OFFICE OF THE MINNESOTA ATTORNEY GENERAL
CONVICTION REVIEW UNIT

Application for Relief on Behalf of

MARVIN HAYNES

December 15, 2022

GREAT NORTH INNOCENCE PROJECT

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EXECUTIVE SUMMARY

Marvin Haynes has spent the past eighteen years in prison for a crime he did not commit. Mr. Haynes is presently serving a life sentence arising out of false allegations that he shot and killed Jerry Sherer at a flower shop in North Minneapolis on May 16, 2004, when Mr. Haynes was just sixteen years old. The case against Mr. Haynes was thin even at the time of trial. Since that time, that thin case has collapsed entirely based on newly discovered evidence. Mr. Haynes comes now seeking relief from the Conviction Review Unit in hopes of finally reclaiming his liberty.

The case against Mr. Haynes rested primarily on the testimony of two eyewitnesses. The most central of these witnesses was Cynthia McDermid, the sister of the deceased, who was in the flower shop with the perpetrator for a few minutes before he pulled a gun, demanded money, and ultimate shot McDermid's brother. The other eyewitness was Ravi Seeley, a fourteen-year-old who attended church in the neighborhood and happened to be passing by when he heard a gunshot and saw someone running from the flower shop. Both witnesses provided the police with descriptions of the perpetrator. While McDermid's description was more detailed, they both agreed that the perpetrator was a young Black man with short hair.

From the state's perspective, this case took a wrong turn almost immediately. The day after the shooting, McDermid was shown a photo lineup in which she identified someone as the shooter with what she described as 75 to 80 percent confidence. The problem is that the person she selected was not even a suspect but rather what is commonly referred to as a "filler," someone who is placed in a photo lineup to provide a point of comparison to test the witness's memory. Thus, from the

get-go, it was apparent that the central eyewitness in this case did not have a clear memory of the perpetrator's face. From that point forward, law enforcement was going to have to cut corners if they were going to build a case that would stick.

Two days later, after the police received an anonymous tip pointing toward Mr. Haynes, they showed McDermid another photo lineup, this time including Mr. Haynes. Complicating matters for the state, Mr. Haynes did not match the person McDermid had described. Among other inconsistencies, McDermid described the perpetrator as having short-cropped hair. Mr. Haynes, however, had long natural hair that no one could ever describe as being short-cropped. His appearance three days after the shooting is reflected in the mugshot below:

Thus, instead of showing McDermid a contemporaneous mugshot that plainly did not match her description, the officers chose to use a two-year-old mugshot of Mr. Haynes in which he did have short-cropped hair. Continuing to cut corners, the officers chose to violate operative guidelines by conducting that lineup procedure themselves instead of having someone without knowledge of the investigation conduct the lineup (a "double-blind" lineup) in order to avoid the risk of suggesting

the identity of the suspect to the witness. The officers had no good reason to justify this violation of protocol.

After McDermid and Seeley had both identified Mr. Haynes in a photo lineup, the officers continued to cut corners in ways that threatened the integrity of the investigation. It is well established that subjecting witnesses to multiple viewings of a suspect risks tainting the identification both by suggesting to the witness that the person shown twice is the suspect and by creating a risk that the witness will be confused about whether they recognize the suspect from the actual event or from a prior viewing. Despite those known risks, the officers here proceeded to show Mr. Haynes to the witnesses a second time, this time in the form of a live lineup. Here again, the officers—without any valid basis—opted to administer the lineup themselves instead of doing a double-blind lineup. Remarkably, even cutting all these corners, both eyewitnesses *still* expressed doubts about their identifications. The most straightforward explanation for their doubt is that this was the first time they viewed Mr. Haynes with long hair, thus deviating from the description they both provided of a short-haired perpetrator.

These errors and many others are detailed below and in the accompanying expert report of Dr. Nancy Steblay, a Professor of Psychology at Augsburg University and a leading expert on the psychology of eyewitness perception and memory. In short, this eyewitness identification evidence was deeply flawed and never should have been presented to the jury. While counsel for Mr. Haynes filed a brief motion to suppress this evidence, he failed to even scratch the surface of the problems with this

evidence. The case set forth below and in Dr. Steblay's expert report goes far beyond anything the trial court was ever asked to consider. As set forth below, this eyewitness evidence should have been suppressed under governing case law because it was obtained through unnecessarily suggestive procedures, and a consideration of the totality of the circumstances shows that the evidence is wholly unreliable. Even setting aside the legal standard for suppression, the facts show that this evidence is fundamentally defective and cannot support Mr. Haynes' conviction.

The remainder of the state's case, such as it is, cannot salvage this conviction. Aside from the two eyewitnesses, the state's case was based largely on a small handful of witnesses who claimed to have heard Mr. Haynes make incriminating statements before and/or after the shooting. Two of these witnesses, Isiah Harper and Anthony Todd, have now provided credible recantations making clear that their prior statements were the result of heavy police pressure. Both witnesses were teenagers at the time, and both report that the police threatened them with their own prison time if they refused to cooperate and provide evidence against Mr. Haynes. Their claims of police pressure find support in the statement of Ashley Toten, a witness who did not end up testifying at trial but who describes being subject to pressure from police to implicate Mr. Haynes. Their claims also find support in the statement of eyewitness Ravi Seeley who, in addition to making clear that he never actually got a good look at the shooter's face and has no confidence in his identifications, describes feeling pressured to make an identification and stick with it, even after he expressed doubts.

Finally, four of Mr. Haynes' sisters have provided statements accounting for his whereabouts on the morning of the shooting. They all tell a consistent story placing Mr. Haynes at home in bed that morning. While they cannot state with certainty eighteen years later what time he got up that day, they know that he was in bed at 10:30 that morning and got up sometime later that day. Their account is consistent with Mr. Haynes' prior statement that he was in bed until around 3:00 that afternoon. Also, their account adds credibility to Isiah Harper's and Anthony Todd's recantations since the prior statements that Harper and Todd have now recanted included the false claim that Mr. Haynes was with them at another friend's house at 10:00 that morning when he made incriminating statements. We now know Mr. Haynes was in fact home at that time.

To describe the state's case against Mr. Haynes as hanging by a thread would be to afford that case unmerited generosity. Quite simply, there is no valid factual basis to support the conviction and continued incarceration of Mr. Haynes. The evidence shows that Mr. Haynes is innocent and played no role in the tragic death of Harry Sherer. Earlier this month, Mr. Haynes turned 35 years old. Unjustly incarcerated since he was sixteen, he has now spent a majority of his life in prison for a crime he did not commit. The Conviction Review Unit can help bring justice, however belated, and recommend that Mr. Haynes' conviction be vacated.

FACTS AND PROCEDURAL BACKGROUND

A. Shooting of Harry Sherer

On Sunday, May 16, 2004, Jerry Sherer was shot to death while working with his sister Cynthia McDermid at Jerry's Flower Shop in North Minneapolis. (T. 804.)[1] At approximately 11:40 a.m., a young Black man walked into the store and told McDermid he was looking for a flower arrangement for his mother's birthday. (T. 816.) McDermid and the man engaged in small talk as she prepared a bouquet. (T. 819.)

Later, McDermid described the man as speaking with clarity and appearing educated. (T. 850). During a police interview, she described the man's speech as "not hip-hop type speaking" and, when asked if he was educated, she responded, "absolutely." (MPD Supp. 17.)[2]

After McDermid quoted a price of $40 to $50, the man indicated that he would pay with a Visa card. (T. 822.) The man went to pick out a birthday card off the two card racks. He spun the rack around, picked out a card, and gave it to McDermid. (T. 823). McDermid said that he was leaning on green wax wrapping paper as he was looking at the cards. (T. 837.)

According to McDermid, she was still preparing the flowers when she turned around and saw a gun pointed about twelve inches from her face. She described the

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1 Citations to "T." are to the transcript of the trial in this matter held from August 22, 2005, to September 2, 2005, in the Minnesota District Court, Fourth Judicial District before Judge Robert Blaeser (District Court File 04035635; Supreme Court File A05-2444).

2 Citations to "MPD Supp." are to police reports of the Minneapolis Police Department in Case MP-04-117071, cited by Case Supplement number.

gun as silver "with a round thing with bullets in it." (T. 824.) The man said, "I'm not joking with you. . . . I want the money." (T. 825.) She responded that she would go to the till, and she took a step toward it. The man told McDermid not to move and demanded tapes from the store's security camera, which she told him did not exist. (T. 825.) He put the gun closer to her eyes and said, "In the back." (T. 825.)

Sherer, who had by then entered the main area of the store, told the man there was no safe and no money. (T. 828.) The man then pointed the gun at Sherer's face, and McDermid ran out of the shop to the nearby address of 3310 Lyndale Avenue North, the home of Etta McCabe, to the north of the flower shop. While running out, McDermid heard what she described as two gunshots. (T. 830–31; *see also* MPD Supp. 6.)

As McDermid jumped the fence into McCabe's yard, she claims to have observed the shooter walking down the alley with his hood over his head. (T. 831–32.) McDermid proceeded to run to the McCabe house and ask for help. After the woman in the house called 911, McDermid gave the 911 operator her first of three descriptions of the shooter:

> He is an African American, about 22 and he's real dark. He had a hat, he had a hood, hooded sweatshirt and he ran down the alley behind the shop. . . . He's about 5'10 or 5'11. He was thin. . . . He was thin about 180 pounds. . . . I'd say in his early 20's.

(911 Call Tr. at 2–3.)

When Minneapolis Police Officers arrived upon the scene shortly thereafter, Sherer was determined to be dead upon arrival. (MPD Supp. 2.) Dr. Katheryn Berg, the medical examiner who performed the autopsy in this case, later determined that

the cause of death was a gunshot wound to the chest and the manner of death was homicide. (T. 1329.)

B. Crime Scene Investigation

Officers from the Minneapolis Police Department ("MPD") proceeded to secure the crime scene around Jerry's Flower Shop at 3300 Lyndale Avenue North (at 33rd Avenue North) and commenced their initial investigation. (MPD Supp. 3.)

Around 12:50 p.m. that day, Officer Andrew Stender brought a canine to track the route of the shooter after he fled the scene. (T. 1108; MPD Supp. 4.) Starting from the last known location of the suspect, the canine tracked the scent east on 33rd Avenue and then north up the alley behind the store. The canine ultimately lost the scent behind an apartment building at 3343 6th Street North. (T. 1107–09; MPD Supp. 4.) Officer Stender then called in a bloodhound to track the scent, this time using green wrapping paper that the suspect touched as a scent article. Handled by a different officer who had not been told of the results from the first canine, the bloodhound tracked the scent to the same location. (T. 1114; MPD Supplement 4.)

MPD officers took photographs to document the appearance of the deceased victim, as well as the interior and exterior of the crime scene, including photographs looking east down 33rd Avenue and north up the alley, tracking the route the suspect was believed to have fled. (MPD Supp. 14.)

Sergeant Rod Timmerman processed the interior of the flower shop for fingerprints. He ultimately identified two latent prints from the interior of the glass door, which he determined belonged to a police officer, as well as other partial latent prints from the same glass door. (T. 794; MPD Supp. 22.) Sergeant Timmerman

processed the birthday card that the suspect was said to have handled, which had some ridge detail that was insufficient for comparison. (T. 795.) He also identified five latent prints on a large card rack, none of which matched Mr. Haynes or otherwise resulted in an identification. (T. 795.)

MPD officers collected two of what appeared to be fired bullets. One was found near the body of the deceased in the main showroom of the flower shop. The other was found in a cardboard box in a storage room, appearing to have arrived there after passing through a wall. Both bullets were described as being most consistent with a caliber 357 Magnum or .38 Special. (T.801; MPD Supps. 14, 50.)

Police investigators cleared out of the scene around 5:00 p.m. that evening. (MPD Supp. 20.)

C. Eyewitnesses

Police investigators ultimately identified two individuals who claimed to have seen the man who shot Harry Sherer. The first, of course, was Cynthia McDermid. The second was fourteen-year-old Ravi Seeley, a high school student who attended church in the area and claimed to have been walking by the flower shop when he heard gunshots and saw someone running away. Neither witness provided a description of the culprit that matched Marvin Haynes, but both would ultimately identify him in a series of lineup procedures.

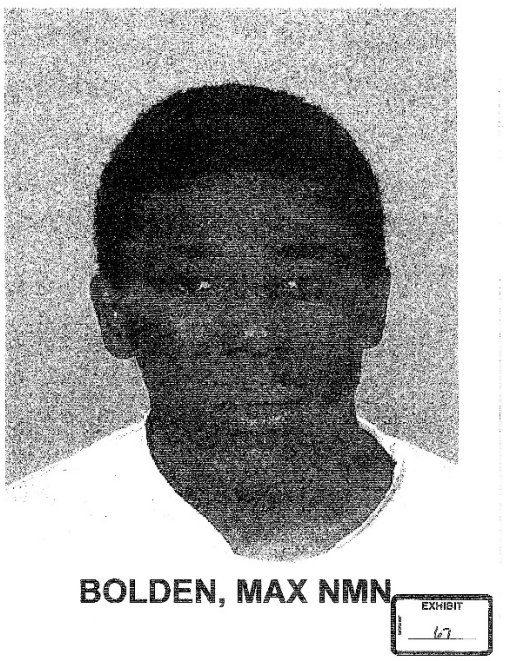
1. Cynthia McDermid

When the first MPD officers arrived upon the scene shortly after the shooting, Cynthia McDermid provided her second (following the 911 call discussed above) description of the culprit. She described him as being a Black male, 22 years old, with

a dark complexion and short-cropped hair, wearing a grey hooded sweatshirt and possibly a jacket. (MPD Supp. 6.)

On May 16, 2004 (the day of the shooting), McDermid participated in the first of four lineup procedures. This first photo lineup was conducted by Sergeant Rick Zimmerman, an MPD officer who was not working on the investigation (i.e., a "double-blind" lineup). (MPD Supp. 30.) The suspect in this first lineup was Jerry Hare, a resident of 3343 6th Street North (the building to which the canines tracked) who officers determined most closely resembled McDermid's description of the culprit. (*Id.*) Sergeant Zimmerman showed McDermid six photographs, one at a time (i.e., a "sequential" lineup). McDermid indicated that Hare (photograph 2) looked familiar from around the neighborhood, and that photograph 4, a non-suspect (i.e., a "filler"), looked similar to the culprit. (*Id.*)

The next day, McDermid was shown this same photo lineup a second time. (*Id.*) The lineup was again double-blind and sequential, this time conducted by Sergeant Bruce Folkens. (MPD Supp. 18.) This time around, McDermid identified the filler in photograph 4 with what she described to be 75 to 80 percent confidence. (*Id.*) This individual was 20-year-old Max Bolden. (MPD Supp. 30.) Below is the mugshot of Bolden, wearing short-cropped hair, whom McDermid identified as the likely culprit (Trial Ex. 67):



Based on this identification, officers briefly investigated Bolden as a potential suspect. When an MPD officer interviewed Bolden, he said that he had been in Sioux Falls, South Dakota visiting a relative on the weekend in question and that he had returned on May 29, 2004. Bolden's mother, Towanda Logan, backed up his story, as did Loutasha Mix, the individual he was said to be visiting. (MPD Supp. 40.)

Following her identification of Bolden, Cynthia McDermid was interviewed by Sergeant David Mattson who, along with Sergeant Michael Keefe, led the investigation for MPD. During that interview, McDermid estimated that the culprit was in the store for five to eight minutes total. In the third of three descriptions, she described the culprit as a Black male, about 19 to 20 years old. She said that he had short-cropped hair, no facial hair, a medium skin tone, and a thin build. She said he was wearing a sweatshirt with a jacket over it. She believed she had seen this individual four or five times previously in the store or on the street. She said the

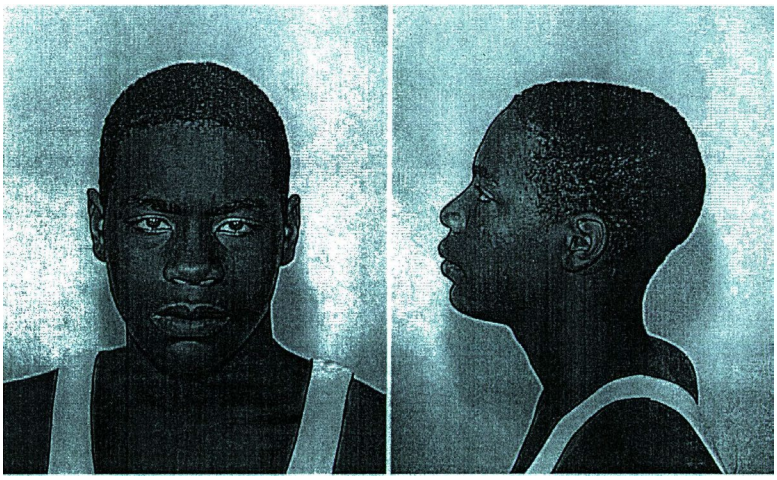
culprit's speech was "not a hip-hop type speaking," that he spoke with clarity, and that he "absolutely" had an education. (MPD Supp. 17.) Thus, to synthesize all three of McDermid's descriptions of culprit, she described a Black male between 19 and 22 years old, 5'10" to 5'11", about 180 pounds, with medium to dark complexion, short-cropped hair (but not bald), no facial hair, and an educated manner of speaking.

The day after McDermid's first lineup, MPD received an anonymous tip identifying sixteen-year-old Marvin Haynes, also known as "Little Marvin," as the shooter in the flower shop murder. (MPD Supp. 31.) The next day, May 19, 2004, Mr. Haynes was arrested based on his failure to appear in juvenile court in an unrelated matter. (T. 1094; MPD Supp. 32.) The following reflects a mugshot taken of Mr. Haynes that day:

The physical descriptors accompanying that mugshot describe Mr. Haynes as 5'7", 130 pounds, and as having a mustache. (Trial Ex. 96.)

Following Mr. Haynes' arrest, MPD officers met with McDermid for a third lineup procedure, this time including Mr. Haynes as a suspect. This six-person photo lineup also included a second suspect, fifteen-year-old David Neal, who had been

identified based on his residence at 3343 6th Street North (the building of interest based on the canine tracking). (MPD Supps. 30, 32.) Unlike the first two lineups, this lineup procedure was not double-blind, instead being conducted by Sergeant Keefe and Sergeant Mattson themselves. (MPD Supp. 32.) Sergeant Mattson later acknowledged at trial that this practice violated guidelines in place at the time. (T. 1049–50.) Also, instead of using the mugshot of Mr. Haynes taken three days after the shooting, the officers opted to use a mugshot from two years earlier when he was fourteen years old, which reflected Mr. Haynes with short-cropped hair and no facial hair (Trial Ex. 46):



Based on a non-blind photo lineup containing an outdated picture of Mr. Haynes that differed materially from his appearance at the time, McDermid identified the picture of Mr. Haynes as the culprit. While not deviating from her prior description of the culprit as having short-cropped hair, she did note that the culprit had longer hair than was reflected in this mugshot. (MPD Supp. 32.)

Finally, officers brought McDermid in for a fourth lineup procedure on May 20, 2004, this time a live lineup. As with the last photo lineup, Sergeant Keefe and

Sergeant Mattson opted to conduct the lineup themselves instead of doing a double-blind lineup. According to the police report, the officers asked Mr. Haynes' attorney whether she had any concerns or objections about the procedure, and she responded, "Not that I would tell you." The officers cycled through six individuals two times, with McDermid viewing the subjects from behind glass next to Sergeant Mattson while Sergeant Keefe handled the subjects. The first time through, McDermid sat up in her chair and said that subject 4 (Haynes) looked like the culprit. The second time through, she again focused on Mr. Haynes but, according to the police report, said "she was now having problems concentrating as she was very traumatized and upset and she felt she was blending them all together." (MPD Supp. 34.)

At trial, McDermid maintained her identification of Mr. Haynes as the one who shot her brother. (T. 815).

2. Ravi Seeley

The second eyewitness was fourteen-year-old Ravi Seeley. At the time of the shooting, Seeley was in eighth grade and lived in St. Louis Park. He attended a church in North Minneapolis near the flower shop, which brought him to the neighborhood on the day of the shooting. (T. 875.) On May 18, 2004 (two days after the shooting), Seeley approached Dennis Maki, a patrol officer at his junior high school, indicating that he had information about the shooting. Officer Maki then arranged for Seeley to meet with MPD officers. (T. 999–1000.)

When Seeley met with the officers, according to a police report, he described the perpetrator as "a slender black male [with] a natural haircut possibly faded on the sides and some sort of a light blue (possibly zip up) sweatshirt)." (MPD Supp. 31.)

Seeley said that he saw the culprit while walking from church to a "Chinese Store." Seeley claimed to have seen this same man the previous Sunday, which was Mother's Day, when the man approached him to ask for money. He said that he saw the man a second time that day with another individual outside what he referred to as the "Rose Shop," and he claimed that the two appeared to be "planning something." (MPD Supp. 23.)

Seeley told officers that he saw this same man again on the day of the shooting while on his way to the "Chinese Store" when the man "meanmugged" Seeley and his friend. It was after Seeley left the "Chinese Store" to walk back to the church that he claimed to have heard a gunshot, after which he said that he saw the man running out of Jerry's Flower Shop. Seeley said that he was between 30 and 40 feet from the man when he saw him running away. He said that his friend ran after hearing the gunshot, so the friend did not see anything. (*Id.*)

On May 19, 2004 (three days after the shooting), Seeley participated in his first of two lineup procedures. Sergeant Gerard Wehr administered a double-blind, sequential lineup containing a picture of Mr. Haynes. As with McDermid's third photo lineup, this lineup included the mugshot of Mr. Haynes from two years earlier reflecting short-cropped hair. (*Supra* at 13.) The first time through the lineup, Seeley told Sergeant Wehr to "hold on that one" when he got to Mr. Haynes (photograph 5). After viewing the sixth and final photograph, Seeley said that "he looks like the other one." Sergeant Wehr then asked Seeley if he would like to view the lineup a second time, and Seeley indicated that he would "to be sure." Seeley again identified Mr.

Haynes as "the one I saw at the Rose Shop." He said that photograph 6 looked like the individual who had been with the other man when Seeley saw them on Mother's Day. (MPD Supp. 23.) Photograph 6 was a 22-year-old filler named Devon Mapp, whose mugshot was contributed by the Brooklyn Park Police Department in November 2000. (Trial Ex. 47.) There is no evidence that Mr. Haynes knew Mapp or that Mapp even lived in Minnesota in 2004.[3]

The next day, on May 20, 2004, Seeley was shown the same live lineup that was shown to McDermid. (*Supra* at 13–14.) As with McDermid, this lineup procedure was not blind but rather was conducted by Sergeant Keefe and Sergeant Mattson. According to the police report, when Seeley saw Mr. Haynes (subject 4), he said, "Woe [*sic*] I recognize him[.] He looks like who I saw." (MPD Supp. 34.) At trial, Seeley would later testify that he was not confident about that identification and that he had expressed doubt to the officers at the time. (T. 887–89.) The officers failed to capture that information in the police report.

As discussed further below (*infra* at 27), Seeley provided a recent affidavit in which he states that he is not confident about either identification, that he never really got a clear view of the culprit's face, and that he felt pressured by the officers to make an identification. (Seeley Aff.)

D. Haynes Interrogation

As noted above, Marvin Haynes was arrested on May 19, 2004 (three days after the shooting), following an anonymous tip. He was arrested based on his failure to

[3] A search for Mapp on the LocatePlus database suggests that he was likely living in Chicago in 2004.

appear in juvenile court in an unrelated matter. (T. 1094; MPD Supp. 32.) Mr. Haynes was interrogated by Sergeant Keefe and Sergeant Mattson shortly after his arrest that day. The interrogation was video and audio recorded, and a transcript of a portion of the recording was created. Mr. Haynes insisted upon his innocence throughout that interrogation.

The officers did not initially inform Mr. Haynes of the real reason he had been brought in. After informing Mr. Haynes of his rights, the officers started by inquiring about Mr. Haynes missing court that week and the reasons for that warrant. (Scales Tr. at 5.)[4] They then proceeded to ask Mr. Haynes about his whereabouts on the preceding weekend, including on Sunday, May 16 (the day of the shooting). Mr. Haynes explained that he had been at his friend "Muffy's" house on Saturday. (*Id.* at 7.) He said that he got home around 2:00 a.m. on Sunday morning, slept until around 3:00 p.m., and then went to his friend "DD's" house around 6:00 p.m. to see if she could braid his hair. (*Id.* at 9–11.) He explained that he had been wearing his hair in an afro since the previous Wednesday and that DD started braiding his hair that evening but could not finish it, so she took out the braids. (*Id.* at 13.)

Mr. Haynes provided all of this information before the officers ever mentioned anything concerning the shooting at Jerry's Flower Shop. When they did finally introduce that topic, Mr. Haynes said that he did not know anything about the

[4] Citations to "Scales Tr." are to the "Scales Interview" transcript of a portion of the recorded interrogation of Marvin Haynes on May 19, 2004. Counsel is separately making available video recordings of the interrogation, which extend beyond the end of the transcript.

shooting. (*Id.* at 14.) Mr. Haynes maintained that position despite the officers proceeding to repeatedly lie about incriminating evidence that did not exist. Specifically, the officers told him that his fingerprints were in the flower shop, including on a card. (*Id.* at 17, 24.) They implied that he had been seen on surveillance cameras. (*Id.* at 17, 24.) They told him that body fluids with his DNA were found in the store. (*Id.* at 24–25.) These were all lies.

After trying to convince Mr. Haynes that they already knew what happened, the officers asked an extended series of questions focusing on the difference in moral seriousness between an intentional killing and an accident, and they tried to get Mr. Haynes to confess that the shooting was an accident. (*Id.* at 26–30.) The video recording of the interrogation, which extends well beyond the end of the transcript, shows the officers loudly and profanely berating Mr. Haynes for an extended period of time. Despite all of these tactics, Mr. Haynes continued to insist that he had nothing to do with the shooting.

E. Trial of Marvin Haynes

The trial of Marvin Haynes commenced on August 29, 2005, following jury selection, before Judge Robert Blaeser of the District Court for the Fourth Judicial District in Hennepin County. Assistant Hennepin County Attorney Mike Furnstahl appeared for the state, and Kassius Benson of the Hennepin County Public Defender's Office for the Defendant. Excluding jury selection, the trial lasted five days and concluded on September 2, 2005.

The state's trial case relied largely upon the testimony of the two eyewitnesses and a handful of witnesses who claimed to have heard Mr. Haynes make incriminating statements before and/or after the shooting.

1. Eyewitnesses

Both Cynthia McDermid and Ravi Seeley testified for the state. Mr. Haynes' attorney filed a short motion before trial seeking to have the eyewitness identification evidence suppressed, but that motion was unsuccessful. Both witnesses identified Mr. Haynes as the perpetrator and provided testimony broadly consistent with what they had previously told police. Notwithstanding her statement at the time of the live lineup that she was "blending them all together" (MPD Supp. 34), McDermid claimed at trial to be "positive" about that identification. (T. 845.) Mr. Haynes' attorney did not point out that inconsistency during his cross-examination of McDermid.

As noted above, while Seeley expressed confidence in his initial identification of Mr. Haynes in the photo lineup, he claimed that he was less certain about his identification during the live lineup and that he had expressed doubts to the officer during the lineup. (T. 887–89, 894–98.) Sergeant Mattson disputed Seeley's testimony when he subsequently took the stand, claiming that Seeley did not express any doubt. (T. 1014.)

2. Other Witnesses for the State

Aside from law enforcement, most of the state's remaining witnesses testified that they had heard Mr. Haynes make incriminating statements of some type.

a. Isiah Harper

The state's principal witness in this category was Mr. Haynes' cousin, Isiah Harper. During an interview with MPD officers on May 28, 2004, Harper said that he had been with Mr. Haynes at the home of "Muffy" (Josilinn Morgan) on the morning of May 16, 2004 (the day of the shooting). Harper said that he arrived there around 10:00 a.m. and that Mr. Haynes was already there, along with some other friends. Harper claimed that, while they were hanging out, Mr. Haynes said that he and their friend Daquan Bradley were going to "hit a lick," meaning they were going to rob someone. He claimed that Bradley had a chrome revolver and that, while Mr. Haynes was not known to carry guns, Harper thought he had a gun based on the way he was holding his pocket. Harper said that Mr. Haynes and Bradley left to commit the robbery in a white Chevy that Bradley had stolen. Harper said that Mr. Haynes called him later that day and told him that he had shot a white man because he would not give Mr. Haynes the money. Harper said that Mr. Haynes told him he had shot the man once in the head, a statement inconsistent with the known facts. (Sherer was shot in the chest.) (MPD Supp. 38.)

At trial, Harper attempted to recant his prior statement from the stand. Harper said that, while he was at Muffy's on the morning in question, he did not remember Mr. Haynes being there. (T. 1140–41.) He testified that his prior statement to the police was false, that Mr. Haynes never told him he was going to "hit a lick," and that he never spoke with Mr. Haynes after the shooting. (T. 1148–51.) Harper said that he previously gave a false statement because the police threatened him with

fifteen years in prison if he did not cooperate. (T. 1153.) He admitted that his prior testimony to the grand jury, which tracked his police statement, was perjured. (T. 1154–55.)

The Court took a recess, during which time Harper consulted with his attorney and Assistant County Attorney Furnstahl and reviewed his prior statement. Back on the record, Furnstahl represented that the state would agree not to pursue perjury charges based on Harper's testimony in court that day so long as he told the truth going forward. (T. 1159.) Harper's attorney represented that Harper was having an extremely hard time and that he had been pounding his legs on the floor in the hall during the break. (T. 1158.) Resuming direct examination, in fits and starts, Harper eventually provided the basic facts against Mr. Haynes from his prior statements. (T. 1166–75.) Furnstahl did not ask Harper to testify to his prior statement that Mr. Haynes told him he had shot the man in the head.

On cross-examination, Harper stated again that the MPD officers had threatened him with fifteen years to get him to cooperate. (T. 1183, 1187.) He also testified that the officers talked to him four or five times before taking a recorded statement, and that each time they threatened him with prison. (T. 1185–89.) Reversing course again from his testimony on direct, Harper testified on cross-examination that the officers put words in his mouth and that the statement he gave to the police was false. (T. 1192–93.)

During his subsequent testimony, Sergeant Mattson conceded that he questioned Harper before the recorded statement, although he disputed that it was

four or five times (T. 1233), and he conceded that he discussed with Harper what he was going to say prior to starting the recording. (T. 1266.) Also, while Sergeant Mattson did not specifically recall threatening Harper with half of the prison time that Mr. Haynes was facing, he conceded that he would often explain that risk to witnesses who could face potential charges for aiding an offender. (T. 1276.)

As discussed further below, Harper has provided a recent affidavit in which he makes clear that his attempted recantation at trial was genuine and that his original statement to the police was false. (Harper Aff.)

b. Anthony Todd

Anthony Todd also testified that he had been with Mr. Haynes at Muffy's house on the morning of the shooting and that he had heard Mr. Haynes state that he was going to "hit a lick." (T. 1290–91.) Deviating from Harper's prior statement about a white Chevy, Todd testified that Mr. Haynes left with Daquan Bradley in a green Explorer. (T. 1293.) Mr. Haynes' attorney never pointed out this inconsistency in their stories.

During the investigation leading up to trial, Todd was interviewed by the police twice. Both interviews were after Harper had already given a statement to the police about Mr. Haynes saying he was going to "hit a lick." During the first interview, on June 16, 2004, Sergeant Keefe specifically introduced the "hit a lick" language, asking whether Todd "hear[d] anyone talk about hitting a lick or robbing someone or someplace," to which Todd responded, "Nope." (MPD Supp. 45.) The second interview was on October 13, 2004. By that time Todd was at the St. Croix Boys Camp, a facility

to which minors were typically referred by juvenile courts for corrective purposes. Once in that institutional setting, Todd provided a different story, claiming that in fact he had heard Mr. Haynes state on the morning in question that he was going to "hit a lick." (MPD Supp. 55.)

As discussed further below, Todd recently recanted his trial testimony to counsel for Mr. Haynes and stated that he never heard Mr. Haynes make any such statement. (Markquart Aff.)

c. Jennifer Coleman

Jennifer Coleman testified for the state that she had seen Mr. Haynes outside her house the day after the shooting and that he said "he had shot some old white man." (T. 1219–20.) She testified further that she saw Mr. Haynes again at his house and that Mr. Haynes said he could not come out because the police were looking for him. (T. 1220–23.) She stated that this house was close to Broadway Liquor Store in North Minneapolis. (T. 1221–22.) Coleman claimed that her friend Jyssica[5] was with her for both conversations. (T. 1220–21.)

Coleman's testimony differed from what she told the police during an interview on October 19, 2004, when she was incarcerated in the Juvenile Detention Center in Lino Lakes. During that interview, she provided the same basic information but indicated that Mr. Haynes made both statements the day after the shooting at the house near Broadway Liquor. (MPD Supp. 61.)

[5] The transcript references "Jessica," which appears to be a misspelling of Jyssica Warfield's first name.

Prior to that interview, Coleman identified Mr. Haynes in a photo lineup. This lineup was not blind, as Sergeant Keefe opted to administer it himself. (*Id.*) The lineup used the same outdated picture of Mr. Haynes with short hair that had been shown to McDermid and Seeley (Trial Ex. 72), although Coleman said that she proceeded to identify a recent picture of Mr. Haynes with longer hair. (MPD Supp. 61.)

Despite this earlier identification, Coleman testified at trial that she did not recognize the Defendant. (T. 1214.) While she did not retract her prior identification, she claimed that, due to the passage of time, she no longer recognized him. (T. 1215–16.)

Following Coleman's trial testimony, Sergeant Mattson took Coleman out to see if she could identify the house where she testified Mr. Haynes was living when he told her he could not leave because the police were looking for him. (T. 1344.) Coleman showed him a house at 2126 Queen Avenue North. (T. 1344.) That was the home of another acquaintance of several of the witnesses: Marvin Miller, also known as "Big Marvin." (T. 1348.) Coleman was never shown a lineup including Marvin Miller.

d. Jyssica Warfield

Finally, Jyssica Warfield testified as part of the state's rebuttal case. The state introduced through Warfield a photo lineup from August 10, 2005 (shortly before trial), in which she had identified Mr. Haynes as the person who had bragged about killing a guy in a flower shop. (T. 1447–50.) She said that she believed this conversation occurred somewhere around 27th and Russell, although she was not

sure, and that her friend Jennifer was with her at the time. (T. 1449–50.) This was the only lineup shown to any witness in this case that used a contemporary photograph of Mr. Haynes with long hair. (Trial Ex. 75.)

On cross-examination, Warfield acknowledged that she had failed to identify Mr. Haynes in a photo lineup conducted in October 2004. (T. 1452.) That lineup was not blind, as it was conducted by Sergeant Keefe. (MPD Supp. 60.) Warfield testified that the MPD officer was pointing to a specific picture in the lineup to see if she recognized that person, and she still could not make an identification. (T. 1455.) Warfield claimed that the reason for her confusion was that she thought the officer was trying to get her to identify the other Marvin (i.e., Marvin Miller, a/k/a "Big Marvin"). (T. 1453–54.) This testimony contradicted what Keefe described Warfield as saying in a police report from the October 2004 interview. There, he said that Warfield claimed that Little Marvin made the incriminating statement while they were walking past the flower shop (not in the vicinity of Broadway Liquor) but that she was too high to make a positive identification. (MPD Supp. 60.)

3. Mr. Haynes' Testimony

Mr. Haynes chose to take the stand to testify in his own defense. He provided testimony consistent with what he told the officers during his interrogation. He testified that he had been out the night before the shooting until about 2:00 a.m. and that he was in bed until around 3:00 p.m. on the day in question. (T. 1364.) He testified that this mother and his sisters Cynthia, Marquita, and Sharita were home that day and presumably would have seen him sleeping. (T. 1402–04.) Mr. Haynes denied having anything to do with the shooting. (T.1362.) He denied ever saying that

he was going to "hit a lick" or commit a robbery. (T. 1362.) He denied telling anyone that he shot a white man. (T. 1367.) He made clear that on the date in question, he was wearing his hair in an afro. (T. 1415.)

In the end, the jury found Mr. Haynes guilty of murder in the first degree and assault in the second degree. (T. 1571.) On September 27, 2005, Mr. Haynes was sentenced to life in prison.

F. Appeal

On January 4, 2007, the Supreme Court of Minnesota affirmed Mr. Haynes' conviction on direct appeal. *State v. Haynes*, 725 N.W.2d 524 (Minn. 2007). Rejecting all of Mr. Haynes' arguments for reversal, the Court held as follows:

1. The District Court did not abuse its discretion when it granted the jury's request during deliberations to replay Isiah Harper's taped statement. *Id.* at 529.

2. The prosecutor's question to Anthony Todd as to whether he was afraid of Mr. Haynes, in violation of a court order, did not rise to the level of prosecutorial misconduct. *Id.* at 530.

3. The prosecutor's cross-examination of Mr. Haynes as to whether four people would have seen him sleeping on the couch at the time of the murder did not constitute improper comment on Defendant's failure to call witnesses. *Id.* at 530.

4. The District Court did not abuse its discretion in allowing for cross-examination of Mr. Haynes concerning his lies to police on two prior occasions. *Id.* at 531.

5. The District Court did not abuse its discretion in allowing the prosecutor to question Mr. Haynes about being stopped several times by police in the

neighborhood of the flower shop where the shooting occurred because such questions were relevant to rebut Mr. Haynes' testimony that he was not familiar with either the flower shop or the immediately surrounding area. *Id.* at 532.

No issue was raised on appeal concerning the admissibility of the eyewitness testimony against Mr. Haynes.

G. Recent Investigation

A recent investigation by counsel for Mr. Haynes at Great North Innocence Project has developed material new evidence relevant to Mr. Haynes' claim of innocence.

Ravi Seeley provided an affidavit dated October 11, 2022, in which he states that he felt pressure from the police to make an identification and stick with it to make sure they caught a dangerous person. (Seeley Aff. ¶¶ 3, 6.) He was uncertain of his identifications during both the photo lineup and the live lineup, but he was worried about getting in trouble if he was not cooperative. (*Id.* ¶¶ 5–6.) It is his belief that, "as a young and impressionable teenager, the police officers pressured [him] into making potentially inaccurate identifications and telling the officers what [he] believed they wanted to hear." (*Id.* ¶ 7.)

Isiah Harper provided an affidavit dated September 28, 2022, in which he states that the police pressured him into making incriminating statements against Mr. Haynes. (Harper Aff. ¶ 2.) The officers repeatedly threatened him with criminal charges if he did not cooperate and said he could get half of the prison time Mr. Haynes was facing if he did not cooperate. (*Id.* ¶ 2.) He states that, as a fourteen-year-old, he was scared and confused and felt that he had no choice but to tell the

officers what they wanted to hear, so he gave them false statements about Mr. Haynes. (*Id.* ¶ 3.) Harper states in his affidavit that his attempted recantation at trial was authentic, but during a break in his testimony he was pressured into reversing again because he was threatened with criminal charges. (*Id.* ¶ 5.) He never heard Mr. Haynes make any incriminating statements before or after the murder of Harry Sherer. (*Id.* ¶ 6.)

Anthony Todd has recanted his trial testimony against Mr. Haynes, as described in the affidavit of Mr. Haynes' attorney, Andrew Markquart, dated October 10, 2022. Similar to Harper, Todd said that police threatened him with criminal charges if he refused to cooperate, and he eventually broke down and said that Mr. Haynes had told him he was going to "hit a lick," a statement he repeated at trial. (Markquart Aff. ¶ 5.) Todd said that this was a lie and that he never heard Mr. Haynes make any such statement. (*Id.* ¶ 5.) Todd said that he was concerned about how cooperating in this case could affect him given his status on intensified supervised release, and he ultimately declined to provide an affidavit based on the advice of counsel. (*Id.* ¶¶ 5–6.)

Ashley Toten provided an affidavit dated October 1, 2022, in which she states that she was interviewed by police in connection with the investigation of Mr. Haynes and that she felt they were pressuring her to make incriminating statements about Mr. Haynes despite her lack of knowledge. (Toten Aff. ¶¶ 2–3.) Toten ultimately did not testify in Mr. Haynes' trial.

Four of Mr. Haynes' sisters provided affidavits accounting for Mr. Haynes' whereabouts for much of the critical period on May 16, 2004, including the time during which Isiah Harper and Anthony Todd (in testimony that they both have now recanted) claimed they were with Mr. Haynes at Muffy's house and heard him make incriminating statements. Marvina Haynes, Sharita Harris, Marquita Haynes, and Cynthia Haynes all provide a consistent account in which Marvina came to their mother's house around 10:00 a.m. on the date in question to confront Mr. Haynes about taking her Nike Air Jordan sneakers. After Marvina woke Mr. Haynes up and argued with him briefly, Mr. Haynes went back to sleep. Cynthia and Marquita left for church around 10:30 a.m. None of them have any reason to believe Mr. Haynes got back up before 3:00 p.m. that afternoon, consistent with his statement to the police and trial testimony. The three older sisters also make clear that, contrary to Cynthia McDermid's description of the shooter, Mr. Haynes did not at the time speak like someone who was educated.

ARGUMENT

Marvin Haynes' conviction for murder and assault is legally defective and devoid of any sound factual basis, let alone a factual basis sufficient to support a life sentence for someone sentenced as a juvenile. The state's case against Mr. Haynes rested largely on eyewitness testimony that was secured in reliance upon suggestive, improper, and unreliable methods. It should have been clear then, but it is abundantly clear now, that the person those eyewitnesses saw did not match the appearance of Marvin Haynes.

Moreover, the limited evidence that the state presented beyond the two eyewitnesses has been severely eroded since the time of trial. Two of the key witnesses who provided inculpatory evidence against Mr. Haynes have given compelling recantations that are consistent with the known facts. Further, members of Mr. Haynes' family have provided statements attesting to his whereabouts on the morning in question, evidence that should have been presented at his trial but was not.

A. The Eyewitness Identifications Used to Convict Mr. Haynes Were Fundamentally Defective and Unreliable.

The eyewitness identification evidence in this case is legally defective and factually unreliable. This evidence should not have been admitted in the first place, and it should not provide a basis for continuing to incarcerate Mr. Haynes all these years later. This evidence was plagued by numerous problems, outlined below, including officers' use of unduly suggestive lineup procedures and their repeated and flagrant deviations from internal policies and known best practices. Beyond these process errors, there are pervasive reasons to doubt the reliability of these identifications. No court has ever had an opportunity to seriously examine these issues. While Mr. Haynes' attorney filed a perfunctory pretrial motion to suppress the identification evidence, that motion failed even to scratch the surface of the problems with this evidence.

Supreme Court Justice Brennan observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors

than all other factors combined." *United States v. Wade*, 388 U.S. 218, 229 (1967). Nearly forty years later, the International Association of Chiefs of Police published training guidelines in which it concluded that, "[o]f all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work." Int'l Ass'n of Chiefs of Police, *Training Key No. 600, Eyewitness Identification* 5 (2006).

Substantial empirical evidence supports these statements. According to one estimate, approximately 7,500 of every 1.5 million annual convictions for serious offenses may be based on misidentifications. *See* Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 7 (1995). The introduction of DNA analysis and the subsequent exoneration of defendants convicted by faulty witness identification have demonstrated the fragility of eyewitness identification evidence. The Innocence Project reports that more than 69 percent of convictions overturned due to DNA evidence involved eyewitness misidentification.[6]

It is thus of the utmost importance that law enforcement agencies are attuned to the fallibility of eyewitness identification and employ safeguards to prevent misidentifications. As such, courts have consistently held that unreliable identifications that result from suggestive lineup procedures must be suppressed,

[6] Innocence Project, "DNA Exonerations in the United States," https://innocenceproject.org/dna-exonerations-in-the-united-states.

given the risk of misidentification and the resulting threat to the fundamental fairness of the trial.

Tracking the United States Supreme Court's test from *Manson v. Brathwaite*, 432 U.S. 98 (1977), Minnesota courts apply a two-part test to determine whether pretrial eyewitness identification testimony must be suppressed. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). The first question is whether the pretrial identification procedure was unnecessarily suggestive. *Id.* If the procedure is found to be unnecessarily suggestive, the identification evidence may still be admissible only if "the totality of the circumstances establishes that the evidence was reliable." *Id.* Applying this test to the facts of the present case, the identification evidence here never should have been admitted. Moreover, even if one concludes that the evidence was properly admitted as a legal matter, that evidence remains fundamentally unreliable as a factual matter and should not be a basis for upholding Mr. Haynes' conviction.

1. Police Investigators Used Flawed and Unnecessarily Suggestive Lineup Techniques with Both Eyewitnesses.

As to the first prong of the *Manson* test, the identification evidence in this case was obtained through procedures that were unnecessarily suggestive in at least three key respects: (1) the MPD officers subjected witnesses to multiple viewings of Mr. Haynes; (2) the officers employed non-blind lineup procedures; and (3) the lineups were defective in their construction. As Dr. Nancy Steblay notes in her expert report accompanying this submission, "the danger of misidentification increases as

violations of good lineup practice cumulate." (Steblay at 6.)[7] This is just such a case of compounding errors, errors that contributed to a tragic misidentification.

As a matter of terminology, courts and academics sometimes refer to the variables within the state's control, which can be manipulated to affect the degree of suggestiveness in any given procedure, as "system variables." In this case, several system variables were such that the lineup procedures resulted in "the defendant [being] unfairly singled out for identification." *Simmons v. United States,* 390 U.S. 377, 383 (1968). For the reasons discussed below, those factors made the identification procedures here unnecessarily suggestive, thus satisfying the first prong of the *Manson* test.

a. Multiple Viewings of Suspect

First, the identification procedures in this case were unnecessarily suggestive because both eyewitnesses were exposed to the suspect multiple times. The mere act of showing an individual to a witness multiple times suggests to the witness that the person in question is the suspect (i.e. the person they are "supposed" to select). Moreover, this practice undermines reliability because successive views of the same person "can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure." *State v. Henderson*, 27 A.3d 872, 900 (N.J. 2011). The Minnesota Supreme Court has held as much, stating that "a subsequent lineup, even though otherwise proper, is

[7] Citations to "Steblay" are to the expert report of Dr. Nancy Steblay dated December 13, 2022.

open to question when the individual is the only person in the lineup whose picture has recently been shown to the complainant." *State v. Witt*, 245 N.W.2d 612, 615 (Minn. 1976).

Multiple viewings of the same suspect is suggestive and amounts to prejudicial influence over eyewitnesses when they learn or infer that police suspect a particular individual of being the perpetrator of the crime. As the Minnesota Court of Appeals reasoned in *State v. Hooks*:

> [T]he eyewitness's subsequent identification of the same individual is questionable because of the significant possibility that the identification rests indirectly on the officer's perceived suspicion rather than on the witness's own direct recollection. And because the reliability of identification evidence is crucial, an eyewitness's tainted identification conflicts with the fundamental fairness required to satisfy due process.

752 N.W.2d 79, 84–5 (Minn. Ct. App. 2008). *See also Simmons v. U.S.*, 390 U.S. 377, 383 (1968) (discouraging use of single photo or photos of several persons among which a single individual appears multiple times or whose image is emphasized); *Witt*, 245 N.W.2d at 614–15 (finding improper suggestion when victim who failed to pick defendant from a photo lineup later picked the defendant in an in-person lineup).

These decisions of Minnesota and federal courts find support in the prevailing scientific understanding of memory and memory contamination. As Dr. Steblay explains:

> Solid scientific facts about human memory and memory contamination dictate that the *first* eyewitness identification attempt via unbiased lineup procedures is the one that counts, whether the witness makes a positive identification or not, and an identification *must* have been conducted with an unbiased fair procedure. . . . Any identification made from repeated procedures—beyond the first identification procedure—should not be considered reliable eyewitness evidence.

(Steblay at 4 (internal citations omitted).)

The officers in this case violated these basic principles by subjecting both witnesses to multiple lineup procedures (McDermid to four (two of which included Mr. Haynes) and Seeley to two). Ideally, each witness would have one opportunity to view a lineup containing a given suspect. Once the witness has been exposed to the suspect, there is a serious risk that the suspect will appear familiar in any subsequent lineup not because the witness saw that person at the crime scene, but rather because the witness saw the person in the earlier lineup. In Mr. Haynes' case, the officers disregarded this principle, and he appeared before both witnesses in two separate lineups: one photo and one live lineup.

There simply was no good reason for the officers to show Mr. Haynes to the eyewitnesses multiple times. This was a purely gratuitous injection of suggestiveness that they easily could have, and should have, avoided. The only discernible reason—and it is not a good one—is that the state recognized its case was on shaky ground without more evidence. It was on shaky ground after the state's primary witness, Cynthia McDermid, identified filler Max Bolden with 75 to 80 percent confidence. It was on shaky ground because the mugshot of a younger Marvin Haynes with short-cropped hair that they used for the photo lineups differed dramatically from his appearance at the time. That the state's case was weak, however, is decidedly *not* a basis for employing procedures that create a serious risk of misidentification. Those procedures, in exposing the witnesses to the suspect a second time, were inherently and unnecessarily suggestive.

b. Failure to Conduct Double-Blind Lineups

Second, several of the identification procedures in this case were unnecessarily suggestive because the officers failed to provide for double-blind administration of the lineups. A lineup is double-blind if the individual administering the lineup does not know who the suspect is or where the suspect is located in the lineup. Double-blind lineup administration is widely viewed among experts as "the single most important characteristic that should apply to eyewitness identification procedures. Its purpose is to prevent an administrator from intentionally or unintentionally influencing a witness' identification decision." *Henderson*, 27 A.3d at 896. In this case, without any good reason, the officers repeatedly conducted non-blind lineups and thus introduced an unnecessary element of suggestiveness to the procedures. Specifically, as to Cynthia McDermid, both the photo lineup and the live lineup in which she identified Mr. Haynes were non-blind. As to Ravi Seeley, the live lineup in which he identified Mr. Haynes was non-blind.

Research has shown that lineup administrators familiar with the suspect may leak suggestive information to the witness by "consciously or unconsciously communicating to witnesses which lineup member is the suspect." Sarah M. Greathouse & Margaret Bull Kovera, "Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification," 33 *Law & Hum. Behav.* 70, 71 (2009). Psychologists refer to that phenomenon as the "expectancy effect": "the tendency for experimenters to obtain results they expect . . . because they have helped to shape that response." Robert Rosenthal & Donald B.

Rubin, "Interpersonal Expectancy Effects: The First 345 Studies," 3 *Behav. & Brain Sci.* 377, 377 (1978). In a seminal meta-analysis of 345 studies across eight broad categories of behavioral research, researchers found that "[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero." *Id.* Even seemingly innocent words and subtle cues influence a witness' behavior. *See* Ryann M. Haw & Ronald P. Fisher, "Effects of Administrator–Witness Contact on Eyewitness Identification Accuracy," 89 *J. Applied Psychol.* 1106, 1107 (2004). As such, a non-blind procedure can induce the witness "to feel that they made a good lineup decision, even when that decision was heavily directed by the non-blind police officer. The risk of false confidence in a mistaken identification is therefore significantly increased with non-blind lineup administration." (Steblay at 27.)

The New Jersey Supreme Court, based on this analysis, found that "the failure to perform blind lineup procedures can increase the likelihood of misidentification." *Henderson*, 27 A.3d at 897. The court there reasoned:

> The consequences are clear: a non-blind lineup procedure can affect the reliability of a lineup because even the best-intentioned, non-blind administrator can act in a way that inadvertently sways an eyewitness trying to identify a suspect. An ideal lineup administrator, therefore, is someone who is not investigating the particular case and does not know who the suspect is.

Id.

Indeed, these same considerations led then County Attorney Amy Klobuchar to mandate that all lineup procedures in Hennepin County be sequential and double-blind as a part of a pilot program that was operative at the time of the investigation in Mr. Haynes' case. *See* Amy Klobuchar et al., "Improving Eyewitness

Identifications: Hennepin County's Blind Sequential Lineup Pilot Project," 4 *Cardozo Pub. L. Pol'y & Ethics J.* 381, 389 (2006) (discussing purposes of double-blind identification procedures in an effort to combat suggestiveness of identification process). The protocol for double-blind lineups was specifically "designed to prevent undue influence in witness identification." *State v. Shannon*, No. A20-0624, 2021 WL 1525255 (Minn. Ct. App. Apr. 19, 2021). Yet, in this case, the MPD officers disregarded that protocol without any documented basis for so doing.

Notably, while postdating this case, Minnesota law now *requires* blind procedures statewide, a development informed by the growing body of research regarding the fallibility of eyewitness identifications and their role in wrongful convictions. Minn. Stat. Ann. § 626.843. In 2020, the Minnesota legislature passed a bipartisan bill that requires law enforcement agencies to use best practices in eyewitness identification procedures, including a requirement that all photo or live lineups are blind. The lineup procedures used in Mr. Haynes' case, if conducted today, would therefore be in violation of Minnesota law.

In this case, the officers started out by complying with the policy mandating double-blind lineup administration. Eventually, however, Sergeant Keefe and Sergeant Mattson abandoned this practice and started conducting the lineups themselves. Thus, for McDermid, neither of her two identifications of Mr. Haynes were made in double-blind lineups. For Seeley, he did identify Mr. Haynes once in a double-blind lineup, but the live lineup procedure was not blinded.

The video of Seeley's live lineup procedure provides a perfect example of the problems that can arise in non-blind lineups. During that procedure, Sergeant Keefe can be observed ushering lineup participants in and out of the room one at a time. He does not call any of them by name except for Mr. Haynes, which could have been a clue to Seeley that Mr. Haynes was the suspect since he was the only one whose name the officer knew.

As with the issue of multiple exposures discussed above, there simply was no reason for the officers here to abandon the proper double-blind procedures for lineups. When pressed on this point at trial as to why they did not have another officer conduct the third photo lineup shown to Cynthia McDermid (the one where she identified Haynes), Sergeant Mattson suggested that it would be inconvenient since they were going to conduct the lineup at her home and many people in their office had heard of the case by then. (T. 1051.) That simply is not a compelling reason to deviate from such a foundational principle and risk tainting the central eyewitness in a case where someone could (and eventually did) face life in prison. Indeed, that very same day, the officers sent a colleague to the home of Ravi Seeley to administer a photo lineup. (MPD Supp. 30.) Certainly they could have found another officer in a department the size of MPD if they wanted to do things the right way. Instead, they decided to cut corners during McDermid's photo lineup and again for the subsequent live lineup shown to both witnesses. The non-blind nature of these procedures made them unnecessarily suggestive.

c. Defective Lineup Construction

Finally, the identification procedures in this case were unnecessarily suggestive because the lineups were constructed in ways that failed to provide for a sufficiently robust test of the witnesses' memory. The basic problem is that lineups with fillers (non-suspects) who obviously do not match the suspect end up pointing toward the suspect by process of elimination. In other words, lineups that suggest to the witness who the suspect is *not* end up narrowing the pool of who the suspect might be. In contrast, properly constructed lineups do not suggest the identity of the suspect to the witness but instead "test a witness' memory and decrease the chance that a witness is simply guessing." *Henderson*, 27 A.3d at 897. As such, courts "should consider whether a lineup is poorly constructed when evaluating the admissibility of the identification." *Id.* at 898–899.

Mistaken identifications "are more likely to occur when the suspect stands out from other members of a live or photo lineup." Roy S. Malpass et al., "Lineup Construction and Lineup Fairness," in 2 *The Handbook of Eyewitness Psychology: Memory for People* 155, 156 (R.C.L. Lindsay et al. eds., 2007). Therefore, it is critical that fillers in the lineup resemble the suspect on key descriptors in order to provide for a meaningful comparison.

Relatedly, lineups should include a minimum number of fillers. In short, a greater number of individuals in a lineup diminishes the element of suggestion and results in a higher likelihood that the procedure will serve as a reliable test of the witness' ability to distinguish the culprit from an innocent person. General consensus

among law enforcement agencies is that a minimum of five fillers should be used in lineups. *See* Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 29 (1999). Based on the same reasoning, lineups should not feature more than one suspect, because "if multiple suspects are in the lineup, the reliability of a positive identification is difficult to assess, for the possibility of 'lucky' guesses is magnified." *Henderson*, 27 A.3d at 898.

The officers in this case committed each of these errors when constructing the lineups, once again amplifying the suggestiveness of the identification procedures in Mr. Haynes' case. As to the live lineup, there were at least two low quality fillers. The first filler can be seen on the video, limping into the room. He appears to be struggling to move, which is inconsistent with someone who ran away from the crime scene just days before. Further, that same filler and a second filler struggled to orally deliver the line they were instructed to recite, apparently confused over the word "till." That they appeared so obviously unfamiliar with the basic subject matter (involving a demand that the worker empty cash from the till) would have been a suggestive indication to the witnesses that these people were fillers and could be eliminated right away.

The officers also committed errors when constructing the photo lineups. The officers included two suspects (Mr. Haynes and another individual, David Neal) in the second photo lineup shown to McDermid. Including multiple suspects in a single lineup is widely considered improper lineup construction, because it doubles the baseline probability of randomly selecting a suspect (from one in six to one in three)

and reduces the number of fillers to four, which is less than the minimum number (five) that the literature supports as necessary for a robust lineup procedure. Thus, based on all these errors, the lineup procedures were inherently suggestive due to their poor construction.

2. Both Eyewitness Identifications Were Fundamentally Unreliable.

As to the second prong of the *Manson* test, the identification evidence in this case should have been suppressed because, based on the totality of the circumstances, these identifications were not reliable.

In assessing reliability, courts will analyze a broad range of factors that bear upon the likelihood of identifications to be accurate under all relevant circumstances. These include what are commonly referred to as "estimator variables." Unlike "system variables," "estimator variables" are factors beyond the control of the law enforcement. They can include factors relating to the particular circumstances of the witness' viewing of the suspect, as well as characteristics of the witness and/or the perpetrator. "Estimator variables" are equally capable of impacting an eyewitness' ability to perceive an event as well as to recall it later. Moreover, the impact of these factors must, in any case, be considered in light of "the corrupting effect of the suggestive identification itself." *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

Thus, the central question when analyzing eyewitness identification evidence is whether, given the totality of the circumstances, "the procedures created a substantial likelihood of misidentification." *State v. Kyles*, 357 N.W.2d 378, 380 (Minn. 1977). In this case, given the impact of all the factors discussed below, the answer is, decidedly, yes.

a. Biggers Factors

When assessing the reliability of eyewitness identifications for purposes of the second prong of the *Manson* test, Minnesota courts will follow the lead of the United States Supreme Court in examining a *non-exhaustive* list of factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972). These factors are commonly referred to as the "*Biggers* factors." They are the "opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Biggers*, 409 U.S. at 199–200. As discussed below, these factors in the aggregate weigh against reliability.

i. Accuracy of Witness' Prior Description

The factor that most clearly weighs against reliability in this case is accuracy of the witnesses' prior descriptions. Both McDermid and Seeley provided descriptions that deviate from Mr. Haynes' appearance in ways that undermine any confidence in their identifications. To level-set, Mr. Haynes was sixteen years old, 5'7", and 130 pounds. He had fairly long, natural hair, some amount of mustache growth, and a dark complexion. The mugshot below reflects Mr. Haynes' appearance upon his arrest on May 19, 2004, three days after the shooting:

Put simply, Mr. Haynes' appearance at that time is incompatible with the descriptions of the two eyewitnesses.

For her part, McDermid's descriptions of the perpetrator depart from Mr. Haynes' appearance in several respects. As outlined in greater detail above (*supra* at 9–12), McDermid described a Black male between 19 and 22 years old, 5'10" to 5'11", about 180 pounds, with medium to dark complexion, short-cropped hair (but not bald), and no facial hair.

The most obvious divergence is McDermid's description of the hair. Anyone viewing his mugshot can see that Mr. Haynes did not have anything remotely resembling short-cropped hair at the time of the crime. At trial, the prosecution tried to square this circle by suggesting that he must have had his hair in braids at the time and then taken the braids out after the shooting. (T. 1490–91.) That explanation does not hold water. Braids are a distinctive and readily recognizably hairstyle—indeed much more distinctive than a comparatively generic short-cropped hairstyle. McDermid claims to have been in a room with the culprit for several minutes in broad daylight. If that person was wearing braids, a highly distinctive feature, she surely

would have noticed and described such braids. But she did not. She described someone with short-cropped hair. That person was not and could not have been Marvin Haynes.

McDermid also overestimated Mr. Haynes' age by several years and his size by three to four inches and 50 pounds. Especially considering McDermid was face-to-face with the perpetrator, and thus had an opportunity to gauge his approximate size, these discrepancies are significant. McDermid is 5'6". By describing the shooter as 5'10" or 5'11", she was describing someone taller than herself by four or five inches. Mr. Haynes, however, was 5'7", much closer to McDermid's height, a comparison she would have been well suited to make if he was the person she actually stood across from. Instead, McDermid described a much larger man. That man was not Marvin Haynes.

McDermid's also misses the mark in her description of the perpetrator's speech. She said the shooter's speech was "not a hip-hop type speaking," that he spoke with clarity, and that he "absolutely" had an education. (MPD Supp. 17.) The video recordings of Mr. Haynes' interrogation show that his speech did not come close to matching what McDermid described. Further, statements from Mr. Haynes' sisters make the same point. In sworn affidavits, they state that Mr. Haynes was not particularly well-spoken at the time but rather spoke informally and with a great deal of slang. They further point out that he did poorly in school, struggling with reading and writing, and that he had an individualized education plan (an "IEP"), meaning he received special education services. (Marvina Haynes Aff. ¶ 6; Marquita

Haynes Aff. ¶ 7; Harris Aff. ¶ 6.) The bottom line is that he did not speak in a way that someone would describe as educated.

Seeley's description fares no better, except perhaps to the extent that his less detailed description offered fewer points on which he could err. Seeley described the perpetrator as "a slender black male [with] a natural haircut possibly faded on the sides and some sort of a light blue (possibly zip up) sweatshirt)." (MPD Supp. 31.) The most concrete physical description here is the hair. As with McDermid, he describes a shorter hairstyle that is nowhere in the ballpark of the afro that Haynes was actually wearing at the time. Thus, both eyewitnesses provided descriptions that do not match Mr. Haynes and that weigh strongly against reliability.

ii. Level of Certainty Demonstrated at Confrontations

The factor of confidence level at the time of identification also weighs decidedly against reliability. Both McDermid and Seeley demonstrated a lack of confidence in their identifications of Mr. Haynes during the lineup procedures. Remarkably, the record suggests the witnesses were least confident in connection with the *most* suggestive lineup: the non-blind live lineup where they were subjected to a repeat viewing of Mr. Haynes. If anything, all things equal, one would expect the witnesses to convey more subjective confidence at that point, not less.

Here, however, McDermid struggled with her identification of Mr. Haynes during the live lineup. While she selected Mr. Haynes, she expressed serious reservations, saying that "she was now having problems concentrating as she was very traumatized and upset and she felt she was blending them all together." (MPD

Supp. 34.) That McDermid was feeling disoriented should not be surprising since, just three days earlier, she had identified Max Bolden—a short-haired filler bearing no resemblance to Marvin Haynes—with 75 to 80 percent confidence. (*Supra* at 10–11.)

Seeley similarly demonstrated a lack of confidence in his identification at the live lineup. Seeley testified that he told the officer next to him during that lineup that he was uncertain about his identification. (T. 887–89.) In his sworn affidavit, Seeley reaffirms this earlier statement. Indeed, Seeley states that he has *no* confidence in either of the identifications he made implicating Mr. Haynes. (Seeley Aff. ¶ 7.)

What can explain the particularly low level of confidence for the most suggestive identifications in this case? There is at least one straightforward explanation: that was the only time the witnesses observed Mr. Haynes based on how he looked in May 2004. As discussed above, the photo lineups shown to both witnesses included a two-year-old picture of Mr. Haynes with short-cropped hair matching the witnesses' descriptions. Only when they got to the live lineup did the witnesses view Mr. Haynes with the afro he was wearing at the time. At this point, the witnesses had been tainted by showing them Mr. Haynes' face multiple times. Even given that high degree of suggestiveness, they still indicated uncertainty. Therefore, this factor cuts strongly against reliability.

iii. Opportunity to View the Criminal and Degree of Attention

The factors of opportunity to view and degree of attention apply somewhat different to the two witnesses. As to Seeley, these factors weigh against reliability. While Seeley claimed at trial to have seen the same person on other occasions, his

opportunity to view at the time of crime was limited. He told police that he observed the individual from about 30 to 40 feet away. (MPD Supp. 23.) Given the person was running away, he presumably only saw the person very briefly. In his affidavit, Seeley clarifies that he "did not get a clear view of the face of the person running from the flower shop," and thus he has no confidence in his ability to positively identify the face of the perpetrator, much less that it was Mr. Haynes. (Seeley Aff. ¶¶ 6–7.) Moreover, his degree of attention was quite low, as he was a casual, passing observer with no reason to pay particular attention to the person he briefly observed from a distance. So these factors cut decidedly against reliability for Seeley.

McDermid's identification is admittedly different as it relates to these particular factors. Because she was working at the flower shop during the events leading up to the shooting, McDermid had a much better opportunity to view the perpetrator in good lighting and for a longer period of time, and her attention was substantially higher than Seeley's. So, in isolation, these factors arguably offer a modest counterbalance in favor of the reliability of her identifications.

In the context of everything else we know in this case, however, the fact that McDermid had a pretty good opportunity to view the perpetrator just puts an exclamation point on all the other problems with her identifications. Since she had a good opportunity to view, we can probably trust her description of the shooter as being a man that was older, larger, and had much shorter hair than Marvin Haynes.

iv. Time Between the Crime and the Confrontation

The time between the crime and the identifications arguably provides a modest check in favor of reliability. Both Seeley and McDermid identified Mr. Haynes a few days after the shooting (on May 19 and 20). So, while these are not same-day identifications when the witnesses' memories are maximally fresh, they are also not all that long after the event. Even so, the relative proximity in time is only one factor to consider in the totality of the circumstances analysis, and it does not come close to compensating for all the other factors that weigh strongly against reliability.

b. Other Factors

As already noted, courts are clear that the *Biggers* factors, while providing a useful guide for analysis, are not intended to be an exhaustive list of factors that may inform the reliability analysis. Here, at least four other factors cut against the reliability of the eyewitness identifications: (1) McDermid's prior identification of filler Max Bolden with a relatively high degree of confidence; (2) the cross-racial nature of the identifications for both eyewitnesses; (3) the phenomenon of weapons focus for McDermid; and (4) the presence of high stress, at least for McDermid. When considered in connection with the *Biggers* factors discussed above and the suggestive nature of the lineup procedures, these factors significantly diminish the reliability of both eyewitness identifications.

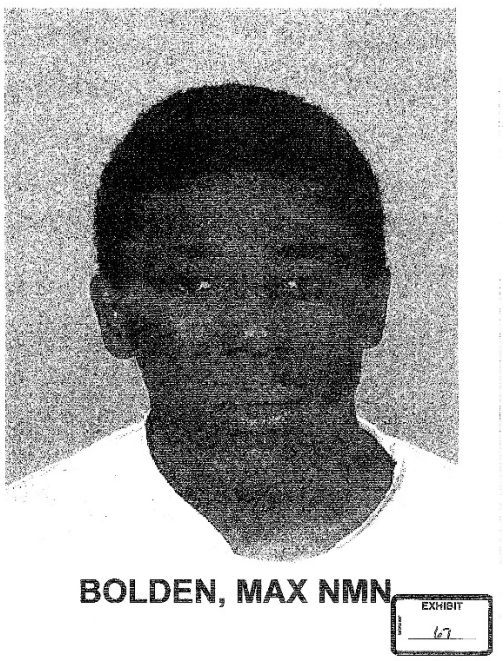
i. McDermid's Prior Identification of a Filler

First, the fact that Cynthia McDermid, prior to identifying Mr. Haynes, identified filler Max Bolden with 75 to 80 percent confidence severely undermines

any confidence in the reliability of her subsequent identifications. Indeed, that identification of Bolden, coming the day after the shooting should have been *more* reliable given its proximity in time to the events. As Dr. Steblay notes, "the best possibility for a correct identification is when memory is fresh and uncontaminated by outside influences." (Steblay at 19.)

Moreover, as Dr. Steblay explains in her report, the mere fact that McDermid was willing to pick a filler indicates that she was unable to accurately reject persons who are not the culprit and is instead willing to rely on relative judgment to select an innocent filler. According to Dr. Steblay, "a filler identification should not be considered a 'non-event.' Filler identifications are a form of exculpatory evidence for the suspect in the lineup and reflect poorly on the witness's ability to take on future identification tasks." (Steblay at 26.)

Finally, it is worth noting just how markedly different Bolden and Haynes were in appearance. See below for a comparison, with Bolden on the left and Haynes on the right:



Put bluntly, a witness who could select both of these individuals as the culprit is a witness who has no ability to make a reliable identification.

ii. Cross-Racial Identification

Both eyewitnesses in this case were of a different race than Mr. Haynes, a factor repeatedly shown to reduce the accuracy and reliability of identifications. Specifically, while Mr. Haynes is Black, McDermid is white, and Seeley is of South Asian descent.

There is a robust body of literature showing that people of all races struggle more on average with identifying unfamiliar faces of other races. *See, e.g.,* Christian A. Meissner & John C. Brigham, "Thirty Years of Investigating the Own–Race Bias in Memory for Faces: A Meta–Analytic Review," 7 *Psychol. Pub. Pol'y & Law* 3, 21 (2001) (meta-study assessing thirty-nine separate studies involving nearly 5,000 identifications and finding robust support for conclusion that cross-racial

identifications are generally less accurate). As Dr. Steblay explains, humans "have learned to pay attention to facial features that help us discern between faces within our same race, but these cues do not work equally well for encoding and for recognizing faces of another race [or] ethnicity." (Steblay at 18.)

These insights rooted in social science have led some courts to expressly treat cross-racial identifications with special care. For example, the New Jersey Supreme Court requires a jury instruction in appropriate cases explaining the particular fallibility of cross-racial identifications. *See State v. Cromedy*, 727 A.2d 457 (N.J. 1999). While Minnesota courts generally do not require such jury instructions, *State v. Thomas*, 890 N.W.2d 413 (Minn. Ct. App. 2017), the literature on cross-racial identifications, nevertheless, is informative in assessing the reliability of a particular identification. In this case, it is yet another factor weighing against reliability.

iii. Weapons Focus

The presence of a gun on this case gives rise to the phenomenon commonly known as "weapons focus," another factor cutting against the reliability of at least McDermid's identification. When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit and onto the weapon. This "weapons focus" phenomenon can significantly impair a witness' "ability to make a reliable identification and describe what the culprit looks like." *State v. Henderson*, 27 A.3d 872, 905 (N.J. 2011).

A meta-analysis of nineteen studies of weapons focus, involving over 2,000 identifications, found that the average accuracy of identifications decreased

approximately 10 percent when a weapon was present, in addition to substantially diminishing witnesses' ability to describe the perpetrator. *See* Nancy M. Steblay, "A Meta–Analytic Review of the Weapon Focus Effect," 16 *Law & Hum. Behav.* 413, 415–17 (1992). In a separate study, half of the witnesses observed a person holding a syringe in a way that was personally threatening to the witness. The other half saw the same person holding a pen. *See* Anne Maass & Gunther Koehnken, "Eyewitness Identification: Simulating the 'Weapon Effect'," 13 *Law & Hum. Behav.* 397, 401–02 (1989). Sixty-four percent of witnesses from the first group misidentified a filler from a target-absent lineup, compared to 33 percent from the second group. *See id.* at 405; *see also* Kerri L. Pickel, "Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect," in 2 *The Handbook of Eyewitness Psychology: Memory for People* 339, 353–54 (noting that "unusual items [like weapons] attract attention").

The presence of a gun in this case likely resulted in a weapons focus phenomenon that would have negatively impacted the reliability of McDermid's identification. As discussed in detail above, McDermid said that the perpetrator demanded money from gunpoint before she fled to the back of the store. In interviews with the police following the incident, McDermid gave a detailed description of the weapon used in the attack. She described a silver gun that "had a chamber where you could see the bullets in it . . . a round chamber that was down below the handle" and that the perpetrator "was holding the gun with two hands." (MPD Supp. 17.) That McDermid could describe the gun in such detail shows that once this interaction

transitioned from a routine daily interaction to something much more memorable, McDermid's attention was directed at the gun and not on the face of the perpetrator. The result is that, all other things equal, McDermid's identification is less reliable than it would have been in the absence of a weapon.

iv. High Stress

Finally, McDermid almost certainly experienced extremely high levels of stress once the perpetrator pointed a gun at her and continuing through the shooting of her brother and her flight to the neighbor's house to call 911. This stress is yet another factor that diminishes the reliability of her identification. The scientific literature shows that, even under the best viewing conditions, high levels of stress can severely diminish an eyewitness' ability to recall and make an accurate identification. A meta-analysis of sixty-three studies showed "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." Kenneth A. Deffenbacher et al., "A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory," 28 *Law & Hum. Behav.* 687, 699 (2004).

One field experiment tested the impact of stress on the memories of military personnel. *See* Charles A. Morgan III et al., "Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress," 27 *Int'l J. L. & Psychiatry* 265 (2004). More than 500 active-duty military personnel, with an average of four years in the service, experienced two types of interrogation after twelve hours of confinement in survival school training: "a high-stress interrogation (with real

physical confrontation) and a low-stress interrogation (without physical confrontation)." *Id.* at 267–68. Both interrogations lasted about 40 minutes. *Id.* at 268. Twenty-four hours later, the subjects were shown either a live lineup or a sequential or simultaneous photo array and asked to identify their interrogators. *Id.* at 269–70. Across the procedures, subjects performed more poorly when they identified their high-stress interrogators. *Id.* at 272. For example, when viewing live line-ups, 30 percent of subjects accurately identified high-stress interrogators, but 62 percent did so for low-stress interrogators. *Id.* The study's authors concluded that "[t]hese data provide robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error." *Id.* at 274.

These findings apply to McDermid's identification of Mr. Haynes. McDermid was held at gunpoint while the perpetrator demanded that she retrieve money from the back of the store. As she fled, she heard the gunshots that dealt the fatal blows to her brother. This would have been an exceedingly high stress scenario for McDermid.

Further, a "fight or flight" response is typical in threatening and stressful situations, "with the result being that limited attention is paid to the face of the perpetrator." (Steblay at 15.) McDermid fled the scene, engaging in a "flight" response. The encoded memory from the event is thus fragmented and likely confused. (*Id.*) The bottom line is that all this stress would have had the effect of diminishing the reliability of McDermid's identification.

Based on all the factors discussed above, there is simply no basis for concluding that either of the eyewitnesses' identifications were even remotely reliable. Because the identifications were (1) the product of unnecessarily suggestive procedures, and (2) not reliable based on the totality of the circumstances, this evidence should never have been admitted under the *Manson* test.

3. No Court Has Ever Heard a Robust Case Setting Forth the Problems with These Eyewitness Identifications.

Very few of the extensive defects with eyewitness identification evidence in this case outlined in the preceding 25 pages and the accompanying expert report of Dr. Nancy Steblay have ever been presented to any court. The limited attempt of Mr. Haynes' trial attorney to suppress the eyewitness identification wholly failed to analyze the myriad issues discussed above. Prior to the trial, counsel submitted a cursory two-page, double-spaced memorandum in support of his motion to suppress the identifications. Only one paragraph analyzed the facts of Mr. Haynes' case. Regarding the in-person lineups, counsel simply stated in a conclusory manner that they were "unduly suggestive," without citing a single fact as to why or how the lineups deviated from best practices. Regarding the photographic lineups, counsel argued that he was unable to ascertain any suggestiveness based on the black and white photographs he had been provided. Again, despite the information being available to him, he failed to mention that there was more than one suspect included in a lineup and that the photograph depicting Mr. Haynes was two years old and differed in obvious respects from his appearance at the time. Counsel also completely failed to examine how and why the identifications were unreliable, the second step of

the two-part *Manson* test to determine admissibility of faulty identifications. This perfunctory motion to suppress was unsurprisingly denied by the trial court.

As a result, the court never had to grapple with the compelling arguments for why the identifications should have been suppressed. Had the court been presented with the reasons as to why the identifications were suggestive and unreliable, there is reasonable possibility the court would have suppressed the evidence and that, lacking the state's central evidence against Mr. Haynes, the ultimate result would have been different. The faulty admission of these identifications, in large part due to his counsel's insufficient motion to suppress, severely prejudiced Mr. Haynes and ultimately led to his wrongful conviction.

Even if one is not convinced that this evidence should or would have been excluded as a matter of law under the *Manson* test, the same factors discussed above destroy any possible grounds for confidence in the factual accuracy of the identifications. All legal niceties aside, the evidence shows that these eyewitnesses identified the wrong person.

B. Newly Discovered Evidence Further Erodes the Factual Basis for Mr. Haynes' Conviction.

In addition to the extensive flaws with the eyewitness identification that should have been illuminated at trial but were not, there has recently arisen substantial newly discovered evidence that further erodes what was already a weak case against Mr. Haynes. Much of this new evidence reveals a pattern on behalf of MPD officers applying heavy pressure upon young, impressionable witnesses to make

incriminating statements. Ravi Seeley, Isiah Harper, Anthony Todd, and Ashley Toten all report having been on the receiving end of such pressure.

Seeley states in his affidavit that he felt pressure to make and stick with an identification, even when he never really got a good view of the suspect's face and had substantial doubts about the accuracy of his identification. Harper and Todd have recanted incriminating statements against Mr. Haynes at trial, both stating that their prior statements were the direct result of intense police pressure, including threats that they would face criminal charges themselves if they refused to cooperate. While Toten, unlike the others, did not testify against Mr. Haynes, she too reports that she felt the police were pressuring her to make incriminating statements about Mr. Haynes, regardless of the actual facts.

Finally, four of Mr. Haynes' sisters, none of whom were called to testify at trial, have provided affidavits placing Mr. Haynes at home on the morning of the shooting, including during the period that Harper and Todd, prior to recanting, had said they heard Mr. Haynes say that he was planning to "hit a lick." This new evidence from Mr. Haynes' sisters adds credibility to Harper's and Todd's recantations and supports Mr. Haynes' own statement that he was in bed at the time the shooting occurred.

The cumulative effect of this new evidence, particularly once accounting for the fact that the eyewitness testimony central to this case has been severely undermined, is to leave the state's case against Mr. Haynes in tatters and to show that he is in fact innocent.

1. Ravi Seeley's Eyewitness Identification Was the Subject of Police Pressure and Was Not Made with Confidence.

First, Ravi Seeley's new affidavit further undermines any confidence in his prior identifications of Mr. Haynes because those identifications were influenced by police pressure and because he himself does not have any confidence in those identifications.

Seeley was only fourteen years old at the time he identified Mr. Haynes as the person he saw running from the flower shop. By his own admission, he was "a young and impressionable teenager" at the time. (Seeley Aff. ¶ 7.) Up to that point in his life, he had no meaningful experience with law enforcement. As he explains, he "had never been interviewed by police or been involved with anything like this." (*Id.* ¶ 6.) As a young, unsophisticated witness, he was maximally susceptible to police pressure. Thus, he states that he "was terrified about what could happen to [him] if [he] was not cooperative." (*Id.*)

It is in this context that Seeley made identifications that we now know to have been flawed. In describing the initial photo lineup, Seeley states, "After I initially indicated I thought it might be that photo, I remember feeling like the officer wanted me to stick with that photo. He emphasized how important it was to solve this crime and put a dangerous criminal away." (*Id.* ¶ 3.) Then, in describing the subsequent live lineup, Seeley states that he expressed doubts about his identification to the officer who was next to him. (*Id.* ¶ 5.) As to both identifications, Seeley states that he "felt the police officers pressured [him] to make an identification" and that they led him to feel "that [he] could get in trouble if [he] was not helpful." (*Id.* ¶ 6.)

Perhaps most critically, Seeley states that he "did not get a clear view of the face of the person running from the flower shop." Based on all of this, he concludes that he has "no confidence in the identifications [he] made back in 2004." (*Id.* ¶ 7.) That lack of confidence is wholly justified by the facts. Whatever weight his identifications may have been given at the time of trial, they should be given no weight today based on all of this evidence.

2. Isiah Harper Has Recanted His Testimony Against Mr. Haynes and Explained that It Was the Result of Police Pressure.

Second, Isiah Harper has wholly recanted his incriminating statements against Mr. Haynes and made clear that those statements were the product of heavy police pressure against him. As explained above, Harper previously attempted to recant from the stand when the state called him to testify against Mr. Haynes at trial. It was only after the court took a recess and Harper was threatened with perjury charges that Harper backtracked on his recantation. (Harper Aff. ¶ 5.) Now he makes clear that his original recantation was genuine. The available facts support that he is telling the truth.

Like Seeley, Harper was only fourteen years old at the time he came into contact with police in this case. He states that they badgered him after he initially told the truth, which is that he did not know anything about the flower shop murder. He states that they threatened him, saying he could get half of the prison time that Mr. Haynes was facing if he did not cooperate with them. (*Id.* ¶ 2.) At one point, Harper explains, the police put him in a jail cell for a period of time before picking back up with the interrogation, a tactic that would only have highlighted the threats

of criminal charges. (*Id.*) Harper explains that he "was scared and confused" and "felt [he] had no choice but to the tell the officers what they wanted to hear." (*Id.* ¶ 3.) As a result of this intense pressure, Harper broke and told the officers Mr. Haynes told him he was going to "hit a lick" (i.e., commit a robbery) and that Mr. Haynes later told him he had shot a man because the man would not give Mr. Haynes any money. (*Id.*)

In his affidavit, Harper expressly states that none of these statements against Mr. Haynes were true. In fact, he never heard Mr. Haynes make any incriminating statements before or after the shooting, and he has no reason to believe Mr. Haynes had anything to do with the murder of Harry Sherer. (*Id.* ¶ 6.)

Harper's most recent statement is credible because it is the version most consistent with the known facts. Harper's original statement to the police always had major flaws. Most blatantly, Harper said that Mr. Haynes told him he had shot the man in the head. But we know that Sherer was shot in the chest, not the head. (MPD Supp. 38.) Also, Harper's original story was inconsistent with that of Anthony Todd (discussed immediately below). Harper said that Mr. Haynes left with Daquan Bradley in a white Chevy that Bradley had stolen. (*Id.*) In contrast, Todd said that they left in a green Explorer. (T. 1293.) So the original story was not even internally consistent.

Harper's current statement, however, makes perfect sense. It is not at all hard to see how a fourteen-year-old child faced with police threatening him with fifteen years in prison if he did not cooperate would be willing to lie in an effort to save

himself. Moreover, that he attempted at trial to recant only adds credibility to his current recantation. It was only as a result of perjury threats that he backed off his original recantation. Finally, the statements of Mr. Haynes' sisters, discussed below, add credibility to Harper's recantation. He told police that he was with Mr. Haynes and others at Muffy's house around 10:00 a.m. that morning when Mr. Haynes was talking about how he was going to "hit a lick." (MPD Supp. 38.) The statements of Mr. Haynes' sisters, however, show that Mr. Haynes was home at that time. In short, Harper's recantation is credible and serves to further erode the state's case against Mr. Haynes.

3. Anthony Todd Has Recanted His Testimony Against Mr. Haynes and Explained that It Was the Result of Police Pressure.

Third, Anthony Todd has recanted his trial testimony against Mr. Haynes in a conversation with Andrew Markquart, counsel for Mr. Haynes. As with Isiah Harper, Todd explains that his prior false statement was the product of intense police pressure and threats of criminal charges. (Markquart Aff. ¶5.)

Similar to Harper, Todd stated that he heard Mr. Haynes say that he was going to "hit a lick" on the morning on the shooting. That particular language may appear to be distinctive in a way that would tend to lend credibility to his original statement since it was consistent with Harper's separate statement. It is essential to note, however, that Todd did not offer that language in the first instance. Instead, in an interview postdating Harper's original statement using that language, Sergeant Keefe specifically asked Todd whether he had "hear[d] anyone talk about hitting a lick or robbing someone or someplace." (MPD Supp. 45.) Todd denied hearing any

such thing in that first interview but then reversed his story, employing that same "hit a lick" language in a second interview with police a few months later. (MPD Supp. 55.)

Todd has now stated expressly and unequivocally that this was a lie. (Markquart Aff. ¶ 5.) He said that he only made this statement after police pressured him and told him that he could face his own criminal charges if he did not cooperate. (*Id.*) While Todd ultimately chose not to sign an affidavit for this case because he was worried about how that could affect him given his current status on intensive supervised release, he never wavered on his recantation. (*Id.* 5–6.)

For many of the same reasons discussed above as to Harper, Todd's recantation is credible and consistent with the known facts. As noted above, his original story was inconsistent with Harper's as it concerned the description of the car that Mr. Haynes was said to have left in. Also, as already discussed, the critical language to which Todd testified was fed to him in the first instance from the police. It was not something that he freely offered. As with Harper, it is not hard to understand why a young Todd would have buckled under pressure when threatened with criminal charges. Finally, as also discussed above, the statements of Mr. Haynes' sisters make Todd's recantation more credible because it shows Mr. Haynes was home that morning, not with Todd. Therefore, this recantation serves to undermine the state's faltering case even further.

4. Ashley Toten Was Pressured by Police to Provide What Would Have Been False Incriminating Evidence Against Mr. Haynes.

Fourth, Ashley Toten has provided an affidavit in which she describes feeling pressured by the police to provide incriminating evidence against Mr. Haynes even though she had no such information to provide. Unlike Isiah Harper and Anthony Todd, Toten did not testify for the state in Mr. Haynes' trial, so her affidavit does not go toward directly undermining the state's trial evidence. Her statement does, however, add credibility to the other witnesses' descriptions of experiencing heavy police pressure. Specifically, she states that she "felt the police officers pressured [her] to say certain things about Marvin," including that he was of bad character and known to have guns. (Toten Aff. ¶ 3.) She goes on to state that "it seemed like they were trying to frame Marvin as a dangerous person" and that she believes "the police officers asked [her] specific questions to make Marvin seem like someone capable of such a crime." (*Id.* ¶ 4.)

Toten is the fourth witness (along with Ravi Seeley, Isiah Harper, and Anthony Todd) who was a teenager at the time of police investigation and who describes having experienced police pressure in this case. Thus, Toten provides one more data point to show a pattern of aggressive police techniques deployed against young witnesses. While those techniques may not have resulted in false evidence from Toten, they did have such a result as to the other witnesses. Toten's affidavit makes those other witnesses' recent statements even more credible.

5. Mr. Haynes' Sisters Show that He Was Home During the Critical Time Period.

Finally, four of Mr. Haynes' sisters have provided affidavits attesting to his whereabouts on the morning of the shooting. They all provide a consistent account placing him at home until sometime after 10:30 a.m. that day. While none of them have a specific recollection of how late Mr. Haynes stayed in bed, their statements are consistent with his prior testimony that he was in bed until around 3:00 p.m. that day. Moreover, they all place him at home during the period in which Isiah Harper and Anthony Todd originally claimed to have been with him at Muffy's house when he said that he was going to "hit a lick." Therefore, as noted above, the sisters' affidavits add credibility to Harper's and Todd's recantations of those prior statements since Harper's and Todd's present accounts are more consistent with the evidence.

According to all four sisters, Mr. Haynes was sleeping that morning at the home of their mother Sharon Shipp, where Mr. Haynes and the sisters other than Marvina Haynes lived. (Marvina Haynes Aff. ¶¶ 2, 5; Marquita Haynes Aff. ¶¶ 2–3; Cynthia Haynes Aff. ¶¶ 2, 5; Harris Aff. ¶¶ 2, 5.) Cynthia Haynes and Sharita Harris were waiting for their ride to church, which was running later than usual that morning. (Cynthia Haynes Aff. ¶¶ 3–4; Harris Aff. ¶¶ 3–4.) They recall finally getting picked up for church sometime around 10:30 a.m. that morning. (Cynthia Haynes Aff. ¶ 4; Harris Aff. ¶ 4.)

Sometime before Cynthia and Sharita left for church, Marvina came over to the house to confront Mr. Haynes about taking her Nike Air Jordan sneakers.

(Marvina Haynes Aff. ¶ 3; Marquita Haynes Aff. ¶ 3; Cynthia Haynes Aff. ¶ 5; Harris Aff. ¶ 5.) Marvina woke Mr. Haynes up. They argued for a bit about the shoes. Then Marvina left, and Mr. Haynes went back to sleep. (Marvina Haynes Aff. ¶¶ 3, 5; Marquita Haynes Aff. ¶¶ 3, 5; Cynthia Haynes Aff. ¶ 5; Harris Aff. ¶ 5.) Cynthia and Sharita both state that Mr. Haynes was sleeping when they left for church around 10:30 a.m. (Cynthia Haynes Aff. ¶ 5; Harris Aff. ¶ 5.) Marquita was the only sister who remained at the house past that point. While she cannot recall all these years later when Mr. Haynes finally got up that day, she recalls that he slept for some period of time before getting up. (Marquita Haynes Aff. ¶ 5.) Their mother was also home that day and might theoretically be able to attest to Mr. Haynes' whereabouts, but she suffered a stroke that has left her unable to communicate except through a few basic hand signs. (Marquita Haynes Aff. ¶ 6.)

Admittedly, none of the sisters can definitively state where Mr. Haynes was at 11:40 a.m. that morning, the time that the shooter was said to have entered the flower shop. But they all describe Mr. Haynes as having gone back to sleep after Marvina woke him up. Cynthia and Sharita can say he was asleep when they left for church around 10:30 a.m., and Marquita remembers him sleeping for some amount of time after that. All of this is consistent with Mr. Haynes' statements during his interrogation and again at trial that he was in bed until around 3:00 that afternoon. Indeed, the fact that the sisters' statements cannot, by themselves, provide a perfect alibi tends to support the credibility of those statements. If Mr. Haynes' sisters were trying to manufacture an alibi for him, they would have provided statements that

could definitively account for his whereabouts until sometime after the crime. But the sisters can only swear to what they actually know, which is what their affidavits reflect.

One might question why Mr. Haynes did not describe the incident of Marvina waking him up and arguing with him about her shoes in his prior statements, including during his trial testimony. The short answer is that he did not at the time find that incident to be particularly memorable or relevant to his account of what happened that day. From his perspective, the key fact was that he was at home in bed until 3:00 p.m., when he finally got up for the day. That his sleep was briefly interrupted did not strike him at the time as a relevant fact. Thus, his perspective differs from that of his sisters, for whom the argument between Mr. Haynes and Marvina before Cynthia and Sharita left for church was what they remembered about that morning.

In the end, there is no evidence to refute Mr. Haynes' consistent statements that he was in bed until 3:00 p.m. that day. His sisters' affidavits are at least consistent with his account, and they tend to support that he was sleeping at the time of the shooting. They also definitively place him at home at 10:00, thus refuting Isiah Harper's and Anthony Todd's original statements against Mr. Haynes and, conversely, supporting those witnesses' recent recantations.

Despite the strength of this evidence, Mr. Haynes' trial counsel did not call any of his sisters to testify in his defense. Even if they were not able to provide a clean alibi at the time of the shooting, as already noted, they at least could have provided

evidence against Isiah Harper's and Anthony Todd's incriminating statements. And they could have testified that Mr. Haynes was sleeping shortly before the events, which tends to support his version of the facts. Yet, for reasons unknown, none of these women or their mother were called to testify. Instead, the prosecutor was left to inject innuendo about the fact that none of Mr. Haynes' potential alibi witnesses were there to testify on his behalf. (T. 1404.) These women provide an important piece of the story, which should have been presented at Mr. Haynes' trial, and which supports his claim of innocence now.

C. Mr. Haynes Is Prepared to Reenter Society.

While Mr. Haynes should be released from prison for the simple reason that he is innocent, it is also worth noting that he has taken steps over the past nearly two decades to improve himself. As such, he is prepared to participate as a law-abiding and productive member of his community.

Mr. Haynes was wrongfully convicted at the young age of sixteen and thus was never able to graduate high school with his peers. Nevertheless, Mr. Haynes earned his high school diploma while incarcerated, awarded by the Minnesota Department of Education on June 15, 2011.

In addition, Mr. Haynes has completed numerous behavioral and emotional courses, including: (1) a thirteen-week course in the "Thinking for a Change" program, completed on October 26, 2022; (2) an "Anxiety Management" program, completed on August 10, 2022; (3) an "Anger Management" course, completed on May 16, 2022; (4) the "Phillip Roy Social Skills" curriculum, completed on May 15, 2009; (5) phases one and two of the "Thinking for a Change / Critical Thinking" program,

completed on February 6, 2009; (6) the "Trauma Outcome Process, Cycle of Abuse, and Offense Prevention" program, completed on January 9, 2006; and (7) a "Restorative Justice Workshop" certificate of achievement, received in 2006.[8] Thus, despite being incarcerated for a crime he did not commit, Mr. Haynes managed to spend his time in a productive and meaningful way. These courses and the skills he developed will assist in his ability to adjust, emotionally and socially, once he is released from prison.

CONCLUSION

For all of the reasons set forth above, Mr. Haynes respectfully requests that the Conviction Review Unit recommend that his conviction be vacated. Mr. Haynes' conviction is both legally and factually defective. The conviction rests primarily on unreliable eyewitness identification testimony that was the result of unnecessarily and improperly suggestive techniques. This evidence should have been suppressed, and Mr. Haynes' counsel should have made a more serious effort to achieve that result. Beyond the eyewitnesses, the state's remaining evidence, thin even at the time of trial, has been hollowed out as the result of witness recantations and other new evidence. Marvin Haynes is innocent of the crimes for which he was convicted. The interests of justice demand that he should be fully exonerated and released from prison as soon as possible. The undersigned counsel stand by to assist the Conviction Review Unit in any way necessary to achieve that result.

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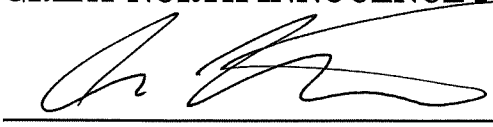
[8] The certificates for these programs are being provided in an aggregated PDF titled "Haynes Certificates."

Dated: December 15, 2022

GREAT NORTH INNOCENCE PROJECT



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