IN THE CIRCUIT COURT OF SCOTT COUNTY, MISSOURI

**STATE OF MISSOURI,**

Plaintiff, **:**

**: Case No. XXXXX**

**:**

**v. :**

**:**

**:**

**[DEFENDANT], :**

**:**

Defendant. **:**

# MOTION TO SUPPRESS IDENTIFICATION TESTIMONY AND REQUEST FOR PRE-TRIAL HEARING IN ADVANCE OF TRIAL

[DEFENDANT], through counsel, respectfully moves this Honorable Court to suppress identification testimony pursuant to Rule 24.05, the Fifth Amendment to the United States Constitution, the Missouri Constitution, the common law of the State of Missouri, and the Rules of Evidence. A hearing well in advance of trial is requested on this Motion due to its comprehensive and critical nature to the case. A memorandum of points and authorities in support of this motion is being filed contemporaneously.

The series of events that resulted in the charges being leveled against [DEFENDANT] in this case began in July 2005, when an employee at McDonald’s Food Mart, Marilyn Manning, unwittingly processed two forged checks. Ms. Manning paid little attention to the women cashing the checks that day, as she was distracted by their children, and did not check for IDs. (Manning Dep. 22, Oct. 25, 2006.) Ms. Manning was unable to make an identification when prompted by police following the incident. (Meacham Offense Rpt. 2, Sept. 13, 2005.) Five months later, Rebecca Higgins processed three more forged checks without checking IDs, also paying little attention. (Higgins Dep. 73-74, Oct. 25, 2006.) Sometime later, in January of 2006, store owner

Duke McDonald found a driver’s license in the store’s lost-and-found bin. (McDonald Dep. 11, Nov. 30, 2006.) At the time he found the license, Mr. McDonald had recently learned about the second set of bad checks, and knew he was out another $1,500. With the theft weighing on his mind, Mr. McDonald “noticed” that the woman on the license appeared to match the very generic description given of all the culprits – that is, African-American, and female – and immediately suggested to the first cashier that this might have been one of the culprits. (McDonald Dep. 11.)

On the suggestion of her boss, Ms. Manning was quick to point the finger. Ms. Higgins was in a similar position when she was approached with the same ID by both her manager and the store owner, as she had also cashed bad checks without checking IDs or paying any attention, contrary to store protocol. Thus began the investigation of [DEFENDANT], which was followed by a tour of her workplace, arranged by Mr. McDonald to give the witnesses a chance to match the photo on the driver’s license to [DEFENDANT]. (McDonald Dep. 12-14.) During the “tour,” the witnesses were led by a guide directly to [DEFENDANT], at which point the tour came to a halt so the witnesses could get a good look, her nametag in full view, to do just that. (Higgins Dep. 84.)

These are not witnesses with an independent memory of the perpetrators’ identities. Neither witness gave any description of the culprits prior to viewing the license, and there is no indication that either recalled anything beyond their gender and race, even in filing a police report; the only descriptions came after Mr. McDonald began passing around the driver’s license, thereby polluting their already vague memories. In short, the objective facts of this case demonstrate that the only thing that these identifications show is that, when an employer utilizes a highly suggestive show-up procedure on witnesses whose weak independent memories have long since degraded, such a procedure is highly likely to lead to an identification of the chosen suspect – regardless of whether

that person is the actual culprit. Anyone whose face was on that driver’s license would likely have been fingered as the culprit in this case, so long as she matched a very generic description.

Following this series of biased and suggestive procedures, the police officer on the case compiled a photographic lineup so suggestive and otherwise flawed, that it too – notwithstanding the irreparable taint that had already resulted from the preceding procedures – could have had no other result than the confirmation of the witnesses’ acquired belief that [DEFENDANT] was the culprit. In compiling the lineup, Officer Meacham violated nearly every principle of lineup construction set out by the Department of Justice. See Eyewitness Evidence, A Guide For Law

Enforcement, United States Department of Justice (Oct. 1999). Officer Meacham included *six*

*suspects* in the lineup with only one filler, where the only filler was described as belonging to a *different race* than the suspects. (Prelim. Hearing 18, Dec. 26, 2006.) He made no effort to make the lineup members match the witnesses’ descriptions, nor did they match even loosely, and made no effort to avoid making [DEFENDANT] stand out in the lineup, which she dramatically did. (Meacham Dep. 60-61.) Among other violations, Officer Meacham also retained no records of the procedure.

The identifications should be excluded under due process, because the unnecessarily suggestive procedures produced an unreliable identification. Manson v. Brathwaite, 432 U.S. 98

(1977). The police procedures needlessly violated DOJ guidelines, and the resulting identification is unreliable for this and other reasons. It was tainted by the prior procedures orchestrated by Mr. McDonald in the months leading up to the police lineup, beginning with the photo show-up, and followed by the functional equivalent of a live show-up. The identification is further unreliable because of the amount of time that had passed since the original viewing, coupled with the total lack of attention paid because the cashiers had no idea a crime was occurring. The unreliability is

compounded by the fact that it was a cross-racial identification of a stranger, about whom no details were retained in memory.

The identifications should also be excluded for lack of probative value, and certainly none that outweighs the unfair prejudice that would result. At least one court has held that, even in the absence of governmental conduct, a pre-trial identification must be barred from admission into evidence when it “is so unduly suggestive as to deprive that identification of probative value.” Sheffield v. United States, 397 A.2d 963, 967 n.4 (D.C. 1979). The initial identification was a

photo show-up, a practice which “has been widely condemned” for its likelihood of resulting in an irreparable misidentification. Stovall v. Denno, 388 U.S. 293, 302 (1972). Worse, the show-up

procedure was conducted with witnesses with no detailed memory of the culprits, who on prompting were able to give only generic descriptions of race and gender. The irreparable effects of the initial show-up were compounded by the functional equivalent of a second show-up during the nursing home tour, which came to a halt to allow the witnesses to observe [DEFENDANT] alone. The procedure lacks probative value because it was consistently biased toward the selection of [DEFENDANT], and fails to provide any information from the independent memory of the witnesses. But even if the Court does find the identification in this case to be minimally probative, its prejudicial effect would be incalculable. In the words of Justice Brennan, there is “nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” Watkins v. Souders, 449 U.S. 341, 352 (1982) (Brennan, J. dissenting).

While such prejudice might be deemed “fair” in a case where the “identification” is based on actual memory, here the prejudice from such an identification would be wholly unfair as it would stem from suggestion, coupled with a demonstrable absence of independent memory. The prejudice that

would result in this case would be not only unfair, but irreparable, and as such the identifications should be excluded as an evidentiary matter.

Finally, if the Court finds that this identification evidence passes muster under existing standards, then the law needs to be changed. The Court should establish a new minimum reliability threshold under the state constitution as a check against the shortcomings of the federal due process standard, as evidenced by several decades of social science research that call into question the accuracy of the factors relied upon by the Supreme Court in the late 1970s, and the sufficiency of that test as a screening mechanism against suggestive and otherwise unreliable identifications. This is an emerging trend in state courts, including those of Wisconsin, Utah, Kansas, New Jersey, Massachusetts, New York, and others. The Wisconsin Supreme Court applies a *per se* rule of exclusion in cases where law enforcement officers are unable to demonstrate that a suggestive procedure was necessary under the circumstances. State v. Dubose, 699 N.W.2d 582, 592 (Wisc.

2005). The New Jersey Supreme Court exercised its supervisory authority to exclude any police identification procedures about which detailed records are not preserved. State v. Delgado, 902

A.2d 888, 897 (N.J. 2006). Both Utah and Kansas have modified the test set out in Manson to

formally incorporate a consideration of the adverse effects of suggestive procedures on reliability, under those states’ constitutions. See State v. Ramirez, 817 P.2d 774, 781 (Utah 1991); State v.

Hunt, 69 P.3d 571 (Sup. Ct. Kan. 2003). If this Court finds that an identification as unreliable as the

one in this case is admissible under current law, then it is incumbent upon it to look to the state constitution and the Court’s supervisory powers to establish a new minimum standard of reliability for identification evidence.

For all the reasons set forth herein, [DEFENDANT] calls upon this Court to exclude or suppress the identification evidence in this case, based on Missouri common law, the rules of evidence, and the Fifth Amendment to the U.S. Constitution. She requests a hearing on this Motion.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Filing and the attached letter have been hand- delivered to .

Leah Garabedian

IN THE CIRCUIT COURT OF SCOTT COUNTY, MISSOURI

**STATE OF MISSOURI,**

Plaintiff, **:**

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**[DEFENDANT], :**

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# MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

**OF DEFENDANT’S MOTION TO SUPPRESS IDENTIFICATION TESTIMONY**

Faulty eyewitness identifications are a well-known problem in the American criminal justice system. According to the Innocence Project, a full 75% of the 192 prisoners exonerated by DNA testing as of this writing were convicted based in part on mistaken eyewitness identification testimony. See [www.innocenceproject.org](http://www.innocenceproject.org/) (click on “Eyewitness

Misidentification” under “Understand the Causes”) (as of Feb. 21, 2007). The Department of Justice (DOJ) issued a report in June 1996 entitled “Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial,” profiling 28 DNA exoneration cases; in almost every case, the wrongful conviction was based on eyewitness identification testimony. Id. at 15. The Report of the Illinois Commission on Capital

Punishment, released in 2002, also cites unreliable eyewitness identification as a contributing factor in that state’s famously broken system. See Report of the Illinois Commission on Capital

Punishment at 127-31 (April 2002).

The State of Missouri is not immune to these nationwide problems. At least six men – Johnny Briscoe, Lonnie Erby, Larry Johnson, Steven Toney, Armand Villasana, and Anthony D.

Woods – have been wrongly convicted on the basis of mistaken eyewitness identifications in Missouri, only to be exonerated by DNA evidence years later. See [www.innocenceproject.org](http://www.innocenceproject.org/)

(click on “Browse Profiles” under “Know the Cases”) (as of Feb. 21, 2007). In the case of Mr. Briscoe, as one example, eyewitness testimony was admitted regarding a flagrantly suggestive police lineup in which he was the only man wearing an orange jumpsuit. Id.; see State v.

Briscoe, 672 S.W.2d 370 (Mo.App. E.D. 1984). Not surprisingly, he was identified from that

lineup. He was then convicted on the basis of the eyewitness’s testimony, and spent 23 years in prison for a crime he did not commit. Others have similar stories, and the government seeks to admit testimony regarding the same sort of contaminated identification procedures in the case of [DEFENDANT].

Given the documented dangers of allowing tainted eyewitness evidence to be used at trial, the time has come for Missouri courts to enforce serious safeguards for screening eyewitness identification evidence by adhering to a minimum threshold of reliability. This sort of screening, in fact, is the stated purpose of the current federal standard for the admission of eyewitness testimony under the Fifth Amendment to the United States Constitution, set forth in Neil v. Biggers, 409 U.S. 188 (1972) and Manson v. Brathwaite, 432 U.S. 98 (1977), which the

Supreme Court of Missouri has adopted. See, e.g. State v. Middleton, 995 S.W.2d 443 (Mo.

banc 1999). Under that two-pronged “totality of the circumstances” analysis, the identification procedures used against [DEFENDANT] are both unreliable and inadmissible. Indeed, as the facts will demonstrate, if one were attempting to design a series of identification procedures in order to maximize suggestivity and increase the risk of error, the identification procedures used here would serve as a good model.

The highly suggestive police procedure employed in this case to secure an identification was preceded by a flurry of incidents – the discovery of a driver’s license in a lost-and-found bin many months after the original check-cashing incident, the highly suggestive presentation of that license to witnesses who had previously acknowledged an inability to identify a culprit, the “identification tour” at a nearby nursing home where witnesses already familiar with [DEFENDANT] by name and photo from earlier suggestive procedures “identified” her while she was wearing a prominent name tag – that polluted the memory of the witnesses and would have rendered any identification unreliable. But the police lineup here exacerbated the problem by including *six suspects*, plus a member of a different race from the all the culprits and suspects. Best practices set forth by the Department of Justice require that only one suspect be present in each lineup, with a minimum of five fillers, all of whom should be carefully chosen to match the description originally provided by the witness; these and other guidelines have been carefully crafted to ensure accuracy in lineup procedures and avoid wrongful convictions. Eyewitness Evidence, A Guide For Law Enforcement, United States Department of Justice (Oct. 1999).[1](#_bookmark0)

The procedures used in [DEFENDANT]’s case violate every rule devised by every oversight body that has contemplated the risk of faulty eyewitness procedures and the testimony that flows from them, and should be found inadmissible as violative of due process, the law of evidence, and the Missouri State Constitution. See also American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures, August 2004.[2](#_bookmark1)

# FACTUAL BACKGROUND

The State of Missouri has charged defendant [DEFENDANT] with three counts of forgery, alleging that, on December 27, 2005, she passed three bad checks at McDonald’s Food

1 Appendix A – DOJ document.

2 Appendix B – ABA document.

Mart in East Prairie. (Compl.) The trial is scheduled to begin on May 29, 2007. According to information obtained through the discovery process, there is one eyewitness, Rebecca Higgins, who will purport to identify [DEFENDANT] as one of the persons who passed the bad checks on December 27, 2005. Ms. Higgins’ testimony is the central component of the Government’s case, but it is the product of unconstitutional, unlawful, and unreliable procedures and should be suppressed.

Police apparently believe that the checks in this case stem from a ring of counterfeit checks out of Memphis, Tennessee, which the United States Secret Service began investigating in 2005. The ring involved more than ten instances of bad checks being passed throughout the Southeastern portion of the United States. (Meacham Dep. 38-39.) In February 2005, the first two instances of bad checks occurred locally at the Town and Country food store in East Prairie. The culprits in this incident have never been identified, although [DEFENDANT] has been eliminated as a suspect. (Meacham Dep. 55.) On July 16, 2005, two African-American women and three young children cashed two checks at McDonald’s Food Mart in East Prairie. (Manning Police Statement, Jan. 11, 2006.) Each of the women cashed one of the checks. The names on the checks were Aisshalott Covington and Precious Simms. At the time, the transaction seemed routine, as McDonald’s Food Mart cashes checks for its customers on at least a daily basis. The cashier, Marilyn Manning, has even acknowledged that she was paying virtually no attention to the check cashers, and was instead focused on the children. (Manning Dep. 22.) (“They had small children with them, and I was watching the children instead of them. That was my downfall, right there.”)

Some time soon after the checks were cashed, the bank returned them to McDonald’s Food Mart, accompanied by a note explaining that the checks were counterfeit. (Manning Dep.

24.) As soon as the counterfeit checks were returned, the store owner, Duke McDonald, began his own investigation. He immediately contacted the cashier on duty at the time, Marilyn Manning, and examined with her the store videotapes from the time of the transaction. The videotape showed Ms. Manning interacting with the people who cashed the checks, but Ms. Manning could not make an identification from the videotape. The videotape also showed that Ms. Manning had failed to request any form of identification; Mr. McDonald reminded Ms. Manning that she should have asked for identification at the time of the transaction. (Manning Dep. 25-26.) Sometime during the same time period, Mr. McDonald also contacted the local police. On September 13, 2005, Officer Paul Meacham of the East Prairie Police Department prepared a report concerning the incident, and proceeded to interview Ms. Manning regarding her memory of the events and the identities of the perpetrators. When asked if she could identity the responsible parties, “she could not give positive ID on the two. She thinks she saw them in the store but she can’t be for sure. She said she can’t do it.” (Meacham Offense Rpt.)

On December 27, 2005, another bad check incident occurred at McDonald’s Food Mart. According to the cashier in that instance, Rebecca Higgins, three African-American women entered the store, and each woman cashed what appeared to be a payroll check from the Miner Nursing Home. They signed the checks in Ms. Higgins presence simultaneously, with ink pens provided by the store. The checks were in the name of Aisshalott Covington, Patrice Alexander and Vera Redwing. Ms. Higgins then provided cash to each woman, without taking notice of anything unusual about the women’s appearances. (Higgins Dep. 68-70.) Ms. Higgins noticed nothing unusual about the three women, and spoke to them only when they asked her to cash the checks. They made no additional purchases. Ms. Higgins remembers nothing about how the three women left the store because she “didn’t pay attention,” she had no idea at the time that the

checks were forged, nor did she ask the women for identification. (Higgins Dep. 73-74.) Ms. Manning was “probably” the night manager on duty during the December 27, 2005 incident but did not witness anything and has not purported to remember anything about the incident. (Manning Dep. 8.)

In early January 2006, the bank notified Mr. McDonald that the checks were counterfeit. Mr. McDonald immediately called Ms. Higgins into his office, lectured her about the importance of requiring identification when cashing checks, and asked her whether she remembered the women and could make an identification. Ms. Higgins responded by telling him the women’s height and weight, and adding that she had not observed any other unusual features. (Higgins Dep. 74-75.) Mr. McDonald and Ms. Higgins then reviewed the store videotape but did not see the incident. (Higgins Dep. 75.)

On January 11, 2006, two weeks after the incident, Officer James Fortner took a statement from Ms. Higgins about her recollection of the incident. (Fortner Police Rpt., Jan. 11, 2006.) When asked to give as much detail as possible, Ms. Higgins stated that the first woman was “a heavy-set woman wearing scrubs.” (Higgins Police Stmt., Jan. 11, 2006) She described the second woman as “also a black woman,” of “slender and of average height,” with “short black hair.” (Higgins Police Stmt.) Ms. Higgins described the third woman as “also a black woman,” also “heavy-set,” with her “hair in a weave” and “wearing a black coat.” Ms. Higgins told police that all three had entered the store “with what appeared to be payroll checks from Miner Nursing Home.” (Higgins Police Stmt., Jan. 11, 2006.) She stated that all of the women appeared to be in their late 30s to early 40s. (Higgins Police Stmt.) In Ms. Higgins’ deposition ten months later, however, she described all of the women as being approximately ten years younger. (Higgins Dep. 71-73.)

During this same time period, Mr. McDonald learned that a driver’s license had been found at this store and placed into the lost items bin, “some time” after the checks had been passed. The driver’s license had [DEFENDANT]’s name and picture on it. When he found the license, Mr. McDonald decided it was odd for a license to remain in the store unclaimed, particularly a license from Sikeston, Missouri. Mr. McDonald showed the license to Ms. Manning to inquire whether it had any connection to the bad checks, and Ms. Manning responded that she “thought that was one of the ladies that had cashed the checks” back in July. (McDonald Dep. 11, Nov. 30, 2006.) Mr. McDonald also showed the license to Ms. Higgins and she also said that she thought it was one of the women who had cashed a check in the December incident. (Meacham Officer Stmt.)

Because the checks had the name of a nursing home printed on them, Mr. McDonald telephoned his niece, Megan Parker, who worked for Miner Nursing Home, to see if she knew [DEFENDANT]. (McDonald Dep. 12.) They discovered that [DEFENDANT] worked at the Clearview Nursing Home, owned by the same parent company that operates the nursing facilities in the East Prairie area. Ms. Parker eventually put her uncle in touch with Jo Carolyn Noe, the Director of Operations for the parent company, called Health Services. (McDonald Dep. 12-14.) Mr. McDonald spoke with Ms. Noe, and suggested that she give a “tour” of the Clearview Nursing Home to Ms. Manning and Ms. Higgins in order to attempt to confirm their identification of [DEFENDANT] from the driver’s license. (Noe Dep. 32, Nov. 30, 2006.) Mr. McDonald also stated that he suspected [DEFENDANT]’s mother, Mary McCain, who also worked at the Clearview Nursing Home, as having been one of the women who cashed the checks, and suggested that Ms. Manning and Ms. Higgins also seek to identify Ms. McCain during their “tour” of the facility. (McDonald Dep. 14.)

Ms. Noe set up the tour on February 8, 2006, at the start of which both cashiers knew [DEFENDANT]’s name from the driver’s license found at the store. (Noe Dep. 33.) Five or ten minutes into the “tour,” the women approached [DEFENDANT] as she was wheeling a patient down the hall. [DEFENDANT] was wearing green hospital scrubs, as well as her name tag, and Ms. Noe stopped to talk with the resident in the wheelchair while Ms. Higgins and Ms. Manning took a closer look at [DEFENDANT]. (Higgins Dep. 81-82.) The employee name tags were easily readable from a distance of five to ten feet, and anyone could have read them as they walked past, according to Ms. Noe’s testimony. (Noe Dep. 55.) Both women claim to have recognized [DEFENDANT], whose name and photograph they had both studied in preparation for the tour. (Manning Dep. 16.) Ms. Noe continued the tour by finding a nursing station where Ms. McCain and Carolyn Hines were walking side by side. One of the cashiers made a comment about Ms. McCain and the other cashier said “that other girl, she’s been in the store too.” (Noe Dep. 40.)

After the “tour” of the Clearview facility, Mr. McDonald contacted Officer Meacham to report that “he found out who had cashed these checks at his store.” Officer Meacham then met with Mr. McDonald, who explained how he had conducted the investigation, focused around the driver’s license. (Meacham Officer Stmt., Feb. 26, 2006.) Officer Meacham then obtained photos of the three women identified at the Clearview Nursing Home and showed them to Ms. Manning and Ms. Higgins as part of a photo-lineup. Officer Meacham does not recall how many photos were in the lineup. “I think I had six or eight. I don’t recall the exact number.” (Meacham Dep. 61.) Officer Meacham does recall that “they both said that these people are the ones that cashed the checks.” (Meacham Officer Stmt.) Officer Meacham did not save the photos he showed in any particular order, and did not have them numbered. But as he explained,

there was no need for him to do so because “I know who the suspects were, and I also knew if they picked the correct people.” (Meacham Dep. 58.) Officer Meacham then took additional statements from Ms. Manning and Ms. Higgins, in which each explained that she had gone to the nursing home to try to identify [DEFENDANT], and that she had done so. (Manning Police Stmt., Higgins Police Stmt.)

# ARGUMENT

1. **The Identification Procedures Employed Were Unnecessarily and Impermissibly Suggestive**

The identification procedures used in this case were so unnecessarily and impermissibly suggestive as to require suppression of the identification under the due process clause of the Fifth Amendment. Under federal law, Manson v. Braithwaite, 432 U.S. 98, 114 (1977); Neil v.

Biggers, 409 U.S. 188, 192 (1972), this Court must address two core questions in resolving a

motion to suppress an identification based on a suggestive pre-trial procedure: (1) whether the identification procedure itself was unnecessarily and impermissibly suggestive; and (2) “whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive.” Neil v. Biggers, 409 U.S. at 198-99.

The lineup in this case was, without a doubt, impermissibly suggestive – all of the factors point in this direction, including the odd manner in which the driver’s license photo was shown to the witness, the multiple viewings, the “tour” of the nursing home facility, and the subsequent lineup composition in the absence of proper instructions. The Supreme Court has long recognized that “a major factor contributing to the high miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.” United States v. Wade, 388 U.S. at

228. As the Court has explained, moreover, these procedures can “take the form of a lineup . . .

or show up” but “it is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification.” Id. at 229-30. And, as the Court has

noted, “it is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined then and there, before the trial.” Id. at 228.

The danger of allowing suggestive identification procedures in front of juries is well- established, and the likelihood that even the most skilled defense attorney can deflate that testimony in the minds of jurors – no matter how wrong – is remote. See Jennifer L. Devenport

et al., How Effective Are the Cross-Examination and Expert Testimony Safeguards? Jurors

Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures, 87 (6) J. of

Applied Psychol. 1042 (2002). The Missouri case of Toney v. State bears out the force of

eyewitness testimony, even when subjected to a vigorous cross-examination. Toney v. State,

770 S.W.2d 411 (Mo.App. E.D. 1989) (characterizing trial counsel’s cross-examination as “a strenuous attack upon the identification testimony” in the case, and upholding the conviction). It also bears out the risk: after mistaken eyewitness testimony was allowed in front of Mr. Toney’s jury, despite defense counsel’s targeted cross, Mr. Toney was convicted and spent over 13 years in prison. See [www.innocenceproject.org](http://www.innocenceproject.org/) (click on “Browse Profiles” under “Know the Cases,”

then click “Toney”) (as of Feb. 21, 2007). In 1996, DNA testing was conducted on the biological evidence from his case, and he was cleared from any involvement, despite undoubtedly compelling eyewitness statements to the contrary. Id. Mr. Toney’s case puts a fine

point on the importance of keeping eyewitness identifications based on flawed procedures out of evidence, as the harm is all but impossible to undo.

The procedures used in [DEFENDANT]’s case are no exception. Notwithstanding the unduly suggestive procedures employed by Mr. McDonald in his series of textbook improper identifications (addressed in detail below), and the irreparable taint that Mr. McDonald’s quest cast on any future identifications in this case, the techniques employed by Officer Meacham in conducting the photo lineup were unnecessarily and impermissibly suggestive in their own right.

1. The Composition of the Lineup in a Manner That Made the Suspect Unduly Stand Out Made the Lineup Impermissibly Suggestive

The danger posed by lineups in which a suspect stands out is acute, because they draw unnecessary attention to the suspect, thereby diminishing the weight that a witness attributes to her own memory and increasing the likelihood that the police suspect will be chosen, regardless of the identity of the culprit. See Eyewitness Evidence, A Guide For Law Enforcement at 29.

As mentioned above, the Missouri trial court in State v. Briscoe admitted an eyewitness

identification from a lineup in which the defendant was the only person wearing an orange jumpsuit, resulting in Mr. Briscoe’s 23-year prison term. See State v. Briscoe, 672 S.W.2d 370

(Mo.App. E.D. 1984); see [www.innocenceproject.org](http://www.innocenceproject.org/) (click on “Browse Profiles” under “Know

the Cases,” then click “Briscoe”) (as of Feb. 21, 2007). If the trial judge in that case had followed the guidance of available scientific research, he would have found the lineup in which Mr. Briscoe unduly stood out from the others to be impermissibly suggestive, and would have excluded it from evidence. And in the absence of any corroborating evidence, Mr. Briscoe would have spent the last 23 years with his family, rather than in a Missouri prison. Other courts have found photo lineups inadmissible for failure to follow this recommendation alone. See

State v. Haynes, 345 N.W.2d 892 (Wisc. App. 1984) (overturning trial court’s admission of

photo lineup in which an “important identification factor” was unique to the suspect photo, finding lineup both impermissibly suggestive and unreliable); United States v. Fernandez, 456

F.2d 638, 641-643 (2nd Cir. 1972) (finding photo array in which suspect was only light-skinned African American man with afro impermissibly suggestive).

The same danger is present here, as the record gives no indication that anyone else in the lineup bore any resemblance to the photo of [DEFENDANT]. From the available record, we know that a photo of Carolyn Hines was included in the lineup, in addition to that of [DEFENDANT]. According to the description given by Ms. Manning, based on her viewing during the tour of the nursing home, Ms. Hines is in her forties and heavy-set, with “fluffed” hair. (Manning Dep. 14-15.) In striking contrast, [DEFENDANT] is slender, in her twenties, and wears her hair pulled back. Another person whose photo was included in the lineup is *[DEFENDANT]’s mother*, Mary McCain. (Meacham Officer Stmt.) Presumably [DEFENDANT] and her mother are easily distinguishable by, if nothing else, their obvious difference in age. Another person included in the photo lineup was described by Ms. Manning, in her recollection of the photo procedure, as belonging to *another race* from the other members of the lineup. (Prelim. Hearing 18.) The stark contrast between the features of [DEFENDANT] and the other members of the lineup renders the procedure extremely suggestive and introduces a substantial likelihood of misidentification.

1. The Use of Fillers Not Matching the Original Description Rendered the Lineup Impermissibly Suggestive

It is a fundamental rule of lineup construction that the fillers should generally match the original description given by the witness in order to avoid suggestiveness. Eyewitness Evidence,

A Guide For Law Enforcement at 29; Statement of Best Practices For Promoting the Accuracy of

Eyewitness Identification Procedures at 3. When the fillers are not selected to match the original

description, this increases the danger that the suspect – who presumably became a suspect at least in part because she matched the witness’s description – will be the person in the lineup who

obviously matches that description most closely. The guideline is aimed at discouraging the use of lineup fillers who are chosen to match the characteristics of the *suspect*, rather than the witness’s description of the *culprit*. While this guideline may not be immediately intuitive, it serves to protect against lineups in which the suspect stands out as the only person linked to the witness’s description by a core trait (or traits), but by which the suspect might not be linked to fillers – despite the fact that the suspect might not otherwise appear to stand out as compared to those fillers, absent consideration of the traits included in the description, which is presumably the witness’s benchmark.

For that reason, the guideline requires that the original description of the culprit, rather than suspect characteristics, be used as the lineup norm. The danger is particularly evident in cases where the suspect is not the culprit: in those cases, fillers chosen to match the suspect’s characteristics might be easily ruled out because they fail to match even the most generic original description, and the only person left in the lineup will be the police suspect, even though a third party viewing the lineup might not conclude that any one person objectively stands out when the lineup is viewed on its face. When fillers are chosen to match the suspect and not the description, the procedure is reduced to a test of matching documented descriptors to the only person in the lineup who could be described as a match, rather than a test of the witness’s ability to remember the identity of the actual perpetrator.

The lineup here is worse than even the scenario envisioned by the DOJ and ABA when they set out the lineup guidelines to protect against suggestive procedures. In the current case, the witnesses gave generic descriptions of the race, height, weight, approximate age, and clothing of the women who passed the fraudulent checks, thereby providing some guidance by which to compile reliable lineups. (Higgins Stmt. 1; Manning Stmt.) The woman now alleged to

have been [DEFENDANT] was described as “slender,” and as far as the record indicates, hers was the only photo in the lineup matching that single “important identification factor.” (Higgins Stmt. 1); State v. Haynes, 345 N.W.2d at 897. Instead of following the non-suggestive protocol

recommended by both the Department of Justice and the American Bar Association, Officer Meacham ignored the recommendations and again used the most suggestive protocol conceivable: he discarded the description given altogether, *also* ignored the characteristics of the suspect, and instead chose fillers based on the arbitrary criterion of their suspected involvement in the case – plus one additional individual belonging to a different race. There can be no question that [DEFENDANT] stood out as the only person in the lineup matching the witness’s description, and as a result this lineup was both impermissibly suggestive and entirely unreliable.

1. The Failure to Give Cautionary Instructions Made the Lineup Impermissibly Suggestive

To prevent the risk that a witness will make a “forced choice,” the administrator of a lineup procedure should also give detailed instructions to the witness regarding the purpose and nature of the lineup procedure. Eyewitness Evidence, A Guide For Law Enforcement at 31-32.

In every case, the investigator should “provide instructions to the witness to ensure the witness understands that the purpose of the identification procedure is to exculpate the innocent as well as to identify the actual perpetrator.” Id. at 31. Further, the lineup administrator should

expressly instruct the witness that the culprit might or might not be present in the lineup, and that the investigation will continue regardless of whether an identification is made. Id. at 32.

Extensive studies have confirmed the importance of this set of instructions in reducing false identifications, as well as the danger of failing to include it. Courts are beginning to require jury instructions to offset the risk when police investigators fail to use it. See State v. Ledbetter, 881

A.2d 290, 314-319 (Conn. 2005); compare State v. King, 915 A.2d 587 (N.J. Super. Ct. A.D.

2007) (overturning conviction for trial court’s failure to give instruction on the effects of suggestive police practices). Psychologist Dr. Nancy Steblay conducted a meta-analysis of the literature to examine the effect of the “might or might not be present” instruction, and found that across all the studies she examined, this instruction alone reduced the rate of false identifications by *41.6%* in lineups where the actual culprit was not present in the lineup. It was based largely on the research of Dr. Steblay that the Department of Justice included this recommendation in its Guide for Law Enforcement. See Gary L. Wells & Elizabeth A. Olson, Eyewitness Testimony,

54 Ann. Rev. Psychol. 277, 286-287 (2003).

At least one state court has acknowledged the importance of lineup instructions, and held recently that in cases where such identification testimony is otherwise admissible, it must be accompanied by an instruction warning the jury of the associated risk of misidentification when no such instruction was provided at the lineup. State v. Ledbetter, 881 A.2d 290, 318-319

(Conn. 2005). In this case, no instructions whatsoever were given to any witness, and the resulting risk that [DEFENDANT] was falsely identified is unacceptably high. Once again, well-known non-suggestive procedures were readily available, but instead Officer Meacham took the great risk of conducting a lineup procedure with no cautionary instructions, thereby leading the witnesses to believe that it was their duty to select *someone* from the photo array. This fact alone should be sufficient to prevent the results of this procedure from being admitted in court.

1. The Procedure Was Impermissibly Suggestive Because the Administrator Knew the Identity of the Suspect

In order to avoid suggestiveness in conducting a lineup, police best practices dictate that an investigator should not know the identity of the suspect. According to the Department of Justice publication entitled Eyewitness Evidence: A Trainer’s Manual for Law Enforcement,

using “blind” procedures helps to ensure “that the case investigator does not unintentionally influence the witness.” Eyewitness Evidence: A Trainer’s Manual for Law Enforcement, United States Department of Justice (Sept. 2003).[3](#_bookmark2) Research has conclusively demonstrated that when individuals conduct experiments in a context in which they know the preferred or “correct” outcome, they are likely to give inadvertent cues that not only support that result, but increase the likelihood that it will occur – often with no knowledge that the suggestion is taking place, and even when earnest attempts are made to avoid doing so. This danger is particularly grave immediately following the lineup, when non-blind investigators almost always give confirmatory feedback – whether intentionally or unintentionally – which has been shown to eliminate doubt in the mind of the witness that may have existed previously. Gary Wells et al., Eyewitness

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

Behav. 6, 14 (1998). In this case, Officer Meacham knew that [DEFENDANT], Ms. McCain, and Ms. Hines were the suspects, and conducted the lineup with the intention of confirming their involvement – in Officer Meacham’s words, “I know who the suspects were, and I also knew if they picked the correct people.” (Meacham Dep. 58.) Even worse, though it is unclear when, Ms. Higgins also became aware that the three primary suspects were present in the lineup, even though she is unsure if she ever identified one of them. (Prelim. Hearing 23.)

There are simple methods available at zero cost to avoid the highly suggestive practice of a non-blind lineup administration, even when a “blind” administrator is not available to conduct the procedure. One such low-budget option is known as the “folder method,” which is the recommended procedure in several jurisdictions for cases in which cost prohibits bringing in an investigator who is not aware of the identity of the suspect. See Model Policy and Procedure for

Eyewitness Identification, State of Wisconsin, Office of the Attorney General, 7 (2005); Amy

3 Appendix C – DOJ document.

Klobuchar et al., Improving Eyewitness Identifications: Hennepin County’s Blind Sequential

Lineup Pilot Project, 4 Cardozo Pub. L., Pol., & Ethics J. 381 (2006). Despite the ready

availability of less suggestive alternatives, Officer Meacham used the most suggestive method for conducting the lineup procedure in this case.

1. The Lineup Procedure Was Tainted Because [DEFENDANT] Was the Only

“Repeater”

Apart from the composition of the lineup, another serious problem with the lineup is that [DEFENDANT] was the only person in the lineup of whom the witness had already seen a prior photograph. That is, [DEFENDANT] was the only “repeater” – the only person in the police lineup that the witness had seen before. To make matters dramatically worse, it appears from Officer Meacham’s testimony at the preliminary hearing that he may have used *the exact same photo from the driver’s license*, as the lineup photos were “given to me by the driver’s license bureau.” (Prelim. Hearing 30.) This greatly adds to the suggestivity of the lineup in that it creates a high probability of a scenario where the witness could be identifying [DEFENDANT] not because she recognizes her as the perpetrator but because she recognizes her from a photograph she had seen of her previously. Jennifer E. Dysart et al., Mug Shot Exposure Prior to

Lineup Identification: Interference, Transference, and Commitment Effects, 86 (6) J. Applied

Psychol. 1280 (2001). “Th[e] danger [that a witness will make an incorrect identification] will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw.” Simmons v. United States, 390 U.S. 377, 383 (1968).

Here, the witnesses viewed [DEFENDANT]’s photograph presumably numerous times preceding the nursing home tour, as they discussed the case, and memorized her name and face, and quite likely the exact same photo. “Regardless of how the initial misidentification comes

about, the witness thereafter is apt to retain in [her] memory the image of the photograph rather than of the person actually seen**,** reducing the trustworthiness of subsequent lineup or courtroom identification.” Id. at 383-384.

# The Identification of [DEFENDANT] is Unreliable

Where an identification is shown to be suggestive, it must be examined for reliability. “Reliability is the linchpin in determining the admissibility of identification testimony.” Manson

v. Braithwaite, 432 U.S. 98, 114 (1968). On this point, it is important to remember that

suggestivity and reliability are inherently related: “suggestive confrontations are disapproved because they increase the likelihood of misidentification.” Neil v. Biggers, 409 U.S. at 198.

Apart from suggestivity, factors relevant to the determination of reliability include the opportunity of the witness to view the defendant at the time of the crime, the accuracy of any prior description, the level of certainty of the witness and the length of time between the crime and the identification. Neil v. Biggers, 409 U.S. 188, 199-200 (1972). The identification of

[DEFENDANT] is unreliable not only because it is the result of suggestive procedures, but the totality of the circumstances demonstrates that it is unreliable for a host of other reasons as well.

In considering these factors, it is important to scrutinize with care any self-reports by the eyewitness about the circumstances of their identification. In the 30 years since Manson, social

science research has demonstrated witness self-reports about the attention they paid to the suspect, the extent of their opportunity to view the suspect, and the duration of the event, are notoriously unreliable. R.E. Nisbett & T.D. Wilson, Telling More Than We Can Know Verbal

Reports On Mental Processes*,* 84 Psychol. Rev. 231-59 (1977); Gary L. Wells & Donna M.

Murray, What can psychology say about the Neil v. Biggers Criteria for Judging Eyewitness

Identification Accuracy*,* 68 J. Applied Psychol. 347-62 (1983); Elizabeth F. Loftus et al., Time

Went by So Slowly: Overestimation of Event Duration by Males and Females, 1 Applied

Cognitive Psychol. 1 (1987); Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony:

Civil and Criminal 26-27 (1987) (explaining that a witness tends to overestimate the duration of an especially stressful or violent event).[4](#_bookmark3) In addition, research has now demonstrated that witness confidence statements correlate with accuracy only when they are made immediately after the original identification, and are uncontaminated by confirming feedback. Gary L. Wells et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22

1. L. & Hum. Behav. 15-16 & 18 (1998); see, e.g. Evan J. Mandery, Due Process

Considerations of In-Court Identifications, 60 Alb. L. Rev. 389, 418 (1996); Benjamin E.

Rosenberg, Rethinking Due Process in Connection with Pretrial Identification Procedures: An

Analysis and a Proposal, 79 Ky. L.J. 259, 276 (1990/1991) (citing Cutler et al., The Reliability of

Eyewitness Identification*,* 11 L. & Hum. Behav. 233, 234 (1987); Kenneth A. Deffenbacher,

Eyewitness Accuracy and Confidence*,* 4 L. & Hum. Behav. 243, 258 (1980). And most

importantly, suggestive police procedures themselves can skew all of the factors set forth in Manson: research has shown that witness statements concerning their own level of certainty,

their opportunity to view the suspect, the detail of the description, and their attention level all can be inflated through the use of suggestive procedures. Bradfield et al., The Damaging Effect Of

Confirming Feedback on the Relation Between Eyewitness Certainty And Identification

Accuracy, 87 J. Of Applied Psychol. 112 (2002); G.L. Wells & A.L. Bradfield, “Good, You

Identified the Suspect”: Feedback To Eyewitnesses Distorts Their Reports Of The Witnessing

4 In a survey of over 100 experimental psychologists, potential jurors, judges, law students, and lawyers conducted by Daniel Yarmey and Hazel P. Tressillian Jones, ninety-five percent of the experts agreed that witnesses generally overestimate the duration of crimes, whereas fewer than half of the potential jurors did so. A. Daniel Yarmey & Hazel P. Tressillian Jones, Is the Psychology of Eyewitness Identification a Matter of Common Sense?, in Evaluating Witness Evidence: Research and New Perspectives 33 (Sally M. Lloyd-Bostock & Brian R. Clifford eds., 1983).

Experience, 83 J. of Applied Psychol. 360-76 (1998); G.L. Wells & A.L. Bradfield, Distortions

In Eyewitnesses’ Recollections: Can the Post-Identification Feedback Effect Be Moderated?, 10

Psychol. Sci. 138-44 (1999). In short, in assessing the Manson reliability factors, this Court must

be ever mindful of the ability of suggestive procedures to influence those factors.

* 1. The Suggestiveness of the Lineup Contributed to the Unreliability of the Identification

The suggestive lineup here thus substantially undermined the reliability of the identification, and an analysis of the Manson reliability factors only confirms this result. First,

with respect to the opportunity to view at the time of the incident, the check cashing incident was a routine encounter in which the witness was paying very little attention. Studies have shown that witnesses to crimes recall the identities of perpetrators far less accurately – as little as 19% of the time – when the crime involved a low-value item. See Michael R. Leippe et al., Crime

Seriousness as a Determinant of Accuracy in Eyewitness Identification, 63 J. of Applied Psychol.

345, 345-351 (1978). In the case of the forged checks, the witness *had no idea a crime was occurring at all*, thus compounding her inability to remember the surrounding details accurately, and further undermining the reliability of the identification procedure. Even if there was opportunity, it was undermined by the absence of any motive to pay attention, as would be expected to exist (unlike here) if a witness knew a crime was occurring.

An analysis of the other Manson factors similarly fails to produce reliable fruit.

Regarding the accuracy of the prior description of the perpetrator, the description is so generic that that it fits scores of African American women. In addition to the description being vague, it did not match [DEFENDANT] where it did give detail – the description given by Ms. Higgins was “slender and of average height,” in her “late 30’s early 40’s,” her hair in braids, with no “tattoos, jewelry, [or] anything like that.” (Higgins Dep. 72; Higgins Stmt.) At the time of the

incident, [DEFENDANT] was a young-looking 20-something African American female with multiple readily visible tattoos on her arms, conspicuous scars on her hand, and straight hair pulled back. Third, the length of time between the incident and identification is particularly troubling. The lineup was conducted at least six weeks after the incident observed by Ms. Higgins, and *seven months* after the incident observed by Ms. Manning, and after the witnesses’ memory had been polluted in a variety of ways, by all of the peculiar procedures chronicled above – from the driver’s license to the cross-contamination between the two witnesses to separate events, to the multiple-witness show-up at the nursing home with [DEFENDANT]’s nametag in full view, after both witnesses had memorized her name from the driver’s license.

Manson also gives weight to a witness’s confidence with respect to her identification.

Ms. Manning admittedly could not make an ID, “said she could not give positive ID on the two” women who cashed the checks in July, and further was unsure that she had even seen them at all. (Meacham Offense Rpt. 2.) Ms. Higgins only expressed any ability to make an identification when prodded by her displeased employer to give him a suspect to go after, and even then it took the form of mere assent to the suggestion presented to her by Mr. McDonald, when he showed her a photo of [DEFENDANT] – a suggestion which by then had already been adopted by her coworker, making it that much easier to point the finger and unconsciously shift the blame away from her own failure to follow store procedures. Indeed, Ms. Higgins’ level of certainty was something far short of confident, and more closely resembling acquiescence.

Further, both Neil v. Biggers and Manson v. Braithwaite emphasize “the totality of the

circumstances” and note that the factors listed in evaluating reliability are merely illustrative. See Manson v. Braithwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 192 (1972).

And there are other issues that affect reliability that are at play in this case. There is substantial

academic and real world research about the unreliability of cross-racial stranger identifications, an effect found to be most prominent when white witnesses view African American individuals – and the courts are beginning to acknowledge this factor in conducting the reliability analysis. See, e.g. Stephen Lindsay et al., Other Race Face Perception, 76 (4) J. of Applied Psychol. 587

(1991); State v. Cromedy, 727 A.2d 457 (N.J. 1999) (discussing at length the unreliability of

cross-racial identification). Another study has suggested that memory can be impaired at both extremely high and extremely low stress levels (e.g., inattention if the witness does not realize that he or she is witnessing a crime); see also Smith v. State, 880 A.2d 288 (Md. 2005) (reversing

conviction for refusal to allow defendant to argue problems with cross-racial identifications). Gary L. Wells and Elizabeth A. Olson, Eyewitness Testimony, 54 Annual Review Psychology

277 (discussing K. Deffenbacher, The Influence of Arousal on Reliability of Testimony, in

S.M.A. Lloyd-Bostock & B.R. Clifford (eds.), Evaluating Witness Evidence: Recent

Psychological Research and New Perspectives 235-51 (1983)).

* 1. The Inclusion of Six Suspects and Only One Filler Made the Lineup Unreliable

To comport with established best practices, the lineup administrator should include *at least* five fillers, and *only one suspect*, both aimed to ensure that the lineup procedure is a test of the witness’s legitimate recollection and not an empty guessing game. Eyewitness Evidence, A

Guide For Law Enforcement at 29. The guidelines require at least five fillers in a given lineup,

because the probability of a mistaken identification increases as the ratio between suspects and non-suspects in a lineup decreases. For the same reason, there should only be one suspect per lineup; the more non-suspect choices are presented, the more likely the procedure is to serve as a reliable test of the memory of the witness – namely her ability to distinguish the culprit from innocent people and vice versa – and the less likely it is to result in the wrongful conviction of an

innocent person placed in the lineup as a result of a bad police procedure. In this case, *nearly all of the photos were suspects*, in a lineup following the exact inverse of established guidelines: here there were six *suspects*, and only one *filler*. This renders the lineup wholly unreliable, because in the best cast scenario it can do no more than confirm police suspicion that *someone* in the lineup is guilty; in the worst case scenario, it validates a suspicion that is incorrect, and leads to a wrongful conviction.

A lineup stacked with suspects reveals nothing about the witness’s independent memory, in direct conflict with established protocols. The procedure in this case is no more informative or reliable as a measure of Ms. Higgins’ recall than a multiple choice test with no wrong answers. When an officer is prepared to file charges against any one of six people depicted in a lineup, then a choice of any one of them provides no discriminating information regarding the identity of the perpetrator, and no test of the witness’s memory. If all lineup members are suspects, then wherever the witness lands her pick, there is a positive identification – which is to say, there is no mechanism to protect against false picks. This fact alone should be sufficient for a finding that that the identification in this case has no reliable independent basis, but given an analysis of the totality of the circumstances, there can be no question that the lineup procedure employed by Officer Meacham was unreliable, and as such, should be found inadmissible at trial.

* 1. The Lineup Was Unreliable Because the Witness’s Memory Was Polluted by Previous Procedures

Any memory the witness may have had of the actual events was irreparably tainted by the fact that Mr. McDonald showed [DEFENDANT]’s driver’s license to the witness in connection with the case, and then arranged the nursing home tour, where Ms. Higgins again encountered [DEFENDANT] – all of which preceded the lineup procedure, and rendered it wholly inaccurate

and unreliable. The Supreme Court observed in 1969 that subjecting a witness to multiple viewings of a single suspect is equivalent to repeating the message that “[t]his is the man,” “whether or not he was in fact ‘the man.’” Foster v. California, 394 U.S. 440, 442-443 (1969)

(finding that it was *inevitable* that the witness would pick the suspect from the final lineup, *regardless of culpability*, after multiple viewings of the same suspect prior to the lineup). The findings of social science research in the interim bear out what the Supreme Court has known for almost forty years, which show that once a witness views a photo of someone allegedly connected with a crime, a substantial risk is introduced that the image from the photograph will supplant the original memory. Jennifer D. Dysart et al., Mug Shot Exposure Prior to Lineup

Identification: Interference, Transference, and Commitment Effects, 86 (6) J. of Applied

Psychol. at 1281.

The procedure at the nursing home even further tainted the subsequent lineup by exposing the witness to [DEFENDANT] when she was wearing the same type of outfit as the perpetrators were described as wearing. Studies have shown that an “accumulated bias” effect occurs when a show-up procedure is conducted in which the suspect is wearing similar clothing to that which the perpetrator was described as wearing. See Jennifer E. Dysart et al., Show-ups:

The Critical Issue of Clothing Bias, 20 Applied Cognitive Psychol. 1009 (2006). The effect is

particularly severe when the clothing in question is unique, such as green hospital scrubs. Id. at

1012.

With the “mug shot effect” compounded by the “clothing bias” effect, and, indeed, a photo show-up followed by a live show-up, it is difficult to conceive of a less reliable or more corrupted identification procedure – or for that matter, a procedure less certain to result in the identification of the suspect whose photo and person had been viewed countless times prior to

the eventual police lineup. What was true in Foster is trebly true here, and given the

demonstrated weakness in the witnesses’ memories of the original events and the lack of any detailed memory of the identities of the perpetrators, it is hard to imagine a more dangerous set of circumstances for such suggestive, polluting procedures.

# The Identification of [DEFENDANT] Poses a Grave Risk of Unfair Prejudice, and Provides no Probative Value

The Missouri Rules of Evidence and state common law also prohibit the admission of any evidence whose probative value is substantially outweighed by its likelihood of introducing unfair prejudice. See, e.g. State v. Miller, 208 S.W.3d 284, 287 (Mo.App. W.D. 2006). In other

words, evidence must be both logically and legally relevant to be admissible. In order to be logically relevant, evidence must “make a material fact either more or less probable.” Id. As

above, at least one court has held that, even in the absence of governmental conduct, a pre-trial identification must be barred from admission into evidence when it “is so unduly suggestive as to deprive that identification of probative value.” Sheffield v. United States, 397 A.2d 963, 967

n.4 (D.C. 1979).

An identification is only probative to the extent that it reflects the witness’s ability to reliably retrieve from memory the identity of a person whose identity is at issue. When a strong independent memory is formed at the outset and reliable procedures are used to collect eyewitness evidence, an identification can undoubtedly be compelling evidence of culpability. In the case of Ms. Higgins, however, it is clear from the facts not only that no independent memory ever existed, but that the circumstances surrounding the various identifications were so rife with bias and other polluting influences on the memory of the witness as to render her testimony wholly uninformative on the material question before the jury – namely, whether Ms.

Higgins reliably remembers [DEFENDANT] as one of the people who cashed a bad check at McDonald’s Food Mart. As such, the identification should be excluded on evidentiary grounds.

As above, the first encounter of the witnesses in this case with the image of [DEFENDANT] occurred only as a result of Mr. McDonald discovering her driver’s license in the lost-and-found bin in his store, “some time” after the checks were cashed on December 27, 2005. (McDonald Dep. 11.) Determined to find a culprit, Mr. McDonald seized this opportunity to suggest a suspect on his employees, seeking to turn the driver’s license into a lead – despite the fact that he knew that neither cashier had checked for a driver’s license on the dates of the forged checks, for which Mr. McDonald specifically reprimanded both Ms. Manning and Ms. Higgins. In the functional equivalent of a photo show-up – which have been “widely condemned” for their substantial suggestiveness – Mr. McDonald showed the license to Ms. Manning to inquire if it was connected to the case. See, e.g. Stovall v. Denno, 388 U.S. 293, 302

(1972). At his suggestion, Ms. Manning (perhaps unconsciously) seized the opportunity to shift the attention – and blame – away from her own failure to follow orders and onto a suspect, despite her admitted inability to make an ID. In a similar boat herself, it was easy enough for Ms. Higgins to sign on as well – particularly at the suggestion of both her manager, Ms. Manning, and the store owner – and she agreed that the woman depicted in the driver’s license was one of the culprits.

By showing both witnesses [DEFENDANT]’s driver’s license in connection with his investigation of the fraudulent checks, Mr. McDonald openly suggested that the woman on the license was one of the culprits, promoted cross-contamination of the witnesses’ respective recollections of separate incidents, and by so doing, irreparably tainted their already vague memories of the events at issue. By showing the license first to Ms. Manning and acquiring her

assent to the culpability of the person depicted, and then confronting Ms. Higgins with the suggestion that both her employer and her coworker believed [DEFENDANT] to be the culprit, Mr. McDonald introduced the additional danger that Ms. Higgins would consciously or unconsciously conform her own opinion, however different, to that of the others. See Berns et

al., Neurobiological Correlates of Social Conformity and Independence During Mental Rotation,

58 Bio. Psychol. 245 (2005) (finding wrong answers to objective questions by peers caused many subjects to conform their answers to wrong results, and caused changes in brain activity suggesting subjects actually misperceived a test image due to social pressure). To compound the wholly unnecessary suggestive effect, the driver’s license procedure had the additional effect of imprinting [DEFENDANT]’s name in the minds of the witnesses, in addition to her appearance from the photograph. Once the initial identification had been made, the likelihood of Ms. Manning or Ms. Higgins ever changing their minds – right or wrong – was slim indeed. See

Wade, 388 U.S. at 229.

The probative value of any identification that follows a series of procedures so fundamentally biased and otherwise flawed is minute, at best, and its value was even further diminished when Mr. McDonald arranged the nursing home tour, during which the guide *paused the tour to talk with the resident [DEFENDANT] was escorting* – with [DEFENDANT]’s nametag in full view – as if to say, “take a good look now, because this is the woman whose driver’s license you’ve been looking at.” (Higgins Dep. 82.) The record shows no indication that the tour guide paused to “chat” with anyone else during the entire tour. (Higgins Dep.; Manning Dep.; Noe Dep.) This severely flawed procedure thereby relinquished any remaining doubt that the witnesses would choose the same person whose identity they had memorized from the driver’s license – *regardless of the identity of the perpetrator*, which was undoubtedly long

forgotten. See Foster v. California, 394 U.S. at 442-443. That is to say, any name could have

been on that driver’s license that turned up in the lost-and-found that day, and given the events that followed, it is all but assured that that person would be facing the same charges as [DEFENDANT] today.

With respect to the police procedure that followed, no meaningful assessment of its probative value can be rendered, because Officer Meacham kept no records. (Meacham Dep. 58- 59.) Best practices dictate that every step of the identification process be recorded, from the pre- lineup instructions, to any conversation between the investigator and a witness, to any selections made by a witness and corresponding confidence statements in the witness’s own words, to any feedback given by the investigator following the lineup. Eyewitness Evidence, A Guide For Law

Enforcement at 34. Wherever practicable, the entirety of the procedure should be videotaped.

Statement of Best Practices For Promoting the Accuracy of Eyewitness Identification Procedures

at 1. At least one state’s highest court has expressly held that the failure of police to record an identification procedure “should be weighed in deciding upon the probative value of the identification, out-of-court and in-court.” State v. Delgado, 188 N.J. 48, 902 A.2d 888 (N.J.

2006). Here, we have no records whatsoever of the procedure that the government seeks to introduce as evidence against [DEFENDANT], which deflates the procedure and resulting identification of any logical connection to the witness’s memory, which is the material matter the jury will seek to resolve.

Even if this Court finds that the identification evidence is logically relevant, the Missouri Court of Appeals for the Eastern District has held that logically relevant evidence should be excluded “if it brings into a case matters which cause prejudice wholly disproportionate to the value and usefulness of the offered evidence.” State v. Pollard, 719 S.W.2d 38, 39 (Mo.App.

E.D. 1986). Given the laundry list of suggestive practices and compounded polluting influences on the witnesses’ memory, described in detail above, the prejudice that this identification testimony would introduce would be “wholly disproportionate” to whatever probative value that it might provide toward elucidating the facts of this case. Researchers and legal scholars alike have found that “evidence of identification, however untrustworthy, is taken by the average jur[or] as absolute proof.” John C. Brigham et al., The Ability of Prospective Jurors to Estimate

the Accuracy of Eyewitness Identifications, 7 L. & Hum. Behav. 19, 20 (1983) (internal

quotation and citation omitted); Loftus & Doyle, Eyewitness Testimony: Civil and Criminal §§

1-2 through 1-6; Watkins v. Souders, 449 U.S. 341, 352 (1982) (Brennan, J. dissenting) (There is

“nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”). Indeed, according to a survey of one potential juror pool, eyewitness identification evidence is one of the most persuasive types of evidence along with DNA, fingerprints, and taped confessions. App. D (Survey conducted by Lake Snell Perry & Associates, Inc., December 2003) pp. 2-3. The problem is that the average lay person is simply unaware of the potential sources of error in eyewitness testimony. See Gary Wells et al.,

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

Hum. Behav. 603, 624 (1998); Loftus & Doyle, Eyewitness Testimony: Civil and Criminal § 1-

6; Handberg, Roger B., Expert Testimony on Eyewitness Identification: A New Pair of Glasses

for the Jury, 32 Am. Crim. L. Rev. 1013 (1995); Brian L. Cutler et al., Juror Sensitivity to

Eyewitness Identification Evidence, 14 L. & Hum. Behav. 185 (1990).

There is no reason to believe Missouri jurors are the exception to this long-standing rule. Recent polling data from other jurisdictions demonstrates that jurors simply do not understand how to analyze eyewitness identification evidence, and – presumably for that reason – that an

overwhelming majority of jurors (4 out of 5 or 83%) generally believe eyewitness identification is reliable. App. E (Survey conducted by Peter D. Hart Research Associates, February 2004). The prejudicial impact of allowing eyewitness testimony in this case cannot be overstated, while its probative value is demonstrably minute.

# An In-Court Identification of [DEFENDANT] Would Create a Very Substantial Likelihood of Irreparable Misidentification

In the same line of cases that informed the Manson standard for the admissibility of out-

of-court identifications, the Supreme Court in Simmons v. United States held that in-court

identifications are violative of due process when the pre-trial procedure was “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” Simmons v. United States, 390 U.S. at 384. If ever there were a case in which the complete

sequence of events leading up to an in-court identification gave rise to such a risk – from the irrecoverable manner in which the witnesses were first exposed to [DEFENDANT]’s photograph on her driver’s license, to the cross-contamination of both witnesses by way of conversation throughout the proceedings, to the confirmatory nursing home “tour” at which the witnesses’ guide stopped the tour to give them a better look only at [DEFENDANT], to the textbook failure of Officer Meacham to conduct a proper photo lineup – it is this case. In addition to the entire series of out-of-court identifications, due process demands the prevention of any in-court identification of [DEFENDANT] as well.

# If the Court Finds the Identification Evidence Admissible Under the Current Standard, Then the Law Needs to Be Changed Under the Missouri Constitution

Finally, if the Court finds that the identification evidence in this case passes muster under due process and the law of evidence, then the law needs to be changed. The Court should establish a new minimum reliability threshold under the Missouri State Constitution that serves

as a check against the shortcomings of the Manson analysis, as evidenced by several decades of

social science research that call into question the accuracy of the Biggers factors and the

sufficiency of that test as a screening mechanism against suggestive and otherwise unreliable identifications.

We know from the alarming series of wrongful convictions around the country that the status quo is failing. As a result, many state high courts have taken the lead in tightening due process safeguards under their own constitutions – standards that accord with new research findings and seek to guard against further instances of error. Utah and Kansas have modified the reliability test to accord diminished reliability to eyewitness evidence that is the product of suggestion. See State v. Ramirez, 817 P.2d 774, 781 (Utah 1991); State v. Hunt, 69 P.3d 571

(Sup. Ct. Kan. 2003). Massachusetts and New York have announced *per se* rules of exclusion for identifications resulting from unnecessarily suggestive procedures. Commonwealth v.

Johnson, 650 N.E.2d 1257, 1260 (Sup. Jud. Ct. Mass. 1995); People v. Adams, 423 N.E.2d 379,

440 (Ct. App. NY 1981). Georgia and Connecticut have acknowledged the failure of the status quo and diverged from Manson as well. See Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005)

(prohibiting jury from considering “level of certainty” in assessing reliability of an identification); State v. Ledbetter, 881 A.2d 290, 314-319 (Conn. 2005) (invoking court’s

supervisory authority to require jury instruction on the “risks inherent in certain eyewitness identifications”). In light of Missouri’s own wrongful conviction problem, it should revisit its legal standard for the treatment of eyewitness evidence, and craft a more informed rule of decision akin to those emerging across the country.

First and foremost, the Court should take a firm stand against inexcusable police practices used in the collection of eyewitness evidence, by placing threshold conditions on the

admissibility of eyewitness evidence as in jurisdictions like New Jersey and Wisconsin. The New Jersey Supreme Court exercised its supervisory power to require that, “as a condition of an out-of-court identification, law enforcement officers make a written record detailing the out-of- court identification procedure, including the place where the procedure was conducted, the dialogue between the witness and the interlocutor, and the results” and noted that “[p]reserving the words exchanged between the witness and the officer conducting the identification procedure may be as important as preserving either a picture of a live lineup or a photographic array.” State v. Delgado, 902 A.2d 888, 897 (N.J. 2006). The Wisconsin Supreme Court took a similar

approach to show-up identification procedures, announcing a *per se* rule of exclusion in cases where law enforcement officers are unable to demonstrate that the procedure was necessary under the circumstances. State v. Dubose, 699 N.W.2d 582, 592 (Wisc. 2005). Massachusetts

and New York have adopted substantially similar standards, and New Jersey’s Supreme Court announced a willingness to depart from federal law on the topic and consider a similar heightened standard, when next confronted with the issue. See Commonwealth v. Johnson, 650

N.E.2d 1257 (Mass. 1995); People v. Riley, 517 N.E.2d 520 (N.Y. 1987); State v. Herrera, 902

A.2d 177 (N.J. 2006). Aggressive measures like those taken in Dubose and Delgado are seminal

examples of the power invested in state courts to combat systemic injustices like those implicated by this case.

A lesser option is to revisit the Manson/Biggers reliability factors, and adjust them to

comport with the findings of the social science research that contradict that rule of decision. In State v. Ramirez, the Supreme Court of Utah acknowledged the shortcomings of the Manson

analysis and modified the reliability prong of the test to protect against the admission of eyewitness evidence that is the product of suggestion, as inherently diminishing reliability. State

v. Ramirez, 817 P.2d 774, 781 (Utah 1991) (considering “whether the witness’s identification

was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion”). The Kansas Supreme Court later adopted the Ramirez factors under its own state

constitution as a “refinement in the [Manson] analysis,” and quoted Justice Brennan in support of

its modification of the federal rule: “A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.” State v. Hunt, 69 P.3d 571 (Sup. Ct. Kan. 2003) (quoting Wade, 388 U.S. at 228). Missouri

would be well-served by implementing a more informed adaptation of the Manson reliability test

in the tradition of Ramirez.

If the Court is not convinced that the rules governing the admission of eyewitness evidence are in need of reformation, other avenues have been forged to serve as minimal protections against the potential injustices that spawn from faulty identifications. The New Jersey Supreme Court in State v. Cromedy engaged in a lengthy discussion of the scientific

research on the limited reliability of cross-racial identifications and the “own race” bias, and overturned the defendant’s conviction for the failure of the trial court to instruct the jury on the cross-race issue. State v. Cromedy, 727 A.2d 457 (N.J. 1999). In that case, the court found that

when a cross-racial identification is a critical issue in a case, and is not corroborated by other evidence – as here – it is error to fail to give an instruction cautioning the jury on the issue. Id. at

467. Georgia’s high court followed research findings that contradict the Manson rule, and

prohibited the jury from considering the “level of certainty” of a witness in its deliberations about the reliability of an identification. See Brodes v. State, 614 S.E.2d 766, 771 (Ga. 2005).

In Connecticut, the state supreme court invoked its “supervisory authority” to require a jury

instruction with respect to otherwise admissible eyewitness evidence, when the police administering a lineup procedure fail to give an instruction informing the witness that the perpetrator “may or may not be present” in the lineup. State v. Ledbetter, 881 A.2d 290, 313-

319 (Conn. 2005). And the Third Circuit recently found that expert testimony on the lack of correlation between eyewitness confidence and accuracy was the proper subject of an instruction, and that to deny it was reversible error. That court further found that the “inherent unreliability of human perception and memory” is beyond the ken of the average juror, and that expert testimony on a multitude of factors affecting the reliability of eyewitness testimony is an essential safeguard against wrongful convictions. United States v. Brownlee, 454 F.3d 131 (3d

Cir. 2006) (quoting Rudolf Koch, Note, Process v. Outcome: The Proper Role of Corroborative

Evidence in Due Process Analysis of Eyewitness Identification Testimony, 88 Cornell L. Rev.

1097, 1099 n. 7 (2003)). In the event that this Court is not persuaded that the more aggressive measures outlined in the paragraphs above are the appropriate purview of the courts, the use of jury instructions and expert testimony would serve as a minimum protection of the citizens of Missouri from the “tragic irony of eyewitness testimony.” Id. at 142 (quoting Lawrence Taylor,

Eyewitness Identification 1 (1982)).

# CONCLUSION

In 1967, the U.S. Supreme Court stated, “[a] conviction which rests on a mistaken identification is a gross miscarriage of justice.” Stovall v. Denno, 388 U.S. 293, 295 (1967).

Addressing the questions presented to it, the Supreme Court in Manson fashioned rules designed

to guard against the type of unreliability that it knew about at that time. Now, over thirty years later, social science and our national experience have demonstrated new threats to the integrity of our criminal justice system. To fail to respond to these challenges undermines public confidence

and leaves Missouri citizens vulnerable to wrongful conviction. For all of these reasons, [DEFENDANT] respectfully requests that this Court GRANT this Motion and exclude or suppress all out-of-court and in-court identifications in this case, under Missouri law and the Fifth Amendment to the United States Constitution.

Respectfully submitted,

[xxx]

# CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Filing and the attached letter have been hand-delivered to .

[xxx]