's face.

85. Moreover, it is exculpatory because it establishes that she did not have an ability to observe the perpetrator's faces, the first *Biggers* factor. If the jury knew this, it would have been clear the identification was the product of the suggestive in-court identification procedure, and not an independent recollection of the perpetrator's face from two-and-a-half years prior.

86. In *Smith v. Cain*, the United States Supreme Court found that a suppressed note in a police file which memorialized that the identifying witness "could not ID anyone because [he] couldn't see faces" was material, despite the witness's other contradictory statements that he could identify one perpetrator but not others. 565 U.S. 73, 76 (2012). Unlike this case, the only evidence against the defendant in *Cain* was the identification. Nonetheless, *Cain* is persuasive.

87. The Mathis Note's impact likely would have been significant because the accuracy of Mathis's identification was questionable for reasons over and above its suggestiveness. Mathis' description of the perpetrator taken shortly after the crime does not match Spellman's appearance. *Cf. Manson v. Brathwaite*, 432 U.S. 98 (1977 (reliability depends in part on the accuracy of the prior description); *Neil v. Biggers*, 409 U.S. 188 (1972) (reliability of identification following impermissible suggestive show up depends on accuracy of witness' prior description). Further,

Mathis was susceptible to the suggestive in-court identification procedure because of the deleterious effect the event had on her memory, as identified by Dr. Dysart.¹⁷

88. The Commonwealth also cannot ignore that when the Superior Court addressed the defense argument that this identification was a discovery violation and trial by ambush, the Superior Court denied the claim, observing, “we share Spellman’s skepticism of the prosecutor’s claim that he was unaware of what Mathis’s answer would be when he asked her if the fleeing woman was in the courtroom.” *Commonwealth v. Spellman*, No. 3781 EDA 2015, 2017 WL 75875 at *3 (Pa. Super. Ct. Jan. 8, 2017).

Prior Sustained IA Findings

89. Detective Pitts’ IA file contains conclusions of the PPD’s own internal command finding that Detective Pitts abused his authority. It also implicitly and explicitly concluded that the formal written interview that Detective Pitts gave to IA was not credible. These are “internal markers of credibility,” making the file subject to the Commonwealth’s *Brady* obligations, regardless of the fact that the PBI administrative process allowed Detective Pitts to avoid punishment. *See Georgiou*, 777 F.3d at 142.

90. The first two sustained findings predate Spellman’s 2013 trial, while the third investigation related to an incident that occurred on October 2, 2013 and concluded in September 2014 (after Spellman’s trial, but before the court’s 1925 (a) opinion on February 16, 2016).¹⁸

91. The first sustained finding involved Detective Pitts detaining an 84-year-old man without justification, in order to induce the 84-year-old man’s grandson to appear in court. The second sustained IA finding involved Detective Pitts physically assaulting his then-wife, after

¹⁷ This susceptibility is additionally evidenced by the fact that despite failing to identify Combs at a pretrial lineup, she nonetheless identified him during his juvenile adjudicatory hearing.

¹⁸ The long delay between the end of trial and the direct appeal was the result of trial counsel’s ineffective assistance, which this Court found during earlier litigation.

which he self-inflicted an injury and blamed his wife in order to “buy time” to think about how he would handle his domestic violence criminal act, upon which he made false allegations against his then-wife, who was also a law enforcement officer. The third sustained IA finding involves the detention of a witness for 47 hours.

Pitts’s Prosecution

92. Detective Pitts has been charged criminally with perjury and obstruction for testifying falsely on May 22, 2013 and May 29, 2013, and for coercing a confession from Obina Onyiah on November 8, 2010. Detective Pitts had actual knowledge of his misconduct, which he committed while working as a Philadelphia Police Department Homicide Detective. Consequently, the Commonwealth’s obligations under *Kyles* applies.

93. As with the third of Detective Pitts’s sustained IA files, this incident occurred prior to the Superior Court issuing an opinion in Spellman’s case on February 16, 2016.

94. In assessing the significance to be given the undisclosed material, the Commonwealth cannot ignore the findings of the Honorable M. Teresa Sarmina in *Commonwealth v. Dwayne Thorpe* at CP-51-CR-0011433-2008. After days of testimony concerning Detective Pitts’s interrogation habits, Judge Sarmina found that:

. . . distinct patterns of behavior described by the witnesses throughout the arc of Detective Pitts’ career rose to the level of habit evidence. Rather than supporting the value-laden conclusion that Detective Pitts has a general propensity of “abusiveness” toward uncooperative or unhelpful witnesses and suspects, this Court found that, when he is operating under the apparent belief that an interrogation subject is untruthful or withholding evidence, Detective Pitts habitually (1) makes unreasonable threats of imprisonment or threats targeting an interrogation subject’s specific vulnerabilities, such as family members, children, or housing; (2) employs physical abuse; (3) prolongs detentions of interrogation subjects to an unreasonable degree and without probable cause; and,

(4) does not permit witnesses or suspects to review or correct statements before signing them. The witnesses' testimony, described *supra*, established that Detective Pitts' conduct with systematic, as he consistently applied two or more of the four distinct tactics described when a witness asserted that he or she knew nothing about a given incident or failed to answer questions to Detective Pitts' apparent satisfaction. The timespan over which the incidents described occurred, comprising a majority of Detective Pitts' career in the Homicide Unit, established that these behaviors were continuous.

Commonwealth v. Thorpe, CP-51-CRT-00011433-2008. Applying this evidence to the testimony of a recanting witness at trial, Judge Sarmina found it "rendered [the witness's] mere signature on the statement an insufficient indicia of reliability and trustworthiness to comply with the *Brady/Lively* requirement" to make the statement admissible as substantive evidence against the defendant. *Id.*

Spellman's confession

95. The sustained IA findings against Detective Pitts could have been used to support Spellman's claim that her confession was false and that she was coerced into signing it by the detectives who interrogated her. The first sustained finding involved Detective Pitts detaining an 84-year-old man for more than six hours without justification. This is relevant to the line of questioning that Spellman pursued during her motion to suppress, which suggested that Detective Pitts may have been responsible for taking Stafford's cell phone while Stafford was trying to contact a lawyer. *See* N.T. 02/13/2013a at 82. It also would have been used to impeach Detective Pitts's testimony that Stafford never tried to see his daughter or otherwise intervene while detectives were interrogating her. *See id.* at 80 – 81.

96. The second sustained IA finding involved the physical assault of Detective Pitts' then-wife. This finding is material to Detective Pitts' overall credibility as a witness because IA

credited Officer Dotson’s statement that Detective Pitts hit himself in the face in order to “buy time” over Detective Pitts’s allegation that Officer Dotson struck him. This finding is also significant because Spellman has alleged that Detective Pitts hit her in the face and screamed at her during the interrogation. The Commonwealth pre-empted any questioning about Detective Pitts’s potential abuse during Spellman’s motion to suppress, eliciting testimony from Detective Glenn that neither he nor any other Homicide detective ever struck Spellman. N.T. 02/13/2013 at 35 – 36. The defense did very little to respond to this testimony. *See id.* at 40 – 50. Had Detective Pitts’s sustained IA findings been disclosed, competent defense counsel could have rebutted this testimony.

97. The third sustained IA finding involves the detention of a witness for 47 hours, without cause. The length of the detention, along with the other coercive techniques that Detective Pitts employed, would have been used to attack the Commonwealth’s testimony that the detectives interrogating Spellman never raised their voices or struck her. Detective Pitts’s treatment of Al-Rasul demonstrated his willingness to rely on extreme interrogation techniques—even when questioning a potential witness, let alone a suspect.

Combs’s statement

98. Detective Pitts testified at Spellman’s Motion to Suppress that he took a statement from Combs while his parent was in the room. N.T. 2/13/13 at 80. Information about Detective Pitts’ misconduct, as well as newly discovered evidence in the form of Combs’s recantation, would have undercut the credibility of this testimony.

99. Von combs unsuccessfully contested the voluntariness of his confession and was placed at a juvenile facility. He was brought to court and compelled to testify against Spellman. The Commonwealth obtained court-ordered use, and derivative-use immunity pursuant to 42

Pa.C.S. §5947 (c). Essentially, the Court ordered that he must testify under threat of contempt, and that his testimony could not be used against him, except for a perjury or false swearing prosecution. He was not promised transactional immunity, which would have protected him from the threat of prosecution if his testimony at trial deviated from his prior *confession*.

100. By the time Combs appeared at Spellman’s trial, he had been adjudicated based on the statement that Detective Pitts obtained, and was serving an indeterminate detention based on the court’s continued finding that he was in need of “treatment, rehabilitation, and supervision.” He was then compelled to testify under circumstances where the only way he could face additional charges was if his testimony deviated from his prior statement to police. When Combs spoke with the CIU he explained feeling like he just had to fight his case based on his statement to Detective Pitts, even though it wasn’t true.

When Viewed Separately and Cumulatively, the Suppressed Information is Material

101. Considered separately and cumulatively, the five pieces of information—the three sustained IA findings, the misconduct for which he is facing prosecution, and the note—raise serious questions about Spellman’s identity as the perpetrator. Spellman was linked to the crimes by her own *confession* and the testimony of her alleged child co-conspirator Combs, as well as the testimony of two eyewitnesses.

102. The materiality of the suppressed information in this case must be assessed in relation to the strength of the evidence that the Commonwealth used to convict. In light of the facts of this case viewed through the lens of Dr. Dysart’s expert opinion, which is consistent with caselaw, the identification testimony of Mathis and Phillips carries little weight.

103. The Mathis note further substantially undermines this identification evidence.

104. The remaining evidence is the product of custodial interrogations of two children. The information about Pitts' misconduct is significant. Based on the information provided by Combs, Pitts misconduct has a direct nexus to the evidence in this case. Taken together and individually, this information would have allowed a competent defense attorney to challenge the reliability and accuracy of these statements.

105. For these reasons, if this information had been disclosed to the defense, there is a reasonable likelihood that the outcome of the trial would have been different.

106. Spellman is constitutionally entitled to a new trial.

The Petitioner's Ineffective Assistance of Counsel Claim

107. The Commonwealth agrees Spellman is entitled to an evidentiary hearing on her claims of ineffective assistance for failure to present her alibi. For the reasons stated above, the Commonwealth asks the Court to decide the *Brady* claims first, as it would render the alibi claim moot.¹⁹

108. However, the CIU is troubled by defense counsel's incompetent handling of the eyewitness identifications in this case. The CIU is also troubled by defense counsel's ineffective failure to pursue a direct appeal.

109. While the decision not to call an alibi witness will generally be presumed to be effective, there are additional concerns here. Prior to trial, the Commonwealth provided defense counsel with phone records related to Spellman's phone, which establish a phone call between Spellman's phone and her then-girlfriend. Defense counsel likely did not appreciate the

¹⁹ While the merits of this potentially moot claims may not be resolved in these proceedings, their existence is not surprising. Most documented wrongful convictions are the result of multiple constitutional and systems-level errors. *See generally* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press 2012) (discussing the cases of the first 250 wrongfully convicted people exonerated by DNA testing and highlighting that such cases generally involve numerous investigatory and trial errors).

significance of this records, because there is no indication that defense counsel considered using them at trial. The trial file contains no correspondence from defense counsel about these records such as requests to stipulate to their authenticity/custodian of records, or identification of a custodian as a possible witness at trial. It appears that post-conviction counsel was first to discover the significance of these records when the CIU made the file available as discovery during this PCRA.

110. A failure to investigate will generally not be deemed a strategic decision, unless the failure was itself reasonable under the circumstances. *See Commonwealth v. Malloy*, 856 A.2d 767, 784 - 85 (Pa. 2004) (finding that trial counsel’s failure to investigate potential mitigation evidence in a death penalty case was unreasonable because, although the attorney presented some mitigating evidence, he failed to pursue other leads as “a result of simply inattention.” *Id.* at 785.). That does not appear to be the case here, where the evidence was reliable, having been obtained by the Commonwealth from a telecommunications company, and corroborative of Spellman’s proffered alibi, which otherwise relied on the testimony of family. This sort of corroborative record causes alibi testimony to carry greater weight. To the extent the court requires further information, the Commonwealth asks for the opportunity to provide additional information responsive to this claim.

CONCLUSION

111. After considering this case with the knowledge of Pitts' serious misconduct, interviewing the Commonwealth's key trial witness who now describes being coerced by Pitts when he was a child and considering the extremely unreliable eyewitness identifications, the Commonwealth does not have confidence in this verdict. The Commonwealth asks the Court to grant the petition and order a new trial.

Respectfully Submitted,

LAWRENCE S. KRASNER
District Attorney of Philadelphia

/s/ Graham Sternberg
Assistant District Attorney
Conviction Integrity Unit

/s/ Michael Garmisa
Assistant District Attorney
Supervisor, Conviction Integrity Unit

Date: June 24, 2022

VERIFICATION

The facts above set forth are true and correct to the best of the undersigned knowledge, information and belief. I understand the statements herein are made subject to the penalties of 18 Pa C.S. §4904 (relating to unsworn falsification to authorities).

Respectfully submitted,

/s/ Michael Garmisa

Michael Garmisa (Pa. Bar 203708)
Assistant District Attorney, Supervisor
Conviction Integrity Unit
Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
(215) 686-8724

/s/ Graham Sternberg

Graham Sternberg (Pa. Bar 329468)
Assistant District Attorney

CERTIFICATE OF SERVICE

I, Graham Sternberg, Assistant District Attorney, hereby certify that a true and correct copy of the foregoing Respondent Commonwealth's Answer to PCRA Petition was served on June 24, 2022, to the parties indicated below via email:

Todd M. Mosser, Esq.
Mosser Legal, PLLC
448 N. 10th Street, Suite 502
Philadelphia, PA 19123
todd@mosserlegal.com

/s/ Graham Sternberg
Assistant District Attorney
Conviction Integrity Unit

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION


IN RE: : MISC. NO. 0001458-2021
: :
THE THIRTY-FIRST COUNTY : :
: :
INVESTIGATING GRAND JURY : NOTICE C-1

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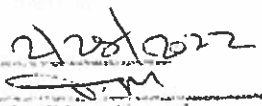
ORDER ACCEPTING PRESENTMENT NO. 2

1. The Court finds Presentment No. 2 of the Thirty-First Philadelphia Investigating Grand Jury is within the authority of said Grand Jury and is in accordance with the provisions of the Investigating Grand Jury Act, 42 Pa.C.S. § 4541, *et seq.* Accordingly, this Presentment is accepted by the Court.
 2. The County for conducting the trial of all charges pursuant to this Presentment shall be Philadelphia County.
 3. The District Attorney of Philadelphia, or his designee, is hereby authorized to prosecute as recommended in this Presentment by instituting appropriate criminal proceedings in the aforesaid County.
- SO ORDERED this 28th day of February, 2022.

BY THE COURT



MIA R. PEREZ
Supervising Judge
Thirty-First County Investigating Grand Jury

I HEREBY CERTIFY the foregoing to be
a true and correct copy of the original
order as filed in this
office.
Date: 2/28/22


Active Criminal Records
Criminal Justice Court Clerk
First Judicial District of Pa.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
TRIAL DIVISION**

IN RE: : **MISC. NO. 0001458-2021**
: :
THE THIRTY-FIRST COUNTY : :
: :
INVESTIGATING GRAND JURY : **NOTICE C-1**

TO THE HONORABLE MIA R. PEREZ, SUPERVISING JUDGE:

PRESENTMENT NO. 2

We, the Thirty-First County Investigating Grand Jury, were impaneled pursuant to the Investigating Grand Jury Act, 42 Pa.C.S. § 4541 *et seq.*, and have been charged by the Court to investigate the facts and circumstances surrounding the potential criminal acts committed by Detective James Pitts of the Philadelphia Police Department.

SUMMARY OF THE GRAND JURY'S FINDINGS

INTRODUCTION

1. On May 4, 2021, a Philadelphia Common Pleas Judge signed orders that vacated Obina Onyiah's ("Onyiah") 2013 homicide conviction, granted him a new trial and then dismissed all related charges against him. The orders were signed after judicial findings were made that Onyiah was likely innocent of the crimes for which he had been convicted and sentenced to life without parole. At that time, Onyiah had already been incarcerated for eleven years.

2. More specifically, Onyiah was exonerated of his conviction for an October 2010 robbery and homicide, in part because of a Philadelphia Police Department ("PPD") Homicide detective's involvement in the investigation.

3. During the original police investigation of the crime and Onyiah's ensuing criminal trial, Homicide Detective James Pitts ("Detective Pitts") not only obtained Onyiah's purported confession to the crime, he also served as a critical witness for the Commonwealth at trial, allowing the Commonwealth to introduce several important pieces of evidence against Onyiah.

4. During his trial in 2013, Onyiah argued unsuccessfully that the purported confession obtained by Detective Pitts had been physically coerced, making it both involuntary and illegal.

5. Later, during post-conviction proceedings initiated by Onyiah, new scientific evidence provided by photogrammetry experts demonstrated the falseness of Onyiah's purported confession.

6. Photogrammetry is the science of obtaining reliable measurements and information about physical objects and the environment through the process of recording, measuring, and interpreting photographic images.

7. The photogrammetry reports submitted by two different experts showed that Onyiah could not have been the second assailant that witnesses to the crime described. While Onyiah is 6'3" tall, the second assailant, measured from the surveillance video recovered from the crime, is no taller than 5'11". In fact, because the second assailant is wearing a hat in the video, both experts agreed the second assailant's true height is likely shorter than 5'11".

8. This new scientific evidence, in conjunction with the District Attorney's Office's Conviction Integrity Unit's ("CIU") investigation into Detective Pitts' conduct, established that Onyiah's purported confession was, in fact, false.

9. This Grand Jury has investigated and independently examined evidence to determine how this happened, and whether criminal acts were committed during this miscarriage of justice.

10. While many shortcomings in the criminal legal system contributed to Onyiah's wrongful conviction, one stands apart because it was the result of intentional and knowing criminal conduct.

11. At bottom, this Grand Jury finds that Onyiah's wrongful conviction occurred because Detective Pitts physically coerced Onyiah during the 2010 interrogation, and made materially false statements about that interrogation while testifying under oath in his official capacity as an employee of the PPD.

12. As a result, this Grand Jury recommends Detective Pitts be prosecuted for perjury and obstructing the administration of law or other government function.

CRIMINAL CONDUCT COMMITTED BY DETECTIVE PITTS SUBJECT TO PROSECUTION

13. The Grand Jury finds that Onyiah gave a false confession to police because he was physically assaulted by Detective Pitts.

14. Although this physical assault was a criminal act, committed without lawful justification and an abuse of Detective Pitts' official authority, the statute of limitations has expired for assault and official oppression. As a result, the Grand Jury is constrained to only recommend that the Commonwealth charge Detective Pitts for his acts of obstructing the administration of law when he assaulting Onyiah without justification during an interrogation.

15. The Grand Jury also recommends charges for Detective Pitts' subsequent illegal acts of lying under oath during two related judicial proceedings: First, during a pretrial motion in which Onyiah's defense counsel challenged the admissibility of Onyiah's purported confession as the product of Detective Pitts' unconstitutional and illegal physical coercion. Second, during Onyiah's jury trial. In both instances, Detective Pitts, knowing that his sworn testimony was false, affirmatively and unequivocally denied touching Onyiah during this investigation.

DETECTIVE PITTS' FALSE TESTIMONY DURING ONYIAH'S HOMICIDE PROSECUTION

16. On May 22, 2013, Detective Pitts was called by the Commonwealth to testify under oath at a pretrial hearing for a motion brought by defense counsel to suppress Onyiah's statement as being taken in violation of Onyiah's constitutional rights.

17. At that hearing, Detective Pitts testified about the circumstances of obtaining Onyiah's purported confession. On cross-examination, Pitts testified as follows:

Q: Sir, would it be fair to say that you with your hand hit Mr. Onyiah at least six times on his chest?

A: I never touched your client.

5/22/2013 N.T. at 88.

18. On May 29, 2013, Detective Pitts was called by the Commonwealth to testify under oath at a jury trial charging Onyiah with murder. At the trial, Onyiah's defense attorney questioned Detective Pitts about the circumstances of his interrogation of Onyiah as follows:

Q: Now, you stated earlier that there was – you never touched this man at all.

A: Yes.

Q: Sir, I am going to ask you a direct question. Did you ever hit him on his chest?

A: No, sir.

Q: Did you ever grab his head and put it down between his legs?

A: No, sir.

5/29/2013 N.T. at 103-04.

CRIMES COMMITTED IN OFFICIAL CAPACITY

19. Detective Pitts became a police officer in 1996 and was promoted to detective in 1999. He joined the PPD Homicide Unit as a detective in July 2006. He remained active in that unit throughout Onyiah's 2013 trial. Although he was administratively reassigned, Detective Pitts remains a PPD employee.

20. This Grand Jury finds that Detective Pitts was acting within his official capacity as a PPD employee when he committed these crimes.

THE ORIGINAL CRIMINAL INVESTIGATION INTO THE 2010 ROBBERY AND HOMICIDE

21. On October 21, 2010, William Glatz ("Glatz"), Margaret Colbridge ("Colbridge"), Eric Stuess ("Stuess"), and Paul Brewington ("Brewington") were inside Glatz Jewelry Store in the Northeast section of Philadelphia when two men attempted to commit a gunpoint robbery in the store. A shootout occurred in which one of the perpetrators shot and murdered Glatz, while Glatz shot and killed one of the perpetrators. That perpetrator was later identified as Kevin Turner, who had escaped from the Philadelphia County Prison, Curran-Frumhold Correctional Facility ("CFCF") nine days prior.

22. The second perpetrator fled the store, chasing after one of the victims before the shooting began, and managed to escape both injury and apprehension.

23. According to eyewitness accounts, there may have been a third perpetrator waiting outside in a nearby car who acted as the getaway driver. Like the second perpetrator, he managed to escape injury and apprehension.

24. Detective#1, known to this Grand Jury, was the lead investigator assigned to the case. He died before Onyiah's case went to trial. He was therefore unavailable to testify at that trial, and before this Grand Jury. Detective#1 was present for the processing of the crime scene. However, the majority of the witness interviews were conducted by other detectives, and the majority of the search warrants were obtained by other detectives. Significantly for this Grand Jury, Onyiah identified Detective Pitts as the person who assaulted him, offering a description of Detective Pitts "...six-three, more chubby build, he has a big, big keloid on the back of his neck." Detective#1 did not match that description.

25. On the day of the murder, the police had no leads to develop or identify a suspect for the second perpetrator who escaped. However, eyewitnesses provided the following descriptions:

26. Colbridge described the second perpetrator as a Black male, around 5'7", and approximately sixteen to twenty years old with a "very slight" build.

27. Stiess similarly described the second perpetrator as a "Black guy, early twenties, light skin, about 5'8", thin build."

28. Brewington described the second perpetrator as a Black male in his twenties with a "younger complexion," around 5'7"-5'8" in height, and weighing about 150-160lbs.

29. PPD homicide detectives recovered surveillance video from three security cameras inside the store.

30. With no leads, PPD quickly sought help from the community, releasing a still photograph and compilation of the surveillance video to the media in hopes of identifying the second perpetrator. On October 23, 2010, the *Philadelphia Inquirer* ran a story on its front-page, above-the-fold, which included a still of the unidentified second perpetrator. Other media outlets also covered the crime.

COMMUNITY OUTREACH LEADS TO THE FIRST IDENTIFIED SUSPECT

31. On October 23, 2010, an individual, known to this Grand Jury, called the police and said her ex-boyfriend, Suspect#1, looked like the person in the still photo.

32. Suspect#1 was taken into custody on unrelated charges on October 22, 2010, and his height was recorded as 5'9". Based on this tip, Detective Pitts conducted identification procedures in which Suspect#1's photograph was placed among an array of photographs of seven other individuals. This photo array was separately shown to the victims to determine whether they recognized Suspect#1 as the perpetrator.

33. Both Stuess and Colbridge identified Suspect#1 as the perpetrator.

34. Additionally, being 5'9", Suspect#1 matches the height description provided by all of the victims, and as explained below, he is within the height range determined by experts who have analyzed the surveillance video of the crime.

35. At the time, police knew Suspect#1 was on probation for a robbery and had a criminal record that included multiple arrests for crimes including attempted burglary, robbery, and theft of a motor vehicle. (Since then, Suspect#1 has been arrested on multiple occasions. He is currently being prosecuted for separate incidents: one charging aggravated assault, possessing instrument of crime, and related offenses; and the other charging rape by forcible compulsion, intimidating a witness, and related offenses.)

36. Despite the positive identifications and relevant criminal history, the police conducted no further investigation of Suspect#1.

COMMUNITY OUTREACH ALSO LEADS TO ONYIAH BECOMING THE SECOND IDENTIFIED SUSPECT

37. After Detective Pitts obtained the positive identifications regarding Suspect#1, an incarcerated individual named Donnell Cheek—who was himself awaiting trial on multiple felonies—contacted PPD twice, claiming to have information on the murder. First on October 25, 2010 through his girlfriend, and again on November 3, 2010 through the federal public defender who was representing him. Detectives first spoke with Cheek on November 4, 2010.

38. Onyiah and Cheek met in 1997 when they attended the same middle school. Later, the two committed a series of unarmed bank robberies in which they passed notes to the tellers, and for which they were both apprehended and prosecuted years prior to this incident. During that prosecution, Onyiah cooperated with law enforcement against Cheek and accepted responsibility for his own role in the robberies, pleading guilty to the crimes.

39. In reporting that the still photograph released to the press by police looked like Onyiah, Cheek hoped to cooperate against Onyiah in exchange for a benefit in his unrelated open criminal case. (Cheek would later be called as a witness in Onyiah's jury trial, but would refuse to testify until a federal prosecutor promised to petition the U.S. courts for a further sentencing reduction, in consideration for Cheek's testimony against Onyiah.)

40. Instead of first conducting a photo-array identification procedure to see if the victims recognized Onyiah, as they had for Suspect#1, PPD set out to locate and question Onyiah.

41. In its efforts to locate Onyiah, PPD contacted Onyiah's sister, who in turn agreed to assist the police by arranging to meet Onyiah at the McDonald's parking lot at Bridge and Pratt Streets. When Onyiah arrived, he was taken into custody by police, handcuffed, and transported to PPD's Homicide Unit in the Police Administration Building ("PAB") at Eighth and Race Streets.

42. During police transport, Onyiah showed police his girlfriend's residence where he had been earlier in the day. PPD dispatched other officers to that residence and transported several people known to the Grand Jury to the Homicide Unit, including Witness#1, Witness#2, and Witness#3.

2021 TESTIMONY AND EVIDENCE PRESENTED TO THIS GRAND JURY

43. At the Homicide Unit, Onyiah was placed in a small interrogation room.

44. No audio or video recordings were made of the interrogation of Onyiah.

45. This Grand Jury heard the testimony of several detectives and supervising members of the PPD Homicide Unit, some of which is described below.

DETECTIVE#2

46. Detective#2 appeared before the Grand Jury and testified. He was represented by Fraternal Order of Police ("FOP") Attorney#1.

47. Detective#2 testified that he spoke with Onyiah at the Homicide Unit and conducted a biographical interview, memorialized on form 75-229 (“75-229”). Detective#2 explained that he always completed a 75-229 because you obtain information from witnesses by doing so.

48. Detective #2 did not complete any additional paperwork pertinent to this investigation.

49. Detective#2 did not recall why he did not conduct the formal interview of Onyiah.

50. Detective#2 did not recall why Detective#1, the assigned investigator, did not interview Onyiah.

51. Detective#2 did not recall what happened between the time that he conducted the 75-229 and the time that Detective Pitts and another detective, Detective#3, interviewed Onyiah. However, Detective#2 testified that if a suspect denied involvement in the crime—such as saying “I didn’t do this robbery, I didn’t do that murder”—he would not memorialize it in a formal interview record, form 75-483 (“75-483”). Detective#2 would determine in his mind that the suspect was not cooperating, and at that point would just leave the interview room.

52. Detective#2 also testified there are situations where “sometimes the suspect initiates something later on,” and agreed that in those situations, another detective could come in and interview the suspect.

53. At his request, Detective#2 was provided with police paperwork to review— specifically, the Activity Sheets for the Glatz murder investigation. After having reviewed those documents, he still did not have a recollection of what occurred between the time that he did the 75-229 and the time Detective Pitts and Detective#3 conducted the written 75-483 interview.

54. Detective#2 agreed that, although he did not have an independent recollection of what happened, it was possible that Onyiah was saying he did not commit the crime.

55. When asked about Detective Pitts, Detective#2 agreed that Detective Pitts would “confront a suspect with facts he knew about the investigation from other witnesses.” Detective#2 agreed the interview would be such that Detective Pitts would be “sort of saying, if the person wasn’t telling the truth, here is what we know happened.” Detective#2 has seen Detective Pitts do this during an interview.

DETECTIVE#3

56. The Grand Jury heard testimony from Detective#3, who was partnered with Detective Pitts for several years, including 2010. Detective#3 testified that he was friends with Detective Pitts outside of work, and that on some occasions they saw each other socially.

57. Detective#3 was represented by FOP Attorney#1.

58. Detective#3’s name appears along with Detective Pitts’ on the 75-483 containing Onyiah’s false confession.

59. Detective#3 agreed that the procedure for conducting witness interviews at the Homicide Unit was such that there might be an informal verbal interview with the witness to find out what they saw and knew, followed by a formal written interview on a 75-483.

60. Detective#3 agreed that during an informal interview, a second interviewing detective might step out of the room to check information while the first interviewing detective continued on with questioning.

61. Further, there were situations where a formal 75-483 was being conducted in the sergeant’s office and Detective#3 stepped away from the interview while it continued outside of his presence, and where the fact that Detective#3 left the interview was not memorialized.

62. Detective#3 testified that when he learned he was being subpoenaed to appear before a grand jury, he assumed the Grand Jury was investigating Detective Pitts, because Detective Pitts had been reassigned outside of the Homicide Unit.

63. Detective#3 testified that he had no independent recollection of the investigation of the murder and robbery at the Glatz Jewelry Store, during which Mr. Glatz was killed during a shootout and one of the perpetrators was also killed.

64. Detective#3 testified that he had no independent recollection of taking a confession from the suspect in this investigation.

65. Detective#3 testified that he did not recall whether he and Detective Pitts conducted an informal interview before the formal interview of Onyiah.

66. Detective#3 testified he did not recall whether or not Detective Pitts was ever alone with Onyiah during the interview.

67. After being shown Onyiah's false confession, Detective#3 testified "I may not have been present for the whole interview. I may have stepped away. I don't recall."

68. Detective#3 testified that he did not recall whether Onyiah said he was innocent before the written 75-483 was taken.

69. Detective#3 testified he did not recall going to court for the case.

70. Detective#3 testified that obtaining a confession was not a common outcome when he interviewed suspects.

71. Detective#3 was one of only two detectives to appear before the Grand Jury who testified that he had no recollection of the Glatz robbery and homicide investigation, even after being shown documents that might refresh his recollection. Instead, Detective#3 testified his inability to remember was the result of the passage of time.

72. Although many detectives professed an inability to remember certain aspects of the investigation into the Glatz robbery and homicide investigation, all others had some recollection of the general nature of the crime and the role they either played or likely played in the investigation. (The only detective other than Detective#3 with no recollection of this investigation suffers from a medical condition that impairs the detective's ability to remember events that occurred prior to the onset, which includes this investigation.)

OBINA ONYIAH

73. Onyiah testified before the Grand Jury on October 8, 2021 and maintained that he was not involved in the Glatz robbery and murder.

74. He explained in detail how Detective Pitts coerced him into giving the false confession: Pitts physically struck him, verbally abused him, invaded his personal space, and kept him isolated in an interrogation room for hours affording no opportunity to eat food or utilize the bathroom.

75. During the interrogation, Onyiah's proclamations of innocence were met with violence. Referring to Detective Pitts, Onyiah explained, "[b]asically, when I wasn't agreeing with what he was saying, he punched me closed-first [sic] on my chest. And talking loud in front of my face, spitting at the same time as he's talking, cussing at me." He also described how Detective Pitts "punched me on my chest, doinked me in my chest. Here and there he would, with an open hand, hit my shoulder lightly but not as hard as the punch and the doink was." He demonstrated the "doink" by straightening his index finger and middle finger together and making a jabbing forward motion.

76. Onyiah clarified that at times during the interview, Detective Pitts was yelling "real close, like, two inches away from my face. Yelling and spitting at the same time because he is yelling so loud."

77. After the interview, Detective Pitts sat Onyiah before a computer to conduct a photo procedure. Because Onyiah had no knowledge of the crime, he selected a photo at random. When the photo "wasn't to his liking," Detective Pitts, who was sitting right next to Onyiah, "grabbed the back of my neck and forced it all the way between my legs saying to stop lying and pick the right one."

78. What Onyiah experienced did not "sink in" until after he left the Homicide Unit. He testified that while inside the interrogation room, he was not able to fully grasp what was happening to him, instead "[i]t was just waves of surprisement and shock..." Only upon leaving the Homicide Unit did he understand the significance of what had happened: "[w]hen I actually had, like, clarity and everything like that, that's when it, like, hit me, like, I'm in jail for a homicide that I did not do."

79. The fact that Detective Pitts hit Onyiah is corroborated by additional evidence. The Grand Jury heard testimony from Witness#1 and Witness#2. (Witness#3 is deceased and therefore was unavailable to testify before the Grand Jury.)

WITNESS#1

80. Witness#1 explained that on a November day approximately ten years ago, she was at her house with Onyiah, Witness#2, and Witness#3. Onyiah and Witness#1 were dating at this time.

81. Around 11:00am, Onyiah received a phone call from his sister. When the call ended, Onyiah told Witness#1 he was going to meet his sister at the McDonald's at Bridge and Pratt Streets to retrieve his winter coat. He never returned from this meeting.

82. A few hours later, PPD homicide detectives arrived at Witness#1's house and immediately began ransacking her home. Witness#1 described one of the detectives present as a bald, Black

man with a large scar or birth defect on the back of his neck. (This description is consistent with that of Detective James Pitts.) Witness#1 recalled this detective as “very arrogant and rude.”

83. The detectives handcuffed Witness#1, Witness#2, and Witness#3 and transported them to the Homicide Unit at Eighth and Race Streets to be interviewed. Witness#1 testified that the detective who interviewed her threatened to take away her children. Despite being accused of involvement in criminal activity while being held in custody, Witness#1 was never *Mirandized* nor was a formal interview record, form 75-483 ever created.

84. After her interview, Witness#1 was directed to sit on a bench in the lobby of the Homicide Unit. From the bench, Witness#1 was able to lean back against a wall. Through this wall, she recognized the voices of Obina Onyiah and the Black detective with the large scar who had been at her home.

85. From this position, Witness#1 “put my ear on the wall and heard, you know, how they were treating him, how they were beating him. At one point I heard a big thump. I got scared on the bench, I jumped. That's when I heard, like, [...] it sounded like a body hitting the floor with a chair. And then I heard a loud scream like a cry, scream, ‘please stop hitting me.’”

86. Witness#1 testified that she heard Onyiah saying “I didn’t do anything” and the detective who she described as Detective Pitts screaming at Onyiah, yelling at the top of his lungs “we will have you in here forever, we won’t release you, we won’t feed, we won’t give you water, nothing.” She also overheard who she described as Detective Pitts saying to Onyiah, “you did it and we’re going to make sure we pin this on you.”

87. During the six hours Witness#1 was seated on the bench, she frequently observed the two detectives go in and out of the room, one at a time. At one point when the detective who she described as Detective Pitts left the interrogation room, Witness#1 approached him and pleaded

with him to stop hitting Onyiah. The detective warned Witness#1 that if she did not “shut the fuck up, he was going to lock [her] up and put [her] in a cell.”

WITNESS#2

88. Witness#2 also testified that he, Witness#1, and Witness#3 were all together at Witness#1’s house when the police arrived. All three were handcuffed by PPD detectives and transported to the Homicide Unit at Eighth and Race Streets around 3:00pm or 3:45pm the same day Onyiah was taken in for questioning.

89. At the Homicide Unit, Witness#2 was briefly questioned and then placed in a “holding room,” where he remained until the early morning hours. Although Witness#2 could not see out of this room into the rest of the unit, he could hear voices coming from other rooms. First, he overheard a detective yelling at Witness#1. Then, he recognized Onyiah’s voice coming from a different location.

90. Listening through the wall, Witness#2 overheard Onyiah “screaming that he didn't do it and it sounded like thump sounds that I can only assume he was being hit.” Witness#2 demonstrated this thumping sound to the Grand Jury by hitting his closed-fist against his open palm. He testified that the sound was so loud it echoed. When this stopped, Witness#2 heard Onyiah crying.

91. Witness#1 and Witness#2 were finally released from the Homicide Unit at the PAB after midnight. Witness#2 called his father, Witness#4, to come pick him up from the PAB. Witness#4, who also testified before the Grand Jury, confirmed that he picked up his son from the PAB in the early morning hours.

FORENSIC AND SCIENTIFIC EVIDENCE

PHOTOGRAMMETRY ANALYSIS

92. In 2021, expert photogrammetry analysis proved that Obina Onyiah could not have been the second perpetrator in the robbery of Glatz Jewelry.

93. Because the interior of what was once the Glatz Jewelry store has changed significantly since the incident and no measurements of the store's interior, such as cabinets, are available as references, both photogrammetry analyses utilized the Height Comparison method for their analysis.

94. Two independent analyses reached the same conclusion: Onyiah could not be the perpetrator who got away.

95. The second analysis was "independent," because it was conducted by a second expert, Expert#2, who was not associated with Expert#1 and did not know the outcome of Expert#1's photogrammetry analysis. Further, the second analysis was "peer reviewed" by another expert who reviewed and confirmed the accuracy of Expert#2's work. In total, three separate experts agreed.

96. Initially, each expert was asked to provide all the information they could determine about the height of the second perpetrator.

97. Expert#1 determined that, measuring from the top of the second perpetrator's hat, he was likely to be in the range of 5'8" to 5'11" tall.

98. Expert#2 found that the second perpetrator was most likely 5'11". However, Expert#2 similarly noted that this measurement was to the top of the individual's hat. Therefore, he would expect the true height of the individual to be slightly shorter than this measurement.

99. After these conclusions were reported, a follow-up question was asked: “Based on your analysis, could the second suspect be 6’3”?” This question was asked after the initial reports were completed so to avoid any potential to bias the analysis.

100. Expert#1 opined that “it is highly unlikely that the second suspect is 6’3”.”

101. Expert#2 opined that “the questioned person cannot be 6’3”,” as their analysis showed the top of the suspect’s hat to be shorter than an individual known to be 6’1” and more consistent with an individual known to be 5’11”.

FALSE CONFESSIONS

102. The Grand Jury heard testimony from Expert#3, an experimental psychologist and expert on police interrogations, interviews, and false confessions. Expert#3 explained that there are three types of false confessions recognized in academic literature: voluntary false confessions, coerced compliant false confessions, and coerced internalized false confessions.

103. Coerced compliant false confessions are the result of “a decision process in which the subject weighs the value of giving police what they want in the immediate term and discounting any long-term consequences.” In other words, the subject knows that they are innocent, but feels that there is no other way out than to tell the interrogator what he wants to hear.

104. According to Expert#3, the impact of an interrogator repeatedly touching a subject’s chest or touching their neck and pushing their head down, as Detective Pitts did to Onyiah, is to make the subject feel helpless and subject to the dominance of the interrogator. He unequivocally stated that these tactics are coercive, abusive, and produce false confessions.

EYEWITNESS IDENTIFICATIONS

105. After determining how Onyiah was coerced into making a false confession, the Grand Jury considered the reliability of the eyewitness identifications of Onyiah. The Grand Jury

heard testimony from Expert#4, a nationally recognized expert in the factors affecting eyewitness identifications, with over twenty years of experience in the field.

106. Based on that testimony, the Grand Jury finds that the three victims in this case (and other witnesses who viewed the surveillance video) made a mistaken identification of Onyiah as the perpetrator. Some witnesses, like the victims, may have been honestly mistaken, while other witnesses, such as Cheek—who only viewed surveillance video—were biased.

107. These mistaken identifications occurred as a result of “estimator variables” that lessened the ability of the victims to accurately perceive the crime as they were victimized; and as a result of “system variables” of the identification procedures employed by the Philadelphia Police Department, which decreased the chances of accurately assessing and recording the quality of their eyewitness identifications of Onyiah.

108. Several facts are of particular concern to this Grand Jury. First, all the victims described the perpetrator as 5’7” or 5’8”, whereas Onyiah is 6’3”. Second, two victims identified the same alternate suspect—Suspect#1—before identifying Onyiah. Third, PPD’s procedures for administering live lineups fall far short of contemporary standards designed to obtain accurate evidence for court.

109. On the other hand, we note that Cheek was motivated to make an identification in order to reduce the sentence he was facing for his open federal prosecution.

DETECTIVE PITTS CHARACTER AND INVESTIGATIVE HABITS DURING HIS CAREER WITH PPD

LIEUTENANT#1

110. The Grand Jury heard testimony from Lieutenant#1, who was represented by FOP Attorney#1. Lieutenant#1 was Detective Pitts’ supervisor in the Homicide Unit and described their relationship during that time as “paternal.” Lieutenant#1 testified that he believed Detective Pitts

was a good detective, "a very strong interrogator," and that the allegations that Detective Pitts engaged in misconduct were false.

111. Lieutenant#1 was confronted with the fact that a judge of the Court of Common Pleas issued a Rule to Show Cause why Detective Pitts should not be held in contempt of court for assaulting a witness in the lobby of the Criminal Justice Center during a homicide jury trial in which the witness had just testified that Detective Pitts engaged in coercive acts during an interview at the Homicide Unit. Lieutenant#1 responded that he was told by Detective Pitts, as well as unidentified "other people who were there," that Detective Pitts had been found to have done nothing wrong in that incident. Although Lieutenant#1 acknowledged that part of his supervisory duties was to refer incidents to Internal Affairs for investigation, he testified that, despite being Detective Pitts' supervisor, he did not make a referral for Internal Affairs to investigate this incident. When asked about this decision, Lieutenant#1 reasoned "I heard about it after the fact and was told there was nothing happened. Why would I refer it?"

112. Because Lieutenant#1 claimed that Detective Pitts was good detective, this Grand Jury considered evidence about Detective Pitts' history within the department.

DETECTIVE#4

113. Detective#4 was assigned to the Homicide Unit, and worked closely enough with Detective Pitts to learn about Detective Pitts' interrogation habits. Detective#4 was represented by FOP Attorney#1.

114. Detective#4 described Detective Pitts' interrogation techniques as "aggressive with yelling and kind of easing his way into the personal space of that person trying to get their attention."

115. Detective#4 explained Detective Pitts would “get as close as foot to a person” he was interviewing and would be “raising his voice and yelling at them.” Detective#4 characterized this as something Detective Pitts did frequently to witnesses and suspects.

116. Detective#4 saw Detective Pitts engage in general name calling of witnesses or suspects, including calling the subject of the interview “an asshole.”

117. Detective#4 has not observed other detectives get within a foot of somebody and call them names during an interview.

118. Detective#4 also recounted that Pitts would threaten witnesses with jail time saying “if you don’t tell us the truth you might get locked up and you might not be able to see your kids again.” Detective#4 further explained, “you try to say things that get their heart going and say, hey, what’s more important to you here your family and your freedom.”

119. Detective#4 testified that when Detective Pitts was yelling at a person from a foot away, he would also confront the person with facts Detective Pitts knew from other parts of the investigation.

EXPERT#3

120. Expert#3, the expert in interrogation techniques and false confessions, also addressed the testimony of Lieutenant#1 that Detective Pitts was a good detective and interrogator, in conjunction with Detective#4’s description of Detective Pitts’ interrogation habits. Expert#3 explained that the problem with these coercive techniques is not that they work on the guilty, but that they also work on the innocent, and result in false confessions.

121. While the interrogation habits described by the witnesses range from permissible to illegal, all are coercive, and likely to produce a false confession when used against an innocent suspect.

INTERNAL AFFAIRS HISTORY

122. The Grand Jury heard that the Internal Affairs ("IA") department of the PPD had opened investigations into other complaints against Detective Pitts, but has not considered the substance of those complaints.

123. The Grand Jury considered the substance of a single PPD Internal Affairs investigation, IA number #02-1009/PBI number 2003-0042, because it sustained a finding against Detective Pitts for an off-duty act of domestic violence, in which he punched his then-wife one time in the stomach, and specifically did not sustain Detective Pitts' false allegation that his spouse struck him in the face during the incident. This resulted in a guilty verdict for the charge of Conduct Unbecoming an Officer by the Police Board of Inquiry ("PBI"). We considered this for the limited purpose of assessing Detective Pitts' character for untruthfulness, but did not consider it to the extent it might tend reflect negatively on Detective Pitts' propensity or character for violent behavior or other illegal acts.

124. The IA investigation reveals that police officers responded to Detective Pitts' apartment after his wife called 911 to report the fact that Detective Pitts punched her the stomach, causing her to fall to the floor, which occurred during the pendency of divorce proceedings. Detective Pitts lied to the responding officers by falsely claiming that his wife assaulted him. Later, Detective Pitts repeated this lie in a formal written statement to IA investigators who were investigating this act of domestic violence.

125. In both instances, Detective Pitts described an injury to his eye (that he had self-inflicted) in an effort to fabricate evidence that would substantiate his false-allegation that his wife hit him first. This injury was not observed by any of the officers who saw Detective Pitts at the scene of the crime.

126. One officer who responded said that Detective Pitts went to the bathroom several times while at the scene, and later viewed him at the PPD Internal Affairs Division and noticed a bruise under Detective Pitts' left eye. However, this officer stated that while at the scene, Detective Pitts indicated he was punched on the right side of the face.

127. A second officer did not recall seeing a visible injury on Detective Pitts while at the scene, but recalled that Detective Pitts kept going to the bathroom, while they waited for a supervisor to respond to the scene.

128. When Detective Pitts' ex-wife was interviewed about the incident, she described a troubling interaction with Detective Pitts that occurred after this event. When she asked why Detective Pitts put marks on his own face and said she did it, Detective Pitts responded that "he needed to buy time. He needed time to think" but didn't say what he did to his face.

129. This evidence is not necessary for this Grand Jury to recommend charges. However, the Grand Jury finds that Detective Pitts made false statements on October 28, 2002, during an official investigation by IA, and did so in an effort to cover-up the fact that he illegally assaulted his wife.

CONCLUSION

130. The Grand Jury considered this evidence of dishonestly, along with the testimony of Detective#4 and Expert#3, and find that it outweighs the testimony of Lieutenant#1. The Grand Jury rejects Lieutenant#1's opinion that Detective Pitts was a good detective and skilled interrogator.

131. Instead, the Grand Jury finds that while acting in his official capacity Detective Pitts habitually used coercive interrogations techniques when interviewing suspects and witnesses

in the Homicide Unit of the Philadelphia Police Department, and lied under oath to conceal his criminal acts.

CONCLUSION

132. The scientific photogrammetry evidence establishes that Onyiah could not have been the perpetrator in the Glatz Jewelry Store robbery and homicide, while the scientific evidence of eyewitness identifications explains how the victims mistakenly identified Onyiah as the second perpetrator.

133. We also find the Onyiah's testimony that he was assaulted by Detective Pitts at the Homicide Unit on November 8, 2010 credible and corroborated by the testimony of Witness#1, Witness#2, and the scientific evidence.

134. After our investigation, we, the members of the Thirty-First County Investigating Grand Jury, believe that the evidence establishes a *prima facie* case that Detective Pitts engaged in obstruction when he physically assaulted Onyiah, without lawful justification, to make a false confession.

135. We further believe the evidence establishes a *prima facie* case that the following statements, made under oath, were false (false statements emphasized in bold):

136. On May 22, 2013, Detective Pitts intentionally testified falsely during Onyiah's motion to suppress that he never touched Onyiah:

Q. Now, physically before the statement was he touched or threatened in any way?

A. **No, ma'am.**

Q. During this statement was he touched or threatened in any way?

A. **No, ma'am.**

Q. After the statement was he touched or threatened in any way?

A. **No ma'am.**

5/22/2013 N.T. at 52.

137. He continued by giving the following false statement:

Q. Sir, would it be fair to say that you with your hand hit Mr. Onyiah at least six times on his chest?

A. **I never touched your client.**

Q. You never touched my client?

A. **No, sir.**

[...]

Q. So you would have no knowledge of any thumps coming in or coming out of a room, of the interview room?

A. Any thumps? What are you saying, sir?

Q. Thumps.

A. **Your client was never touched, sir.**

Q. So there is no reason for anybody to hear any thumps coming out of the interview room?

A. **Your client was never touched.**

5/22/2013 N.T. at 88-89.

138. On May 29, 2013, Detective Pitts again testified falsely about not touching Onyiah during the interrogation, making the following false statements at Onyiah's jury trial:

Q. Now, you stated earlier that there was – you never touched this man at all.

A. **Yes.**

Q. Sir, I am going to ask you a direct question. Did you ever hit him on his chest?

A. **No, sir.**

Q. Did you ever grab his head and put it down between his legs?

A. **No, sir.**

5/29/2013 N.T. at 103-04.

RECOMMENDATION OF CHARGES

Based upon the evidence that we have obtained and considered, which establishes a *prima facie* case against the peace and dignity of the Commonwealth, we, the members of the Thirty-First Philadelphia County Investigating Grand Jury recommend that the District Attorney or his designee institute criminal proceedings against James Pitts for the following offenses:

As Against the Public Administration of the Commonwealth:

For the assaultive acts without lawful justification on November 8, 2010:

18 Pa.C.S. § 5101, Obstructing administration of law or other government function
(Misdemeanor 2)

For the testimonial acts on May 22, 2013:

18 Pa.C.S. § 4902, Perjury (Felony 3)

18 Pa.C.S. § 5101, Obstructing administration of law or other government function
(Misdemeanor 2)

For the testimonial acts on May 29, 2013:

18 Pa.C.S. § 4902, Perjury (Felony 3)

18 Pa.C.S. § 5101, Obstructing administration of law or other government function
(Misdemeanor 2)

EXHIBIT B

**Eyewitness Identification Expert Report of Dr. Jennifer Dysart for ADA Michael Garmisa in
Commonwealth of Pennsylvania v. India Spellman
(Case No. MC-51-CR-0036347-2010)**

Report Date: June 8, 2022

I. Overview and Credentials of Dr. Dysart

My name is Dr. Jennifer Dysart and I am an Associate Professor of Psychology at John Jay College of Criminal Justice, in New York City. I have been an eyewitness researcher since 1998 and have testified as an Eyewitness Identification expert since 2006. In May 2022, I was contacted by ADA Michael Garmisa, Supervisor in the Philadelphia District Attorney's office Conviction Integrity Unit, who asked me to review materials in the above referenced case and to provide my opinions in a report regarding the eyewitness identification evidence relating to the 2013 conviction of Ms. India Spellman for the shooting death of Mr. George Greaves on August 18, 2010 and the armed robbery of Ms. Shirley Phillips on the same date.

Employment: I am a tenured Associate Professor of Psychology at John Jay College of Criminal Justice of the City University of New York. Prior to my faculty appointment at John Jay College in January of 2006, I was an Assistant Professor of Psychology at Southern Connecticut State University, New Haven, CT (2003-2006).

Education: I hold a PhD in Social Psychology from Queen's University, Kingston, Ontario, a Master's degree in Psychology (Brain, Behavior and Cognitive Science) also from Queen's University, and a Bachelor of Arts degree in Psychology from St. Thomas University, Fredericton, New Brunswick.

Teaching Experience: I have taught about eyewitness identification research in psychology courses at the undergraduate, Master's and doctoral levels. I have supervised more than a dozen undergraduate and Master's thesis research projects and one doctoral dissertation on the topic of eyewitness accuracy.

Testimony & Consulting: I have given testimony as an eyewitness expert approximately 80 times in various pre-trial hearings, trials, post-conviction hearings, and civil cases in California, Connecticut, Delaware, Florida, Illinois, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Vermont, Virginia, and St. Thomas, USVI. I have also testified at a criminal jury trial in Federal court in New Jersey. I have never been deemed unqualified as an Eyewitness Identification expert in court. In addition to testifying, I have consulted in numerous other cases. Although most of my consulting has been for criminal defendants and plaintiffs in civil cases, I have also worked for prosecutors in the Conviction Review Unit in the wrongful conviction case of Mr. Mark Denny in Kings County, New York, who was ultimately released from prison in December, 2017.

Publications: I am an author or co-author of over two dozen eyewitness publications including original research articles published in peer-reviewed scientific journals, book chapters, a law review article, and a book on eyewitness identification accuracy titled "Eyewitness Identification: Civil and Criminal, 6th Edition" published by LexisNexis.

Presentations: I have given more than 175 presentations on eyewitness identification before professional psychological organizations and at conferences (including 10 in Pennsylvania) attended by judges, lawyers, police officers, investigators, law students, and the general public concerning the accuracy of eyewitness identification and factors that may increase or decrease its reliability.

Curriculum Vitae: My complete academic curriculum vitae is attached to this report as Appendix A.

II. Materials Reviewed in this Case

As an eyewitness identification expert witness, I ask the attorney or firm I am working for to provide me with all relevant materials related to the identification of the defendant or client, including police reports, copies of all identification procedures, testimony of the victim(s) and/or witness(es), and any other documentation that is relevant to the eyewitness identification at hand. In this case, I reviewed the following materials, plus other materials cited in this report:

1. Statement by Ms. Kathy Mathis (8/18/10)
2. Statements (2) by Ms. Shirley Phillips (8/18/10)
3. Radio Memorandum (Ms. Phillips) (8/18/10)
4. Statement by Ms. Celestine Bullock (8/18/10)
5. Biographical Information Report of Ms. India Spellman (8/20/10)
6. Lineup Motion notes (9/8/10)
7. Ms. Spellman's confession (8/20/10)
8. Mr. Von Combs' confession (8/20/10)
9. Note regarding call made by Ms. Mathis (9/13/10)
10. Ms. Phillips' Preliminary Hearing testimony (1/26/11)
11. Motion to Quash notes in Mr. Combs' case (4/26/11)
12. Ms. Mathis trial testimony in Mr. Combs' case (9/20/11)
13. Ms. Phillips trial testimony in Mr. Combs' case (9/20/11)
14. Ms. Mathis trial & Suppression hearing testimony in Ms. Spellman's case (2/13-14/13)
15. Ms. Phillips trial testimony in Ms. Spellman's case (2/14/13)
16. Inmate Locator Photo Ms. Spellman (6/10/21)

III. Case Overview

On August 18, 2010 around 2:30pm, Ms. Shirley Phillips was walking down the street on her way to work. She saw a young male and female on the street ahead of her and said hello. Moments later, she was robbed by at gun point by these two individuals. Although she was not physically injured, she ran for her life and was terrified by the event. She called the police and provided a description of the two robbers. The female was dark skinned, 25-30 years old, 5'6", heavy set (around 180lbs) and was wearing all black Muslim clothing. Her hair was covered but her face was visible. A few hours later, Ms. Phillips provided a second statement to police. She was not shown any photographs or photo arrays.

On the same date, Mr. George Graves was shot and killed outside his home on Pickering Ave. One of his neighbors, Ms. Kathy Mathis was inside her home when she heard two gunshots and then saw two individuals, a male and a female, run past her home down the middle of the street. Another neighbor, Celestine Bullock, was with her and also witnessed the male and female running. Both Ms. Mathis and Bullock provided police with a statement and brief description of the individuals. Ms. Mathis described the female as black with a brown complexion, "thick" body type, wearing dark (black or navy) Muslim head garb, a black top and perhaps was wearing jeans. Ms. Mathis did not describe the face of the female and did not describe the female turning around while running. In addition, there is no evidence that police asked Ms. Mathis if she saw the female's face when she ran by. Ms. Bullock was interviewed one time and did not testify at trial. She described the female as being young, perhaps in her teens, wearing a black scarf like Muslims wear.

Two days later, Ms. Spellman was interrogated by police and allegedly confessed to committing the robbery and implicated Mr. Von Combs as the perpetrator of the shooting. On the same date, Mr. Von Combs was

interrogated and allegedly implicated Ms. Spellman as the perpetrator of the robbery and the shooting. After their arrest, their photographs were published in the local paper, likely multiple times.¹

Although this is a stranger identification case, neither Ms. Mathis nor Ms. Phillips was shown a photo array or live lineup containing Ms. Spellman. In fact, the first identification procedure that Ms. Spellman appeared in was an in-court (showup) identification procedure at a Preliminary Hearing on January 26, 2011, five months after the robbery/shooting. On this date, Ms. Phillips identified Ms. Spellman in court.

According to the materials I reviewed, Ms. Mathis was never shown any out of court identification procedures containing Ms. Spellman. Her first identification of Ms. Spellman as the person she saw running past her on August 18, 2010 was two and half years later on February 13, 2013 during Ms. Spellman's trial. Ms. Spellman was convicted and received a sentence of 30 years to life.

In my professional experience, I have never before seen a stranger eyewitness case where *no* out of court identification procedures were conducted with the witnesses. This is especially concerning with Ms. Mathis who viewed Ms. Spellman in a formal identification procedure for the first time two and a half years after her observations. Given the media coverage of the case and other factors that will be discussed below, there are legitimate reasons to be skeptical of the reliability of both witnesses who selected Ms. Spellman for the first time in these suggestive in-court proceedings.

IV. Basis for Expert Witness Opinions

In this section, I identify a series of factors, relevant to the current case, that have been shown through scientific peer-reviewed research to influence the reliability of eyewitness identifications. As this research relates to the selection of Ms. Spellman by Ms. Mathis and Ms. Phillips, I will first outline the factors known to affect eyewitness accuracy that are *not* under the control of law enforcement (known as "estimator variables"), followed by the factors that are under the control of law enforcement (known as "system variables"). It is critical to understand the impact of both system and estimator variables on eyewitness accuracy so that an evaluation of an eyewitness's ability to view and perceive the events and subsequent likelihood of making an accurate identification can be made.

The distinction between estimator and system variables was developed in 1978 by Dr. Gary Wells, a Distinguished Professor of Psychology and leading international expert in eyewitness identification research. Over the past 40+ years, a substantial amount of research on both estimator and system variables has been conducted and published in peer-reviewed scientific journals, books, law reviews, and other sources.

As far back as 1966, the International Association of Chiefs of Police (IACP) published law enforcement training keys on the subject of eyewitness memory where they warned of the fallibility of eyewitness testimony and provided guidance on how to assess eyewitness reliability. IACP also published eyewitness training keys in 1983, 1992, and 2006. The IACP website currently has roll call training videos and additional documentation regarding eyewitness identification best practices.²

Based on my review of the above materials, the estimator and system variables relevant to the selection of Ms. Spellman include:

¹ According to a statement made by defense counsel, their photographs were published "constantly". (P. 14 Lineup Motion) Further, Mr. Andre Wooden who saw a male and female in his store before the robbery and therefore was a potential witness told detectives that he did not recognize the picture of the girl from paper. (P. 7 Motion to Quash)

² See: <https://www.theiacp.org/resources/policy-center-resource/eyewitness-identification>

Estimator Variables:

- 1) Effects of Limited Exposure at the Time of the Event
 - a. Exposure Duration
 - b. Weapon Focus Effect
 - c. Disguise
- 2) Fear/Stress/Arousal
- 3) Post-event & Co-Witness Contamination

System Variables:

- 1) Description “Accuracy”
- 2) Delay
- 3) Showup (in-court) Identification
- 4) Pre-identification Warnings/Instructions
- 5) Post-identification Feedback
- 6) Repeated Identification Procedures, Unconscious Transference and Commitment Effects
- 7) Witness Confidence
- 8) Non-identifications of the Suspect

V. General Overview of Eyewitness Research

Over a period of decades, researchers have established that when we experience an important event, we do not simply record it in our memory as a video recorder would. The situation is much more complex.³ In fact, the National Research Council Report on eyewitness identification titled “Identifying the Culprit: Assessing Eyewitness Identification”⁴ concluded the following with respect to humans’ ability to accurately perceive their environment (P. 55):

Perception does not reflect the sensory world passively, as camera film detects patterns of light.

In fact, the prevailing theory of memory divides it into three stages. First, a witness perceives an event and information is entered into the memory system. Next, some time passes before a witness tries to remember the event. Finally, the witness tries to retrieve the stored information. The National Research Council report reminds us that (P.57-58):

The way an observer experiences a visual scene—the setting, the people, and the actions associated with a crime—is commonly influenced as much by expectations from prior experience with the world as it is by the precise patterns of light cast upon the retina. (P. 57) In view of this inherent dependence of perception on prior experiences and context—and, importantly, the fact that the viewer is commonly none the wiser when perception differs from the “ground truth” of the external world—it appears that accurate eyewitness identification may be difficult to achieve.

Psychologists who conduct research in this area investigate the factors that play a role and can affect memory in each of the three stages. Specifically, researchers have identified a number of ways that eyewitness evidence – a witness’ recollection of events – like other forms of trace evidence in an investigation, can be altered and/or affected through *contamination*, especially when the witness’ memory is not strong to begin with. Contamination of a witness’ memory can come from many sources including information learned from (or about) other witnesses, information provided by law enforcement or other

³ For a review of science of perception and witness memory, see National Research Council (2014). *Identifying the culprit: Assessing eyewitness identification*. Washington, DC: The National Academies Press.

⁴ Ibid.

individuals charged with the collection (and preservation) of eyewitness evidence, media and social media accounts relating to the case. Regardless of the source, however, once a witness' memory has been exposed to post-event information, it is extremely difficult to ascertain the full impacts of this contamination on a witness' subsequent recollection of events and people.

Numerous factors at each stage of memory affect the accuracy of an eyewitness account. Some of the factors affecting eyewitness performance include: the opportunity of the witness to see a perpetrator's face/characteristics and stress or fear experienced during the event. As it relates to law enforcement, research has shown that the procedures and practices police use during the retrieval stage can influence the reliability of an eyewitness identification and the witness's subsequent testimony. Examples of police procedures that can affect an eyewitness' accuracy and memory include the use of pre-lineup/photo array⁵ instructions, whether the identification was conducted using a double-blind administrator, and the type of post-event information provided to a witness after their identification decision.

In February 2020, the American Psychology-Law Society (Division 41 of the American Psychological Association) published a revised White Paper on eyewitness identification best practices, updating their 1998 Eyewitness White Paper.⁶ The 2020 White Paper⁷ maintains the original four best practice recommendations from 1998⁸ and adds five new best practice recommendations for the collection and preservation of eyewitness evidence.⁹ The opinions in this report regarding best practices are, where relevant, consistent with the AP-LS best practice recommendations.

Eyewitness Error Rates in Actual Cases

According to the national Innocence Project database, there have been mistaken eyewitness identifications in nearly 70% of post-conviction DNA exonerations in the United States – which this database currently numbers as 375.¹⁰ In a 2011 analysis of the first 250 DNA exoneration cases in the United States, Duke University Law Professor Brandon Garrett found that the leading contributing factor in these wrongful convictions was erroneous eyewitness identification, which occurred in 76% of the first 250 cases.¹¹ In a quarter of all wrongful convictions studied by Garrett, eyewitness testimony was the *only* direct evidence against the defendant. In the 190 cases where there was an erroneous eyewitness identification of the innocent defendant, 36% included mistaken identifications from *more* than one eyewitness. In fact, some of the cases had as many as five eyewitnesses who incorrectly testified that the defendant was the perpetrator they saw. In these DNA exoneration cases, there is no evidence that witnesses were anything

⁵ The terms “lineup” and “photo array” are used interchangeably in this report, unless noted otherwise.

⁶ Wells, Small, Penrod, Malpass, Fulero, & Brimacombe (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads. *Law and Human Behavior*, 22, 603–647.

⁷ Wells, Kovera, Douglass, Brewer, Meissner, & Wixted (2020). Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence. *Law and Human Behavior*, 44, 3-36.

⁸ These include: how to select lineup fillers, providing witnesses with a pre-lineup warning, the use of double-blind administration, and recording a confidence statement from a witness after they have made a selection.

⁹ These include: the need to conduct a pre-lineup interview with a witness, the need for evidence-based suspicion before conducting an identification procedure, video-recording the identification procedure, avoid repeated identification attempts with the same suspect, and avoid using showups when possible.

¹⁰ The figure of 375 has not been updated on the Innocence Project website for over one year and therefore this figure is outdated. Visit www.innocenceproject.org for information and statistics on DNA exoneration cases nationally.

¹¹ Garrett (2011). *Convicting the innocent: Where criminal prosecutions go wrong*. Cambridge, MA: Harvard University Press.

more than wrong. In other words, mistaken eyewitnesses were not accused or suspected of lying about their selection of the innocent defendant. Evidence demonstrates it is common for eyewitnesses to genuinely believe they are identifying the correct person yet can still be mistaken.

In addition to the wrongful conviction cases described above, archival studies of police records also show that eyewitness identifications can be unreliable. Researchers have analyzed archival records of actual eyewitness identifications and attempted identifications from police files.¹² In the 2020 White Paper mentioned above, Dr. Wells and colleagues summarized the filler identification data from several archival studies of actual eyewitnesses to crimes.¹³ The researchers note that there have been 11 published articles on the subject with data from over 6,500 witnesses in actual cases. The results show that nearly one quarter of witnesses who view a photo array or lineup in actual cases choose an innocent filler. Of those who “identify”¹⁴ a person from a photo array or lineup, more than one third (36.8%) choose an innocent filler as the perpetrator. Further, the overall eyewitness identification error rate must be higher than 36.8%, as these data do not include erroneous selections of innocent suspects (it only includes filler selections).

In summary, identification decisions in actual cases show that errors are common and that over one third of all “positive identifications” are incorrect. While false identifications of innocent fillers almost invariably do not send those fillers to prison, these choices still constitute identification errors and provide valuable information about the reliability of eyewitnesses and the reliability of identification procedures generally.

VI. Expert Opinions Regarding Eyewitness Reliability in *Commonwealth v. Spellman*

Following my review of the materials listed above, I have identified the following eyewitness reliability factors as being relevant to the eyewitnesses in Ms. Spellman’s case. Below, I use examples from the scientific literature to support my conclusions. The cited research is not intended to be an exhaustive list of all relevant research on each topic below, rather a sample of the scientific literature. For each factor, relevant evidence from the record for each witness will be provided to demonstrate that the factor is relevant of consideration in evaluating reliability in this case.

Estimator Variables:

1. Effects of Limited Exposure at the Time of the Event

¹² Unfortunately, when using archival data and police records, it is not possible for researchers to determine when a suspect identification is correct because the ground truth about whether the suspect in a lineup or other identification procedure is guilty is not known. Despite some researchers’ best efforts to *estimate* the truth, actual truth about whether the suspect in the lineup or other identification procedure is truly guilty is rarely known to researchers using archival and field data. It is possible, however, to determine general error rates as reflected in the false identification of non-suspect fillers. Dr. Ruth Horry and colleagues discuss additional concerns about archival studies in their 2014 paper: Horry, Halford, Brewer, Milne, & Bull (2014). Archival analyses of eyewitness identification test outcomes: What can they tell us about eyewitness memory? *Law and Human Behavior*, 38, 94–108.

¹³ Wells, Kovera, Douglass, Brewer, Meissner, & Wixted (2020). Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence. *Law and Human Behavior*, 44, 3-36.

¹⁴ Witnesses who “identify” an innocent lineup filler are obviously not making this selection because they truly recognize the filler from the crime, so the term “identify” is not the correct term. Thus, it is important to distinguish between an identification (which is presumably made based on a recognition of a person based on match-to-memory) and *choosing* behavior (selecting someone from a showup, mug-shot, photo array or lineup procedure).

- 1) **Ms. Mathis.** According to her statement to police on August 18, 2010, Ms. Mathis was inside her home when she heard two “pops” that she believed to be gunshots. Because her 2 year old great grandson was in her front yard playing (with her neighbor), she ran to the doorway to get him.¹⁵ From the doorway, she viewed two strangers run by in the middle of the street.¹⁶ In this interview, she was never directly asked how long she was able to see these individuals or whether she saw their faces. She did describe the male as having turned around and looking behind him but *did not* mention the female turning around or looking back. At trial two and a half years later, however, Ms. Mathis testified that she saw the female’s face 2 times (P. 108, 119 TT) and that she was able to get a really good look at them when the male stopped to pull up his pants. (P. 109 TT). This trial testimony is in direct conflict with a Memorandum of a call Ms. Mathis made to police on September 13, 2010 where she indicated that she “never saw faces; didn’t see the face”.
- 2) **Ms. Phillips.** In her first of two interviews with police on August 18, 2010, Ms. Phillips said that the robbery “all happened so fast”. Consistent with this statement, she testified at the Preliminary Hearing in January 2011 that the robbery took place in a “blink of an eye”.¹⁷ (P. 27) Further, Ms. Phillips was able to give a detailed description of the gun in her interviews with police on the day of the robbery: she thought at first it was a water gun but then realized it was a real gun. It was small, flat, black, and .22 caliber.

An additional potential concern with respect to Ms. Phillips is that she testified at trial that she is “blind as a bat” (P. 27) and “can’t see nothing” (P. 27 TT). During the trial, she was never asked about her vision issues and whether she needs glasses for distance and, if she does, whether she was wearing them on August 18, 2010.

Exposure Duration. Common sense might suggest that even a brief opportunity to view a perpetrator’s face allows us to form a mental “snapshot” of that person. But research supports a different conclusion: the amount of time a witness views a perpetrator’s face significantly impacts the witness’s later ability to identify that person. Generally, when the opportunity to see a person’s face is limited (due to short time, the presence of multiple perpetrators, as is the case here, the presence of weapons, etc.), the result will be a weak or poor memory for that individual.

In research on the effects of exposure duration – the amount of time one has to view or encode something - on eyewitness accuracy, Drs. Peter Shapiro and Steven Penrod found a systematic relationship between exposure time and identification accuracy in their 1986 meta-analysis on this topic.¹⁸ That is, shorter exposure times generally correlate to less accurate identifications. In the time since this comprehensive

¹⁵ The neighbor, Celestine Bullock, was interviewed on August 18, 2010 and provided a contradictory version of events. Ms. Bullock stated that she picked up the great grandson and took him to the house. Ms. Mathis would later testify at trial that she got her great grandson and that he was standing behind her while she stood at the yard gate watching the two people run past.

¹⁶ I have not been provided with information related to the distance from Ms. Mathis’ doorway to the middle of the street. If this information is provided, distance may be a relevant factor in this case. Of note, Ms. Mathis testified at trial that she viewed the two perpetrators from her yard gate. This is inconsistent with her statement provided within hours of the shooting.

¹⁷ Contradicting her own testimony, she also estimated at the Preliminary Hearing (P. 19) that she was able to see the robbers for 5 minutes. Given her description of events and the research on time overestimation described in this section, the estimate of 5 minutes seems unlikely.

¹⁸ Shapiro & Penrod (1986). Meta-analysis of facial identification studies. *Psychological Bulletin*, 100, 139–156.

review was published, an updated meta-analysis¹⁹ and other research²⁰ have replicated the positive correlation between the amount of time a witness saw the perpetrator's face and reliability.

Researchers also have found that a person's retrospective estimate of the amount of time that an interaction or event took place often differs from the actual amount of time, with the error often in the direction of overestimating the amount of time.²¹ Sometimes the estimate of time is profoundly exaggerated. In one study, participants saw a 30-second simulated bank robbery on videotape.²² Two days later they were asked some questions about the tape, including how long it lasted. The average estimate of duration was 152 seconds – more than 5 times the actual length. Very few people estimated a duration that was equal to or less than the true value of 30 seconds. Although it was rare, some people produced inordinately long estimates of over 900 seconds. In other words, these individuals remembered a 30-second bank robbery tape as having lasted over 15 minutes. Thus, it is possible that triers of fact will believe, through witness testimony, that the witness had a longer opportunity to view the perpetrator than is in fact true.

Weapon Focus Effect. The phenomenon where witnesses look at a weapon during an event is referred to as the “weapon focus effect.” As the witness focuses on the weapon, their ability to adequately remember and later recall details such as characteristics of the perpetrator is lessened. Researchers have assessed the ability of eyewitnesses to recall various crime details in an attempt to establish the parameters of weapon focus effects on perception and memory. This research was first reviewed in a meta-analysis published by Steblay in 1992. The weapon focus effect was statistically significant and demonstrated an impairment of identification accuracy when a weapon was present during the event/crime. A more recent meta-analysis confirms the findings of the Steblay 1992 report.²³ In summary, although it can certainly be true that a witness pays close attention to a *weapon*, the research results indicate that attending to the *weapon* impairs memory for the characteristics of the person(s) wielding the weapon(s) and reduces eyewitness description and identification accuracy, especially when the opportunity to see the perpetrator is short or limited. In addition, viewing a weapon can also cause a witness to become afraid, which also can decrease the quality of a witness' memory (see below).

Disguise. Finally, with respect to obstructions limiting a witness' opportunity to see a perpetrator clearly, research indicates that when a perpetrator is merely wearing a hat it can significantly reduce later

¹⁹ Bornstein, Deffenbacher, Penrod, & McGorty (2012). Effects of exposure time and cognitive operations on facial identification accuracy: A meta-analysis of two variables associated with initial memory strength. *Psychology, Crime and Law*, 5, 473–490.

²⁰ For example, see: Longmore, Liu, & Young (2008). Learning faces from photographs. *Journal of Experimental Psychology: Human Perception and Performance*, 34, 77–100; Memon, Hope, & Bull (2003). Exposure duration: Effects on eyewitness accuracy and confidence. *British Journal of Psychology*, 94, 339–354; Read, Vokey, & Hammersley (1990). Changing photos of faces: Effects of exposure duration and photo similarity on recognition and the accuracy–confidence relationship. *Journal of Experimental Psychology: Learning, Memory, and Cognition*, 16, 870–882.

²¹ For example, see: Attard & Bindermann (2014). Establishing the duration of crimes: An individual differences and eye-tracking investigation into time estimation. *Applied Cognitive Psychology*, 2, 215–225; Loftus, Schooler, Boone, & Kline (1987). Time went by so slowly: Overestimation of event duration by males and females. *Applied Cognitive Psychology*, 1, 3–13; Yarmey, & Yarmey (1997). Eyewitness recall and duration estimates in field settings. *Journal of Applied Social Psychology*, 27, 330–344.

²² Loftus, Schooler, Boone, & Kline (1987). Time went by so slowly: Overestimation of event duration by males and females. *Applied Cognitive Psychology*, 1, 3–13.

²³ Fawcett, Russell, Peace, & Christie (2013). Of guns and geese: A meta-analytic review of the “weapon focus” literature. *Psychology, Crime & Law*, 19, 35–66.

identification accuracy.²⁴ Although I am not aware of any research examining the effects of a hijab²⁵ or equivalent on identification accuracy, the negative effects of covering the hair on subsequent identification accuracy should reasonably apply.

In summary, for both Ms. Mathis and Ms. Phillips there were multiple observational factors present that have been shown to reduce the strength of an eyewitness' memory for the perpetrator which, in turn, can reduce eyewitness reliability.

2. Fear/Stress/Arousal

- 1) **Ms. Mathis.** After hearing two “pops” that she knew were gunshots, she ran to get her 2 year old great grandson who was playing in her front yard. (P. 23-4 TT). This set of events no doubt caused her to experience stress and arousal.
- 2) **Ms. Phillips.** On multiple occasions, Ms. Mathis described running for her life, like a “bat out of hell” (P. 22 TT), and that she thought the female was going to shoot her in the back and kill her. (P. 54 Combs trial). She also described the gun being pointed at her head. (P. 13 Preliminary Hearing)

The effects of stress and arousal on eyewitness memory have been studied many times in scientific psychological research. A meta-analysis (statistical summary) of this research was conducted by Drs. Deffenbacher, Bornstein, Penrod, and McGorty²⁶ and these researchers found that – over a number of studies – high levels of stress negatively impact both one's ability to recognize someone and ability to accurately recall details of the event. The meta-analysis also revealed that people in stressful conditions are less likely to be able to pick out a guilty person even when he is present in the lineup. That is, stress particularly reduced correct identification rates of the true perpetrator. Researchers have also found that physical exertion, such as running, can cause increases in arousal and result in impaired identification abilities.²⁷

In summary, both witnesses who selected Ms. Spellman at trial likely experienced high levels of stress and arousal which have been shown to negatively impact eyewitness reliability.

²⁴ E.g., Cutler & Penrod (1988). Improving the reliability of eyewitness identification: Lineup construction and presentation. *Journal of Applied Psychology*, 73, 281–290; Mansour, Beaudry, Bertrand, Kalmet, Melsom, & Lindsay (2020). Impact of disguise on identification decisions and confidence with simultaneous and sequential lineups. *Law and Human Behavior*, 36, 513–26.

²⁵ From the record, it is not entirely clear what type of covering the female (robber) was wearing but all witnesses described the covering as being something that Muslim women wear that covers the hair and not the face and that went all the way to her feet.

²⁶ Deffenbacher, Bornstein, Penrod, S., & McGorty (2005). A meta-analytic review of the effects of high stress on eyewitness memory. *Law and Human Behavior*, 28, 687–706.

²⁷ Hope, Lewinski, Dixon, Blocksidge, & Gabbert (2012). Witnesses in action: The effect of physical exertion on recall and recognition. *Psychological Science*, 4, 386–390.

3. Post-event & Co-witness Contamination²⁸

- 1) **Ms. Mathis.** Before police arrived to investigate Mr. Graves' murder, Ms. Mathis interacted with another witness, her neighbor Ms. Bullock. In addition, it is not clear from the materials I reviewed whether Ms. Mathis she saw the extensive media coverage regarding the case including the photographs of Ms. Spellman and Mr. Combs that were in the paper because she was never on the record.
- 2) **Ms. Phillips.** After the robbery, Ms. Phillips spoke with Mr. Wooden who worked in a store nearby. He provided her with information regarding the male perpetrator whom he had seen many times and he indicated that this person has a tear drop tattoo on his face. As with Ms. Mathis, it is not clear whether Ms. Phillips saw the extensive media coverage because she was never asked. We do know that Mr. Wooden saw the media coverage, as his told police that he saw the media and did not recognize the female's photograph in the news.

Further, from a memory contamination standpoint, it is curious that Ms. Phillips initially described the female with the gun as 25-30 years of age but later described her as a young woman (P. 9 Preliminary Hearing) and then as a girl (. The testimony of seeing a "girl" is consistent with Ms. Spellman's age (17) at the time of trial and thus is it possible that her change in description was a result of learning information from others after her initial description to police (e.g., Radio Memorandum).

It is a well-established fact in the psychological literature that our memories for events can be altered by information we learn after the original event.²⁹ There are many sources of post-event memory contamination that can affect a witness's memory and reporting of an event. Witnesses and victims can learn information about the crime or the perpetrators from other witnesses, law enforcement, the media, etc.

For example, in one research study that examined whether learning misinformation about a suspect could influence a person's memory and identification accuracy, Zajac and Henderson³⁰ found evidence that memory contamination can affect both descriptions and identifications. In this study, research participants were paired with a research confederate (who was working for the researchers) that the participants believed was another participant in the study (i.e., a co-witness). Together, they viewed a video clip of a staged theft. Then, half of the participants were misinformed by the confederate that the thief's accomplice had blue eyes when in fact they were brown. Next, individual participants described the accomplice and viewed a target-absent (the accomplice was not present) line-up comprised of blue-eyed lineup members only. Misinformed participants were eight times more likely than those who did not receive "blue-eyed" misinformation to describe the accomplice as having blue eyes, and twice as likely to falsely identify someone with blue eyes from the line-up. What is important about this study is that merely learning information from another source can influence memory, reports, and identifications made by witnesses to a crime.

²⁸ If co-witness contamination happens spontaneously before law enforcement has the opportunity to interview witnesses, it would be considered an estimator variable (uncontrollable). If, however, witnesses are interviewed together by police or if they are exposed to post-event information through police action, it would be considered a system variable (controllable).

²⁹ National Research Council (2014). *Identifying the culprit: Assessing eyewitness identification*. Washington, DC: The National Academies Press.

³⁰ Zajac & Henderson (2009). Don't it make my brown eyes blue: Co-witness misinformation about a target's appearance can impair target-absent line-up performance. *Memory*, 17, 266-278.

In summary, the concern with post-event contamination is that it can be difficult to accurately remember the *source* of our memories and, thus, information learned from others is likely to contaminate our “original” memory for a person or event. In many actual cases, the full scope and impact of post-event contamination is unknown which is why obtaining a detailed, recorded interview with a witness is so important. In this case, the extent of the contamination is unclear but the record indicates there were multiple opportunities for both Ms. Mathis and Ms. Phillips to have learned information about the suspect from others.

System Variables

1. Description Accuracy

1) **Ms. Mathis.** On August 18, 2010, in her first and only interview with police, Ms. Mathis described the female she saw running as follows:³¹

- She was black, I think she was brown complexion. She was “thick” and was wearing Muslim head garb, it was either black or navy blue... it was dark. Her top was black, but the way she was running I couldn’t tell if she was holding part of it up. And I think she had on a pair of jeans on.

2) **Ms. Phillips.** On August 18, 2010, in two interviews with police, Ms. Phillips described the female who robbed her as follows:

- She had all black Muslim clothes on, she was like 25 and 30. She was heavy like 180 lbs. Like a size 18. She was dark skinned. She was about 5’6”. She was little taller than me. She had the gun. She was aggressive.³²

According to the Philadelphia Police Department Biographical Information Report filled out on the day of her arrest on August 20, 2010, Ms. Spellman was a 17 year old high school student, who was 5’6” and weighed 125 pounds. She was not 25-30 years old. The Report also indicates that Ms. Spellman has a medium complexion however her inmate locator photograph (2021) appears to show her skin tone as being light. At trial, the discrepancy between Ms. Phillips statement and Ms. Spellman’s appearance was brought to her attention. She agreed that Ms. Spellman is not dark-skinned but provided her reasoning as to why there was a difference (P. 38):

Q. But you said today this girl ain't dark-skinned.

A. Well, I guess not. She put makeup on.³³

³¹ As discussed in other areas of the report, witness recollections can become contaminated over time and thus the initial statements are considered more reliable. Where relevant, changes in the witnesses’ descriptions from August 2010 to the trial in January 2013 are also discussed in subsequent sections of this report. The key issue to consider here is whether Ms. Spellman at the time of her arrest on August 20, 2010 matched the descriptions provided by witnesses two days earlier.

³² Although Ms. Phillips never described the female perpetrator’s eyes to law enforcement (except to say they were brown, Radio Memorandum), at trial she testified that she would never forget her eyes (P. 19) and that “I never see her eyes. I know your eyeballs.” (P. 38).

³³ From the materials I reviewed, there was no evidence that the robber was wearing makeup. In my professional experience, I have never before seen an explanation like this from a witness who is trying to explain a skin tone discrepancy between a perpetrator and the defendant. However cognitive dissonance,

Regardless, Ms. Spellman is not “dark-skinned” as described by Ms. Phillips in her first interview with police.³⁴ In addition, in August 2010 Ms. Spellman, at 5’6” tall weighing 125 pounds, would not have been considered by any reasonable standard as “heavy” or being a size 18. However, this is how the female robber was described by Ms. Phillips.

With respect to research on witness description accuracy, in Professor Garrett’s (2011)³⁵ book studying the first 250 DNA-based exonerations in the United States, he found there was a substantial mismatch between the description provided by witnesses and the actual appearance of the innocent defendant in 62% of the 161 wrongful conviction cases that were based in part on misidentification. Garrett’s finding is consistent with scientific research showing a correlation between the presence of incorrect descriptors and inaccurate identifications in that, as the number of incorrect descriptors of a suspect increases, identification accuracy decreases.³⁶

These findings from other wrongful conviction cases are consistent with the facts of this case where there is a substantial mismatch between the perpetrator and the suspect (Ms. Spellman) on important features that are not easily altered (e.g., weight, age).

2. Delay³⁷

- 1) **Ms. Mathis.** From the time of her observations on August 18, 2010 to the first time she was shown Ms. Spellman for purposes of identification (at trial) on February 13, 2013, nearly two and half years had passed.
- 2) **Ms. Phillips.** From the time of her observations on August 18, 2010 to her the first time she was shown Ms. Spellman for the purposes of identification (at the Preliminary Hearing) on January 26, 2011, nearly five months had passed.

It is a generally accepted principle amongst eyewitness researchers that memory decreases relatively quickly after an event and then continues to decrease with the passage of time. This relationship is known as the “forgetting curve”. Researchers have examined delays of up to 11 months and found significant impairments on accuracy after this time period.³⁸ Even longer delays would likely further weaken a witness’ memory and cause even greater reductions in accuracy. One of the earliest eyewitness studies to investigate

described below in the section on Post-identification Feedback, could readily explain Ms. Phillips’ belief that the perpetrator had intentionally concealed her true skin tone with makeup.

³⁴ In her August 18, 2010 statement, Ms. Bullock also told police that the female she saw running was dark-skinned.

³⁵ Garrett (2011). *Convicting the innocent: Where criminal prosecutions go wrong*. Cambridge, MA: Harvard University Press.

³⁶ For a thorough review of this literature, see Meissner, Sporer, & Susa (2008). A theoretical review and meta-analysis of the description-identification relationship in memory for faces. *European Journal of Cognitive Psychology*, 20, 414–455.

³⁷ Similar to Co-witness contamination, Delay can be either an estimator or system variable. For example, if a witness does not report a crime or speak with law enforcement for a long period of time after their observations, it would be classified as an estimator variable. However, if law enforcement delays showing a witness an identification procedure after they have developed a suspect, it would be classified as a system variable.

³⁸ Shepherd (1983). Identification after long delays. In Lloyd-Bostock (Ed.), *Evaluating witness evidence* (pp. 173-187). New York: Wiley.

long periods of delay was a study conducted by Egan and colleagues.³⁹ After a delay of 2 days, 21 days, or 56 days, participants were asked to make an identification of two targets that they had viewed during a live exposure. The researchers found no significant decrease in correct identifications of the target over the delay; however, the rate of false alarms of innocent people increased from 2 days (48% errors) to 21 days (62% errors) to 56 days (93% errors). Other research conducted over the past three decades has confirmed the deleterious effects of delay on identification accuracy and in particular the misidentification of innocent suspects.⁴⁰ Further, individuals with weak or poor memories of an individual are much more likely to be influenced by suggestive procedures (e.g., non-blind administration, filler bias, post-identification feedback). This is why it is important to interview witnesses as soon as possible after an event so that relevant details can be obtained and that witnesses will be less susceptible to suggestion.

3. Showup (in-court) Identifications

Both Ms. Mathis and Ms. Phillips selected Ms. Spellman for the first time from in-court showup identification procedures where Ms. Spellman was seated at the defense table. No out of court procedures were conducted with either witness.

Show-up identifications are suggestive by their nature and are dangerous because there is no particular way for law enforcement (or prosecutors, as is the case here) to know when an eyewitness has made an error and identified an innocent person because, unlike lineups, there are no known-innocent fillers.⁴¹ A meta-analysis comparing witness performance in show-ups to six-person photo arrays indicates that mistaken identifications are significantly more likely with show-ups.⁴² Consistent with these finds, the American Psychology-Law Society 2020 White Paper recommended that showups be avoided when possible.⁴³ Further, some courts have recently begun to limit the use of in-court/showup identification appreciating the suggestive nature of the procedure.⁴⁴ In summary, as stated above, I have never before seen a case where all of the identifying witnesses were asked to make their first identification attempt of the suspect in court at a hearing or at trial.

4. Pre-identification Warnings/Instructions

- 1) **Ms. Mathis.** Before her first identification procedure with Ms. Spellman (at trial), Ms. Mathis was simply asked (P. 19):

Q. Is that young lady here today in court?

³⁹ Egan, Pittner, & Goldstein (1977). Eyewitness identification: Photographs vs. live models. *Law and Human Behavior*, 1, 199-206.

⁴⁰ E.g., Deffenbacher, Bornstein, McGorty, & Penrod (2008). Forgetting the once-seen face: Estimating the strength of an eyewitness's memory representation. *Journal of Experimental Psychology: Applied*, 14, 139-150; Dysart, & Lindsay (2007). The effects of delay on eyewitness identification accuracy: Should we be concerned? In Lindsay, Ross, Read, & Tolia (Eds.), *The handbook of eyewitness psychology, Vol II, Memory for people* (pp. 361-376). Mahwah, NJ: Lawrence Erlbaum.

⁴¹ As stated elsewhere in this report, this is why it is critical to have only one suspect per lineup so that law enforcement can better ascertain whether a witness has a reliable memory.

⁴² Steblay, Dysart, Fulero, & Lindsay (2003). Eyewitness accuracy rates in police showup and lineup presentations: A meta-analytic comparison. *Law and Human Behavior*, 27, 523-540.

⁴³ Wells, Kovera, Douglass, Brewer, Meissner, & Wixted (2020). Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence. *Law and Human Behavior*, 44, 3-36.

⁴⁴ CT v. Dickson, MA trilogy of cases.

- 2) **Ms. Phillips.** Before her first identification procedure with Ms. Spellman at the Preliminary Hearing, Ms. Phillips was asked (P. 12):

Q. Do you see the girl who pulled the gun on you in court?

A. Yes, I do.

Q. Could you please identify her for the record?

Failing to tell a witness that the actual perpetrator may or may not be present in an identification procedure is suggestive because it implies that the perpetrator is present. Implying in any way to an eyewitness that the suspect is in the identification procedure encourages witnesses to make a selection. Instead, eyewitnesses should be told *explicitly* that the person in question might not be in the procedure and that they should not feel compelled to make an identification.⁴⁵ This pre-lineup warning/instruction follows from decades of empirical data showing that eyewitnesses are less likely to identify an innocent suspect when they are warned that the actual culprit might not be present.⁴⁶ Taken as a whole, the results of instruction bias research shows the power of pre-identification warnings and how, when properly issued, they can prevent mistaken identification decisions from happening to begin with.

In 1992, the International Association of Chiefs of Police issued Training Key (#414) on how to conduct identification procedures and that training key included recommendations for pre-identification warnings. Later, in 1999, the Department of Justice's National Institute of Justice (NIJ) issued a report that outlined several methods for minimizing mistaken eyewitness identification when collecting evidence.⁴⁷ These best practices also recommend, among other things, that cautionary instructions be provided to the eyewitness that the culprit may not be in the procedure and that the police will continue to investigate the case even if no identification is made, so as to minimize the natural inclination to guess or to be guided by suggestion simply because the witness believes that the police suspect is present.

5. Repeated Identification Procedures: Unconscious Transference and Commitment Effects

- 1) **Ms. Mathis.** According to the record, there was extensive media coverage relating to this case and Ms. Spellman's photograph was shown in the news. It is not known whether Ms. Mathis saw this photograph prior to her selection of Ms. Spellman at trial because she was not asked whether she viewed this coverage.
- 2) **Ms. Phillips.** Similar to Ms. Mathis, it is unknown whether Ms. Phillips viewed the media coverage regarding this case and whether she saw Ms. Spellman's photograph in the news. Regardless, on two occasions, Ms. Phillips was shown Ms. Spellman for the purposes of identification. Both instances were in court and Ms. Phillips selected her each time.

⁴⁵ At Mr. Combs' trial in 2011, Ms. Mathis testified that she expected that the male she saw running would be the same person who was on trial. (P. 32-33). It is reasonable to believe that she had the same expectation with respect to the female she saw running at Ms. Spellman's trial in 2013.

⁴⁶ Steblay (1997). Social influence in eyewitness recall: A meta-analytic review of lineup instruction effects. *Law and Human Behavior*, 21, 283-297; Clark (2005). A re-examination of the effects of biased lineup instructions in eyewitness identification, *Law and Human Behavior*, 25, 575-604; Steblay (2013). Lineup Instructions, in Cutler (Ed)., *Reform of eyewitness identification procedures* (65-86). American Psychological Association.

⁴⁷ National Institute of Justice Eyewitness Technical Working Group on Eyewitness Evidence. (1999). *Eyewitness evidence: A guide for law enforcement*. United States Department of Justice, Office of Justice Programs.

In this case Ms. Mathis and Ms. Phillips viewed two individuals on August 18, 2010. Police developed two suspects, Ms. Spellman and Mr. Combs. Although Ms. Spellman never appeared in any out of court identification procedures, Mr. Combs was viewed by both witnesses in a lineup. The results of that lineup were negative – neither witness identified Mr. Combs or any other lineup member. Despite this negative result, both witnesses were permitted to view him again in court in 2011 and on these occasions made “positive” in-court identifications (Preliminary Hearing by Ms. Phillips and at his trial by Ms. Phillips and Ms. Mathis). Because a pattern of rejection followed by selection occurred in this case, the concept of unconscious transference applies to these witnesses.

Unconscious transference has likely plagued most people at one time or another as evidenced in the question “where do I know that face?” Witnesses that view a person in multiple identification procedures or in multiple contexts (e.g., in a photo array and then in court) are faced with a similar question. The correct answer is for the witness to say “I saw that face from several different contexts”, but the erroneous conclusion is that the face is familiar **only** because it is the face of the perpetrator. The concern is that this sense of familiarity on the part of the witness may lead to an increased likelihood of choosing that person and a feeling of increased confidence in subsequent identification procedures. In fact, a meta-analysis on transference from viewing mugshot photographs confirms that witnesses are more likely to pick from a lineup a person previously viewed.⁴⁸

If an individual has been selected in one identification procedure, that person is considerably more likely to be selected in a subsequent procedure regardless of whether or not they are the actual perpetrator;⁴⁹ this is known as “commitment.”⁵⁰ Thus, it is quite possible that Ms. Spellman was selected by Ms. Phillips at trial merely because she had previously selected her at the Preliminary Hearing. Results from a second, third, fourth, etc. identification procedure whereby a witness has already viewed the suspect are not independent of the previous viewings and should be treated with extreme caution. It is for this reason that psychologists view in-court identifications as mere theatre and not actual independent tests of a witness’s memory or ability to identify perpetrators.⁵¹ In fact, some courts have recently begun limiting the use of in-court identifications.⁵²

⁴⁸ Deffenbacher, Bornstein, & Penrod (2006). Mugshot exposure effects: Retroactive interference, mugshot commitment, source confusion, and unconscious transference. *Law and Human Behavior*, 30, 287-307.

⁴⁹ For a review, see Steblay & Dysart (2016). Repeated eyewitness identification procedures with the same suspect. *Journal of Applied Research in Memory and Cognition*, 5, 284-289.

⁵⁰ Brigham & Cairns (1988). The effect of mugshot inspections on eyewitness identification accuracy. *Journal of Applied Social Psychology*, 18, 1393-1410; Deffenbacher, Bornstein, & Penrod, (2006). Mugshot exposure effects: Retroactive interference, source confusion, and unconscious transference. *Law & Human Behavior*, 30, 287-307; Dysart, Lindsay, Hammond, & Dupuis (2001). Mugshot exposure prior to lineup identification: Interference, transference, and commitment effects. *Journal of Applied Psychology*, 86, 1280-1284; Gorenstein, & Ellsworth (1980). Effect of choosing an incorrect photograph on a later identification by an eyewitness. *Journal of Applied Psychology*, 65, 616-622; Behrman & Vayder (1994). The biasing influence of a police showup: Does the observation of a single suspect taint later identification? *Perceptual and Motor Skills*, 79, 1239-1248; Godfrey & Clark (2010). Repeated eyewitness identification procedures: Memory decision making, and probative value. *Law and Human Behavior*, 34, 241-258; Haw, Dickinson, & Meissner (2007). The phenomenology of carryover effects between show-up and line-up identifications. *Memory*, 15, 117-127.

⁵¹ See Steblay & Dysart (2016). Repeated eyewitness identification procedures with the same suspect. *Journal of Applied Research in Memory and Cognition*, 5, 284-289. In fact, courts in MA and CT are also beginning to limit in-court identifications as they have recognized the suggestive nature of the procedure.

⁵² CT v. Dickson, MA trilogy of cases.

In each succeeding repeated identification procedure, witnesses can become increasingly more committed to their identifications and increasingly certain of their accuracy. In fact, there are examples from post-conviction DNA exoneration cases where, after a witness had incorrectly selected an innocent suspect, they continued to identify the innocent suspect even when presented with the actual perpetrator responsible for the crime.⁵³

6. Witness Confidence

Neither witness in the case was asked to provide a confidence statement when they selected Ms. Spellman from the (suggestive) in-court identification procedure. From the written trial record, it is not possible to assess whether certain statements were made assertively (with confidence) in front of the jury.

Research shows that there is a relatively strong relationship between the accuracy of an eyewitness's positive identification and their confidence in that identification *at the time of the first identification attempt with a suspect when certain conditions are met*.⁵⁴ An eyewitness who expresses high confidence in their identification is expressing a strong belief that the identified person and the perpetrator are the same individual. This belief can arise out of pure memory judgments (i.e., a perception of remarkable resemblance between the identified person and the eyewitness's memory of the culprit) or for reasons other than the eyewitness's memory including suggestion, and other factors.⁵⁵

An important fact to consider is that the relationship between confidence and accuracy can be significantly affected by pre- and post-identification factors. Expressions of confidence *at trial*, however, are relatively **meaningless**⁵⁶ because confidence is *malleable*, and easily affected by external sources. The lack of a meaningful relationship between confidence and accuracy at trial is concerning because there is significant

⁵³ The wrongful convictions of John Jerome White and Ronald Cotton are two such examples. See <https://www.innocenceproject.org/cases/john-jerome-white/> (the rape victim incorrectly selected John White from a lineup and did *not* select James Parham from the same lineup, even though Parham was present; Parham was later identified by DNA testing as the actual rapist, and White was exonerated); Jennifer Thompson, "I Was Certain, but I Was Wrong," *N.Y. Times*, June 8, 2000 (rape victim describing her misidentification of Ronald Cotton as her assailant, and how she subsequently testified at a second trial in which the real assailant (later identified through DNA), Bobby Poole, was brought to court, at which Thompson testified, "I have never seen [Poole] in my life" and maintained she was still positive that Cotton was her assailant; DNA testing later exonerated Cotton and implicated Poole, proving that Thompson was incorrect in her identification of Cotton and her non-identification of Poole). See also: <https://www.youtube.com/watch?v=u-SBTRL0Puo> and

<https://www.youtube.com/watch?v=I4V6aoYuDcg>

⁵⁴ See, Wells, Small, Penrod, Malpass, Fulero, & Brimacombe (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads. *Law and Human Behavior*, 22, 603–647; Wixted, & Wells (2017). The relationship between eyewitness confidence and identification accuracy: A new synthesis. *Psychological Science in the Public Interest*, 18, 10–65.

⁵⁵ E.g., Leippe (1980). Effects of integrative memorial and cognitive processes on the correspondence of eyewitness accuracy and confidence. *Law and Human Behavior*, 4, 261–274; Luus & Wells (1994). Eyewitness identification confidence. In Ross, Read & Toglia (Eds.), *Adult eyewitness testimony: Current trends and developments* (348–361). Cambridge University Press; Wells & Bradfield (1998). 'Good, you identified the suspect': Feedback to eyewitnesses distorts their reports of the witnessing experience. *Journal of Applied Psychology*, 83, 360–376; Wells, Ferguson, & Lindsay (1981). The tractability of eyewitness confidence and its implications for triers of fact. *Journal of Applied Psychology*, 66, 688–696.

⁵⁶ *Ibid.*

evidence, going back decades, showing that witness confidence is the single most powerful determinant of whether or not triers of fact will believe that the eyewitness made an accurate identification.⁵⁷

7. Post-identification Feedback

- 1) **Ms. Mathis.** At trial, Ms. Mathis was asked, for the first time, whether she could identify the female she saw running two and a half years earlier (P. 27-8):

Q. Do you think you would be able to recognize the girl again if you saw her?

A. Absolutely.

Q. Is she here today?

A. Mm-hm.

Q. Would you please point to her?

A. Yes.

MR. SEAY: Your Honor, may we see the court at sidebar?

THE COURT: Okay. She had indicated the defendant for the record.

- 2) **Ms. Phillips.** At the Preliminary Hearing on January 26, 2011, Ms. Spellman was asked for the first time to make an identification of the female robber (P. 12):

Q. Do you see the girl who pulled the gun on you in court?

A. Yes, I do.

Q. Could you please identify her for the record?

A. Her.

MS. COELHO: Indicating for the record by point of finger the defendant, India Spellman.

At trial, Ms. Phillips again was asked to make an identification (P. 19):

Q. Is that young lady here today in court?

A. Yes. There she go. How you doing, baby? I forgive you.

THE COURT: Indicating for the record the defendant.

For both Ms. Mathis and Ms. Phillips, the information provided to them by the prosecutor or judge after their selection of Ms. Spellman is considered post-identification feedback. In effect, they were told that they correctly selected the defendant.

As described above, witness confidence can be a useful factor to consider when assessing witness reliability when certain conditions are met. One of the major and primary concerns with interpreting confidence, however, is that research shows *confidence is easily changed*. Confidence malleability is the tendency for an eyewitness to become more (or possibly less) confident in their identification as a function of events that occur after the identification decision. Strong and broad effects of confidence malleability have been shown to emerge when eyewitnesses are told or led to believe that they identified the suspect (versus being told nothing about the alleged accuracy of their decision). This is known as *post-identification feedback*.⁵⁸

⁵⁷ See Cutler, Penrod & Dexter, 1990; Leippe & Romanczyk, 1989; Leippe, Manion, & Romanczyk, 1991; Lindsay, Wells, & O'Connor, 1989; Lindsay, Wells, & Rumpel, 1981; Turtle & Wells, 1988; Wells, Ferguson, & Lindsay, 1981; Wells, Lindsay, & Ferguson, 1979; Wells & Murray, 1984

⁵⁸ Wells & Bradfield (1998). 'Good, you identified the suspect': Feedback to eyewitnesses distorts their reports of the witnessing experience. *Journal of Applied Psychology*, 83, 360-376.

Post-identification feedback is any information provided to a witness or victim that suggests whether their identification decision was accurate, such as telling the witness that they have identified the suspect or defendant or that they have been a really good witness.⁵⁹

In the first research on the post-identification feedback phenomenon, Gary Wells and Amy Bradfield⁶⁰ found that eyewitnesses who received confirming feedback (such as that used in this case) were not only much more confident than were witnesses who received no feedback or disconfirming feedback, the feedback witnesses also distorted their reports of their witnessing conditions by exaggerating how good their view was of the culprit, how much attention they paid to the culprit's face while observing the event, and so on.⁶¹ The results of this study have been replicated many times and also with real witnesses in real ongoing criminal investigations.⁶²

One explanation that has been proposed to explain the post-identification feedback effect, and its strong and pervasive influence on eyewitness confidence, is the theory of *cognitive dissonance*.⁶³ In essence, this theory, which is a long-standing and well-supported theory in social psychology, states that people are in a state of discomfort when they have inconsistent or contradictory beliefs, or when they have beliefs and behaviors that are inconsistent. As it relates to eyewitness identification, a powerful example of cognitive dissonance is the DNA exoneration case of Dean Cage from Illinois. After Dean was exonerated in 2008, the victim refused to believe the accuracy of the DNA results and held on to her belief that Dean was guilty. Thus, cognitive dissonance was so powerful in that case that it was easier for the witness to believe that the DNA testing was flawed than to accept that she had made an error and identified an innocent person. Only after she was presented with independent results of the DNA testing did she come to accept that Dean was innocent and was not the man who had raped her in 1994.

Evidence of cognitive dissonance exists with Ms. Phillips. In her August 18, 2010 interview with police she described the female as being dark-skinned, 25-30 years old and heavy (size 18). At the Preliminary Hearing and at trial, however, she referred to the female as a "girl" and said they were not adults (P. 26 TT), thus changing her description of the robber's age. She also provided explanations for the discrepancy in skin tone and body type between her description of the robber and Ms. Spellman. Specifically, she said the robber must have been wearing makeup (P. 21 Preliminary Hearing, P. 33, 38 TT) because Ms. Spellman is not dark-skinned and that Muslim garments make people look bigger (P. 22 Preliminary Hearing) because Ms. Spellman is not a size 18 (P. 32 TT).

In sum, post-identification feedback or confirmation of an identification decision can lead a witness to believe that they had a better opportunity to see a perpetrator than was actually the case and can make them more confident in their identification decision (along with a host of other effects outlined above). The

⁵⁹ Dysart, Lawson, & Rainey (2012). Blind lineup administration as a prophylactic against the post-identification feedback effect. *Law and Human Behavior*, 36, 312-319.

⁶⁰ Wells & Bradfield (1998). 'Good, you identified the suspect': Feedback to eyewitnesses distorts their reports of the witnessing experience. *Journal of Applied Psychology*, 83, 360-376.

⁶¹ For example, Ms. Mathis told police in 2010 that she thought the female had on a pair of jeans. At Mr. Combs' trial, she testified "that's how I know she had jeans on." (P. 34) This improvement in her confidence about jeans could be a result of cognitive dissonance.

⁶² Wright & Skagerberg (2007). Postidentification feedback affects real eyewitnesses. *Psychological Science*, 18, 172-178.

⁶³ Charman, et al., 2010; Festinger, 1956; Festinger & Carlsmith, 1959.

impacts of feedback are some of the strongest effects that have been found in eyewitness research.⁶⁴ Therefore the testimony of witnesses that they are “certain” of their in-court identification does not provide any meaningful indication of the reliability of those identifications.

8. Non-identifications of the Suspect

- 1) **Mr. Andre Wooden.** Non-identification of Ms. Spellman from the (suggestive) media coverage.
- 2) **Ms. Celestine Bullock.** Although Ms. Bullock was interviewed by police on August 18, 2010 and provided them with descriptions of the people she saw running, it appears that she was never shown any identification procedures and did not testify at trial. At this point, it is impossible to know whether Ms. Bullock would have selected Ms. Spellman as the person she saw running or whether, like Mr. Wooden, she would have indicated that Ms. Spellman was not the person she saw.

In a 2007 meta-analysis of 94 eyewitness identification experiments by Clark, Howell, and Davey,⁶⁵ eyewitnesses gave non-identification responses far more often in target-absent lineups (.52 probability) than in target-present lineups (.33 probability). Thus, the rejection of Ms. Spellman by Mr. Wooden in this case is an important factor to weigh when assessing the reliability of the selections of Ms. Spellman by other witnesses who viewed her in suggestive in-court procedures.

VII. Summary of Opinions

The evidentiary value of an eyewitness identification can be assessed by the existence or absence of factors known – empirically – to influence the strength of the witness’s memory, the reliability of the identification, and the reliability of the in-court testimony. Evidentiary value of an identification is undermined when factors that have been shown to decrease reliability are present in a particular case, and the more factors present, the less probative an identification will be. In other words, when there are numerous factors present in a case that have been shown to decrease reliability, the result can easily be a misidentification of an innocent suspect. In this case, there were many estimator and system variables present that have been shown to decrease eyewitness reliability.

VIII. Supplemental Materials

If additional materials are provided to me in reference to this case, I reserve the right to supplement this report in the future.

If called to testify, I would swear to the truth of these opinions.



Dr. Jennifer Dysart

⁶⁴ See Steblay, Wells & Douglass (2014). The eyewitness post identification feedback effect 15 years later: Theoretical and policy implications. *Psychology, Public Policy, and Law*, 20, 1–18; Douglass & Steblay (2006). Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect. *Applied Cognitive Psychology*, 20, 859–869.

⁶⁵ Clark, S., Howell, & Davey (2007)