Declaration of Geoffrey R. Loftus, Ph.D
in the case of
Javier Suarez Medina

I. Qualifications

My name is Geoffrey R. Loftus. I am a Professor of Psychology at the University of Washington in Seattle. My area of expertise, in which I have been working for 30 years, is human perception and memory. Over the past ten years, I have qualified as an expert in perception and memory in approximately 120 criminal cases in nine states, federal courts in six cities, and U.S. Military court in Sigonella, Italy. My *curriculum vitae* is attached.

II. Information Relied Upon

I am familiar with the following facts and circumstances surrounding the accusation that Javier Suarez Medina shot Michael Mesley, as described in the police reports and testimony at Mr. Medina's trial.

As I understand it, Michael Mesley came forward after seeing television coverage of Javier Suarez Medina's murder trial in 1989. Mr. Mesley testified that he recognized Javier Suarez Medina as one of three people who assaulted him and his wife nearly two years earlier on October 10, 1987.

According to Mr. Mesley, he and his wife were in seated in their Mazda truck parked on a hill near a residential area in Dallas to watch the State Fair fireworks. At some time between 8:40 p.m. and 9:00 p.m. two men approached the driver side of the truck, where Mesley was seated, and one man approached the passenger side of the truck, where his wife was seated.

Mesley testified that a "Latin" man stuck a 12-gauge shotgun in his face and said "give me your money or I'm going to blow your f---in' head off." The man then took Mesley's money, his wife's purse, his camera equipment and told him to walk toward the woods. When Mesley refused and got back in his truck, at least two shots were fired into the truck, one hitting Mesley in the face. Mesley's wife was also struck in the face by a shotgun blast. Seriously injured, Mesley was nevertheless able to drive his truck down the hill and summon medical attention.

Shortly thereafter, Mr. Mesley stated that he saw the shooter's face for 10 to 15 seconds. He stated that although it was dark out, the moon was full and there was a street light ten or fifteen feet behind where the incident occurred. Mr. Mesley, a white male, described the shooter as a Latin male with a "little bitty" mustache. He also stated that the man was wearing a dark navy blue or black tank top shirt and a hat. Mesley's description of the shooter failed to contain any other details concerning the facial characteristics of the person who shot him.

Nearly two years passed from the time that Mesley was shot until the time that he identified Javier Suarez Medina as the person that shot him. I understand that Mesley saw Mr. Suarez Medina on television during the course of Mr. Suarez Medina's highly publicized trial. After Mesley identified Javier Suarez Medina after having viewed his picture on television, Mesley was shown a photographic montage. Mesley identified Mr. Suarez Medina's photograph as the person who shot him. Finally, Mesley identified Mr. Suarez Medina in court.

When Mr. Mesley was asked at trial if he had ever seen Javier Suarez Medina before Mesley answered "yes." Mr. Mesley further stated that he did not "have any problem

identifying the man" who shot him. Finally, in response to the prosecutor's question whether Javier Suarez Medina was "the same man that shot you, that robbed you, and has caused your life to be forever changed," Mr. Mesley answered, "Yes, it is."

III. Summary of Findings

There are a number of factors present in Mr. Mesley's identification of Mr. Suarez Medina as the person who shot him that support the conclusion that Mesley's identification of Suarez Medina, no matter how sincerely Mesley believes he is correct, is false. Mr. Mesley viewed the person who shot him for a short period of time, much less than a minute. The event was, to say the least, enormously stressful. Mr. Mesley and Mr. Suarez Medina come from different racial backgrounds, increasing the likelihood of a mistaken identification.

Shortly after the shooting, when the event was freshest in his mind, Mr. Mesley was able to give only the briefest description of the person who shot him, a description almost devoid of facial features. Nearly two years passed from the time that Mesley was shot to the time that he identified Suarez Medina as the person who shot him. Obviously, Mesley's memory would have dimmed significantly during this time. Contrary to popular opinion, such events are not "stamped" or "branded" into memory. Finally, Mr. Mesley identified Javier as the person who shot him only after a highly suggestible situation (seeing Suarez Medina on television described as a man who shot and killed a police officer) and shortly thereafter being shown a photo montage containing a photograph of the man he saw on television.

Ultimately, I cannot say with certainty that Mr. Mesley is wrong. However, I can say that there are numerous reasons in this case to be seriously concerned with the reliability of Mr. Mesley's testimony.

IV. General Issues

In the next two subsections, I will briefly discuss two issues: How juries evaluate eyewitness testimony and the scientific understanding of how memory works and the circumstances under which memory fails.

A. How Juries Evaluate Eyewitness Testimony

Contrary to common sense, a confident witness is not necessarily an accurate witness. The central role of eyewitness expert testimony at trial is to alert jurors to situations which, on the basis of scientific studies, are known to lead to such a false sense of confidence. In the absence of such testimony, jurors will inappropriately use witness confidence as an index of the witness's accuracy (see Penrod & Cutler, 1995, for scientific evidence concerning this assertion).

It is important first to establish *why* a confident witness sways jurors. The reason, quite simply, is that in most of normal everyday life, high confidence *is* predictive of high accuracy. Therefore it makes sense that an average juror would believe intuitively that high confidence is *always* associated with high accuracy, or at least that the juror should use such predictive power as a default assumption in evaluating the credibility of a witness's identification.

However, contrary to intuition, such predictive power can break down, and a great deal of scientific research has delineated the circumstances in which such a breakdown occurs. These circumstances include (1) an original event that does not lend itself to a witness's being able to easily perceive or relate the details of the event (e.g., lighting is poor; the time to experience the event is short; or the witness's attention is drawn to a weapon, and away from the perpetrator's appearance) along with (2) some form of suggestive post-event information that would bias the witness to reconstruct his memory in some fashion. A biased lineup or a showup procedure, are excellent examples of such post-event information-they would bias a

witness to reconstruct his memory such that his originally hazy memory of the culprit is replaced by a much stronger memory of the defendant

Under such circumstances, the witness is inclined to rehearse this falsely-constructed memory of the original event such that the memory becomes strong and confidence-inducing. Accordingly, although nonintuitively, the witness's confident recounting of the event at trial is based not, as the witness believes, on objectively accurate information about the original event, but on potentially inaccurate memory based on the misperceptions and misinterpretations of the original event.

While this combination of circumstances is rare in most peoples' experience, it is relatively common in crimes such as the one in this case. It is also clear, based both on common sense and on confirming laboratory studies, that a highly confident eyewitness can be quite persuasive to a jury.

B. How Memory Works

Before discussing the specific evidence germane to the present case, it is useful to provide a brief synopsis of the scientific understanding of how memory works. A generally accepted theory of this process was first explicated in detail by Neisser (1967) and has been continually refined over the intervening quarter-century (e.g., Loftus, 1979; Loftus & Loftus, 1990; Schacter, 1995). The basic tenets of the theory are as follows.

First, memory does not work like a video recorder. Instead, when a person witnesses some complex event, such as a crime, or an accident, or a wedding, or a basketball game, he or she acquires *fragments* of information from the environment. These fragments are then *integrated* with other information from other sources. Examples of such sources are: information previously stored in memory that leads to prior expectations about what will happen, and information-both information from external sources, and information generated internally in the form of inferences-that is acquired after the event has occurred. The result of this amalgamation of information is the person's memory for the event. Sometimes this memory is accurate, and other times it is inaccurate.

An initial memory of some event, once formed, is not "cast in concrete." Rather, a memory is a highly fluid entity that changes, sometimes dramatically, with the passage of time. Every time a witness thinks about some event-revisits his or her memory of it-the memory changes in some fashion. Such changes take many forms. For instance, a witness can make inferences about how things probably happened, and these inferences become part of the memory. New information that is consistent with the witness's beliefs about what must have happened can be integrated into the memory. Details that do not seem to fit a coherent story of what happened can be stripped away. In short, the memory possessed by the witness at some later point (e.g., when the witness testifies in court) can be quite different from the memory that the witness originally formed at the time of the event.

Memory researchers study how memory works using a variety of techniques. A common technique is to try to identify circumstances under which memory is inaccurate versus circumstances under which memory is accurate. These efforts have revealed four major sets of circumstances under which memory tends to be inaccurate. The first two sets of circumstances involve what is happening at the time the to-be-remembered event is originally experienced, while the second two sets of circumstances involve things that happen after the event has ended.

The first set of circumstances involves the state of the *environment* at the time the event is experienced. Examples of poor environmental conditions include poor lighting, obscured or interrupted vision, and long viewing distance. To the degree that environmental conditions are poor, there is relatively poor information on which to base an initial perception and the memory that it engenders to begin with. This will ultimately result in a memory that is at best incomplete and, as will be described in more detail

below, is at worst systematically distorted.

The second set of circumstances involves the state of the *observer* at the time the event is experienced. Examples of suboptimal observer states include high stress, perceived or directly inflicted violence, viewing members of different races, and diverted attention. As with poor environmental factors, this will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted.

The third set of circumstances involves what occurs during the *retention interval* that intervenes between the to-be-remembered event and the time the person tries to remember aspects of the event. Examples of memory-distorting problems include a lengthy retention interval, which leads to forgetting, and inaccurate information learned by the person during the retention interval that can get incorporated into the person's memory for the original event.

The fourth set of circumstances involves errors introduced at the time of *retrieval*, i.e., at the time the person is trying to remember what he or she experienced. Such problems include biased tests and leading questions. They can lead to a biased report of the person's memory and can also potentially change and bias the memory itself.

V. The Present Case

A. Factors that Affect the Witnesses' Original Perceptions

The factors that are relevant to the witnesses' ability to accurately perceive and interpret the fight.

1. Lighting Conditions

The poorer the lighting conditions, the worse is visual perception. The reason for this rests on the fact that humans are equipped with two physiologically separate visual systems: the *photopic* system, and the *scotopic* system.

The photopic system is used for viewing during ordinary (i.e., relatively intense) lighting conditions. It has two major capabilities: it can distinguish colors, and it can resolve fine detail. Its major disadvantage is that it cannot operate under conditions of dim illumination.

The scotopic system is used for viewing during conditions of dim illumination. Although it can detect small amounts of light, it has two major disadvantages: it cannot distinguish colors (i.e., it "sees" the world in shades of gray) and it cannot resolve fine detail.

To use an everyday illustration, if one viewed a garden during a sunny day, one would perceive the minute details of plants in vivid color. If one viewed the same garden at night, one would perceive only the general shapes of the plants and would perceive them only in shades of gray. A yellow flower, for instance, could not be distinguished from a pink flower. Roughly speaking, perceiving using the scotopic system is like seeing a bad photocopy of a photocopy.

This limit on perception has two consequences.

First, it means that there is a concomitant limit on the quality of any memory that results from the perception.

Second, it means that what is perceived may (as described below) be highly dependent on expectations, rather than on veridical environmental information.

In this case, Mr. Mesley claims that he had a good view of his shooter. There were many objective factors that suggest otherwise. Mr. Mesley was shot at night. The shooter was wearing a hat that obscured portions of his head and face. Finally, the shooter was holding a shotgun pointed directly at Mr. Mesley. Most importantly, Mesley's description of the shooter taken shortly after the incident was vague and

contained very few descriptive details.

2. Stress

The following scientific information about stress is relevant.

The relation between stress and mental functioning in general is described by what is known as the Yerkes-Dodson law (Yerkes & Dodson, 1908). According to this law, the quality of mental functioning is an inverted U-shaped function of the amount of stress the person is undergoing. With either very low or very high stress, mental functioning-including ability to perceive and memorize-is not very good. It is at an intermediate stress level, that mental functioning is optimal.

Note that this is a generic description of the relationship between stress and mental functioning. In any specific experiment to study stress, both the definition of stress and the definition of "mental functioning" would be quite concrete and precise.

Stress is an unusual topic of scientific investigation: it is difficult to study in the laboratory because of obvious ethical considerations. For this reason, I include in this report information about how stress can be scientifically studied. There are four major techniques for doing this.

The first technique is to use animals rather than humans. In many respects, animals are sufficiently like humans that conclusions made from animals will apply to humans. Indeed, the first studies that revealed the Yerkes-Dodson function used mice as subjects. Stress was defined as the degree of shock to which the mice were subjected and mental functioning (such as it is in mice) was defined to be the animals' ability to learn a maze.

Second, stress can be studied with ordinary people (e.g., college students) under conditions that are not so stressful as to be unethical. These include manipulations such as showing violent slides or movies, or subjecting people to loud and unpleasant noise. In these studies, increasing stress is sometimes found to improve performance, and other times is found to impair performance. This is entirely understandable from the perspective of the Yerkes-Dodson function. If the general stress levels used are moderate, then in some experiments the overall stress level may be less than the optimal level, while in other experiments the overall stress level may be higher than the optimal level. In the former case, increasing stress would improve performance, while in the latter case, increasing stress would impair performance. This technique is *not* very good for studying effects of very high stress levels (e.g., Christianson, Loftus, Loftus, & Hoffman, 1991).

Third, about four decades ago, before ethical considerations were developed and enforced, the U.S. military did studies in which military personnel were put under conditions of high stress. For instance, in one study, they were on an airplane that they were told was going to crash. In this high-stress situation, mental functioning of various sorts showed substantial deterioration (Berkun, Bialek, Kern, & Yagi, 1962).

Fourth, stress can be ethically studied in naturally-occurring stressful situations. For example, the British psychologist, Alan Baddeley has studied scuba divers and parachute jumpers in who voluntarily place themselves in circumstances of great stress. He finds that as stress level gets very high, mental functioning of various sorts begins to deteriorate, sometimes catastrophically so (e.g., Baddeley, 1972).

A final issue I wish to clarify relates to the common belief that under conditions of high stress, the details of an event are "stamped into" a person's memory. This experience seems superficially at odds with the assertion I have just made that high stress leads to poor memory. The resolution of this apparent discrepancy is as follows.

Under conditions of high stress, the *fact* that the stress-producing event itself occurred could well be stamped in; it is unlikely, for instance, that a person would forget that she was robbed. The reason for this is that stressful events are very *salient*, and people tend to rehearse salient events over and over in their minds. This causes the event

to be stamped in.

However, this does not mean that the *details* of the event will be perceived and remembered correctly. Indeed, as I noted, under conditions of stress, details may very well be perceived incorrectly. This would mean that the incorrectly perceived details could get rehearsed over and over, along with the occurrence of the event itself, and memory for them would thus be very strong. This means that the person would be very confident in remembering the details even though they were incorrect. I will return below to the relation between confidence and accuracy.

Obviously, Mr. Mesley's encounter with the shooter was a highly stressful event. Mr. Mesley admits as much, stating that he refused to walk to the wooded area fearing that he would be killed. Additionally, the time just after Mesley and his wife were shot can only be described as a time of intense stress. According to his testimony, the individuals who attacked him and his wife were brandishing two shotguns, one of which was pointed "in [his] face" during the course of the attack, he was threatened that if he didn't hand over his money one of his assailants would "blow his f---in' head off", and Mesley was shot at close range in the face by one of these individuals.

3. Cross-racial identification

Cross-racial identification refers to the common scientific finding that people are less able to recognize members of another race than members of their own race. Such a cross-racial effect has been observed in numerous empirical studies (e.g., Malpass & Kravitz (1969)).

It is well established that there exists a comparative difficulty in recognizing members of a race different from one's own. Many possible explanations of the cross-racial effects have been offered. The best explanation, based on the research conducted, is that we process faces of a different race in a different way and that people are unconsciously more willing to guess at the identity of a criminal in a cross-racial situation than they are when a same-race identification takes place.

This case clearly involves the cross-racial identification of a Hispanic male by a white male, another problematic factor associated with the identification of Mr. Suarez Medina.

B. Factors that Bias the Witnesses' Interpretation and Memory

1. Post Event Suggestions and Biased Lineups

Post-event suggestions in general and a biased lineup (which is a form of post-event suggestion) can affect and even change a person's memory of an event in such a way that the memory becomes consistent with the suggestions. In the case of a biased lineup, for example, a witness can change his memory for the original crime such that his memory for the perpetrator is changed to resemble more the person he has just selected from the lineup (see, for example, Loftus & Ketcham, 1991).

This is not a case where some person, either intentionally or mistakenly, suggested to Mr. Mesley that Mr. Suarez Medina was the person who shot him. On the other hand, the fact that Mr. Mesley observed Mr. Suarez Medina on television where he was shown and described as a Mexican male on trial for shooting and killing a man in the same jurisdiction where Mesley was shot, coupled with the fact that Mesley's shooter had never been identified was potentially highly suggestible.

The photographic montage that was assembled shortly after Mesley saw Suarez Medina on television was not useful in determining if Mesley could identify the person who shot him. Instead, the only purpose of the montage was to determine whether Mesley could identify the person he saw on television days earlier. In this sense, the montage did more harm than good because it confirmed Suarez Medina as the shooter in Mesley's mind, possibly further distorting Mesley's memory.

To define a biased lineup, it is first necessary to define an *unbiased* lineup. To do this, assume that the suspect has never before been seen by the witness; i.e., that the

suspect is innocent. Given this assumption, an unbiased lineup is one in which the suspect has no greater probability of being identified by the witness than anyone else in the lineup. Conversely, a biased lineup is one in which the suspect has a greater chance than any of the other lineup members of being identified by the witness.

For simplicity, I will assume the usual six-person lineup (a suspect plus five fillers). In order for a six-person lineup to be entirely unbiased, it must satisfy five criteria.

a. **Conformity to the witness's description.** The suspect must not conform to the physical description provided by the witnesses any more than do the other five lineup members. To the degree that this criterion fails, a witness can, by the process of logical inference, narrow the set of lineup members whom he or she could plausibly select. In the extreme, such a logical process could be used to narrow the set of lineup members to the suspect alone.

b. Significant visual differences. The suspect's lineup photo must not be different in any significant visual respect from the lineup photos of the other five lineup members. To the degree that this criterion fails, there are two processes, other than a memory match, that could lead a witness to select the suspect's photo. First, attention is, in general, drawn to whatever part of a visual scene is unusual. Thus if one member of a lineup stands out from the others, attention will automatically be drawn to it. Second, the process of logical inference could again result in selection of the defendant: that is, a witness could infer (usually correctly) that, in constructing the lineup, the police had a unique photo of the suspect, but had a collection of generic pictures (e.g., mug shots or driver's license photos) from which they selected the other five lineup members.

c. Unconscious transference. The witness must not have had any opportunity to have interacted with the suspect prior to the crime in question. If such interaction may be inferred to have occurred, then a witness may identify a suspect on the basis of the suspect looking familiar from the previous encounter even if the suspect had not been the individual seen by the witness committing the crime. In memory research, this phenomenon is known as unconscious transference: The witness correctly recognizes an individual as someone the witness has encountered before, but misidentifies the circumstances of the previous encounter.

d. Double-blind procedures. The police officer who administers the lineup must not know who the suspect is. If the officer does know who the suspect is, the officer is in a position to provide conscious or unconscious cues to the witness (e.g., via subtle gestures or other body language) about who the suspect is, i.e., about whom the officer would like the witness to select. In the language of scientific methodology, an identification procedure should be carried out in a double-blind fashion. I might note that recently enacted suspect-identification guidelines in the state of New Jersey specify that double-blind procedures should be used whenever possible.

e. Sequential versus simultaneous lineups. Recent research has indicated that there is a dramatic difference between using a (standard) simultaneous lineup (wherein all photos shown at the same time) versus a sequential lineup in which the identification members are shown to the witness one-by-one. When the standard simultaneous procedure is used then, despite the presence of the "standard admonition", a witness tends to compare the photos to find the person who looks *most like* the perpetrator they saw commit the crime. The witness then tends to choose the lineup member who meets that criterion even if the match between the identified person and the witness's memory of the perpetrator is poor. In contrast if the lineup members are shown sequentially, the witness is more inclined to make an individual and independent decision for each lineup member. The bottom line is that false identifications are more likely with simultaneous than with sequential lineup procedures. Indeed, one recent overview has indicated that the false-identification percentage is 65% when a simultaneous procedure is used versus 32% when a sequential procedure is used. I note that the New Jersey guidelines mentioned

above also specify that sequential rather than simultaneous lineups should be used.

Another important aspect of lineups with respect to the possibility of false identification is the following. Any identification (correct or false) of a suspect is a two-step process. First, the witness must decide to identify *someone* from the lineup. Second, the witness must actually choose the suspect. Given that the suspect is innocent, the chances of a false identification are thereby increased to the degree that the witness chooses to undertake the first step-to make an identification to begin with. Normally procedures are taken to reduce the chance that the witness will make an identification unless the witness is very certain that *someone* in the lineup is a person whom the witness has seen before-the most obvious and pervasive such procedure is the standard admonition that "the perpetrator may or may not be in the lineup…" and so on. To the degree that the witness is very motivated to identify someone in a criminal investigation-either intrinsically motivated, or motivated by pressure from others-the chances are higher that the witness will choose to take the step of identifying someone which, assuming innocence, will increase the chances of a false identification.

Finally, it is important to realize that there are two consequences of a biased lineup. The first is the obvious one: A biased lineup will increase the chances that the witness will choose the suspect even if the suspect is in fact innocent. The second consequence of choosing the suspect from the lineup is less obvious, but probably more insidious. Once the witness has chosen the suspect this can (and probably will) trigger a process whereby the witness will reconstruct his or her memory of the original event such that the appearance of the suspect-an appearance acquired from the lineup-now plays a prominent role in the witness's memory for the original event. This reconstructed memory will form the basis for the witness to later (for example at trial) confidently identify the suspect as the culprit. This second consequence concerns *post-event information*, which is the topic of the next section.

2. Integrating Post-Event Information Into Memory

Suggested post-event information may or may not be integrated by the witness into his or her memory for the event. Some of the major determinants of whether or not post-event information will be integrated are these:

a. Post-event information is most easily integrated into memories that are incomplete to begin with. This is because the fewer the details resident in the original memory, the less likely it is that post-event information will conflict with something that already exists in memory. An incomplete memory could come about as a result of either little information being acquired about some culprit's appearance to begin with (e.g., due to some of the factors described above, such as lack of attention or lack of adequate time) and/or as a result of a great deal of time has elapsed between some original event and the time of test. As indicated above, there is good reason to believe that Mr. Mesley would not have had a great deal of opportunity to accurately memorize his assailant's appearance.

b. Post-event information is more likely to be integrated to the degree that it is plausible. In the present case, Javier Suarez Medina was a plausible suspect-a Hispanic male who robbed and shot a person in the same jurisdiction.

c. Post-event information is more likely to be integrated to the degree that the witness has strong motivation to integrate it. Mr. Mesley admits that he was highly invested in finding the person who shot him. He testified that over a period of time as he was driving down the street he would look at individuals and try to see if he could identify the individuals involved in the shooting. He further testified that he checked the 'wanted poster' published in the Times Herald weekly and that he regularly checked programs on television. When Mesley heard of the Cadena shooting he tried (unsuccessfully) to see pictures of the suspects. When he saw Suarez Medina, a Mexican male on trial for shooting a Cadena, he immediately called someone he knew in the police department. There are strong reasons to conclude that Mr. Mesley was strongly motivated to integrate the image of Mr. Suarez Medina into his memory.

3. Confidence and Accuracy

As indicated earlier, numerous studies have established that the confidence level that witnesses demonstrate regarding their memories of some event is the primary determinant of whether jurors accept such memories as accurate and reliable. This reliance, however, as I have also noted earlier, may well be ill-founded. A variety of researchers have demonstrated that the relation between confidence and accuracy is low especially when the original circumstances for forming a memory are poor (particularly when there is the potential for effects of potentially biasing expectations and/or inferences). For summaries and specific experiments, see Busey, Tunnicliff, Loftus, & Loftus (2000), Chandler, 1994, Deffenbacher (1980); Penrod & Cutler (1995); and Wells, Fegurson, & Lindsay (1981).

For example, Deffenbacher (1980) examined 45 experiments that had measured the relationship between confidence in some memory and the accuracy of that memory. In approximately half of those studies, there was the positive relation between confidence and accuracy that our intuitions would lead us to believe: that is, higher confidence was associated with higher accuracy. In the other half of the experiments, however, there was *no* relation (or, in some instances, even a negative relation) between confidence and accuracy.

Which result was found-that is, whether accuracy was or was not positively related to confidence-depended on the overall circumstances surrounding the formation of the memory. Favorable circumstances (e.g., good lighting, no stress.) lead to the expected positive relation between confidence and accuracy. However, unfavorable circumstances lead to no relation, or a negative relation between confidence and accuracy.

The reason for this is that when circumstances are generally unfavorable, the original perception is poor, and the resulting memory is filled with gaps. Suppose, for example, that a person experiences a near-accident in a car (say is almost hit by another car). Because of the brevity and stress of the situation, the person probably would not remember many details-for example, he or she might not remember the make or color of the other car, or whether or not there was a passenger in the car. These would be *gaps* in the person's memory.

But because the event was salient, the person would rehearse the event in his or her mind. In the process of rehearsing, the memory gaps would tend to be filled in. Such filling in could be random, it could be due to expectations, it could be due to inferences-it could be due to many things, few of them likely to be accurate. The resulting memory would therefore be generally inaccurate. But the rehearsal of this inaccurate memory would leads to a *strong* memory, in which the person would have relatively high confidence.

VI. Summary

This case raises two related concerns. First, there are compelling reasons to conclude that Javier Suarez Medina was misidentified by Mr. Mesley. Numerous factors exist in this case that raise serious issues regarding Mr. Mesley's ability to correctly identify Mr. Suarez Medina nearly two years after seeing a man under less than optimal conditions for 10-15 seconds.

There are also persuasive reasons to conclude that Mr. Suarez Medina's jury believed Mr. Mesley's testimony. Studies prove that juries tend to believe that a witness who is confident is also correct. Mr. Mesley repeatedly told Mr. Suarez Medina's jury that he was sure that Suarez Medina shot him. However, confidence does not necessarily correlate with accuracy.

In summary, this case is troubling, especially given the number of death row cases nationally where individuals were sentenced to death based on eyewitness identifications that were later conclusively shown to be false by scientific evidence

such as DNA. The evidence certainly supports a conclusion in this case that Mr. Suarez Medina was sentenced to death by a jury who had been allowed to consider a crime that he did not commit.

I declare under the penalty of perjury that the above is true and correct.

July, 2002.

GEOFFREY R. LOFTUS, Ph.D.

VII. References

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