Supreme Court No. 92617-4
Court of Appeals No. 45744-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Respondent,

v.

RICK ALLEN RIFFE,
Petitioner.

PETITION FOR REVIEW

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Did the trial court abuse its discretion and deny Riffe the right to present his defense when it prohibited him from calling an expert on the weaknesses in eyewitness identifications?

IV.
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Judge Kozinski recently authored a Preface for the Georgetown Law Journal, which he simply titles "Criminal Law 2.0." The Honorable Alex Kozinski, Criminal Law 2.0, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii (2015). It is a comprehensive review and critique of the flaws and shortcomings of the current U.S. justice system. His very first observation is that eyewitness identification is highly unreliable and mistaken eyewitness testimony was a factor in more than one-third of wrongful

conviction cases. He notes that one of the problems is that "courts have been slow in allowing defendants to present evidence on the fallibility of eyewitnesses." *Id.*

In this case the State initiated a murder prosecution 27 years after the crime. There was no forensic evidence to support Riffe's conviction. Instead, the State relied upon the testimony of witnesses who had been interviewed repeatedly over the years, saw numerous photo montages and who, in many cases, changed their identifications. Yet, the trial judge forbid Riffe from calling an eyewitness identification expert to explain why the State's case against Riffe was flawed. The Court of Appeals affirmed this decision without a thorough discussion of the issue or the constitutional implications of denying Riffe the opportunity to present a defense.

This Court should grant review of this important issue.

V.
STATEMENT OF THE CASE

A. THE MURDERS

Edward (Ed) and Wilhelmina (Minnie) Maurin, both in their 80's, were murdered on December 19 or 20th, 1985. Twenty-seven years later, the State charged Rick Allen Riffe with two counts of first-degree murder, two counts of first-degree kidnapping, two counts of first-degree robbery,

and one count of first-degree burglary in relationship to the Maurin murders.

The State also alleged that the crimes were committed against particularly vulnerable victims, with deliberate cruelty and with an egregious lack of remorse. Because the State believed that Riffe acted in concert with his deceased brother, John Gregory Riffe, the State alleged that Rick was a principle or an accomplice. CP 1-7.

On December 19, 1985, Ed and Minnie Maurin planned to entertain friends at a Christmas luncheon. RP 44. When the guests arrived at the Maurin home, no one was present. RP 45. After members of the extended family[1] were notified, they proceeded to the home. RP 45-49. Family members noted that Minnie's purse was under some newspapers sitting beside a big overstuffed chair and a bank statement was open by the telephone. RP 48, 70. There was $160 cash in the purse. RP 733. Another family member found a box containing bank statements on the bathroom floor. RP 72. There were three sets of plates and three sets of silverware in the dishwasher. RP 736. Sometime later, the police found $2,100 cash in the house. RP 880.

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[1] Minnie had been previously married to George Hadaller, who died in 1958. According to Minnie's son, Dennis Hadaller, there were 440 members of his extended family, 300 of whom lived in Lewis County. RP 147-48.

The police were notified and a search began for the couple. Although the house had a broken window used for entry by family members over many years, there were no signs of forced entry. RP 139, 167, 340, 703. There was no sign of a struggle. RP 141.

On December 20, 1985, the Maurins' 1969 green Chrysler Newport was discovered in the Yardbird's shopping complex parking lot. RP 368. There were blood stains inside and the key was in the ignition. RP 375, 434-44. The police also found shotgun pellets in the vehicle. RP 380, 415.

Ed and Minnie's bodies were discovered on Christmas Eve in a wooded area on Stearns Road. RP 74, 550. Crime scene investigators opined that they had been shot with a "12 gauge shotgun that had a shortened barrel, much like . . . a sawed-off shotgun." RP 483, 636-50. *See also*, Exhibits 689, 690.

B. THE INVESTIGATION

Lewis County law enforcement investigated immediately. They learned that Minnie's son, Dennis Hadaller, and grandson, Michael Hadaller, had driven by the Maurin residence at about 5:30 a.m. on the

19th. RP 91-92, 161-62. It was dark and foggy,[2] but they noticed a light on in Ed and Minnie's bedroom. RP 92-93, 162. According to them, this was an unusual hour for the couple to be awake. *Id.*

They also learned that Ed probably called Sterling Bank about closing time on the evening of December 18, 1985, to request withdrawal of a large sum of money. RP 1348-50. He called again between 9:30 and 10:00 a.m. on the morning of the 19th. He told the teller on duty, Pat Hull, that he wanted to come in and get $8,500 in cash. RP 1345-51. They joked on the phone. RP 1382. Ed arrived at the bank about 10:30 a.m. When Hull asked about Minnie, Ed told her she was outside in the car because she was not feeling well. RP 1351.

> . . . I asked about Minnie and I told him to go have her come in and have coffee and cookies, because that's what we usually did. He said, no, she didn't feel well and he would go ask her if she wanted to come back in so he went back out to the car.

RP 1351.

Ed also told Hull he would use the money to buy a car. RP 1350, 1353. He was calm and again joked with Hull. *Id.* The Maurins still had more than $30,000 in another untouched account. RP 707.

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[2] Nearly all of the witnesses agreed that December 19, 1985 was a very foggy day in Lewis County.

Many people called in with tips. There were two groups of witnesses: those who saw the Maurins' car in and around Chehalis on the morning of the 19th and those who saw a man walking near Yardbirds carrying a gun. The times and locations varied and were often conflicting.

Merle Pickering and Rock Swartz reported seeing a white car pulling out of the Maurins' driveway about 9:30 a.m. on December 19, 1985. RP 907, 912. Lindsey Senter reported seeing two white males walking a mile from the Maurin home on the 19th about 8:00 to 9:00 a.m. RP 921-24.

Norman Laymon saw the Maurins driving up Highway 12 about 11:00 a.m. on the 19th. RP 966-977. He wasn't entirely sure about his description of the man he thought he saw with the Maurins:

> A I don't remember telling him the description because I don't really know for sure.
>
> Q You don't know for sure. Do you believe you gave them a description of the guy in the back?
>
> A No.
>
> Q Did you tell them that the guy in the back was a good sized person?
>
> A Well, I thought so but best I could tell.
>
> Q That he was wearing a khaki colored jacket?
>
> A I thought so yes.
>
> Q You told --

A I just assumed so.

Q Well, you assumed it but you also told the officer about 10 or 12 days later, didn't you?

A Something like that. Yeah, something like that.

RP 982-83.

Kenneth Paul saw three people in a car similar to the Maurins' on Bunker Creek Road. RP 1055-59. Virginia Cummings also saw a young man walking alone near Yardbirds. RP 1149-58. Steve Amoraso saw three people in a green car. RP 1085-88. There was a young man in the back seat with a partial beard. RP 1089.

William Reisinger observed the Maurins' car with a passenger in the back seat. RP 1274-78. Later, he saw the same car being driven by one person either with dark hair or wearing a dark stocking cap and gloves. RP 1279-82. Deanne and Jeff Scherer saw a green car in the Yardbird's parking lot about 9:00 a.m. RP 1309-12, 1315-17.

James Heminger saw a dark haired man wearing a stocking cap and green coat walking near Yardbirds carrying a gun. RP 1318-19, 1321-26. Similarly, Marjorie Hadaller saw a man walking near Yardbirds with a gun. RP 1337. Beverly Gestrine also observed a man in that area with a gun. RP 1622-46. *See also*, testimony of Yvonne Miller. RP 1930-1942.

Seventeen-year-old Jason Shriver and his mother were driving to a dentist appointment on the morning of December 19, 1985. RP 2267-68.

The Shriver family lived in Mossyrock. They saw the Maurin vehicle on the road. RP 2268. When the sheriff came to the Shriver home on December 23, 1985, to talk to them about what happened to the Maurins, Shriver refused to talk to him:

> A Sure. I was in bed the 23rd, when the sheriff came and I didn't want to talk to him.
>
> Q You remember that, because you still weren't feeling well?
>
> A I remember that, because my mom said the Sheriff's here, he wants to talk to you about what happened to the Maurins. I said, I'm not talking to him. I told you not to say anything.

RP 2268. Shriver's mother was deceased by the time of trial.

Frank Perkins told the police that he pulled into a truck stop on December 19 about 8:30 to 9:30 a.m. While there, he saw a car with an older couple it the front seat and a "younger fellow s[i]tting between the two in the backseat." RP 997. The person in the back was white, in his 20's with a dishwater blond beard. RP 997, 1036. He was wearing a stocking cap and military fatigue jacket or old army jacket. RP 998. Later that day, Perkins drove by Yardbirds. RP 1003. He stated that he saw a man carrying a small caliber rifle or a small bore shotgun. RP 1023, 1036. He told the police two or three times he could not identify the face of the young person in the backseat because he only got a glimpse of him. RP 1027.

On December 26, 1985, Officer William Forth reported that he believed that he had seen the Maurin vehicle being driven into Chehalis at 11:10 a.m. RP 1217. There was only one person in the car. He told his fellow officers he saw only three inches of the back of the driver's neck. RP 1226. He never saw that person look into the rearview mirror. He followed the vehicle into town but never stopped it. RP 1178.

Detective Frank Bennett contacted Nonna Pierce, the Maurins' neighbor, on December 20, 1985. In her recorded statement she said she saw headlights at the Maurin home on the morning of December 19, 1985. RP 212, 218. Defendant's Ex. 696: marked for identification on 12/20/85.

On December 22, 1985, Pierce called back and said she needed to report something that happened "two weeks prior." According to the police report:

> She stated that the subject in a older red Ford pickup followed her home. She stated that the subject came to her door, knocked on the door, and asked if husband was home.
>
> She described the person as 6', 30 years plus, 170-75 lbs, dark brown hair, mustache, blue jeans, plaid shirt, and a blue jean jacket.

Defendant's Exhibit 697.

Detective Glade Austin learned that Sheri Amell and Mary Jones were potential witnesses. Amell told Austin that on December 19, 1985, she and Jones were on their lunch break at about noon. RP 1676. They

were about to enter the Yardbirds parking lot when she saw a man walk out from behind some "containers" carrying a gun. RP 1676. She described the man as 27 or 28 years old, about 5'10", thin, about 140 lbs. RP 1682. He was wearing a green army jacket and a stocking cap. *Id.* He was white, with dark hair, a mustache, and "two or three days growth beard." RP 1683, 1713. She and Jones were shown montages, but neither could identify the person they saw. RP 792.[3]

The investigators took taped statements from both women.[4] The police took Amell and Jones to Portland that same day. RP 756-57. The two women gave information to a police officer/forensic artist named Boulin, who produced a "composite" sketch. RP 756-57. This composite sketch was widely distributed on December 24, 1985. RP 762-63.

Later, Amell and Jones were taken to a second sketch artist in Seattle. RP 1694. Detective Austin explained that the police did this because "Sheri Amell in particular mentioned she wasn't entirely happy with the first one." RP 794.

On January 6, 1988, Gordon Campbell went to the Lewis County police and told them about his observations in the Yardbirds parking lot

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[3] According to Kimsey, the records prepared before 2005 did not make it clear what pictures or montages where shown to potential witnesses. RP 3523-24.

[4] By the time of trial, Mary Jones had died.

around December 19, 1985. RP 4636-37, 4660. He could not remember the date, but he reported that about two years earlier he had seen a man walking near Yardbirds carrying a weapon. RP 4638, 4668. He could not identify anyone from the montages presented to him. RP 4642, 4675. He confirmed that statement with Detective Kimsey in June 2012. RP 4642.

In sum, people had seen the Maurins in their car with one or two other people. The general description of the person seen near the Yardbirds parking lot was a white male under 30 wearing a green army coat, and a stocking cap. RP 3465. This person had a two to three day growth of beard. RP 3465. But on Christmas Day 1985, Rick Riffe had a full beard. RP 1820-21, 3507; Exhibit 887.

For years, Hadaller family members believed that Rick and John Gregory Riffe were responsible for the murders. RP 104-05. Dennis Hadaller obtained updated photos of the brothers and gave them to law enforcement officers. RP 188-90. Both Riffe brothers were well known in their home town of Mossyrock. RP 2367. One State's witness said that Mossyrock gossip had identified the Riffe brothers as potential suspects for years. RP 2382-83.

In 1991, Lewis County deputies received a tip they should contact Robin Riffe, Rick's ex-wife. She was dead by the time of trial, so the defense moved to exclude any of her conversations or actions with the

police. After considerable argument, the judge decided that Deputy David Neiser could testify to one thing: when he called Robin and introduced himself, he told her he wanted to talk about an "old homicide." RP 1494. She replied: "You mean the one where two old people were killed?" *Id.* The judge ruled: "The statement on the phone can come in, because that's not hearsay." RP 1480.

The police knew that Rick had access to a sawed-off shotgun in 1984-85. RP 1777, 1902. His friend, Les George, had purchased the gun on October 3, 1984, to put in his long haul truck for protection. RP 2065-70. He gave it to Rick to cut down. RP 2071-72. But Rick returned it in the fall of 1985. RP 2148. Les's mother testified that later found the shotgun in Les's room and told her husband Richard Zandeki to get rid of it. RP 2404. But Zandeki said that at some point local police talked him about the homicides. RP 2433-34. So Zandeki wanted to "get rid of it." RP 2433. He threw the gun off the Mayfield Lake Bridge. RP 2426-27. It was never recovered.

Neither John Gregory nor Rick Riffe was arrested and there were no solid leads from the official investigation. RP 813-14. Dennis Hadaller, became frustrated with the investigation. RP 176. He said that at his mother's funeral: "I laid my hand on her casket and I said, mom, I'll find out who did this to you and Ed and until the day I die I will keep this up."

RP 178. Sometime around 2000 he hired two private investigators to look into the case. RP 181. He received monthly reports from them. RP 182.

In 2005, Lewis County Detective Kimsey was assigned to the case. RP 3229. He began re-interviewing witnesses and developed the theory that at Christmas 1985, Rick appeared to have more money than usual (RP 1794-96, 1830-43, 2690-93, 2855-2871), and that he and Robin engaged in a large purchase of drugs.[5] RP 2816-52.

As discussed below, after speaking with Kimsey, several witnesses changed their statements and for the first time in 27 years, identified pictures of Rick Riffe and his brother John Gregory Riffe, as being the person in the Maurins' car or the person walking along the road near Yardbirds. John Gregory died shortly before Rick was arrested. The media reported Rick's arrest in the summer of 2012 and published pictures of the brothers. At that point, additional witnesses appeared.

C. THE TRIAL

No evidence recovered from the home or vehicle was ever tied to the Riffe brothers. RP 690-91. The State even subjected some items to updated DNA testing. The State's case was based exclusively on various

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[5] It was undisputed that in the 1980's Rick, Robin and Greg used drugs. *See, e.g.,* RP 2036-50, 2733-34.

eyewitness identifications made from montage photos or the composite sketches, and the testimony of a jailhouse snitch, Erwin Bartlett.

Nonna Pierce changed her story. She acknowledged that she had been interviewed by the police on December 20, 1985. RP 212. She repeated that it was foggy on the morning of December 19, 1985. RP 215. The fog was thick and dense. *Id.* But she heard voices and observed headlights coming from the direction of the Maurin home. RP 217-18. She heard no sounds of distress. RP 241-42.

However, she changed her statement concerning the stranger who appeared at her door. She now stated the man knocked on her door on December 18, 1985 – not two weeks before the murders. RP 223. She described him as "probably 5-foot-9" and in his "mid to late 20's" with a medium build and dark hair, and wearing jeans and a blue jean jacket. RP 228-29, 255.

Kimsey showed Pierce a photomontage. Over Rick Riffe's picture, someone wrote: "Looks most like the person you saw on December 18, 1985." Someone dated the picture "6-12-2012" and Nonna Pierce initialed it, "N.P." RP 231-34; Exhibit 189.

At trial the prosecutor asked:

> Q: Nonna are you – is your testimony today that the individual in this photograph that you selected out is

absolutely 100 percent the person you saw on your front porch that day?

A: Yes, I believe with all my heart, yes, it is.

RP 235, 247.

In cross-examination, defense counsel attempted to impeach Pierce with her statement from 1985. Exhibit 700. The prosecutor objected and stated:

> Object to this line of questioning with this exhibit. It is not a statement.

RP 249. Outside the presence of the jury, the prosecutor argued that Exhibit 700 was not Pierce's "statement." Rather, it was a summary "of her statement" to law enforcement in 1985. The Court ruled:

> This is not her statement. This is Detective Bennett's statement . . . This is what the officer says the witness related to him, so it is hearsay.

RP 251. Further, the judge ruled that it was not Pierce's statement because "she hasn't signed it and it is not tape recorded." *Id.* The judge said "I will not allow you to use the statement." RP 252.

When the examination resumed, defense counsel asked about the timing of her statement to the police about the stranger on her porch. RP 254. He asked:

> Q: Is it true that you told the officer that in fact the person showing up on your doorstep came at a much later date about four or five days after the Maurins disappeared?

A: No.

RP 254. Defense counsel persisted:

> Q: Is it true, ma'am, four or five days after the Maurins disappeared that was the first time you told the police officer about this fellow showing up on your doorstep.
>
> A: No. That's not true.

RP 254-55. Defense counsel again asked:

> Q: Is it true, it was four or five days after the Maurins disappeared that you told the officer the guy that showed up on your doorstep to get gas actually came to your door two weeks prior and not the day prior at all?
>
> A: No.
>
> Q: Isn't it true that on that day – on that second day four or five days after the Maurin's disappeared. You actually told that officer that the guy that showed up on your doorstep was thirty years plus years-old; is that true?
>
> A: No. I guessed he was probably in his mid to late 20's, and I was I was guessing. I didn't know how old he was.
>
> Q: Is it true that you also told that person that same officer that the person that came to your doorstep two weeks prior to the Maurins disappearing weighed between 170 to one 175 pounds?
>
> A: I didn't tell anybody that someone came to my door two weeks prior.

RP 255.

On cross-examination Pierce said that the man who came to her door had no beard. RP 264. She also conceded that when she picked

Riffe's picture from the montage he was the "most consistent" with the person on her front porch in 1985. RP 277. She also conceded that after picking Riffe's photo she might have picked the wrong person. RP 280.

For the next 11 pages of transcript, defense counsel questioned Pierce about her 2012 statement to Kimsey. Exhibit 726. Defense counsel repeatedly attempted to get Pierce to acknowledge that Kimsey was the person who suggested to her that the person appeared on her porch on December 18, 1985. Kimsey began his interview by stating to Pierce:

> And so you provided a statement of information that you heard as far as cars and fog and the time period and what I was interested in is you made a report to the Sheriff's office back in December of 1985 and what you're talking about is before the Maurins went missing so it's probably December 18 in the mid-morning about 10:30, 11:00 a truck pulls into your driveway.

Exhibit 726.

And even in Kimsey's interview, Pierce never said the person was on her porch on December 18, 1985. Exhibit 726. Similarly, Pierce refused to admit that during the 2012 interview she twice stated that she was not "100 percent sure" that she had picked the correct person. Exhibit 726; RP 270-90. The judge acknowledged that the witness appeared to be very "hostile" to the defense. RP 268. And that:

> I suspect she's probably of the opinion that she's not going to do anything or say anything that would in any way, shape or form help the defense . . .

Id. At one point, Pierce refused to reread her prior statement. RP 292.

Defense counsel moved to admit her June 2012 statement to Kimsey. Exhibit 726; RP 289. The trial judge denied the motion. *Id.* Defense counsel questioned Pierce further and she stated she could not remember "exactly" what she told Kimsey. RP 294. But she stated that on that day her memory was "good." RP 294-95. Defense counsel again moved to admit the statement. The judge again denied the motion. RP 295.

On redirect, the prosecutor asked:

> Q: Did you tell Detective Kimsey at any point during this interview that you could not make a 100 percent positive identification?
>
> A: No.

RP 296. After Pierce was excused, defense counsel complained that once shown her prior inconsistent statement, Pierce would refuse to answer, frustrating cross-examination. RP 302. The Court stated that the defense could not impeach Pierce by asking her "isn't it true" that you told Kimsey something different. RP 304-06. He stated that the proper impeachment was to call Kimsey. RP 306.

The next day, the judge modified his ruling and permitted defense counsel to recall Pierce. When Pierce was recalled she professed she did not remember her statement to Kimsey. RP 603. She could read that portion of the statement where she said that she was not "100 percent

sure" that the person she saw on her porch was Riffe. RP 604-07. But in re-direct, she again stated that she was 100 percent sure that it was Riffe. RP 616.

William Forth changed his story. He testified that as a police officer he had followed the case and saw the composite sketches. He had been upset for years that he did not stop the green car he observed on December 19, 1985. It appeared to be one reason he left the Sheriff's Department. RP 1231, 1249.

In his testimony, Forth asserted that he had seen the person driving the car. He said that he had locked eyes with the driver. RP 1167. He said that his first thought was "this is an individual that may have done something wrong." RP 1168. He also thought: "That individual had committed a crime such as burglary." RP 1169. Further, he said:

> You could see fear in those eyes. There was a deep concern, a very deep concern for me being back there.

RP 1176. He asserted the driver was in his mid to late-20's with whiskers. RP 1170. And, he even reported that he saw a red blanket on the seat of the car. RP 1174-75.

On April 11, 1991, six years later, Forth was shown a montage by Lewis County Detectives. He picked Rick Riffe's picture and said, "That's the son of a bitch that killed the Maurins." RP 1233. More than

21 years later, in late January 2012, he was again shown a montage by Detective Kimsey. This time he picked John Gregory Riffe's picture. RP 1197-1207, 3484. He told Kimsey he was 100 percent positive it was John Gregory Riffe who he saw driving the car. RP 3484.

Forth met with Kimsey again on February 22, 2012. According to Kimsey, during the 2012 interview "there should have been additional questions of what happened." RP 3473. Kimsey later agreed in his testimony that in Forth's 1985 statement there was no description of the driver of the green car. RP 3477.

More than a year and half later, the day before trial in October 2013, prosecutors told Forth he had picked two different people as the driver of the car. RP 1209. The prosecutor asked:

> If you had to select between two of these photographs, which one would you believe was more reliable as far as your selection?

RP 1208. Forth said:

> I would pick the photo that I picked in 1991 because that was the most current to the time of the homicide.

RP 1208-09.

Gordon Campbell changed his story. He testified that more than 27 years after the murders, he was watching T.V. in September 2012 when a report about the case jogged his memory. RP 4643. His new testimony was that on December 19, 1985, he had driven into the Yardbirds parking

lot and saw two men wiping down a green car. RP 4643. He went over and suggested they go through the car wash. *Id.* Further, unlike in 1985, he could now identify those two men as Rick and John Gregory Riffe. RP 4646-48.

Moreover, the night before Campbell's scheduled testimony – 27 years later – he recalled for the first time that John Gregory had spoken to Rick in is presence. According to Campbell, John told Rick to close the door on the green car. RP 4655-56.

Sheri Amell changed her story as well. Amell said she had spoken to law enforcement ten times over the last 27 years. RP 1695-96. She first testified that State's Exhibit 113 was a "picture that Ms. Boulin made when we – me and Mary went down to Portland." RP 1690.

In explaining the process Amell said:

> She would ask us – show us a bunch of different eyes or different noses and different mouths and different features and then we would pick one that looked similar. Then, she drew it together, and Mary and I disagreed a little bit on the width of his face, but I felt like his face was too wide.

RP 1690-91.

Amell stated that the second composite was based "mostly" on Mary's input. RP 1694. She said that she "agreed" with that composite, but not "100 percent." RP 1695-96; *see also* 1749. This composite was also distributed to the media in 1985. RP 796.

The defense objected to the introduction of the composites as hearsay. The trial judge stated that "The hearsay objection is intriguing." RP 762. But he said that if Amell testified that the composite was a drawing "the police artist came up with in her presence" there is "probably not a legitimate hearsay objection." RP 762. Both composite sketches were admitted. Exhibit 113 and 206.

In February 2012, Kimsey contacted Amell. She was shown yet another montage. She picked a picture and wrote: "Looks like this one a lot." RP 1698; Exhibit 183. But, on July 9, 2012, she read a newspaper article on the case and viewed the accompanying photographs. RP 1728-29. She stated that the picture in the article did not look like the person she saw on December 19, 1985. RP 1730. She printed a copy of the article and took it to Kimsey. Exhibit 877, 859. She also viewed the picture of John Gregory Riffe included in the article. Exhibit 860. She then told Kimsey she must have seen John Gregory Riffe, not Rick Riffe, on December 19, 1985. RP 1736, 1742, 3489.

On redirect, the prosecutor asked her whether the composite looked more like John Gregory Riffe or Rick Riffe. She said it looked more like the montage photo of Rick she selected in February 2012.[6]

Frank Perkins changed his story. At trial he said the man he saw near Yardbirds was carrying a large bore rifle or shotgun – not a rifle. RP 1005, 1023-24. After receiving his subpoena, he watched news reports in the week preceding his testimony. RP 1012-13. During one report, he saw pictures of Rick and John Gregory Riffe. RP 1013. He stated:

> It shocked me, because it was like going back to thirty years ago . . . I recognized the person I saw in the car in that photograph.

RP 1013. He immediately called the prosecutor's office and arranged a meeting with the prosecutor and Kimsey. RP 1015. Kimsey interviewed Perkins and showed him pictures of the two brothers. RP 3491; Exhibit 999. Perkins pointed to the picture of John Gregory Riffe, but called him "Ricky." RP 3491-92.

Donald Burgess was typical of the "new" witnesses. Donald Burgess was a well-known drug dealer and informant in Lewis County. RP 3400. In 27 years, Burgess never implicated Rick. At trial, defense

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[6] The composites were also shown to witnesses: Campbell (RP 1654-55); Tammy Graham (RP 1874); Jerry Nixon (RP 2383); Linda Zandeki (RP 2405) (who said they were posted all over); and Jeff McKenzie (RP 2460).

counsel suggested that Burgess had never implicated Rick because "you didn't know anything about Ricky being involved; right?" RP 2800. Burgess responded, "I did, but I couldn't say a word." RP 2801. He never explained why he couldn't speak for 27 years despite having been questioned by police about the homicides seven or eight times. RP 2799-2800.

He testified he used to hang out with 15 to 20 people in Mossyrock. RP 2789. At some point, the group decided that Rick committed the Maurin homicides. RP 2789-90. But he waited 27 years before reporting to Kimsey that at some undefined time Rick came to his home with another person and said, "I think we are going to get away with it." RP 2772. According to Burgess, Rick did not mention the Maurin murders in relationship to this statement but "I knew that was what he was talking about." RP 2792.

Marty Smetzler contacted Detective Kimsey after reading about Rick's arrest in the paper in 2012. RP 3326-27. He testified that in early December 1985 he heard Rick say he would take two old people to the bank to get money and then kill them. RP 939, 958-59. He said that he reported it to a police officer at the time, but there is no record of that. RP 946-48. Late in December 1985, while he was in jail, he heard about the Maurin murders. So he reported the comment to another police officer

who came by the jail. RP 948-49. Again, he did not remember who he had spoken to. RP 950. He admitted that he suffered from a severe brain injury and said: "I'm slow of remembering." RP 952. Smetzler was actually a suspect in the Maurin murders. RP 952-53. And, when asked to swear that his statements to the police were true he said: "I'm pretty sure it is the truth." RP 962.

Jason Shriver testified that he was contacted by Hadaller's private investigators in 2004 and told them "everything." RP 2300. He stated he waited almost 20 years to tell anyone what he observed on December 19, 1985, because he was afraid of the Riffe brothers. RP 2202-2318. He was interviewed by Kimsey again on February 12, 2012.

He said that on December 19, 1985, as he and his mother passed the Maurins' vehicle, he looked over and saw the Maurins and John Gregory and Rick Riffe. RP 2204-08. He saw no weapon. RP 2208. He had about a 30-second view. RP 2208. According to Shriver, sometime later John Gregory Riffe threatened to kill him and his family if Shriver said anything. RP 2234. That was Shriver's excuse for not saying anything until 2004 even though he knew of the murders.

Brenda King called Kimsey after reading about Rick's arrest. RP 3331. King referred to the Riffes as "Muzzleman." RP 1968. She heard about the murders in 1985 and had seen the composite. RP 1994. But, she

had been too busy in the proceeding 27 years to come to the police station to report what she considered to be information regarding the Maurin homicides. RP 1994-95, 2008-2010. But in 2012 she saw the story in the newspaper and now thought, "I could contribute to the investigation." RP 1996. She read the article and saw the photos before she contacted Kimsey. *Id.*

She first testified that on December 17th, 1985, she had seen the Maurin vehicle in the Yardbirds parking lot. RP 1948, 2020. But she "rectified that with Detective Kimsley [sic] and I specified it wasn't the 17th, it was the 19th." RP 2020. She saw the vehicle at 8:00 or 8:30 a.m. (well before the Maurins went to the bank). RP 3485. She said she observed John Gregory Riffe getting out of the vehicle holding a shotgun. RP 1951.

King also stated that she served the brothers when she was working at a local tavern. RP 1968. On some earlier unidentified date in 1985, she was delivering beer to the two men at their table when she heard John Gregory "talking about needing to get money and the boat and going to Alaska." RP 1993. She said that Rick told John Gregory to "shut up." *Id.* Kimsey showed her a montage on October 23, 2013, just before she testified. RP 3334-35. She picked both brothers' pictures from the group. RP 3334-35.

Brenda King's husband, Steve, knew that the Maurins had been murdered and he realized he might know something about the case. RP 2031-32. But he, too, was too busy to "get involved." RP 2031-32. Steve and Brenda both read the article regarding Rick's arrest in 2012. RP 2011. They went together to see Kimsey. RP 2033.

Steve testified that he remembered a time in December 1985 when he and Brenda were in the Yardbirds parking lot. RP 2021-22. He saw a person getting out of a green car and Brenda said "I know that guy." RP 2024. He saw no gun. RP 2025. Later, he saw a person walking near Yardbirds carrying a gun. RP 2027-28. He was not sure whether this was the same person he had seen earlier getting out of the green vehicle. RP 2028.

In 1985, Jeff McKenzie saw a newscast about the case. He also saw the composite drawings. RP 2469-70, 2482. He identified the composite as "familiar." RP 2482. He told the investigators he had been at the AM/PM minimart in Chehalis "right after dark." RP 2448-50. When he was walking into the minimart, a man wearing a green jacket approached him and asked him for a ride. RP 2452. The man was carrying a crumpled up grocery bag. RP 2455. McKenzie said no, but the man persisted. His eyes were dilated and it occurred to McKenzie that the man may have been drinking or "on something." RP 2452, 2456. The

man had not shaved for "a few days." RP 2476-77. When a patrol car pulled into the parking lot the man ran away. RP 2453. McKenzie got a 35-45 second look at the man. RP 2477.

On September 21, 2012, after Rick's arrest, Kimsey interviewed McKenzie and showed him pictures from a montage. McKenzie then picked two pictures from the montage as similar to the man he saw at the minimart. RP 2465-66. The pictures were of Rick and John Gregory Riffe. RP 3405.

D. THE DEFENSE CASE

The defense proposed expert witness Dr. Mark Reinitz, a professor of psychology at the University of Puget Sound. He previously testified as an expert in perception and memory in state and federal courts in Washington and California. CP 157.

Dr. Reinitz's offer of proof stated that he did not propose to "issue judgments about whether a particular witness's memory in the case at hand is correct or incorrect." Instead, his role was to "provide information to the jury about the scientific bases of various relevant aspects of perception and memory." CP 164. He stated that he would testify about "decades of scientific research" that demonstrate the particular circumstances that result in erroneous eyewitness identification. CP 166. He said there were three relevant points: 1) initial memories are

fragmented, disorganized, and incomplete; 2) memory changes over time and becomes "more detailed, more coherent, and more complete"; and 3) "unbeknownst to the witness the memory is – critically and non-intuitively – not necessarily becoming more accurate; hence the witness ends up with an eventual memory that is strong, detailed, and confidence inducing, but nonetheless incorrect in important aspects."

He said:

> A striking and directly relevant class of such memories is those of eyewitnesses who strongly and confidently – yet falsely – identify as perpetrators, defendants who are later shown unequivocally to *not* to have been the person that the witness saw commit the crime.

CP 166. He said:

> Of most relevance to the case at hand is that the witness may well have begun with perceptions and memories of an individual's appearance that were highly fragmented and incomplete – and yet, at the present time, have a reconstructed memory that includes a strong representation of Mr. Riffe as the perpetrator.

The State moved to prohibit Dr. Reinitz from testifying. CP 167-174. The trial court granted that motion.

E. VERDICT AND SENTENCING

The jury convicted Rick Riffe as charged. The trial court imposed 1,234 months (102 years) in prison. CP 1113. This timely appeal followed. CP 1136-57.

F. APPEAL

On appeal, Riffe argued that the trial court erred when it (1) excluded Dr. Reinitz's expert testimony regarding eye-witness identification; (2) admitted two composite sketches of Riffe; (3) admitted Riffe's brother's statement about killing before as an adoptive admission; (4) admitted Riffe's former wife's question to police; (5) did not allow Riffe to improperly impeach a witness with her prior inconsistent statement; 6) violated Riffe's right to due process when it denied Riffe's motion for mistrial for the State's failure to disclose *Brady*[7] material; and 7) permitted prosecutorial misconduct in closing argument. The Court of Appeals rejected all of these arguments.

VI.
ARGUMENT

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PROHIBTED RIFFE FROM CALLING AN EXPERT TO DISCUSS THE FACTORS THAT CONTRIBUTE TO EYEWITNESS MISIDENTIFICATIONS. THIS IS A QUESTION OF SUBSTANTIAL PUBLIC IMPORTANCE. RAP 13.4(B)(4).

The Court of Appeals stated that it agreed with the trial court that (1) Riffe failed to show that Dr. Reinitz qualified as an expert; (2) the proposed testimony was within the common knowledge, experience, and

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[7] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

understanding of the jury; (3) the proposed testimony was not helpful to the jury; and (4) Dr. Reinitz's testimony was an improper comment on the veracity of the witnesses. Thus, the court concluded that the trial court did not abuse its discretion by excluding Dr. Reinitz's proposed testimony under ER 702. *State v. Riffe*, 45744-0-II, 2015 WL 7146154 at *6 (2015). The appellate court's decision contains almost no analysis of why the trial court's decision is correct. It appears that once again that court incorrectly concludes that there is no need for expert opinion regarding eyewitness identification because "the inexperienced person is capable of forming a correct judgment" about this issue "based on his or her own experience and knowledge." *Id.* at *4.

B. THE COURT OF APPEALS' OPINION AFFIRMING THE EXCLUSION OF RIFFE'S EYEWITNESS IDENTIFICATION EXPERT CONFLICTS WITH MANY APPELLATE COURT DECISIONS AND IS A SIGNIFICANT ISSUE OF PUBLIC IMPORTANCE

ER 702 governs testimony by experts, providing:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under the rule, expert testimony is admissible if it will be helpful to the trier of fact. "Helpfulness" is to be construed broadly. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (citing *Miller v. Likins*,

109 Wn. App. 140, 148, 34 P.3d 835 (2001)). This means the rule favors admissibility in doubtful cases. *Likins,* at 148.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine facts in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The admissibility of expert testimony under this rule depends upon whether: (1) the witness qualifies as an expert; (2) the opinion is based upon an explanatory theory generally accepted in the scientific community; and (3) the expert testimony would be helpful to the trier of fact. *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984).

1. Expertise

The trial court erred in suggesting that Dr. Reinitz was not qualified by experience or education. The trial judge appeared to reach this conclusion sua sponte because the State did not argue that Dr. Reinitz was unqualified in the trial court.

ER 702 provides that a witness can be an expert in five different ways: "knowledge, skill, experience, training, or education." Dr. Reinitz was an expert under all five of these criteria. Dr. Reinitz stated that he was Professor of Psychology at the University of Puget Sound and taught there since 1999. Before that, he was a professor at Boston University in

the psychology department and the medical school. He worked for 25 years in the area of human perception and memory. He stated that his experience included authorship of more than 20 peer-reviewed articles about factors relevant to eye-witness accuracy. He said, "I have given more than 50 representations including many invited addresses at universities and professional organizations both in the US and abroad." He also said he had reviewed major research grants for the National Science Foundation and the National Institution of Health, edited journals and consulted. He testified in both Washington and California, in the federal and superior courts. He reviewed copies of the police reports, witness statements, witness interviews, and photo montages in this case.

He said that at a minimum he would testify about the factors relevant to eye-witness perception and eye-witness memory. He said that he would not make certain representations about whether the eye-witness testimony was accurate or not, and cited to the appropriate professional journals. He said that his testimony would allow the jury to evaluate in a reasonably informed fashion the principals and implications of whatever degree of in-trial confidence the witnesses displayed. He said that the information that he would discuss was generally accepted in the field of psychology, and quoted the other learned treatises and articles that

discussed the research. He stated that his conclusions came from controlled laboratory research.

The State admitted that this information was before the trial court, but asks: "These statements could all be true but how is the trial court to know?" Response Brief at 53. The trial judge in an adversarial system knows these statements are true because the State did not present any countervailing evidence. If the State truly believed that Dr. Reinitz was not qualified, it would have presented the evidence it had to demonstrate its position.

The United States Supreme Court has stated that the gatekeeping function regarding expert qualifications is to ensure what an expert, whether basing testimony upon professional studies or personal experience, employs "in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). That Court also reminds litigants that vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the appropriate means of attacking shaky but admissible evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

The State admitted it had Dr. Reinitz's CV. RP 3882-83. Presumably, the trial prosecutor reviewed that document, read the articles cited or called Dr. Reinitz's past and present employers and confirmed that he was indeed qualified. The State had every opportunity to present the results of its review of Dr. Reinitz's credentials. But rank speculation that Dr. Reinitz was not a qualified expert is not countervailing "evidence." Absent countervailing evidence, the preponderance of the evidence clearly establishes that Dr. Reinitz was qualified.

The Court of Appeals' conclusion that something more was required – copies of articles, previous testimony, or a longer curriculum vitae – is in conflict with a legion of other cases. Certainly, as compared to other experts who have been accepted by the appellate courts, Dr. Reinitz was fully qualified. For example, in *State v. Groth*, 163 Wn. App. 548, 261 P.3d 183 (2011), *review denied*, 173 Wn.2d 1026, 272 P.3d 852 (2012), Division I of the Court of Appeals approved the testimony of a man named Joel Harden. Mr. Harden presented himself as a "human tracker." He opined that based upon certain intermingled footprints, two persons were both within each other's presence and had a dance or physical alteration together. *Id.* at 562. He also opined that based upon his experience, the two people were physically engaged on at least two different occasions. The defendant objected because Harden's testimony

was unreliable and not within his expertise and were unhelpful to the jury. Division I held that Mr. Harden could testify to not only his tracking expertise, but his opinion that only one person was wearing a particular type of footwear.

Groth affirms that "expertise" is not exceptionally high bar. And defense experts should not be subjected to any greater level of scrutiny than experts proposed by the State. *See also, e.g., State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992) (in a prosecution for first degree murder, the trial court properly allowed a Border Patrol agent to testify as to the significance of tracks left by the defendant and other physical evidence at the scene; the court said the witness was "clearly qualified" as an expert after working 23 years as a tracker for the Border Patrol, and having tracked nearly 5,000 persons during his career); *In re Detention of A.S.*, 138 Wn.2d 898, 982 P.2d 1156 (1999) (in mental commitment proceeding, social worker who was designated by statute as a County Designated Mental Health Professional, and who had 17 years of experience in the mental health field, was allowed to express opinion on whether detainee presented a danger to himself or others "with reasonable medical and psychological certainty"; court rejected argument that only a physician had the necessary expertise to offer such an opinion).

2. Generally Accepted

The trial court erred in holding that scientific findings regarding the limits of eyewitness testimony is not generally accepted. That conclusion was simply incorrect. It is unclear why the trial judge came to this conclusion. Certainly the State did not present any evidence to support this finding. The Court of Appeals was wrong when it affirmed the trial judge's ruling.

The case law makes it clear that similar expert testimony is generally accepted in the scientific community. *See, e.g., State v. Taylor*, 50 Wn. App. 481, 489, 749 P.2d 181, 184 (1988) ("[E]xpert testimony on the unreliability of eyewitness identification can provide significant assistance to the jury beyond that obtained through cross examination and common sense."); *see also United States v. Sebetich*, 776 F.2d 412, 419 (3d Cir. 1985), *reh'g denied*, 828 F.2d 1020 (1987), *cert. denied*, 484 U.S. 1017, 108 S.Ct. 725, 98 L.Ed.2d 673 (1988) (interpreting Federal Rules of Evidence); *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985) (same).

In August 2011, the New Jersey Supreme Court issued a landmark decision concerning identification evidence. *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011). The court conducted an extensive and thorough review of the topic, appointing a special master who presided over a

hearing that probed the testimony of seven experts, analyzed hundreds of scientific studies, and produced more than 2,000 pages of transcripts. *Id.* at 877, 916. The results, adopted unanimously by the court, were powerful:

> In the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence . . . a vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory. It also calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications.
>
> We are convinced from the scientific evidence in the record that memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications . . .
>
> In the end, we conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. *It also overstates the jury's inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.*

Id. at 877-78 (emphasis added and citations omitted). *See also, State v. Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012).

3. Helpful to the Trier of Fact

The trial judge was also incorrect when he held that this testimony would not be helpful to the trier of fact. The average juror does not understand the weaknesses of eyewitness identification. If the average juror understood those weaknesses, perhaps eyewitness misidentification

would not continue to be the leading cause of wrongful convictions. It is widely accepted by courts, psychologists and commentators that "[t]he identification of strangers is proverbially untrustworthy." Felix Frankfurter, The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen 30 (Universal Library ed., Grosset & Dunlap 1962) (1927) ("What is the worth of identification testimony even when uncontradicted? . . . The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent – not due to the brutalities of ancient criminal procedure."); *see also Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002) (citing a study that concluded that "mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined."); *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987) (wrongful conviction based on victim's eyewitness testimony); *State v. Youngblood*, 153 Ariz. 50, 734 P.2d 592 (Ariz. Ct. App. 1986), *cert. granted*, 485 U.S. 903, 108 S.Ct. 1072, 99 L.Ed.2d 232, *and judgment reversed*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), *reh'g denied*, 488 U.S. 1051, 109 S.Ct. 885, 102 L.Ed.2d 1007 (1989) (same); *United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (same); C. Ronald Huff et al., Guilty Until Proven Innocent: Wrongful Conviction and Public Policy, 32 Crime & Delinq.

518, 524 (1986) ("the single most important factor leading to wrongful conviction in the United States . . . is eyewitness misidentification").

The Innocence Project at the Benjamin Cardozo School of Law report on the 200 persons exonerated by DNA testing around the country found that 77% of those freed were convicted in part on eyewitness misidentification. Earlier, in a study of 40 cases of DNA exoneration researchers concluded that 36 (or 90%) involved eyewitness identification evidence in which one or more eyewitnesses falsely identified the person. One person was identified by five separate eyewitnesses. It is important to note that the 40 cases were not selected because they happen to have eyewitness identification as the primary evidence. Instead, these cases are simply the first 40 cases in the U.S. in which DNA was used to exonerate a previously convicted person. Hence, the kind of evidence that led to these wrongful convictions could have been anything. The fact that it happened to be eyewitness identification evidence lends support to the argument that eyewitness identification evidence is among the least reliable forms of evidence and yet remains persuasive to juries. Gary L. Wells, Mark Small, Steven Penrod, Roy S. Malpass, Solomon M. Fulero, and C.A.E. Brimacombe, Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law and Hum. Behav. No. 6, at 1 (1998); A. Daniel Yarmey, Expert Testimony: Does

Eyewitness Memory Research Have Probative Value for the Courts? 42 Canadian Psychology 92, 93 (May 2001) ("[E]yewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence."); Gary L. Wells and Elizabeth A. Olson, Eyewitness Testimony, 54 Annu. Rev. Psychol. 277, 278 (2003) (". . . eyewitness researchers have noted that mistaken identification rates can be surprisingly high and that eyewitnesses often express certainty when they mistakenly select someone from a lineup.").

Modern research further reveals that the factors courts have traditionally used to evaluate the reliability of eyewitness identification are not only inconclusive, but also misleading. Jurors tend to overestimate "the likely accuracy of eyewitness evidence." John C. Brigham & Robert K. Bothwell, The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications, 7 Law & Hum. Behav. 19, 28 (1983). Jurors may make this mistake because they "rely heavily on eyewitness factors that are not good indicators of accuracy." Tanja Rapus Benton et al., Has Eyewitness Testimony Research Penetrated the American Legal System?: A Synthesis of Case History, Juror Knowledge, and Expert Testimony, in 2 Handbook of Eyewitness Psychology: Memory for People 453, 484 (R.C.L. Lindsay et al. eds., 2007). Social scientists theorize that jurors rely

heavily on factors that are not correlative of accuracy because many of the scientific principles underlying the reliability of eyewitness testimony are counter-intuitive or do not comport with common sense. Michael R. Leippe, The Case for Expert Testimony About Eyewitness Memory, 1 Psychol. Pub. Pol'y & L. 909, 921 (1995). Whatever the cause, the effect is that jurors cannot accurately discriminate between correct and mistaken eyewitnesses, and that jurors frequently rely on the testimony of mistaken eyewitnesses. *Id.* at 925.

In addition, jurors are compelled by a witness's certainty in his or her identification. "[M]ock-juror studies have found that confidence has a major influence on mock-jurors' assessments of witness credibility and verdicts." Neil Brewer & Gary L. Wells, The Confidence – Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates, 12 J. Experimental Psychol.: Applied 11, 11 (2006). The impact of the eyewitness's confidence in his or her identification here cannot be underestimated because jurors tend to confound certainty and accuracy. *State v. Romero*, 191 N.J. 59, 74-75, 922 A.2d 693, 702 (N.J. 2007) ("Jurors likely will believe eyewitness testimony 'when it is offered with a high level of confidence . . .'"). Moreover, "[w]hen witnesses are briefed or coached about cross-examination, as they almost always are in an actual trial, they

maintain their confidence under cross-examination and thereby sustain (or increase) their incriminating effect on jurors." *Leippe*, supra at 923. Yet scientific research has shown that "eyewitness confidence is a poor postdictor of accuracy." Steven M. Smith et al., Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed?, 85 J. Applied Psychol. 542, 548 (2000).

Here, the task of understanding the counter-intuitive principles of reliability was left to jurors. The expert testimony proposed by Riffe would clearly have assisted them in understanding the various factors that made the witnesses' observations unreliable. Moreover, without the expert testimony, the jurors lacked even a "basic" understanding of the factors that could have affected reliability of the identifications made. And, the prosecutor asked each witness about their certainty. This was a direct effort to get the jury to accept that the witnesses' level if certainty equated with accuracy. And, this was precisely why expert testimony was essential to the defense case.

Moreover, voir dire and cross-examination did not and cannot address the *scientific* basis to challenge the witnesses' in-trial confidence regarding their identifications of Rick Riffe as the person in the green car or near the Yardbirds on December 19, 1985. For example, voir dire and cross-examination were not sufficient to explain that the eyewitnesses'

evidence – offered by Pierce, Forth, Campbell, Amell and others – which became more detailed and more certain 27 years later was actually very unreliable and could lead to an entirely false identification of Rick Riffe as the person they thought they saw.

4. Comment on the Evidence

Finally, expert testimony on this subject is not a "comment on the evidence."

> [E]yewitness identifications does not invade the province of the jury to determine what weight or effect it wishes to give to eyewitness testimony. An expert should not be permitted to give an opinion about the credibility or accuracy of the eyewitness testimony itself; that determination is solely within the province of the jury. Rather, the expert should be permitted to testify only about factors that generally have an adverse effect on the reliability of eyewitness identifications and are relevant to the specific eyewitness identification at issue

Guilbert, 306 Conn. at 248; *See also, People v. McDonald*, 37 Cal.3d 351, 370-71, 690 P.2d 709, 208 Cal.Rptr. 236 (1984) ("[Expert testimony on the reliability of eyewitness identifications] does not seek to take over the jury's task of judging credibility: as explained . . . [such testimony] does not tell the jury that any particular witness is or is not truthful or accurate in his identification . . . Rather, it informs the jury of certain factors that may affect such an identification in a typical case; and to the extent that it may refer to the particular circumstances of the identification before the

jury, such testimony is limited to [an explanation of] the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness.

C. CONTROLLING UNITED STATES SUPREME COURT PRECEDENT MAKES IT CLEAR THAT A DEFENDANT IS NOT REQUIRED TO ESTABLISH THAT HIS PROPOSED EVIDENCE IS ADMISSIBLE UNDER THE WASHINGTON RULES OF EVIDENCE. THIS IS A SIGNIFICANT CONSTITUTIONAL QUESTION. RAP 13.4(B)(3).

Further, the Court said that to prevail on his right to present a defense claim, Riffe was "required to establish that Dr. Reinitz's testimony met the requirements of ER 702." *Riffe*, at *7 (2015). The Court of Appeals was wrong. ER 702 cannot be used to arbitrarily deny a defendant the right to present a defense no matter how strong the case against him appears to be.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense . . . This right is abridged by evidence rules that infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Contrary to the Court

of Appeals statement, the Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote. Only well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *Holmes*, 547 U.S. at 325-327. Stated another way, the Constitution permits judges to exclude evidence only when it is repetitive, marginally relevant or poses an undue risk of 'harassment, prejudice, or confusion of the issues. *Crane v. Kentucky*, 476 U.S. 683, 689-690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

In *Holmes*, the United States Supreme Court struck down South Carolina's judicially created rule of evidence that prohibited defense evidence of third party culpability if "the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." *Holmes,* 547 U.S. at 321. In other words, a defendant could defend by casting suspicion on another's possible guilt but only if by doing so, his own innocence of the charge was established first. If the prosecution's case is strong enough, then a South Carolina court would exclude a defendant's third-party culpability evidence even if that evidence had significant

probative value and posed no undue risk of prejudice or confusion of the issues.

In this case, the prosecutor presented evidence that, 28 years after the crime, the witnesses were 100% sure that the person they saw was Rick Riffe. At bottom, trial court determined that the expert testimony was not "helpful" because the State's witness were sure that it was Riffe. It is true that Riffe was permitted to cross examine the witnesses. But he was prohibited from presenting the most compelling evidence that the witnesses' recollections, no matter how sincerely held, were unreliable. Simply showing that some eyewitnesses failed to identify him as the perpetrator in 1985 was not enough. He needed to explain why those same witnesses might now sincerely, but mistakenly, say he was the guilty party. Thus, like the evidentiary rule at issue in *Holmes*, the use of ER 702 to exclude eyewitness expert identification in this case serves no legitimate purpose and is disproportionate to the ends that it is asserted to promote.

The State failed to show that Dr. Reintz's testimony was irrelevant, repetitive, confusing or "harassing." Under *Holmes*, even if the proposed expert testimony did not meet ER 702, it was a violation of Riffe's federal constitutional right to present a defense to exclude the evidence.

VII.
CONCLUSION

Despite the enormous risk inherent in eyewitness identifications made 27 years after the crime, the trial court and the Court of Appeals approved of the use of ER 702 to unreasonably deny Riffe the right to present his defense. This Court should accept review and reverse the Court of Appeals.

DATED this 7th day of December, 2015.

Respectfully submitted,

Suzanne Lee Elliott

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on:

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