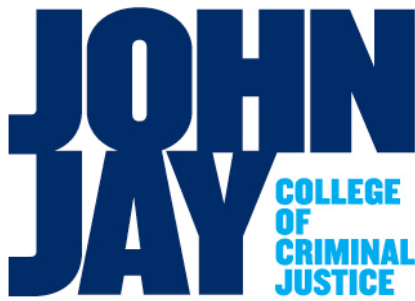


# **APPENDIX W**

Report of Dr. Margaret Bull Kovera



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Shifts in the Field of Scientific Knowledge  
Relating to the Reliability of the Eyewitness Identification  
in *People v. Tyrone Kennedy*  
August 07, 2020

**I. Purpose of the Report**

1. I was asked by Ms. Anwasha Banerjee, Esq. and Ms. Brooke Theodora, Esq. of Davis Polk & Wardwell LLP to review relevant case materials and prepare a report on new scientific evidence that has emerged since 1988 relating to eyewitness memory and identification, in connection with understanding the reliability of the eyewitness identification in *People v. Tyrone Kennedy* (Case No. 87-2560, Calhoun County, Michigan).

**II. Credentials**

2. I have a B.A. in Psychology (with departmental honors) from Northwestern University and a Ph.D. in Social Psychology from the University of Minnesota.
3. I have been on the faculties of Reed College and Florida International University (FIU). Currently, I am a Presidential Scholar and full Professor of Psychology at John Jay College of the City University of New York (CUNY), with appointments in the Psychology and Law, Basic and Applied Social Psychology, and Criminal Justice Ph.D. programs at the CUNY Graduate Center.
4. I have served as the Director of the Psychology and Law Ph.D. programs at both FIU and at CUNY.
5. I have published over 80 papers (articles and chapters) and several books in the area of eyewitness identification and legal decision-making. The National Science Foundation has funded much of this research, with over \$2 million in grant funding received to date. For a full recitation of my research, please refer to my curriculum vitae, attached as Exhibit A.

6. I am a Fellow of the American Psychological Association, the Association for Psychological Science, the American Psychology-Law Society (APLS), the Society for Experimental Social Psychology, the Society for Personality and Social Psychology, and the Society for the Psychological Study of Social Issues. I have received awards from APLS, recognizing me for my outstanding research and teaching. I am a past-president of APLS, an interdisciplinary organization of psychologists and lawyers whose members are devoted to scholarship, practice, and public service in psychology and law. I also served seven years as the Editor-in-Chief (and an additional seven years as Associate Editor) of the journal *Law and Human Behavior*, which is a peer-reviewed publication and the premier outlet for eyewitness identification research. As Editor, I was responsible for guiding the peer review process for the most influential journal in psychology and law, determining which papers meet its very high standards for scientific rigor and which do not.
7. I keep current on the research being done in the area by conducting my own research (which includes reading others' papers on the topic), serving as an editor and reviewer of many eyewitness papers, attending conference presentations on the topic, and teaching at the undergraduate and graduate levels on eyewitness issues. I have been qualified as an expert on a variety of social science and law issues (mostly eyewitness issues) in federal and state venues, including Connecticut, Florida, Illinois, Indiana, Iowa, Maryland, New York, South Carolina, Texas, the District of Columbia, the Eastern District of New York, the District of Massachusetts, and the Canadian province of Ontario.

### **III. Statement of Relevant Facts**

8. The case at issue here involves an assault and robbery of a woman named Elsie Watson. Ms. Watson was attacked in her home on the night of September 4, 1987. Ms. Watson's neighbor, a woman named Hazel Vandevender, said she was sitting on her enclosed porch around 11:00 PM on the night in question when she saw a man walking in the area of her home. The man passed in front of her porch and stopped near two trees at the nearby intersection. Ms. Vandevender said she saw him dump out the contents of a purse, which is when she called out to the man. She said he then hastily threw some contents of the purse into the small river on the other side of the street before fleeing. Investigators later confirmed that the purse the man threw into the river was Ms. Watson's.
9. Ms. Vandevender said that she recognized the culprit as someone she had seen around the neighborhood when he stood to the right of the sidewalk on the intersection, near the two trees. She described him the next day as a black man, 5'5", 145-150 pounds, wearing a dark jacket. Some of Ms. Vandevender's descriptions fluctuated in subsequent interviews. About three weeks after the night in question, Ms. Vandevender identified Tyrone Kennedy as the man she saw. She subsequently identified Mr. Kennedy at pretrial hearings and at trial. More detail will be provided below as necessary.

#### IV. Summary of Opinions

10. This report is based on: i) information from case materials relating to the *People v. Kennedy* matter, including police reports, witness statements, affidavits, and transcripts from the pretrial hearings and jury trial; and ii) information about the level of lighting and relevant distances at the crime scene in the *People v. Kennedy* matter, which was provided to me through field investigations conducted by the Michigan Innocence Clinic at the University of Michigan Law School.
11. After reviewing the abovementioned materials and evaluating them in light of eyewitness memory and identification research that has newly emerged or for which a new consensus has emerged since 1988, I have formed the following opinions:
  - (1) A number of **factors present in the initial eyewitness encounter** in the matter had the likelihood of impairing Ms. Vandevender's ability to encode the face of the culprit:
    - a. Low illumination
    - b. Significant distance
    - c. Low exposure duration
    - d. Time overestimation
    - e. Own-race bias in cross-race identification
  - (2) A separate set of **factors present at the time of the live lineup**, conducted three weeks later, increased Ms. Vandevender's risk of misidentification:
    - a. Unconscious transference
    - b. Memory loss over a long retention interval
    - c. Lack of lineup instruction that perpetrator may not be present in lineup
    - d. Lack of double-blind administration of lineup
    - e. Biased lineup composition
    - f. Speed of identification
  - (3) A final set of **factors present in subsequent identifications** of Mr. Kennedy by Ms. Vandevender in court further undermine their accuracy:
    - a. Commitment effect
    - b. Inherent suggestiveness of in-court identifications
    - c. Witness overconfidence
    - d. Confidence malleability

#### V. Scientific Basis of Research Underlying My Analysis

12. My analysis is based on research that has been conducted using the scientific method. This research includes both experiments regarding how certain factors influence eyewitness accuracy and meta-analyses of these experiments.
13. The scientific method involves generating hypotheses (identifying variables that you think will influence eyewitness accuracy), testing those hypotheses (by conducting experiments in which you vary the variables that you predict will influence witness

accuracy while holding others constant), collecting data to observe the effect of the manipulated variables, analyzing the data, and evaluating whether the hypotheses were supported.

14. Experiments are the primary method used by scientists (whether they are physicists, chemists, biologists, or psychologists) to isolate the causal effects of one variable upon another. Eyewitness researchers conduct experiments in which they vary a set of variables that they think may affect witness accuracy and observe whether the variables do indeed change witnesses' identification decisions.
15. When enough experiments have been conducted, it is possible to statistically combine the data across studies into a single meta-analysis, which provides an estimate of the size of a variable's effect across different experiments. This effect size estimate gives a more accurate picture of how a variable influences eyewitness accuracy than can be achieved by merely counting the number of studies that found an effect and those that did not, because whether an effect is found is in part determined by the number of participants in a study. Sometimes effects are not found in a given study because there were too few participants for an effect to be detected as statistically significant. By combining the data across all the studies testing a particular research question, we can derive stable estimates of how much of an effect a given variable might have.

## **VI. Background on the Unreliability of Eyewitness Identifications**

16. Mistaken eyewitness identification is the leading cause of wrongful convictions. Mistaken identifications have been a known source of erroneous convictions since the start of the innocence movement, which began with exonerations based on DNA evidence. By 1998, post-conviction DNA testing had freed 62 persons in the United States convicted by juries of crimes that they did not commit—eight of whom were on death row. In Scheck et al.'s (2000)<sup>1</sup> analysis of those first 62 DNA exoneration cases, 52 were mistaken eyewitness identification cases. (Sometimes, more than one witness had mistakenly identified a defendant: One DNA exoneree, Kirk Bloodsworth, was mistakenly identified by five separate witnesses.)
17. University of Virginia law professor Brandon L. Garrett's (2008) systematic examination of the first 200 DNA exculpation cases found that the leading cause of wrongful convictions was erroneous eyewitness identification, which was present in 79% of the cases. Moreover, in a quarter of the cases, eyewitness testimony was the *only* direct evidence against the defendant.
18. Even when factoring in non-DNA exonerations, eyewitness misidentification remains one of the leading causes of wrongful convictions. Of the 2,647 total cases of exoneration listed in the National Registry of Exonerations (as of July 28, 2020), almost 30% involve eyewitness misidentification.

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<sup>1</sup> Detailed citations for all articles referenced in this report are provided in the "References" section.

## VII. Several Factors Likely Impaired Ms. Vandevender's Ability to Encode the Culprit's Face During the Initial Encounter

### A. Low illumination and significant distance

19. Scientific research that has emerged since Mr. Kennedy's trial regarding the ability of witnesses to recognize faces shows that greater distance and lower illumination impedes the ability of witnesses to identify faces (Lampinen, Erickson, Moore, & Hittson, 2014; Loftus & Harley, 2005; Wagenaar & Van Den Schrier, 1996).
20. Wagenaar & Van Den Schrier (1996) studied the effects of illumination and distance on the recognition of strangers and concluded that there is "a systematic increase of recognition performance with decreasing distance and increasing illumination." The end result is a practical rule of thumb: the *Rule of Fifteen*. The Rule of Fifteen states that even under ideal conditions, the desired diagnostic value of 15 (the ratio of correct to incorrect identifications, deemed desirable by the authors) is reached at not more than 15 meters, and not fewer than 15 lux (Wagenaar & Van Den Schrier, 1996).
21. In this case, the distance and illumination at which Ms. Vandevender witnessed the man at the end of her street (significantly more than 15 meters and significantly under 15 lux) represent conditions under which identifications have been shown to have high rates of error.
22. Ms. Vandevender testified that she saw the culprit around 11:00 PM, while he was rifling through a purse near a single streetlight that provided only about 1 lux of illumination. Moreover, according to Ms. Vandevender's testimony about where she and the culprit were located when she recognized him, she would have been more than 70 feet (21 meters) away from the culprit.<sup>2</sup>
23. Clearly then, the distance and illumination at which Ms. Vandevender witnessed the culprit would have impaired her ability to make a reliable identification.

### B. Low exposure duration and time overestimation

24. Research shows that the length of time available for viewing a culprit ("exposure duration") is positively associated with the witness's ability to subsequently identify the culprit later on. A recent meta-analysis of the substantial literature on exposure duration—almost all conducted after 1988—demonstrated that the effect of exposure time on eyewitness identification accuracy was moderate to large ( $d = 0.63$ ), with greater witness accuracy for longer exposures than for shorter (Bornstein, Deffenbacher, McGorty, & Penrod, 2012). The Bornstein et al. (2012) meta-analysis, published well after Mr. Kennedy's trial, solidified scientific findings regarding the effects of exposure duration on the memory of eyewitnesses.

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<sup>2</sup> Illumination measurements from various points at the scene were provided to me by the Michigan Innocence Clinic.

25. Ms. Vandevender reported that the culprit passed by her house (where she had the closest view) only briefly, and that the entirety of the time she spent viewing the culprit—including the time the culprit spent rifling through a purse between two trees—was only “a few minutes.” (April 28, 1988 Trial Tr. at pp. 137-38; *see also* p. 133 (“Well, it happened so fast, I don’t know whether he looked at me.”).) This was not enough time to give Ms. Vandevender the opportunity to sufficiently encode the culprit’s face.
26. Further, it is likely that Ms. Vandevender overestimated the amount of time she had to view the culprit, which suggests the exposure duration was even shorter than the time she referenced in her testimony. *See* Yarmey (2000) (finding that witnesses overestimated the length of time an event lasted, with shorter events associated with even greater overestimation).

C. Own-race bias in cross-racial identification

27. Science that has emerged since Mr. Kennedy’s trial shows that witnesses have difficulty making accurate cross-race identifications (Meissner & Brigham, 2001). Meissner and Brigham analyzed data from 39 research articles, with 91 independent samples involving nearly 5,000 witness participants, which included various mixes of White, Asian, Hispanic, Black, and Middle Eastern witnesses. When the culprit was the same race as the witness, witnesses were more likely to make an accurate identification than a mistaken identification. When the culprit was a different race than the witness, witnesses were more likely to make a mistaken identification than a correct identification. Notably, own-race bias is not diminished when faces are viewed at great distances (Lampinen, Roush, Erickson, & Moore, 2015), like the 21 meters at which Ms. Vandevender viewed the culprit on the street corner.
28. In this case, the witness was White and the culprit was Black. The synthesis of the literature on the cross-race effect (Meissner & Brigham, 2001), which was the first demonstration of the robustness of the phenomenon, supports the conclusion that Ms. Vandevender was less likely to be able to make a reliable identification of the culprit because he was of a different race.

**VIII. Several Factors in the Live Lineup Increased Ms. Vandevender’s Likelihood of Misidentifying the Culprit**

29. Eyewitness identifications during live lineups take place in a social context in which the eyewitness’s performance can be influenced by *his or her* expectations and inferences, which in turn can be influenced by the verbal and nonverbal behaviors of investigators, the structure of the identification test, and the environment in which the identification test is conducted. Suggestive procedures are aspects of the identification test that are under the control of police investigators and that enhance the likelihood that an eyewitness will choose *someone*—whether or not that choice is correct.

30. Recent studies of live lineups in actual criminal cases show that lineup identifications are frequently inaccurate. Regardless of whether the actual culprit is known, it is possible to gauge the rate of inaccurate identifications by including innocent “fillers” in a lineup. Studies relating to almost 17,000 actual eyewitnesses showed that nearly *40% of positive identifications were identifications of an innocent filler*, which underscores that many witnesses are willing to guess; consequently, they make errors at a high rate (e.g., Valentine, 2008; Wells et al., 2020).

A. Unconscious transference

31. Recent research shows that witnesses use feelings of familiarity when making identification decisions. When a witness has the opportunity to observe someone in a context other than the witnessed event (e.g., around the neighborhood), the sense of familiarity engendered by that person may cause the witness to misidentify him or her as the perpetrator of a previously witnessed crime. In essence, the witness remembers seeing the person previously, but the memory of the face has become dissociated from the context in which it was seen, a phenomenon called “unconscious transference” (Defenbacher et al., 2006).

32. Kenneth Deffenbacher and his colleagues (2006) conducted a meta-analysis of 19 independent tests of whether witnesses’ failure to remember the source or context of their memory of a face results in transference errors (i.e., misidentifications of innocent suspects). If the witness had seen a person’s face in another context (e.g., not as the perpetrator of the crime), the rate of false identifications of that person increased. This meta-analytic demonstration of the robustness of the unconscious transference phenomenon was not available at the time of Mr. Kennedy’s trial.

33. Mr. Kennedy was known to frequent the neighborhood in which Ms. Vandevender lived, and Ms. Vandevender testified that she had seen Mr. Kennedy “around the neighborhood” before the night of the crime. Thus, it is likely that the sense of familiarity engendered in her by her previous experiences with Mr. Kennedy resulted in a transference error, causing her to mistakenly identify him at the live lineup.

B. Memory loss over long retention interval

34. Because the accuracy of memory deteriorates over time, the delay between the witnessed event and the identification of an individual at, for instance, a live lineup (the “retention interval”) is significant in terms of the reliability of the identification. According to recent studies, longer retention intervals result in lower rates of correct identification. A meta-analysis, published in 2008, which synthesized many studies conducted after 1988, demonstrated that the loss of eyewitness memory is most rapid early on—in the first minutes and hours after an event was witnessed (Deffenbacher, Bornstein, McGorty, & Penrod, 2008). These studies show that memory typically declines by 15-20% within two hours, with a further 4-5% drop in the next 10 hours. Although from that point forward memory loss is less dramatic, it continues to decline.



35. In this case, the time between the crime and the initial identification procedure at the live lineup, almost three weeks, was far longer than the lengths of time mentioned above, which have been shown to produce a significant increase in false identifications. Thus, the retention interval in this case would have resulted in a significant decline in the witness's ability to make an accurate identification.

C. Lack of lineup instructions

36. Instructions given to an eyewitness prior to an identification test can vary in their degree of suggestiveness. Suggestive instructions (e.g., "do your best to identify the person") strongly convey to the eyewitness the impression that the culprit is in fact in the lineup and all the witness needs to do is find which one it is. Suggestive instructions increase the likelihood that the eyewitness will feel inclined to identify *someone* from the lineup, even if the lineup does not include the actual culprit.

37. Since Mr. Kennedy's trial, Steblay (1997) reviewed the research on instruction suggestiveness and bias by conducting a meta-analysis of 22 studies involving nearly 2600 witness-participants. She found that biased instructions (i.e., those that failed to provide a warning that the culprit may not be in the lineup or photo array) caused witness accuracy to decline from 60% (unbiased instructions) to 35% (biased instructions).

38. A number of guidelines regarding best practices in the collection of eyewitness identification evidence (published since the time of trial) recommend that instructions to the witness should include a warning that the culprit may or may not be present in the lineup (Technical Working Group, 1999; Wells et al., 1998; Wells et al., 2020; Yates, 2017).

39. In this case, a warning that the culprit may not be in the lineup was not given to Ms. Vandevender. (April 29, 1988 Trial Tr. at pp. 125-26.) Therefore, based on the science published after the time of trial, there would have been a significantly increased likelihood of a mistaken identification.

D. Lack of blind lineup administration

40. Concern has been expressed about identification procedures that are conducted "non-blind"—that is, when the administering officers know which lineup member is the suspect in the investigation. Best practices for lineup identification (National Academy of Sciences, 2014; Wells et al., 1998; 2020; Yates, 2017), published since Mr. Kennedy's trial, recommend based on new scientific consensus that identification procedures be conducted by administrators who do not know which lineup member is the suspect and which lineup members are fillers. In other disciplines, such non-blind procedures are considered so unreliable that psychological and medical researchers have eschewed non-blind research out of fear that researchers may unwittingly communicate their expectations to research participants, who might unwittingly be influenced by those expectations.

41. Greathouse and Kovera (2009) conducted a study in which a number of variables were manipulated, including: lineup instructions (biased vs. unbiased), the presence of the actual culprit in the lineup, and whether the lineup was “blind” (i.e., the lineup administrator *did not know* which lineup member was the suspect) or “non-blind.” At non-blind lineups, witnesses who were given biased instructions were more likely to identify *the suspect known to the administrator*. The study showed that the resulting increase in mistaken identifications was due to the non-blind administrator’s influence over witnesses who would have, under blind conditions, identified a filler rather than the suspect known to the administrator. Further, identifications of a suspect in a *blind* lineup were twice as indicative of the suspect’s actual guilt when compared to identifications of a suspect in *non-blind* lineups.
42. A recent meta-analysis supports the conclusion that non-blind lineup administrators increase the likelihood that a witness will identify the suspect that the police have in mind, irrespective of whether the suspect is the true culprit. This increase in identifications of the suspect was partly due to witnesses who initially identified a filler but later changed their identification to the suspect known to the administrator (Kovera & Evelo, 2017).
43. In the present case, a police officer (Detective Mueller), who knew which lineup member was the suspect and which lineup members were fillers, administered the lineup to Ms. Vandevender. The research on non-blind lineup administration, which was conducted after Mr. Kennedy’s trial, suggests that there is a significant probability that Ms. Vandevender’s identification was influenced by inadvertent cues from the behavior of Detective Mueller, a non-blind administrator, regarding which lineup member was the suspect.

E. Biased lineup composition

44. A lineup constructed of people who look nothing like the suspect may cause the suspect to stand out in the lineup if he or she is the only lineup member who matches the description of the culprit, increasing the rate of false identifications. Thus, there must be some optimum level of filler similarity to the suspect. The “match-to-description” strategy for selecting lineup members is based on this concept and involves choosing fillers who share the features the witness mentioned in his or her description of the culprit, but who vary on other features (Luus & Wells, 1991). For example, if the witness’s description of the culprit mentioned that the culprit was in his mid-20’s, around six feet tall, with a large build, light brown hair with a reddish-tint, and tanned skin, then all the fillers should share these features.
45. In this case, Mr. Kennedy was the only member of the lineup who had facial hair. Moreover, he was the only lineup member who reasonably fit the witness’s description of a “small” man. Thus, the lineup violated best practices for lineup composition (NAS, 2014; Wells, Kovera, Douglass, Brewer, Meissner, & Wixted, 2020) because Mr. Kennedy stood out from the other lineup members due to his unique features.

#### F. Speed of identification decision

46. No research on identification speed was available at the time of Mr. Kennedy's trial. Today, we know that correct identifications are made more rapidly than incorrect identifications (e.g. Brewer, Caon, Todd, & Weber, 2006; Brewer, Gordon, & Bond, 2000; Dunning & Stern, 1994; Weber, Brewer, Wells, Semmler, & Keast, 2004). In addition, self-reports by witnesses that they have made an automatic rather than a deliberative decision (Dunning & Stern, 1994) and that they have used an absolute rather than relative or comparative judgment strategy (Lindsay & Bellinger, 1999) are associated with accurate identification decisions. Across a number of studies, all conducted after Mr. Kennedy's trial, the optimum cut-off between fast/accurate and slow/inaccurate identifications never exceeded 36 seconds (Brewer et al., 2006; Dunning & Perretta, 2002; Webert et al., 2004).
47. In this case, Ms. Vandevender took five minutes to make her identification of Mr. Kennedy, which is much longer than even the longest optimum cut-off (36 seconds) between fast/accurate and slow/inaccurate decisions. This suggests that Ms. Vandevender was using slow, deliberative, and comparative decision making rather than automatic, absolute recognition, which makes the reliability of her identification less likely.

### IX. **Several Factors Undermine the Accuracy of Ms. Vandevender's Post-Lineup Identifications**

#### A. Commitment effect

48. Although repeated testing may be desirable for fingerprint comparisons or DNA testing, the same is not true for eyewitness identifications. Because witnesses' memories can be changed by post-event information, only the initial identification attempt is uncontaminated by previous testing. Particularly problematic is the situation in which a single witness participates in multiple identification tasks that share the same suspect but have different fillers or no fillers at all. That is what happened in this case when Ms. Vandevender identified Mr. Kennedy (i) during a live lineup in September 1987, (ii) in court at the preliminary hearing in October 1987, (iii) in court at a suppression hearing in March 1988, and (iv) in court at his trial in April 1988.
49. Once we have made a choice, humans have a tendency to commit to that choice, a process known as a *commitment effect* (Deffenbacher et al., 2006). In addition, the act of identifying an innocent suspect from one procedure can cause the witness's memory of the culprit to shift toward the innocent suspect, especially if the witness receives reinforcing feedback (e.g., learning that the identified suspect has been arrested; Smalarz & Wells, 2014).
50. Ms. Vandevender's in-court identifications of Mr. Kennedy at the pretrial hearings and at his trial were repeated identifications subject to the commitment effect. Their accuracy is thus undermined by science produced since the trial, including the

publication of evidence-based recommendations for the collection of eyewitness identification, which warn against repeated identifications (Wells et al., 2020).

#### B. Inherent suggestiveness of in-court identifications

51. During in-court identifications, defendants are typically easily identifiable as the only non-attorney at the defense table. They are also potentially identifiable by other characteristics such as prison clothing (as was the case here).<sup>3</sup> Moreover, they are not surrounded by fillers who also match the description provided by the witness. Thus, an in-court identification is essentially a showup, in which a single suspect is shown to a witness who needs to make a judgment about whether the person is the culprit (Wells et al., 2020).
52. A majority of psychologists are critical of the showup procedure (Kassin et al., 2001). Criticisms tend to fall into two categories. The first category concerns eyewitness reliability. In an identification task with only one possible choice, the witness is asked to choose between two alternatives: “Yes, this is the person that I saw” or “No, this is not the person I saw.” Logically, this task does not provide innocent suspects with the same protections that are associated with standard lineups. The greater number of plausible choices in the standard lineup (six) versus the showup (one) reduces the likelihood that a suspect will be selected purely on the basis of chance. Accordingly, suspects in lineups are somewhat protected from eyewitnesses who are merely guessing, from eyewitnesses who think they are helping police by giving a positive identification, and from eyewitnesses who are motivated to have someone held responsible for the crime.
53. A second category of concern relates to the unique environmental cues associated with the in-court identification or showup. It is not uncommon in showups and in-court identifications for a witness to view the suspect in custody (e.g., handcuffed, in prison garb) or at the scene of the crime. Custody is highly suggestive of guilt and may increase the likelihood that the witness will make a positive identification (Eisen et al., 2017).
54. Ms. Vandevender identified Mr. Kennedy in court while he was sitting at the defense table and wearing prison clothes on at least one occasion, which was highly suggestive of guilt. Evidence-based recommendations that have emerged since Mr. Kennedy’s trial (Wells et al., 2020) show that such an identification is unreliable because of its similarity to showups, which result in identifications that are more unreliable than even lineups that are biased toward the known suspect.

#### C. Witness overconfidence

55. Witnesses overestimate the accuracy of their identifications. A recent study involving the identification of individuals with whom participants interacted for up to a minute

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<sup>3</sup> See Oct. 22, 1987 Prelim. Exam. Tr. at p. 19 (In reference to Mr. Kennedy, Ms. Vandevender testified: “Right there . . . . He’s got the orange outfit on; there by the lawyer.”).

showed poor calibration of accuracy and confidence, with participants being overconfident about their accuracy (Sučić, Tokić, & Ivešić, 2015). In another study, eyewitnesses who were very confident of the accuracy of their identifications (95% certain) were actually 25-30% inaccurate (Brewer, Keast, & Rishworth, 2002). Another study reported that among witnesses who made an identification with 90-100% confidence, 40% were inaccurate; for witnesses who were 70-80% confident, there was a 50% error rate (Sauer, Brewer, & Wells, 2008).

56. Further, recent research suggests that high confidence is an indicator of accuracy *only when the procedures used to collect the identifications are pristine* (Wixted & Wells, 2017). Procedures are pristine if there is i) only one suspect, ii) the lineup is not biased toward the suspect, iii) the witnesses are instructed that the culprit may not be in the photo array, iv) the administrator does not know who the suspect is (i.e., procedure is blind), and v) witness confidence is collected immediately after the identification by a blind administrator.
57. Compounding this issue, there is consistent evidence to indicate that when an eyewitness expresses confidence in his or her identification during in-court testimony, that becomes the most powerful single determinant of whether or not observers of that testimony (i.e., the jury) will believe that the eyewitness made an accurate identification (Cutler, Penrod, & Dexter, 1990).
58. In this case, Ms. Vandevender was not confident when she identified Mr. Kennedy at the lineup,<sup>4</sup> which would suggest that the error rate of her identification was over 50%. Although by the time of trial Ms. Vandevender was very confident in her identification of Mr. Kennedy,<sup>5</sup> any statements of confidence made by Ms. Vandevender after her initial identification at the lineup carry little weight because the lineup procedure was not pristine. The lineup was conducted by a non-blind administrator, the fillers were biased toward the suspect (Mr. Kennedy), and the instructions did not include a warning that the culprit may not be in the lineup.
59. Further, not only was Ms. Vandevender's confidence likely inflated by the time she testified in court and identified Mr. Kennedy for the third time (*see* Part IX.D below), the jury was also likely to place undue value on her confidence in evaluating her credibility.

#### D. Confidence malleability

60. Confidence is malleable; witnesses typically become more confident in their identification over time. Because confidence can change over time, but accuracy cannot (i.e., whether the identification was correct is immutable), the relationship between confidence and accuracy can weaken over time. In particular, studies since Mr. Kennedy's trial have shown that eyewitnesses who received confirming feedback

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<sup>4</sup> At the lineup, Ms. Vandevender identified Mr. Kennedy by "guess[ing] it's No. 2" after spending five minutes studying the six men in the lineup. (April 28, 1988 Trial Tr. at pp. 144-48, 182.)

<sup>5</sup> At trial, Ms. Vandevender testified "there is no doubt" that "this Defendant, here, is the one who [she] saw in the neighborhood and in the alley the night of [the crime]." (April 28, 1988 Trial Tr. at p. 150.)

were much more confident than witnesses who received disconfirming feedback or no feedback at all (Wells & Bradfield, 1998). In addition, witnesses who received confirming feedback tended to subsequently distort their account of the conditions in which they witnessed the culprit by exaggerating how good their view of the culprit was, and how much attention they paid to the culprit's face while observing the event (Wells & Bradfield, 1998). Further, people tend to view witnesses who have received confirming post-identification feedback as more accurate and confident than witnesses who did not receive any feedback (Douglass et al., 2010). Confirming feedback includes learning that the person identified has been arrested and charged with the crime (Smalarz & Wells, 2014).

61. Ms. Vandevender was less than certain of her initial identification. When she identified Mr. Kennedy at the lineup, she said she “guess[ed] it’s No. 2” after spending five minutes looking at the array. The fact that Mr. Kennedy was charged and taken to trial, however, provided her confirmatory feedback about her identification, and she was much more confident by the time she testified at trial. At trial, she stated that there was “no doubt” that the defendant sitting at the defense table was the man she saw “in the neighborhood and in the alley the night” of the crime.
62. Based on science that has emerged since Mr. Kennedy’s trial, this confirmatory feedback was likely to have resulted in the increased confidence that Ms. Vandevender expressed at trial, but it is not an indication that her identification was reliable. Her inflated confidence, in turn, would have increased the jurors’ perceptions of her credibility.

## **X. Conclusions**

63. The case against Mr. Kennedy rests primarily on the identification that Ms. Vandevender made from a lineup that was administered almost three weeks after she witnessed a man from her porch at night from a distance of more than 20 meters under around 1 lux of illumination. There are compelling reasons to question the reliability of the identification in this case because of the scientific research that has emerged and grown to a consensus since Mr. Kennedy’s trial.
64. In particular, recent scientific research shows that there were factors that would have interfered with Ms. Vandevender’s ability to encode the perpetrator’s face on the night of the crime—including poor illumination, great distance, limited exposure time, and the cross-race nature of the identification. Because it would have been difficult for Ms. Vandevender to encode the culprit’s face under these circumstances, the likelihood of an unreliable identification was greatly increased.
65. Additionally, as time passes, memories decay, and there are opportunities for post-event information to interfere with the memory that was encoded. Science that has emerged since Mr. Kennedy’s trial shows that these deleterious effects are seen within days, if not hours, of encoding an event. In this case, almost three weeks passed before Ms. Vandevender initially identified Mr. Kennedy from a lineup. In

addition, Mr. Kennedy was known to frequent Ms. Vandevender's neighborhood, raising the possibility that she mistakenly identified him because of her previous exposure to his face—not because he was the person who was rifling through the purse the night of the crime.

66. Moreover, the lineup did not adhere to current best practices for collecting eyewitness evidence: it had biased instructions that implied the witness should make a choice from the lineup; the administrator knew which lineup member was the suspect; and the fillers in the lineup caused Mr. Kennedy to stand out. Despite the presence of factors that would bias her toward choosing the suspect based on the lineup procedure rather than her memory (which, as noted previously, was likely to be poorly encoded/weak), it took Ms. Vandevender five minutes to identify Mr. Kennedy. Spontaneous identification decisions are more likely to be accurate than deliberative ones.
67. Finally, the subsequent in-court identifications were inherently suggestive and served to inflate Ms. Vandevender's confidence in her earlier identifications. Her inflated confidence was likely to cause the jury to place additional weight in her testimony, despite the fact that confidence is not necessarily correlated with accuracy.
68. Based on current science that has emerged since Mr. Kennedy's trial in 1988, I conclude that there were many factors present in this case that would have impaired the witness's ability to make a correct identification and which greatly undermine the reliability of that identification.

I am willing to testify under oath in court to the content of this report.



Margaret Bull Kovera, PhD  
August 07, 2020

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