IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, FLORIDA
CRIMINAL DIVISION "X"

CASE NO: 50-2017-CF-008722-AXXX-MB

STATE OF FLORIDA

vs.

SHEILA KEEN-WARREN,
Defendant
_____/

DEFENDANT'S MOTION TO SUPPRESS OR EXCLUDE IDENTIFICATION TESTIMONY AND OTHER EVIDENCE RELATED TO THE SPOTLIGHT CLOWN COSTUME

Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, Article I, section 16 of the Florida Constitution, and Florida Rule of Criminal Procedure 3.190(g), the Defendant, Sheila Keen-Warren, through undersigned counsel, moves this Honorable Court to suppress any out-of-court or in-court statements purporting to identify Sheila Keen-Warren as a woman who bought a clown costume from the Spotlight Capezio on May 24, 1990, or any other evidence related to that purchase. In the alternative, under sections 90.401, 90.403, and 90.801, Florida Statutes, Ms. Keen-Warren moves this Court in limine to exclude this evidence. Introducing this irrelevant and unreliable evidence at trial would deprive Sheila Keen-Warren of her rights to a fair trial and due process under the United States and Florida Constitutions. In support thereof, Ms. Keen-Warren states as follows:

INTRODUCTION

The Court should exclude the purported eyewitness identifications made by the Spotlight witnesses of Sheila Keen-Warren as a woman who bought a clown costume on May 24, 1990, and all other evidence related to the woman's purchases because: 1) the evidence is irrelevant because the eyewitnesses to Marlene Warren's murder will testify that the Spotlight clown costume is not

the costume worn by the shooter; 2) the Spotlight witnesses' statements are inadmissible hearsay because they do not fall under the statement of identification exception; 3) the Spotlight witnesses' purported identifications in 1990 resulted from an unnecessarily suggestive lineup procedure, which gave rise to a substantial likelihood of irreparable misidentification, and any probative value is outweighed by the danger of unfair prejudice; 4) the Spotlight witnesses' 1991 statements of identification are inadmissible hearsay and any probative value is outweighed by the danger of unfair prejudice; and, 5) in-court identifications by the Spotlight witnesses would be tainted by unnecessarily suggestive procedures of out-of-court identifications and decades of media exposure to Sheila Keen-Warren's photographs and speculation about her involvement in Marlene Warren's murder.

STATEMENT OF FACTS

I. Police in May 1990 investigated information about a woman who bought a clown costume two days before Marlene Warren's murder.

The Spotlight Capezio (Spotlight) was a shop in West Palm Beach that sold dance shoes, dance apparel, and costumes.[1] Clown costumes were popular for children's birthday parties, and Spotlight sold them throughout the year.[2]

On Saturday, May 26, 1990, just after Marlene Warren's murder, "numerous detectives were . . . assisting in checking . . . costume shops and other places . . . [offering] rentals of clown costumes."[3] One of those detectives visited Spotlight and spoke with Linda Napoleon, the assistant

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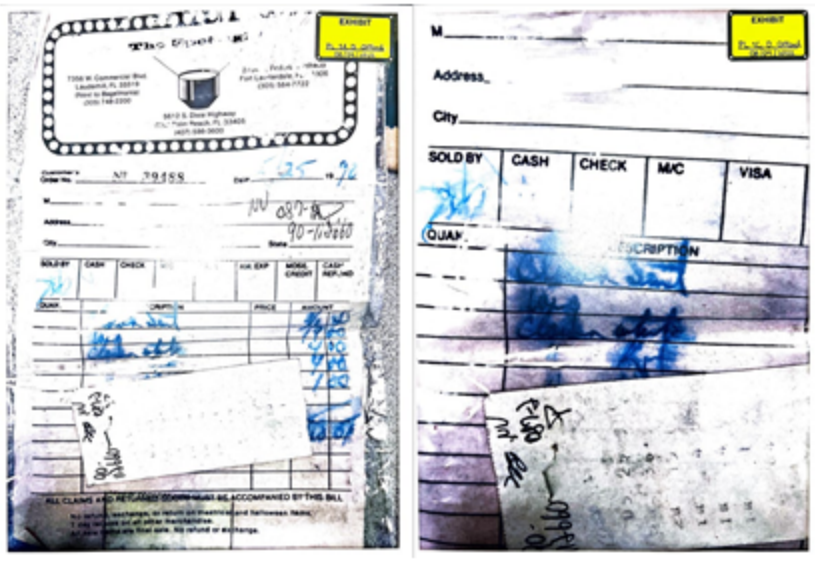
[1] Spotlight was "[o]ne of the most popular costume shops in the area at the time." State's Resp. to Def.'s Mot. to Set Conditions of Pretrial Release [D.E. No. 410], at 7.
[2] Napoleon Dep. 19:4-19.
[3] Williams Supp. Report 16, at 11, June 19, 1990.

manager.[4] Napoleon said she was at work the evening before with Small and Rosales. Around 5:30 PM, she received a call from a woman asking about buying a clown costume, wig, and makeup. The caller did not ask about masks. She did not have an accent. When Napoleon told her the store was about to close, the woman said she would be right over. Napoleon asked Deborah Small[5] and Dinah Rosales[6] to stay and wait for the woman, while Napoleon left for the day. When Napoleon got to work the next morning, she saw a receipt for the purchase of items similar to the ones that the woman caller had discussed. She told the detective about the call and gave him Small and Rosales's names.



Spotlight receipt[7]

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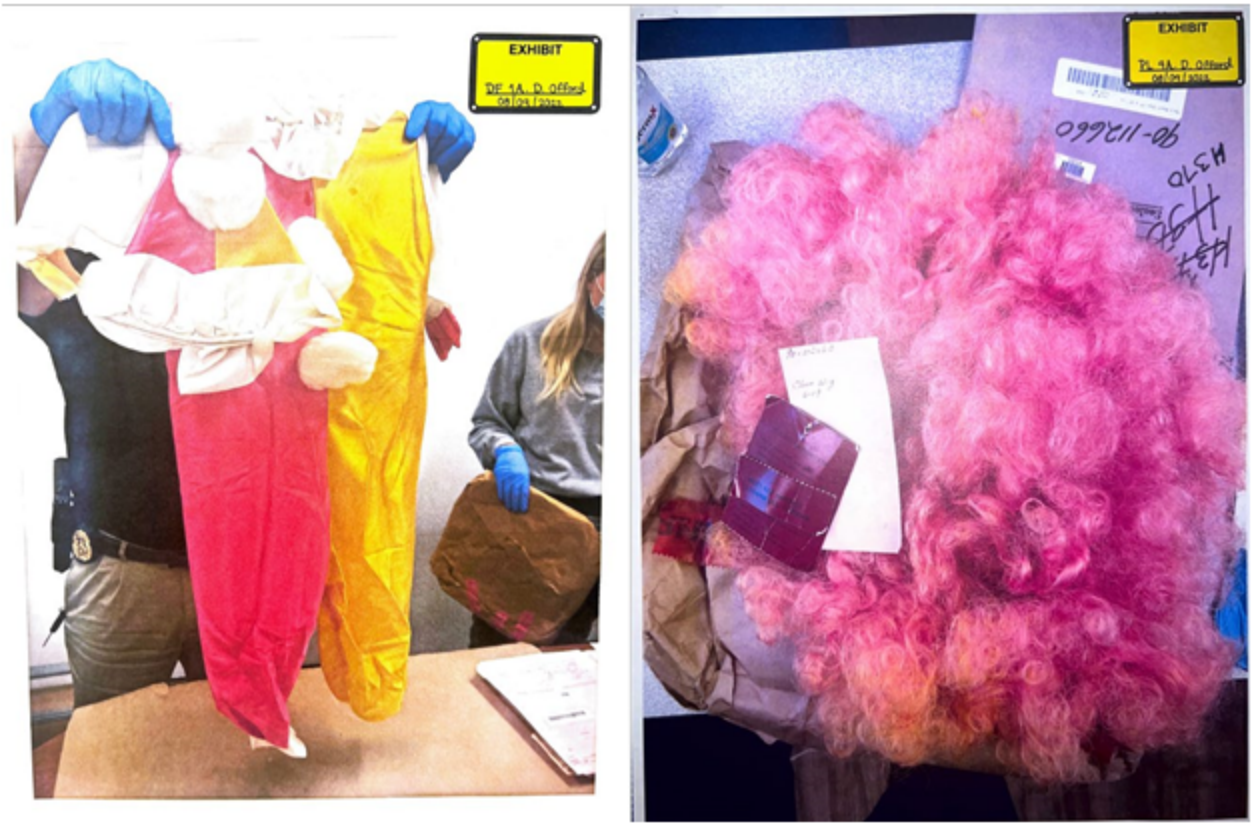
[4] Napoleon Dep. 33:22, Sept. 21, 2022. Napoleon's 1990 interview was neither written nor recorded. *Id*. at 36:20-24.

[5] Small Dep. 4:23-24, Oct. 4, 2019 (Small Dep. I). Small's last name changed to Offord when she married in 2006. *Id*. at 4:17-18. For consistency, she will be referred to as Small.

[6] Since the incident, Rosales married. Her last name is now Gill. Rosales Dep. 3:15-18, July 28, 2020. For the sake of consistency with how her name was referenced in contemporary reports, she will be referred to as Rosales throughout this Motion. Rosales said another employee, Miranda Sukowski, was the first person to tell her about the Marlene Warren murder. *Id*. at 3:13-21.

[7] Small Dep. II, at State's Ex. 1A & 1C.

Also on Saturday, May 26, 1990, Castricone, the manager, phoned Detective Williams with information she said might relate to the Marlene Warren murder. Castricone said a woman bought a clown costume from Spotlight on Thursday around 6 PM. Castricone said she was not at the store when the woman made the purchase, but Small and Rosales were. Detectives collected an orange wig, clown suit, and makeup kit from Spotlight that employees identified as similar to the ones a woman purchased on May 24, 1990:



Spotlight clown suit and wig[8]

[8] Small Dep. II, at Def.'s Ex. 1A & State's Ex. 9A, Aug. 9, 2022. Although apparently provided to detectives as a clown suit similar to the one sold on May 24, 1990, albeit in a child's size, Small later testified that it would have been cut differently and one side would have been orange, rather

On Sunday, May 27, 1990, Detective Williams interviewed Rosales at the Palm Beach County Sheriff's Office (PBSO) Detective Bureau. Rosales said a white female bought a clown costume from Spotlight on Thursday, May 24, 1990, at around 6 PM, just after it had closed.[9] The woman drove up in a "dull colored large car" and walked up to the store's door, which was locked. The woman said she just needed something "real quick" and the employees let her in. The woman bought a yellow and hot pink clown outfit, an orange wig, and clown makeup. Although the store sold many kinds of masks,[10] the woman did not show interest in purchasing one. She said she needed extra makeup to ensure full coverage. Rosales described the woman as "odd, due to the fact that she walked and looked like a man." Her body was wide framed but not fat. The woman had little or no makeup on and had her dark brown hair pulled back in a ponytail. She wore faded jeans. She did not speak with any noticeable accent. Rosales did not describe the woman's eye color or facial features or provide an estimate of her age, height, or weight.

According to his dictated notes, which were subsequently transcribed into a report, Detective Williams personally prepared and administered a six-photo lineup that contained a photograph of Sheila Keen-Warren taken May 27, 1990, the same day he interviewed Rosales. Unlike many other interviews conducted during the investigation, Detective Williams did not record his interview with Rosales. His report describing the lineup does not reflect any instructions that he gave Rosales. According to Detective Williams's report: "Rosales immediately pointed to

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than yellow. *Id.* at 26:1-17. Small described the wig as a "traditional clown wig," not the type with a skull cap. *Id*. at 24:8-19.

[9] Williams Supp. Report 16, at 14.

[10] Neil Santaniello, *Masquerade: Customers Seeking Kookiness in Getups*, Sun Sentinel, Oct. 30, 1985, at 1B & 4B.

a photograph of [Sheila Keen-Warren] and stated that out of the six photographs, [Sheila Keen-Warren's photograph] *looked most like* the subject that bought the clown costume."[11] Rosales did not identify Sheila Keen-Warren as the woman who purchased the clown outfit. Detective Williams asked Rosales not to talk with Small or discuss the lineup with her.

Lineup administered to Dinah Rosales on May 27, 1990

[11] Williams Supp. Report 16, at 15 (emphasis added).

Photo of Sheila Keen-Warren from Rosales lineup (taken May 27, 1990)

On Monday, May 28, 1990, Detective Williams interviewed Small at the PBSO Detective Bureau.[12] Small also told Detective Williams about a "white female" who bought a clown costume on Thursday, May 24, 1990, around 6 PM. The woman drove an "old car possibly medium sized." She had long brown hair and was about 5' 9" and 140 pounds. The woman wore faded jeans, a blue or khaki "jean type of a shirt," flat heeled shoes, and no makeup. Small did not describe the woman's eye color or facial features or provide an estimate of her age. The woman told Small she had driven a while to reach the shop and that she had called earlier in the day about prices. She bought the cheapest clown costume, one that was "yellow orange on one side and a candy pink color on the other side," for $36.50. The woman also bought an orange wig and a "pinky red clown

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[12] *See generally* Williams Supp. Report 16, at 15-16.

nose." The woman did not ask about or select a mask for purchase. She paid for everything with $20 bills. Small denied speaking with Rosales in the past couple of days.

According to his notes, Detective Williams also prepared and administered a photo lineup containing the same photo of Sheila Keen-Warren taken the day earlier, but with her photo in a different position in the array.[13] Detective Williams did not record his interview or his administration of the lineup. In his written report, Detective Williams did not document what instructions he gave Small. According to Detective Williams, Small "immediately pointed to [Sheila Keen-Warren's photograph] and stated, that [the photo] *looked somewhat like* the customer who had purchased the clown costume on 5/24/1990."[14] Small then continued to look at the photos and "began to waiver" and stated that another photo, in position #6, "also resembled the woman in the fact that the nose on photograph #6 was very similar also." *Id*. Small did not tell Detective Williams that any of the women in the photos *actually were* the customer.

Lineup administered to Small on May 28, 1990

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[13] Small recalls being shown "a book of photos" with multiple photos on each page. Small Dep. I 25:11-19; *see also* Small Dep. II 17:20-23 ("large binder . . . at least 35, 40").
[14] Williams Supp. Report 16, at 16 (emphasis added).

II. The media reported that Sheila Keen-Warren was a suspect in Marlene Warren's murder and published photos of her.

Police initially told the media that they did not know if the clown who shot Marlene Warren was a man or a woman.[15] Police said the shooter was "wearing a Bozo costume with red hair, an orange nose, and white gloves."[16]

Bozo the Clown[17]

On June 6, 1990, The Palm Beach Post (The Post) reported that the detectives investigating Marlene Warren's murder were examining phone records for Sheila Keen-Warren and her then husband, Richard Keen.[18] On September 6, 1990, The Post reported that Sheila Keen-Warren was a suspect in the murder, and summarized the "tentative identifications" by the two Spotlight

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[15] Ron Kozlowski, *Clown shoots woman in Wellington*, P.B. Post, May 27, 1990, at 1A.
[16] *Id*.
[17] Still image, credited to WCVB-TV, published in Associated Press, *TV personality known for playing Bozo the Clown dies at 89*, Tampa Bay Times, Mar. 22, 2018, https://www.tampabay.com/news/obituaries/TV-personality-known-for-playing-Bozo-the-Clown-dies-at-89_166627265/.
[18] Ron Kozlowski, *Police inspect victim's phone records in clown slaying*, P.B. Post, June 6, 1990, at 1A & 7A; *see also* Lori Rozsa, *Records Subpoenaed in Probe*, Miami Herald, June 5, 1990, 1B.

witnesses, which were included in the search warrant application.[19] In October 1990, prosecutors arguing against lowering Michael Warren's bond for an unrelated case told the court that the clown who shot Marlene Warren was a woman.[20] On November 11, 1990, The Post published a photo of Sheila Keen-Warren in a front-page article discussing her as a suspect in the Marlene Warren murder:[21]

The article, which continued on 10A,[22] also included a second photo, apparently from a high-school yearbook:

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[19] Peter Whoriskey, *Woman investigated in 'clown' murder: apartment searched for link to flowers, costume*, P.B. Post, Sept. 6, 1990, 1A & 16A; *see also* Peter Whoriskey, *Man quit lunches with woman days before clown killed wife*, Palm Beach Post, Sept. 25, 1990, at 1A & 10A (discussing Sheila Keen-Warren as a suspect); Tim Pallesen, *Case a ploy, husband in clown murder says*, P.B. Post, Oct. 27, 1990, at 1B & 3B (same).

[20] Christine Stapleton, *Warren freed after bond cut to $50,000*, P.B. Post, Oct. 31, 1990, 1B.

[21] Sean Somerville, *Woman couldn't be killer, kin say*, P.B. Post, Nov. 11, 1990, at 1A.

[22] *Id*. at 10A; ; *see also* Neil Santaniello, *Car-lot owner turns self in charges unrelated to murder case*, Sun-Sentinel, ("The search for the killer has focused on Sheila Keen, who repossessed cars for A Bargain Motors and had been having an affair with Warren, detectives said."); Ron Kozlowski, *Husband, woman still suspects year after clown killing*, P.B. Post, May 24, 1991, at 1B.

At a press conference to mark the one-year anniversary of the murder, detectives told the press that "there is no doubt in their minds that Sheila Keen was the killer clown, and that Marlene Warren's husband Michael played some part in the murder."[23]

The Spotlight employees followed the print and television news coverage of the murder investigation closely, discussing and gossiping about the case.[24] According to the manager of Spotlight, both Small and Rosales collected the newspaper clippings and kept them at the shop,[25] including the November article.[26]

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[23] Lori Rosza, *Detectives we know who clown killer is*, Miami Herald, May 24, 1991, 1B; *see also* Mike Folks, *Clown murder case lingers*, Sun-Sentinel, May 26, 1991, 1B; Christine Stapleton, *"I'm the victim," claims man whose wife was killed by clown*, P.B. Post, May 26, 1991, 1B.
[24] Small Dep. I 53:18-54:9; Napoleon Dep. 41:3.
[25] Napoleon Dep. 39:11-15.
[26] Investigative Notes of SAO Investigator Tim Valentine, at 1, June 20, 1991 (Valentine Investigative Notes).

III. The State Attorney's Office interviews Spotlight witnesses in 1991.

On June 19, 1991, Assistant State Attorney (ASA) Paul Moyle interviewed Small at the State Attorney's Office (SAO). Investigator Tim Valentine participated in the questioning. Small said she learned about Marlene Warren's murder when she got a phone call from her boss, Barbara, and then later from reports in the news. Moyle asked if those news reports included "any descriptions of the alleged killer." Small replied:

> I am sure that there were, but at this point in time it is fuzzy as to what they were. It seems to me that I heard multiple descriptions. Some in conjunction with the person that I sold a clown costume to, that Dinah [Rosales] and I both sold a clown costume to, some that vary the description of the killer.[27]

Small told Moyle that she subsequently spoke to deputies who came by the store asking about the clown suit she and Rosales sold. *Id*. at 4:13-17, 5:1-14. Then someone called and asked her to come down to Gun Club to "make a positive I.D." *Id*. at 5:22-6:7. Small recalled being shown "a large booklet like a photo booklet." *Id*. at 6:17-22. She reviewed about 40 photographs in a binder. *Id*. at 7:2-7. Small said,

> There were two pictures of women in particular that were very close to the person that I remembered coming into the store the previous week. However, with the clarity and the size of the pictures it was difficult to make a positive identification so I had to base it on those two close ones.

Id. at 7:8-16. "I let them know I was confused as to which one it was because of the discrepancies of the time frame and the photo itself." *Id*. at 7:21-23. When asked what she meant by "time frame," Small responded,

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[27] Small Sworn Interview, at 3:16-22, June 19, 1991.

> The pictures that I looked at appeared to be approximately high school age or earlier twenties. The person that I remembered that came into the store was older than that. The manner in which she wore her hair was very different than in the photo, it was difficult for me to say precisely, yes, I am sure that this was the person.

Id. at 8:1-8. Small said in the end she "did select one." *Id*. at 8:11. She told Moyle she was 75% certain of her selection. *Id*. at 8:19. She could not recall what further conversation she had with the detectives after selecting a photograph. *Id*. at 8:20-25. Her 1990 interview was not recorded, as far as she recalled. *Id*. at 9:8-10.

Moyle also asked Small to describe the woman's visit to Spotlight on May 24, 1990. Small said,

> A woman came to the door and knocked on the door and basically stated like many customers will, that there is something that I must have, I have to get it right away, I will be five minutes, I know what it is that I want.

Id. at 10:4-8. The woman was friendly and apologetic for being late. *Id*. at 15:21. "She was in and out of the store in record time." *Id*. at 17:19-20.

Small could not describe any vehicle the woman may have arrived in because she did not look. *Id*. at 10:18-19. There was nothing outstanding about the woman's voice. *Id*. at 11:7. She was talking "normal fast because she was in a hurry as were we." *Id*. at 11:8-11. The woman was about 5' 7" and walked with a "mannish gait." *Id*. at 11:19-20. She was dressed in "very mannish clothes, dark straight piped legged jeans, like men's jeans and a men's jeans shirt." *Id*. at 11:21-23. "[S]he had what [Small] considered to be a man's body frame," i.e., "not having curves where a woman has curves." *Id*. at 11:23-12:1. The woman's shoes were dark brown "shoes like men's shoes, almost like a short boot," "up to the base of the ankle," but "not an army boot." *Id*. at 12:7-11, 22:1-2. She did not wear any jewelry or makeup and had "at least shoulder length chocolate brown hair" pulled back "extremely - and then pinned up in the back." *Id*. at 12:14-17, 20-21.

The clown suit that Small showed the woman "was very long and it could fit a six-foot man." *Id*. at 13:12-14. The customer said the suit was for a woman. *Id*. at 13:16-17. "The one she selected was for an individual that would be almost six feet in height, full size adult." *Id*. at 13:17-19. Small "brought that to the woman's attention so that she could properly choose the correct height and size."[28] *Id*. at 18:13-15. The clown suit was "orange and gold on one side and hot pink on the other" with a seam down the center separating the two halves. *Id*. at 13:21-22, 14:5. She also chose a solid-colored orange wig to go with the costume. *Id*. at 13:22-14:1. Small could not recall anything about the woman buying a clown nose. *Id*. at 19:23-20:3.

Small said that, as she started ringing up the costume she helped the woman select, Rosales asked the woman if she needed any makeup. *Id*. at 14:13-16. They discussed "how much coverage was needed." *Id*. at 14:17-18. They chose a "multicolored clown kit, a relatively small pot . . . red, blue, one other color and then white. *Id.* at 14:23-25. But "there [was] very little of the white in that kit," so Rosales "asked her if she wanted more, that there was not enough for full coverage . . . ." *Id*. at 14:25-15:3.

On that same date, Moyle and Valentine also interviewed Rosales at the State Attorney's Office.[29] She told Moyle that she and Small "were trying to get rid of her." *Id*. at 6:24-25. The woman's hair was "very long, straight" down to the midsection of her back. *Id*. at 12:20-13:4. Her hair was a medium shade of brown, lighter than Rosales's, which was dark brown. *Id*. at 13:18-23, 25. The woman's eyes might have been a medium brown, lighter than Rosales's. *Id*. at 25:2-4. Her

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[28] Small's comments imply that the woman was shorter than 6'. At her deposition to perpetuate testimony on August 9, 2022, she said the woman was taller than her and estimated the woman's height at 5' 8". Small Dep. II 12:22-23. Small was 5' 7." *Id*. at 27:15-16.
[29] *See generally* Rosales Sworn Interview, June 19, 1991.

body appeared "manly" to Rosales, not "like a feminine curved body," with a wide, flat bottom. *Id*. at 14:14-16, 14:25-15:3. The woman wore plain jeans. *Id*. at 14:19. There was nothing unusual about how the woman walked, but "she didn't walk real feminine." *Id*. at 16:16-19. Rosales did not know if the woman was taller than her or not. *Id*. at 17:6-9. The woman may have been in her early thirties, but Rosales said she was not good at estimating ages. *Id*. at 24:5-10. She could not recall if the woman wore any jewelry because "we were trying to get her out of there so fast." *Id*. at 16:10-11. Rosales could not recall which makeup she sold the woman, explaining "[i]t was kind of real fast." *Id*. at 18:13-18.

Rosales said that, when Detective Williams showed her the six-photo lineup, she thought one photo looked familiar right away, but she "didn't immediately say I know her." *Id*. at 28:8-17. Rosales remembers that the woman in the photo she identified was wearing black earrings that were squared "maybe circled at the end kind of pointed." *Id*. at 29:25-30:4. Rosales could see the ears because the woman's hair was "pulled back" and "all down behind her back." *Id*. at 30:4-6, 32:10-11. She recalled telling Detective Williams that she was "not sure" it was the customer. *Id*. at 29:18-20. "The picture wasn't like the picture when I saw her," Rosales told Moyle. *Id*. at 32:12-13. After being pressed repeatedly by Moyle to say how certain she was of the identification, Rosales said,

> It has been a long time. I have never – I didn't even – I haven't seen this person again, ever. I haven't seen the picture ever again. It is hard to tell, you know. I mean it has been a year, it is real hard to say. I am positive, I am positive – it was a long time ago, I know what I felt inside. I felt like she looked like the person that walked in, it really did look like her.

Id. at 35:7-16.

On June 20, 1991, Rosales phoned SAO Investigator Valentine to tell him that, after the June 19 interview, she returned to Spotlight, where she, Small, and Napoleon discussed the case.[30] Small and Napoleon showed her a photo of Sheila Keen-Warren in a clipping of a November 1990 article from The Post. Rosales claimed she had never seen the article before and was 100% sure that Ms. Keen-Warren was the woman who bought the clown outfit on May 24, 1990. Rosales claimed she was positive that the woman in the photo in The Post was the woman who bought the clown suit.[31] Rosales said the photo in the paper was "a more recent picture because the picture I saw at the police station was . . . much younger" with hair "really nicely brushed up," with "earrings on," a "little bit of makeup," and "a little bit of lip gloss, a little bit of blush on." *Id*. at 7:5-14. Her hair was "all straight, parted in the middle all down." *Id*. at 7:18-22.

After Rosales's interview, Valentine called Small to ask for her version of the conversation, and later stopped by Spotlight to collect the newspaper clipping.[32] Small said when the detective originally showed her the photo, she was only 75% sure. After viewing the newspaper clipping, she was 90% sure. She explained the discrepancy by saying that the photos Detective Williams showed her were of "high school age women." The clipping was the first page of the November 11, 1990, article in The Post:

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[30] Valentine Investigative Notes.
[31] Rosales Sworn Interview 5:2-7, June 20, 1991.
[32] Valentine Investigative Notes.

Woman couldn't be killer clown, ki i say

By SEAN SOMERVILLE
Palm Beach Post Staff Writer

About two years ago, Sheila Keen walked into Paul's Parts and Equipment in Pahokee wearing a clown costume.

An employee at the shop, where Keen was a regular customer, said she had dressed that way to entertain her infant son and other children.

The lingering question today, more than five months after Marlene Warren of Wellington was fatally shot by a clown bearing flowers, is whether Keen donned a clown costume again May 26 and shot Warren as she answered her door.

Keen, 27, became a focus of the probe after police interviewed witnesses and found evidence linking her to the clown costume, red and white carnations left at the scene, the alleged getaway car and the dead woman's husband.

'She's too sweet a person for this to happen.'

Police, who questioned Keen, have yet to charge anybody with the murder. Prosecutors in West Palm Beach said two weeks ago the person who murdered Marlene Warren is a woman but refused to elaborate.

Friends and relatives who have known Keen in Indiantown, Pahokee and Loxahatchee are stunned that she has been connected to the crime.

"She's too sweet a person for this to happen," said Raymie Sheltra, a cousin of Keen's in Indiantown.

But some say her relationship with a man convicted of drug trafficking might have changed the Glades girl they knew.

The former Sheila Sheltra had wealthy tastes and a number of boyfriends before she married Richard Keen and entered the thorny business of repossessing cars, friends said.

Richard and Sheila Keen picked up the cars of people who missed payments for Michael Warren, Marlene's husband. Michael Warren owns a car dealership and car rental agency in West Palm Beach.

Please see KEEN/10A

MURDER MYSTERY

Richard Keen Sheila Keen Michael War

Sheila Keen, 27, focus of an investigation into Marlene Warren's murder, is married to Richard Keen (left). They both worked for Marlene's husband, Michael Warren, with whom Sheila was rumored to be having an affair.

Newspaper clipping

There is no notation in Valentine's notes indicating he knew that the same article from The Post had a second page containing a photograph closely resembling the one Rosales and Small recall Detective Williams showing them.

ARGUMENT

> [R]eliability is the linchpin in determining the admissibility of identification testimony.
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> *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).
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> Since [*Neil v. Biggers*, 409 U.S. 188 (1972)] was decided, additional social science research, as well as actual cases, have taught us much about the fallibility of eyewitness identification and the danger of relying too heavily on eyewitness identification as absolute proof of a defendant's guilt.
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> *Rimmer v. State*, 825 So. 2d 304 (Fla. 2002) (Pariente, J., concurring in part and dissenting in part).

The Court should exclude the purported eyewitness identifications made by the Spotlight witnesses and other evidence related to the May 24, 1990, customer and her purchases because: 1) the evidence is, at best, conditionally relevant, and the State will be unable to establish preliminary facts necessary to render the evidence admissible because the eyewitnesses to the murder will testify that the Spotlight clown costume is not the costume worn by the shooter; 2) the Spotlight

witnesses' statements are not admissible under the statement of identification exception to hearsay; 3) the Spotlight witnesses' purported statements of identification were the product of an unnecessarily suggestive lineup procedure, which gave rise to a substantial likelihood of irreparable misidentification, and any probative value is outweighed by the danger of unfair prejudice; 4) the Spotlight witnesses' 1991 statements of identification are inadmissible hearsay and any probative value is outweighed by the danger of unfair prejudice; and, 5) in-court identifications by the Spotlight witnesses would be tainted by unnecessarily suggestive procedures of out-of-court identifications and decades of media exposure.

I. The Court should either exclude the Spotlight evidence as irrelevant or preclude discussion or introduction of the evidence until making preliminary findings of fact that would establish its conditional relevance.

The State's theory of admissibility for the Spotlight evidence is that the person who purchased the clown suit from Spotlight was the same person who shot Marlene Warren.[33] Thus, the relevance of the Spotlight evidence depends on a preliminary fact: whether the State can establish that the Spotlight costume was the one worn by the shooter. *See* § 90.105(2). Without evidence connecting the Spotlight purchases on May 24, 1990, to the costume worn by the shooter, any evidence related to Spotlight is irrelevant and thus inadmissible. *See* § 90.401.

The Spotlight employees said they sold an orange and candy pink clown suit, orange clown wig, red clown nose, and clown makeup. PBSO obtained a sample clown suit that resembled the appearance of the clown suit identified by Spotlight staff as similar to the one bought by the woman

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[33] *See, e.g.*, State's Resp. to Def.'s Mot. to Set Conditions of Pretrial Release [D.E. No. 410], at 18-19 (referring to purported identifications of Sheila Keen-Warren as the Spotlight customer as "extremely compelling evidence of her guilt").

on May 24, 1990. But that clown suit is not the one described by the eyewitnesses to Marlene Warren's murder. Joseph Ahrens said the clown was wearing a gray jumpsuit, like a mechanic's uniform.[34] Wendell Pratt said the clown was wearing a white clown suit with red hearts or diamonds. *Id.* Mindy Perez said the suit had blue dots on it. *Id.*

Ahrens described the wig the clown wore as the same as Bozo the Clown: orange, out to the sides, and bald on top.[35] Wendell Pratt[36] and Perez[37] said the clown was wearing a red wig.

Jean Pratt and Ahrens also said the shooter was wearing a mask. Ahrens, Jean Pratt, and Wendell Pratt all said the shooter was wearing white gloves. Perez did not see his hands. The May 24 Spotlight customer, however, did not talk about or buy a mask or gloves.

Crucially, none of those eyewitnesses to the shooting identified the Spotlight clown suit as the one worn by the shooter. Three eyewitnesses have also said that the Spotlight wig is not the wig worn by the shooter, while the other could not recall. And Ahrens, who was familiar with Sheila Keen-Warren and her appearance, described the clown as a skinny 6' or taller man, whereas he described Sheila Keen-Warren as a 5' 6" woman with a "big frame."

Finally, unlike the fresh flowers found at the murder scene, there was no evidentiary basis to determine a timeframe for when the clown costume worn by the shooter was obtained. The fresher the flowers appeared, the stronger an inference that they were purchased recently and thus

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[34] *See generally* Def.'s Written Summation on Def.'s Mot. to Set Conditions of Pretrial Release [D.E. No. 445], and evidence offered in support.
[35] Ahrens Sworn Interview I, at 10:18-11:11, May 26, 1990; *see also* WJNO Interview Part III, at 9:8-10; 11:6-19. In his 1991 by Investigator Valentine, Ahrens said the wig was "orange, yellow, green," "just a bunch of colors." Ahrens Sworn Interview II, 4:16-24, June 28, 1991.
[36] Wendell Pratt Sworn Interview, at 4:6-7, May 26, 1990 ("I looked right at him. All it was was a clown outfit, big, red wig, big ole red nose, white and red outfit.").
[37] Perez Sworn Interview, at 8:20-25.

nearby. But the assumption that the clown suit was purchased recently and locally was not supported by any evidence. Since there was a "large clown community at the time,"[38] clown costumes were not unique items, as the numerous clown sightings reported to police immediately after Marlene Warren's murder demonstrate.[39]

Absent evidence identifying the Spotlight clown suit as the shooter's clown suit, the identity of the Spotlight customer is not relevant to prove any material fact in this case. In other words, because no witness will identify the items purchased at Spotlight as those worn by the shooter, the State will be unable to "connect up" the preliminary facts related to Spotlight with the ultimate facts of the homicide. The Court therefore should exclude the Spotlight testimony and other evidence as irrelevant. *See* § 90.401; *see also State v. Hampton*, 44 So. 3d 661, 664 (Fla. 2d DCA 2010) (holding that, absent preliminary or foundational evidence identifying substance as cocaine and establishing that it was the substance received at the scene, "the substance has no connection to this alleged crime and it is legally irrelevant.").

In the alternative, in the interest of justice, the Court should preclude the State from referring during its opening statement to the Spotlight purchases and from introducing any testimony or other evidence related to the Spotlight purchases unless and until it is able to establish conditional relevance through voir dire of the eyewitnesses to the shooting.[40] *See* § 90.105(3).

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[38] Small Dep. II 14:22-23.
[39] Clown Sightings File, attached as Ex. 1 to Def.'s Addendum to Mot. for Reconsideration and Mot. for Issuance of Written Opinion on Order Denying Def.'s Second and Third Motions to Compel the State to Produce *Brady* Information [D.E. No. 866].
[40] But, given the posture of this case, any such testimony would constitute a discovery violation. *See Scipio v. State*, 928 So. 2d 1138, 1145 (holding that failure to disclose to defendant a material change in deposition testimony constituted reversible error).

II. Purported out-of-court statements of identification made by Rosales and Small are inadmissible under § 90.801(2)(c) because (a) neither person was a witness nor victim of the murder, and (b) they constitute descriptions, not statements of identification.

An out-of-court statement of identification of a person made after perceiving a person avoids the general prohibition against hearsay where (1) the declarant testifies at trial; and, (2) the declarant is subject to cross-examination. § 90.801(2)(c). The exception is limited, however, to statements made by witnesses or victims of a crime. *Ibar v. State*, 938 So. 2d 451, 462 (Fla. 2006); *Jenkins v. State*, 107 So. 3d 555, 556 (Fla. 1st DCA 2013) ("[T]he phrase 'identification of a person made after perceiving him' refers to the witness seeing a person after the criminal episode and identifying that person as the offender.").

In *Jenkins*, the victim of an armed robbery testified that she called her friend immediately after the robbery and said he had just seen "Richard" "riding his bike up in the streets." *Jenkins*, 107 So. 3d at 556. The court held that it was reversible error to admit the friend's statement under section 90.801(2)(c) because –

> there was no evidence that [the friend] was present during the commission of the crime soon thereafter. Thus, he would not qualify as a victim of or a witness to the crime. Moreover, this statement was not one of identification because [the friend] never stated that Appellant was the person that committed the crime.

Id. Since neither Rosales nor Small were witnesses or victims to the murder, nor did they identify Sheila Keen-Warren as the person who committed the murder, their out-of-court identifications constitute inadmissible hearsay. *See id*.

Rosales and Small's out-of-court statements about the 1990 lineups are also inadmissible under section 90.801(2)(c) because they constitute descriptions, not statements of identification. Rosales and Small merely conveyed that the photograph of Sheila Keen-Warren was the photograph that most resembled the Spotlight customer. Small pointed out that another

photograph, not Sheila Keen-Warren's, also resembled the customer. A description of a person's appearance or a statement that someone resembled another person are not statements of identification. *See Puryear v. State*, 810 So. 2d 901, 906 (Fla. 2002) (out-of-court descriptions not admissible under § 90.801(2)(c)); *Swafford v. State*, 533 So. 2d 270, 276 (Fla. 1988) ("An 'identification of a person after perceiving him,' subsection 90.801(2)(c), is a designation or reference to a particular person or his or her photograph and a statement that the person identified is the same as the person previously perceived."). A statement that a person most resembles a photograph is merely a description and thus constitutes inadmissible hearsay. Had Ahrens or Perez said that, out of six photographs shown to them, a photograph of Bozo the Clown "most resembled" the shooter, that statement would not constitute a statement of identification of Frank Avruch[41] as the shooter. Similarly, during the 1990 lineups, Rosales and Small's statements that photograph(s) resembled the Spotlight customer merely constituted descriptions and not statements of identification. As such, they are inadmissible hearsay. *See Brown v. State*, 294 So. 3d 367, 371 (Fla. 4th DCA 2020); *Johnson v. State*, 199 So. 3d 433, 435-36 (Fla. 4th DCA 2016).

Accordingly, this Court should exclude Rosales and Small's purported out-of-court statements of identification because neither Rosales nor Small were witnesses to the murder, and their statements constitute descriptions, not statements of identification.

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[41] *See* Associated Press, *TV personality known for playing Bozo the Clown dies at 89*, Tampa Bay Times, Mar. 22, 2018, https://www.tampabay.com/news/obituaries/TV-personality-known-for-playing-Bozo-the-Clown-dies-at-89_166627265/.

III. The Court should suppress the 1990 lineup identifications because they resulted from the detectives' unnecessarily suggestive procedures, which gave rise to a likelihood of irreparable misidentification.

The Court should exclude Rosales and Small's 1990 identifications because they are the product of impermissibly suggestive police methods that gave rise to a substantial likelihood of misidentification. The dangers of misidentification by witnesses who are shown photo lineups are well established and not in reasonable dispute. "[E]yewitness identification can actually be extremely unreliable." *Rimmer*, 825 So. 2d at 337 (Pariente, J., concurring in part and dissenting in part) (quoting Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 Pace L. Rev. 81 (1994)); *see also State v. Guilbert*, 49 A.3d 705, 721 (Conn. 2012) ("The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification."); *State v. Wright*, 206 P.3d 856, 863 (Idaho Ct. App. 2009) ("In recent years, extensive studies have supported a conclusion that eyewitness misidentification is the single greatest source of wrongful convictions in the United States.").

Of the 367 exonerations based on DNA evidence in the United States, 69% of the original convictions involved eyewitness identifications.[42] At least 25 states have adopted legislation, issued court rules, or implemented measures to voluntarily comply with reforms recommended by

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[42] The Innocence Project, *Eyewitness Identification Reform: Mistaken Identifications are the Leading Factor in Wrongful Convictions*, available at https://innocenceproject.org/eyewitness-identification-reform/; *see also* The Innocence Project of Florida, *Wrongful Conviction Contributing Factors*, available at https://www.floridainnocence.org/contributing-factors ("The most common element of all wrongful convictions later overturned by DNA evidence has been eyewitness misidentification.").

the Innocence Project to reduce the dangers of eyewitness misidentification.[43] In recognition of the abundant scientific evidence on factors causing misidentifications, the U.S. Department of Justice (DOJ) issued a guide for law enforcement that recommended double-blind and sequential lineups, among other safeguards.[44]

Florida, which leads the nation in the number of death row exonerations,[45] is no exception to the phenomenon. "Eyewitness misidentification of crime suspects has contributed to 64 percent of the Florida cases in which DNA evidence later exonerated the defendant."[46] The Florida Supreme Court has recognized there is a substantial body of academic work challenging the reliability of eyewitness identifications in criminal cases. *See McMullen v. State*, 714 So. 2d 368, 372 n.6 (Fla. 1998).

In 2017, the Florida Legislature adopted section 92.70, Florida Statutes, the Eyewitness Identification Reform Act (Eyewitness ID Act), to help avoid wrongful convictions due to eyewitness misidentification by introducing standards for the administration of photographic and live lineups.[47] Section 92.70 also required the Criminal Justice Standards and Training Commission (CJSTC) to create educational materials and provide training programs on how to conduct lineups in compliance with the new statute. § 92.70(5), Fla. Stat. (2017). In response,

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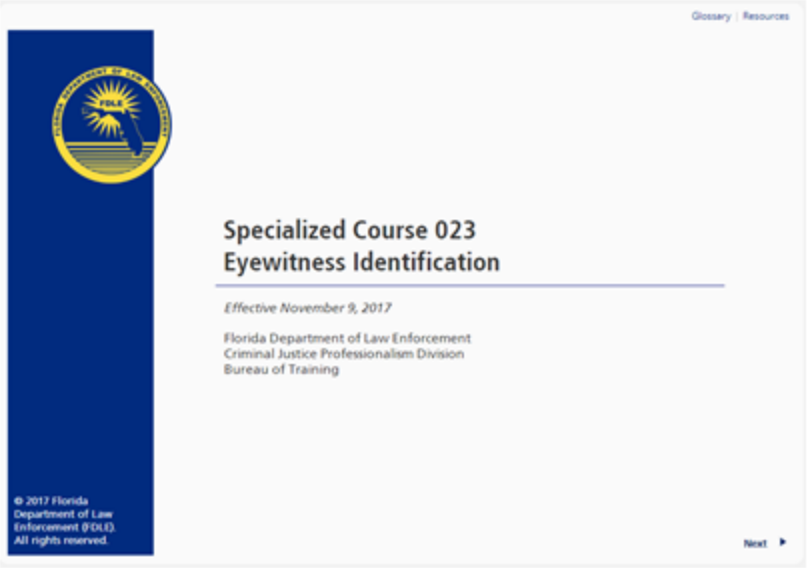
[43] *Id*.
[44] U.S. Dep't of Justice, Eyewitness Evidence: A Guide For Law Enforcement (1999), available at http://www.ncjrs.gov/pdffiles1/nij/178240.pdf. DOJ released updated procedures on January 6, 2017, available at https://www.justice.gov/file/923201/download.
[45] Death Penalty Information Center, Florida, available at https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/florida.
[46] Bill Analysis and Fiscal Impact Statement for CS/SB 312, Eyewitness Identification, Mar. 28, 2017, 1.
[47] *Id.*

CJSTC created a specialized training program, Course Number 23.[48] Law enforcement officers can complete the course online.[49]



A. Detective Williams used unnecessarily suggestive procedures in obtaining purported out-of-court identifications from Small and Rosales.

"The primary evil to be avoided in the introduction of an out-of-court identification is a very substantial likelihood of misidentification." *Grant v. State*, 390 So. 2d 341, 343 (Fla. 1980) (citations omitted). An impermissibly suggestive identification procedure is one that creates the danger of misidentification so great that it violates due process. *Walton v. State*, 208 So. 3d 62, 65 (Fla. 2016). When determining whether the Due Process Clause of the U.S. Constitution requires suppression of an eyewitness identification, the Court must consider: "(1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; and (2) if so,

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[48] CJSTC Technical Memorandum 2017-15, Dec. 4, 2017.

[49] Course available at http://www.fdle.state.fl.us/FCJEI/Online-Training/Standards-for-Photographic-or-Live-Lineups-in-Eyew.aspx.

considering the *totality of the circumstances*, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." *Id.* (emphasis added).

The Court should find the lineup procedures used in 1990 for both Small and Rosales to be unnecessarily suggestive because: 1) Sheila Keen-Warren's photo stood out from the filler photos, which differed in several respects from the descriptions given by the Spotlight witnesses; 2) the lineups were not double-blind; 3) there is no record that Small or Rosales were properly instructed to avoid misidentifications; 4) the lineups were administered simultaneously, not sequentially; and, 5) the procedures were inadequately documented.

1. The lineups were unnecessarily suggestive because Sheila Keen-Warren's photo stood out from the filler photos, which differed from the descriptions given by Small and Rosales.

Detective Williams, the lead detective at the time, personally assembled the photo array and included a photograph of Sheila Keen-Warren taken at the time of her May 27, 1990, interview. The five other photos he selected appeared to be booking photos.

CJSTC instructs officers to select photos of individuals who closely match the description given by the witness:[50]

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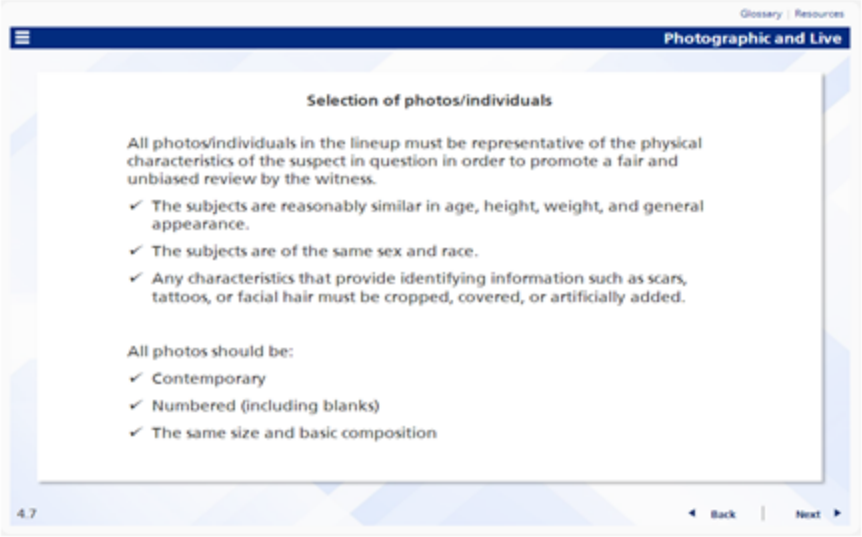
[50] CJSTC Course Number 023 at 4.7.



Detective Williams's notes did not explain what parameters he used to select the five filler photos. Given that he did not elicit information from Small or Rosales about the Spotlight customer's age, eye color, or facial features, the Court should presume that Detective Williams did not consider those parameters.

The women depicted in the lineups that Detective Williams showed Small and Rosales did not closely match the descriptions they gave of the Spotlight customer, and Sheila Keen-Warren's May 27 photograph stood out from the five filler photos that he used. None of the women depicted matched Rosales's description of long hair pulled back in a ponytail, or Small's description of hair clipped back. Rosales said the customer had dark brown hair, which Small described as chocolate brown. But, using the numbering from the Rosales lineup (with Sheila Keen-Warren's photo in position #4), the women in photos #2, #3, and #5 had lighter hair. The women in those photos, #2, #3, and #5, also all had bangs or partial bangs. All but #6 had center parts or otherwise noticeable parts in their hair. The women depicted in the photographs in positions #3 and #6 appeared much younger than the others. The women in photographs #1 and #2 had eye makeup, whereas Rosales

and Small said the Spotlight customer wore no or little makeup. Sheila Keen-Warren's photograph also stands out from the filler photos because she appeared to have more tanned complexion and for her smile, which showed her teeth.

The significant inconsistencies between the photos in the array and the Spotlight witnesses' descriptions demonstrate that Detective Williams built the lineup around the suspect, Sheila Keen-Warren, and not characteristics described by the Spotlight witnesses. The result was that not only did Sheila Keen-Warren's photo stand out, due to her expression and skin tone, but her photo "most resembled" the description in terms of the color of her hair and the lack of bangs and makeup. Constructing a lineup composed of photos that were inconsistent with the eyewitnesses' descriptions and in which Sheila Keen-Warren stood out was unnecessarily suggestive. *See Walker v. State*, 223 So. 3d 388, 390 (Fla. 5th DCA 2017); *State v. Gibson*, 109 So. 3d 251, 255 (Fla. 2d DCA 2013); *State v. Dorsey*, 5 So. 3d 702, 705-06 (Fla. 2d DCA 2009); *Harris v. State*, 857 So. 2d 317, 318 (Fla. 2d DCA 2003); *see also State v. Francois*, 863 So. 2d 1288, 1289-90 (Fla. 4th DCA 2004) ("Photographs used in lineups are not unduly suggestive if the suspect's picture does not stand out more than those of the others, and the people depicted all exhibit similar facial characteristics.").[51]

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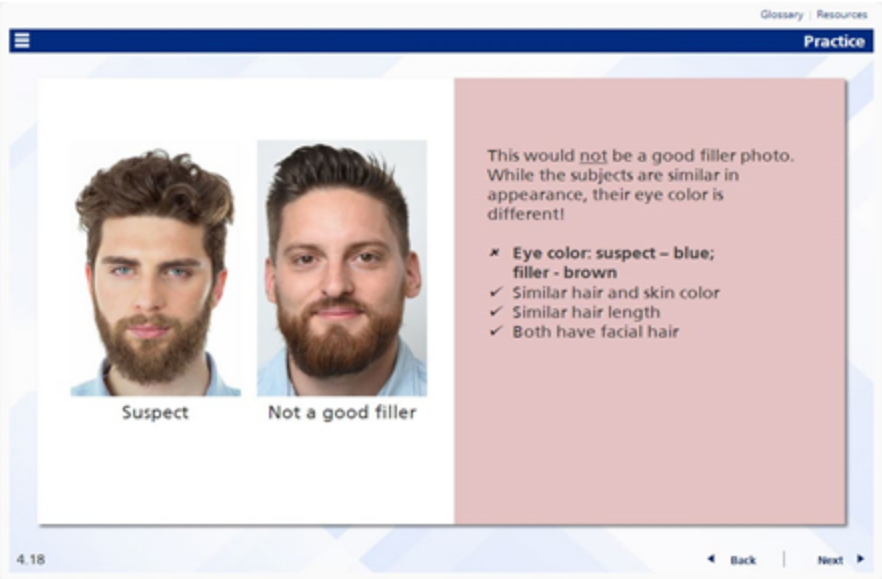
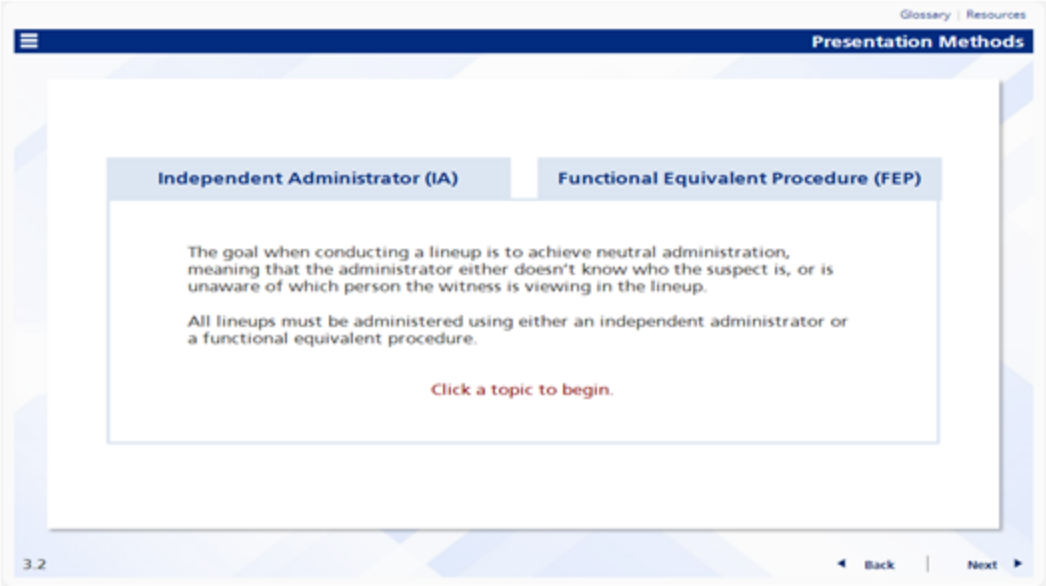
[51] Given the poor quality of the images, eye color was indiscernible. *But see* CJSTC Course Number 23 at 4.18 (example of poor filler photo):

2. The lineups administrations were unnecessarily suggestive because they were not double-blind.

The 1990 lineups, constructed and administered by Detective Williams, were unnecessarily suggestive because they were not double-blind. "Double-blind administrators do not know who the actual suspect is." *State v. Henderson*, 27 A.3d 872, 896 (N.J. 2011). Law enforcement officers who know the identity of a suspect may, while administering a photo lineup, "communicate that knowledge to the witness through verbal or non-verbal cues" even unintentionally. Melissa B. Russano et al., *"Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 Cardozo Pub. L. Pol'y & Ethics J. 355, 358-59 (2006); *see also* Sandra Guerra Thompson, *Beyond a reasonable doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony,* 41 U.C. Davis L. Rev. 1487, 1518-19 (2008) (discussing how double-blind lineup eliminates tendency of witnesses to seek knowledge or clues from the officer administering the lineup).



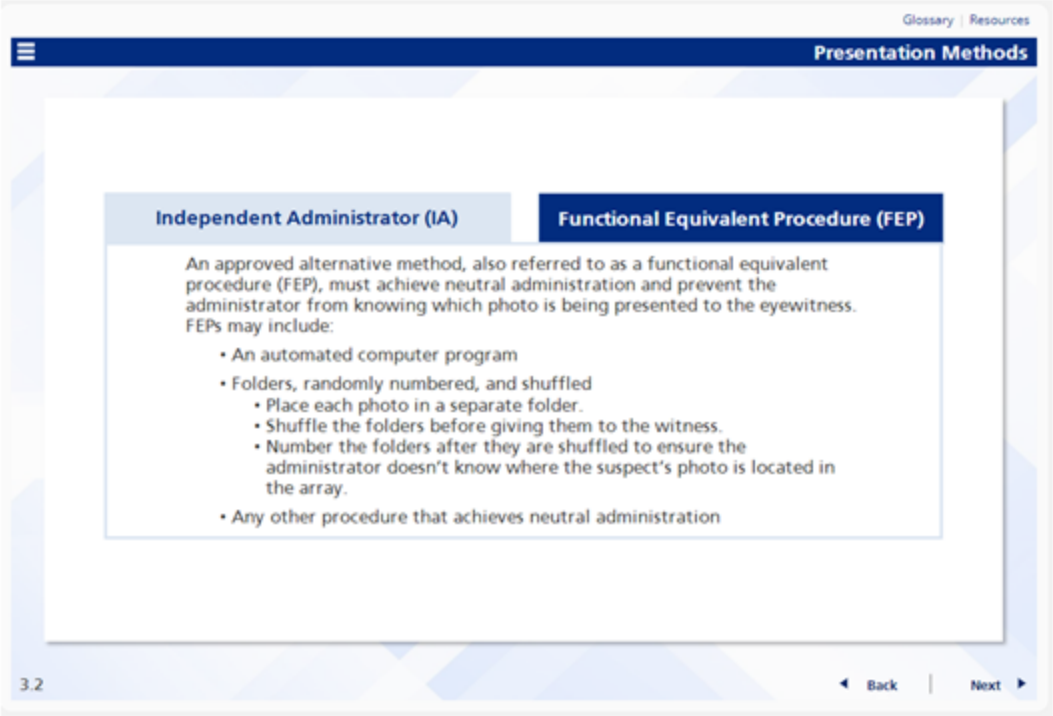
Since 2017, Florida law has required that lineups be double-blind or that law enforcement officers employ a "functionally equivalent" method. § 92.70, Fla. Stat. (2017) (lineups must be conducted by an "independent administrator," "a person who is not participating in the investigation of a criminal offense and is unaware of which person in the lineup is the suspect," or a "functional equivalent").[52] CJSTC Course Number 23 used these slides to explain the requirement:[53]



[52] *See also* Fla. Std. Jury Instr. 3.9(c) ("Eyewitness Identification"):

> You have heard testimony concerning a [live] [photo] lineup conducted by a law enforcement agency. Florida law requires that the person conducting the lineup must not have participated in the investigation of the crime alleged and must not have been aware of which person in the [live] [photo] lineup was the suspect.

[53] CJSTC Course Number 023 at 3.2.



By constructing and administering Rosales and Small's photo lineups himself, Detective Williams used an unnecessarily suggestive method that created a danger of influencing, even if unintentionally, the witnesses' identifications. *Cf. Valentine v. State*, 307 So. 3d 726, 733-34 (Fla. 4th DCA 2020) (finding that lineup complied with § 92.70 where it was assembled by computer program and administered by officers not involved in the investigation); *see also State v. Henderson*, 937 A.2d 988, 996 (N.J. Super. Ct. App. Div. 2008), *aff'd as modified and remanded*, 27 A.3d 872 (N.J. 2011) (holding that failure to follow Attorney General's guidelines on identification requiring that lineup be conducted by officer other than lead investigator "whenever practical" was presumptive evidence of suggestiveness).

3. <u>The lineups were unnecessarily suggestive because there is no record that Small or Rosales were properly instructed to avoid misidentifications.</u>

Another significant problem of the photo lineup is the expectation of the witness that the suspect is, in fact, present in the photo array. Connie Mayer, *Due Process Challenges To*

Eyewitness Identification Based On Pretrial Photographic Arrays, 13 Pace L. Rev. 815, 819 (1994). The witness will often make a "relative judgment" and choose the person who looks most like the witness's memory of the perpetrator compared to the others in the group, rather than choose no one at all. Suzannah B. Gambell, *The Need To Revisit The Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 Wyo. L. Rev. 189, 194 (2006).

Florida law requires that, before conducting a photo lineup, the administrator must give these instructions:

1. The perpetrator might or might not be in the lineup;
2. The lineup administrator does not know the suspect's identity, except that this instruction need not be given when a specified and approved alternative method of neutral administration is used;
3. The eyewitness should not feel compelled to make an identification;
4. It is as important to exclude innocent persons as it is to identify the perpetrator; and
5. The investigation will continue with or without an identification.

§ 92.70, Fla. Stat. (2017). The witness must acknowledge in writing having received a copy of the instructions. *Id*.; *see also* Fla. Std. Jury Instr. 3.9(c).[54]

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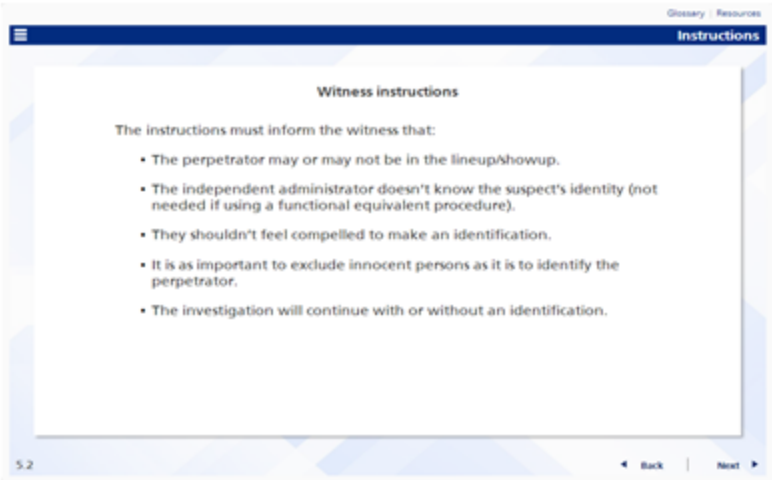
[54] *See also* CJSTC Course Number 023 at 5.2-5.3:



Detective Williams's failure to document what instructions he gave Rosales and Small reveals that he placed little importance on instructing the witnesses in a manner that would avoid misidentification. The notes do not establish that he informed the witnesses that the Spotlight customer may not have been included, that they should not feel compelled to make an identification, or that it was as important to exclude an innocent person as to identify a perpetrator of a crime. His notes reflect that both witnesses merely said they had identified the person most resembling the Spotlight customer. Detective Williams's failure to clarify whether the witness was in fact making an identification shows that he did not appreciate the problems associated with relative identifications. In any event, there is no evidence that the witnesses were properly instructed in a manner that would avoid the unnecessary suggestiveness of the lineup procedure.

4. The lineups were unnecessarily suggestive because they were administered simultaneously, not sequentially.

By showing the photos simultaneously, Detective Williams, rather than eliciting identifications, unnecessarily suggested to the witnesses that they should select the photo most resembling the Spotlight customer. Eyewitnesses are more likely to make a mistaken identification if they review lineup photos all at once, rather than sequentially. Suedabeh Walker, *Drawing on Daubert: Bringing Reliability to the Forefront in the Admissibility of Eyewitness Identification Testimony*, 62 Emory L. J. 1205, 1212-13 (2013). "[W]hen eyewitnesses engage in a simultaneous lineup, they compare the faces of the suspects to each other to decipher which individual among the lineup most closely resembles the culprit." Shirley N. Glaze, *Selecting the Guilty Perpetrator: An Examination of the Effectiveness of Sequential Lineups*, 31 Law & Pschol. Rev. 199, 201 (2007). By doing so, the witness "merely compares the suspects to each other instead of comparing each person to his/her memory of the suspect." *Id.*; *see also* Timothy P. O'Toole & Giovanna

Shay, *Manson v. Brathwaite Revisited: Towards A New Rule Of Decision For Due Process Challenges to Eyewitness Identification Procedures*, 41 Val. U. L. Rev. 109, 142. (2006). In contrast, a sequential lineup forces the witness to compare the individual with the witness's memory of the perpetrator, not with the other individuals in the lineup or photo array. Gambell, *supra*, at 194. One study found that this simple measure could reduce mistaken identifications from 78% to 33%. O'Toole & Shay, *supra*, at 119.

The wrongful conviction of Ronald Cotton illustrates the danger of "relative judgment" identifications. *See State v. Cotton*, 394 S.E.2d 456 (N.C. Ct. App. 1990). In that case, college student Jennifer Thompson was raped in her North Carolina home. *Id.* at 457. Two days later, police showed Thompson a photo array. *Id*. Thompson narrowed the photos down to two and then chose Ronald Cotton as the man that "looks most like" her assailant. *Id.* at 467 (Johnson, J., dissenting). At a seven-person lineup just over a week later, Thompson again chose Cotton as the man who "looks most like him." *Id.* Thompson confidently identified Cotton at trial, and he was convicted of her rape.[55] Eleven years later, Cotton was exonerated by DNA evidence. *Id.*

In recognition of the suggestiveness inherent in simultaneous lineups, jurisdictions such as New Jersey, Wisconsin, and Boston, Massachusetts require sequential lineups. *See* O'Toole & Shay, *supra*, at 142; *see also* Gambell, *supra* at n.50; *Guilbert*, 49 A.3d at 721-22 ("Courts across the country now accept that . . . identifications are likely to be less reliable in the absence of a

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[55] Jennifer Thompson, *I Was Certain But I Was Wrong*, N.Y. Times, June 18, 2000.

double-blind, sequential identification procedure . . . ."). The DOJ also recommends sequential lineups.[56]

Detective Williams's notes reflect that the suggestive procedures he used yielded exactly the kind of relative judgment identifications that have been shown to cause misidentifications. Rosales and Small both, according to Detective Williams, merely stated that, of the photos they were shown, Sheila Keen-Warren's photo resembled the Spotlight customer. Rosales said Ms. Keen-Warren's photo "looked most like the subject that bought the clown costume." Small said Ms. Keen-Warren's photo "looked somewhat like the customer," then clarified that another photo "also resembled" the woman. Neither told Detective Williams that the Spotlight customer was one of the women in the photo arrays they were shown. The Court should consider this as corroboration in this case of the scientific evidence that simultaneous lineups are unnecessarily suggestive.

5. The lack of adequate documentation of the lineup undermines any presumption that lineups were properly administered.

Detective Williams's lack of documentation raises a red flag. Law enforcement officers are required to document lineup procedures to preserve evidence that would allow a judge or jury to evaluate the propriety of the methods used. The CJSTC training instructs lineup administrators to record a witness's statements "word-for-word" and nonverbal communication:[57]

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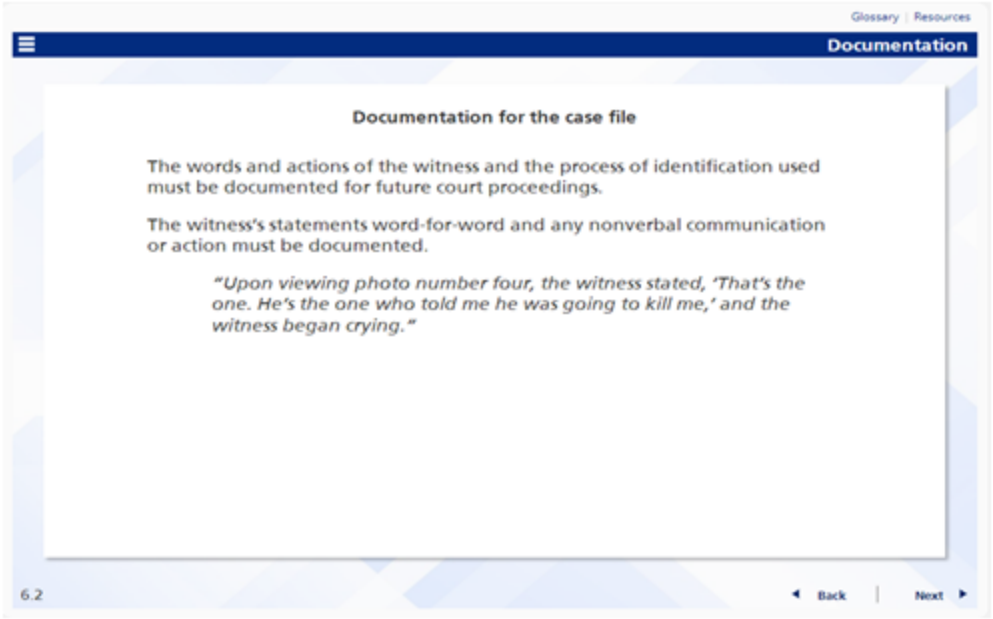
[56] U.S. Dep't of Justice, Eyewitness Evidence: A Guide For Law Enforcement (1999), available at http://www.ncjrs.gov/pdffiles1/nij/178240.pdf.
[57] CJSTC Course Number 023, at 6.2.



Lineups also must be videotaped and/or audiotaped. *Id*. at 2.1.

Memorializing the words and actions of law enforcement officers and witnesses during lineups is necessary to establish the admissibility of the statements in court when the suggestiveness of the lineup procedures is challenged. Documentation can also reveal whether, after an identification is made, the officer made statements confirming that the witness identified the suspect, because that may encourage false confidence in a misidentification. *State v. Lawson*, 291 P.3d 673, 689 (Or. 2012); *see also* CJSTC Course Number 023 at 5.4 ("[s]crupulously avoid any conduct that directly or indirectly influences the witness's decision" or provide feedback such as "Good job! You picked our suspect!").

Detective Williams chose not to record his interviews with Rosales or Small at the PBSO Detective Bureau, although his recordings of other witness interviews prove that he could have recorded the lineup administrations. The lack of adequate documentation disadvantages Ms. Keen-Warren, who is left to rely on the participants' partial memories to fill in the substantial gaps in

the record of the lineups. Even a year later, however, those witnesses proved already to be unreliable historians. Small claims she was shown a binder of 40 photographs, yet Detective Williams reported that she was shown a six-photo array and placed into evidence an array that bears Small's signature on the back of two photos. In 1991, neither Small nor Rosales could recall the photo Detective Williams showed them, describing during sworn statements a photo consistent instead with the high school yearbook photo of Sheila Keen-Warren published in The Post. One could hardly expect the witnesses to recall details like what instructions Detective Williams gave them or any of the other methods employed with any greater accuracy. And, compounding the prejudice to Ms. Keen-Warren caused by this lack of documentation, Detective Williams is not competent to testify, due to significant health issues.

The Court should infer from Detective Williams's failure to adequately document the lineup administrations that the photo arrays were not conducted in a manner that would avoid methods that were unnecessarily suggestive. *See State v. Delgado*, 902 A.2d 888, 897 (N.J. 2006) (requiring as a condition of admissibility of out-of-court identification that law enforcement officer make a written record preserving words exchanged between witness and officer).

6. <u>The lineup procedures lacked safeguards to avoid or reduce risks of misidentification.</u>

Taken as a whole, the lineup procedures discussed above were unnecessarily suggestive and lacked the safeguards that might have otherwise mitigated the risks of misidentification. Defendant's point is not that departing from contemporary "best practices" alone would establish unnecessary suggestiveness. *See Williams v. State*, 285 So. 3d 1003, 1004-05 (Fla. 1st DCA 2019). The notion that suggestive procedures could result in misidentifications and deprivation of due process was not a novel idea – that legal principle has been clearly established since at least 1972.

See Neil v. Biggers, 409 U.S. 188 (1972). Whether Detective Williams was aware of the unreliable nature of his methods is of less importance than whether, considering our knowledge of which procedures create dangers of misidentification, his methods objectively constituted unnecessarily suggestive identification procedures. The adoption by the DOJ, FDLE, and the Florida Legislature of standards that prohibit or disfavor the very methods employed by Detective Williams is relevant to the Court's analysis. Based on the suggestive nature of the construction and administration of the lineups and the lack of adequate safeguards to avoid misidentifications, this Court should find that Detective Williams employed unnecessarily suggestive procedures in eliciting out-of-court identifications from Small and Rosales. *See Grant*, 390 So. 2d at 343.

B. Substantial Likelihood of Misidentification

When police employ an unnecessarily suggestive lineup procedure, the Court must consider, under the totality of circumstances, whether the suggestive procedure gives rise to a substantial likelihood of irreparable misidentification. *Walton*, 208 So. 3d at 65. The burden is on the State to establish the reliability of the witness's identification by clear and convincing evidence. *Johnson v. State*, 717 So. 2d 1057, 1063 (Fla. 1st DCA 1998). Among the factors to consider are those set forth in *Biggers*:

1. the opportunity of the witness to view the criminal at the time of the crime;
2. the witness's degree of attention;
3. the accuracy of the witness's prior description of the criminal;
4. the level of certainty demonstrated by the witness at time of the confrontation; and,
5. the length of time between the crime and the confrontation.

Walton, 208. So. 3d at 66.

When considering what weight to give each factor in this case, the Court should bear in mind recent empirical studies and the historical lessons of wrongful convictions caused by erroneous eyewitness identifications. *See Henderson*, 27. A.3d at 918 ("[*Manson*] does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony."); *see also Lawson*, 291 P.3d at 688-89; *Young v. State*, 374 P.3d 395, 413 (Alaska 2016); *State v. Harris*, 191 A.3d 119, 134 (Conn. 2018); *State v. Kaneaiakala*, 450 P. 3d 761, 772 (Haw. 2019). A "robust body of scholarship and empirical research" has emerged calling into doubt whether the *Biggers* factors are sufficient indicators of reliability and admissibility. *Kaneaiakala*, 450 P. 3d at 772. Four of the five factors are self-reported and may be distorted by suggestive police procedures. Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, And The Limits Of Cross-Examination*, 36 Stetson L. Rev. 727, 754 (2007).

Rosales and Small interacted with the Spotlight customer on a single occasion, at the end of a workday, during a rushed business transaction. When explaining why she could not recall details, such as whether the woman wore jewelry or which makeup she sold the woman, Rosales emphasized that she and Small "were trying to get her out of there so fast."[58] Small estimated that the entire interaction with the Spotlight customer lasted "under ten minutes."[59] *Cf. Valentine*, 307 So. 3d at 736 (finding that identification was reliable where eyewitness was manager who had seen defendant in store before several times); *see also Walton*, 208 So. 3d at 66 ("[witness's] hazy memory of the incident does not give us confidence in her identification of [the defendant]").

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[58] Rosales Sworn Interview 16:10-11, 18:13-18, June 19, 1991.
[59] Small Dep. I 13:9-12; Small Dep. II 24:1-3.

Rosales and Small spent only as much time and paid only as much attention as necessary to quickly conduct the final transaction of the day before closing the store on a Friday night. The limited nature of their interaction is further illustrated through the dearth of detail that the witnesses recalled about the customer. Neither witness could give police in 1990 a description of the woman's facial features or eye color, or provide an estimate of age. *See Walton*, 208 So. 3d at 66 ("As to the third factor, the accuracy of the witness's prior description of the assailant, does not weigh in favor of admitting the identification because it is unclear what [the witness's] prior description of the defendant was.").

The witnesses' level of certainty in their identifications was low, according to the only contemporary record of the 1990 lineups. Detective Williams's dictated notes indicate that Rosales merely found the photo of Sheila Keen-Warren to be the one that resembled the store customer the most. Small said that two photos resembled the customer. The uncertainty of the 1990 identifications, if those responses can be interpreted as identifications, contrast sharply with the witnesses' certainty after more than a year of media coverage, much of which focused on Sheila Keen-Warren as a suspect. *See also Brodes v. State*, 279 S.E.2d 766, 771 (Ga. 2005) (finding a "scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification."); *State v. Discola*, 184 A.3d 1177, 1188-89 (Vt. 2018) (abandoning "witness certainty" reliability factor based on empirical research indicating that suggestive identification procedures easily corrupt witness certainty); *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997); O'Toole & Shay, *supra*, at 120-21 (confirmatory effect inflates certainty of an inaccurate witness *more* than the certainty of an accurate witness).

The customer bought the costume from Spotlight on May 24. Rosales was interviewed three days later, on May 27, and Small was interviewed on May 28, four days after the purchase. This is a long enough gap in time for a witness to have trouble recognizing someone the witness has seen only once. *See Fitzpatrick v. State*, 900 So. 2d 503, 518 (Fla. 2005) (holding that a three-day gap between the observed event and the witness's identification contributed to the unreliability of the identification); *see also* Carla Stenzel, *Eyewitness Misidentification: A Mistake that Blinds Investigations, Sways Juries, and Locks Innocent People Behind Bars*, 50 Creighton L. Rev. 515, 522 (2017) ("a person's memory diminishes rapidly over a period of hours rather than days or weeks"); Aliza B. Kaplan & Janis C. Puracal, *Who Could it Be Now? Challenging the Reliability of First Time In-Court Identifications After State v. Henderson and State v. Lawson*, 105 J. Crim. L. & Criminology 947, 959 (2017) (discussing studies indicating that faces are often forgotten only a few hours after an event, and that after one day, the recall of a stranger's age, hair color, and height is usually inaccurate).

In short, none of the five *Biggers* factors favor the admissibility of the uncertain identifications made by Rosales or Small. The *Biggers* factors and other indicia of unreliability discussed above demonstrate, under the totality of the circumstances, that "there has been a substantial likelihood of irreparable misidentification." *See Johnson v. State*, 717 So. 2d 1059, 1063 (Fla. 1998). Thus, the Court must exclude the out-of-court identifications at trial to prevent a violation of Sheila Keen-Warren's due process rights. *See Walton*, 208 So. 3d at 65.

Finally, the Court should preclude the State from introducing the uncertain identifications from 1990 because their probative value is outweighed by the danger of unfair prejudice. "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403. For relevant evidence "to be deemed unfairly prejudicial, it must go beyond the inherent prejudice associated with any relevant evidence." *Martinez v. State*, 265 So. 3d 704, 705 (Fla. 4th DCA 2019) (reference omitted).

The unreliability of the identifications in this case impacts both sides of the scale in a 90.403 analysis. The State might argue that the probative value of identification evidence is generally high. But, as discussed in Section I, *see supra* at 18-20, the probative value of testimony that Sheila Keen-Warren resembled a woman who bought a clown costume from a popular costume shop a few days before a man wore a *different* clown costume is nonexistent. Even if the identification evidence were relevant, the probative value in this case would be extremely low in light of the many indicia of unreliability in the construction, administration, and other circumstances of the purported identifications. Unreliable evidence has little if any probative value.

At the same time, the danger of unfair prejudice is high, not only because of the lack of direct evidence of guilt in this case, *see Baez-Ortiz v. State*, 311 So. 3d 151, 154 (Fla. 2d DCA 2020) (including "chain of inference" as consideration in § 90.403 analysis), but also because juries tend to overestimate the reliability of eyewitness testimony and overvalue it in comparison with other evidence. *See Manson,* 432 U.S. at 119-20; *State v. Long*, 721 P.2d 483, 490 (Utah 1986); Matthew S. Foster, *I'll Believe It When You See It*, 60 Loy. L. Rev. 857, 878 (2014). "Many of the factors affecting the reliability of eyewitness identifications are either unknown to the average juror or contrary to common assumptions . . . ." *Guilbert*, 49 A.3d at 731. A lay person's overestimate of the reliability of a type of evidence makes the danger of unfair prejudice greater.

Jurors' tendency to assume photo array identifications are valid "tests" of an eyewitness's memory, despite abundant scientific evidence to the contrary, makes the danger of unfair prejudice comparable to other kinds of unreliable evidence that courts categorically exclude. *See, e.g.*, *Davis v. State*, 516 So. 2d 953, 955 (Fla. 4th DCA 1986) (noting the "mythical aura" attributed to polygraph examinations); *Bundy v. State*, 471 So. 2d 9, 15 (Fla. 1985) ("[T]here is the concern that hypnosis is often thought by lay persons to be a magical thing which can produce fantastic recall and startling results.").

In addition, studies have shown that typical trial tools like cross-examination or expert testimony fail to prevent juries from overvaluing eyewitness testimony. Brittany M. Brown, *Ethics, Evidence, and Eyewitnesses: The Role of the Trial System in Evaluating Unreliable Evidence*, 27 Geo. J. Legal Ethics 407, 409-10 (2014); *see also* Epstein, *supra*, at 766 ("A tool designed from its inception to root out liars is ill-suited for the task of exposing the risk or reality of mistaken identification.").

Thus, the Court should minimize the danger of unfair prejudice that would be caused by admitting the Spotlight purported identifications at trial. *See also Shootes v. State*, 20 So. 3d 434, 438 (Fla. 1st DCA 2009) ("The Sixth Amendment imposes upon trial courts an affirmative obligation to minimize any risk of unacceptable factors affecting the accused's right to have a fair trial.") (cleaned up).

IV. Rosales and Small's statements of identification in June 1991 are inadmissible hearsay and any probative value they have is outweighed by the danger of unfair prejudice.

The out-of-court statements made by Rosales and Small in June 1991 regarding their recollection of the 1990 lineups they were shown are inadmissible hearsay. No new photo lineups were administered, and thus no new statements of identification were made. Allowing the June 1991 statements to be offered to bolster their May 1990 identifications falls outside the narrow hearsay exception created by section 90.801(2)(c). "To extend the rule that far would permit countless repetitions by a witness to others, regardless of time and place, of the witnesses' belief as to the guilty party, a result we do not believe intended by the drafters of the rule." *Stanford v. State*, 576 So. 2d 737, 740 (Fla. 4th DCA 1991).

Furthermore, the statements made by Rosales and Small in June 1991 purporting to identify Sheila Keen-Warren as the Spotlight customer based on a photo in The Post are inadmissible hearsay. The hearsay exception for statements of identification provided by section 90.801(2)(c) applies to identifications made close to the time the declarant perceived the identified person. *See id.* at 739 (noting commentary stating that "such statements bear the mark of reliability because they are usually made in close temporal proximity to the actual event while the witnesses' visual memory of the event is fresh"); *see also Manson*, 432 U.S. at 116 ("identifications arising from single-photograph displays may be viewed in general with suspicion"). The interviews with SAO Investigator Valentine, however, occurred more than a year after Rosales and Small's brief encounter at Spotlight on May 24, 1990. *Cf. Liscinsky v. State*, 700 So. 2d 171, 172 (Fla. 4th DCA 1997) (finding that out-of-court identification was admissible under §90.801(2)(c) "because the witness' comments in the instant case were made immediately after the incident"). The

circumstances of these statements lack the indicia of reliability present in a properly administered photo lineup.

The witnesses' memories more than a year after their May 1990 interviews were inaccurate. Small and Rosales recalled being shown photos of younger women, whereas Detective Williams used a photo of Sheila Keen-Warren taken the same day that the photo was included in the lineup administered to Rosales and one day before Small's. Although Rosales claimed the photo was not as high quality as the one in the November 11 article in The Post, it was in fact larger, of higher resolution, and more recent than the photo in The Post and a better depiction of how Sheila Keen-Warren would have appeared on May 24, 1990. If the witnesses had an easier time recognizing the photo in The Post article, that can only be because of their previous exposure to photos of Ms. Keen-Warren in the media, including the November 11, 1990, article that was displayed at the Spotlight.

Any probative value of these purported statements of identification in June 1991 is outweighed by the danger of unfair prejudice due to the witnesses' acknowledged exposure to media coverage identifying Sheila Keen-Warren as a suspect. This exposure not only influenced the reliability of their memories but also introduced an unavoidable danger of confirmation bias.

In 1991, Rosales thought she recalled that the woman in the photo lineup was wearing earrings, with her hair down her back, leaving the ears visible. She told ASA Moyle that the woman in the photo Detective Williams showed her was "much younger," and described her as having her hair "really nicely brushed," with a little makeup and lip gloss. But the photo lineups Detective Williams claimed to have shown them were not of high-school aged girls. To the contrary, Detective Williams showed them a photograph of Sheila Keen-Warren taken the same day as

Rosales's interview, only three days after the unidentified woman walked into Spotlight. Comparing Rosales's 1991 description of the photo to the photos published in the November 11 newspaper article and the actual photo Detective Williams showed Rosales, it is clear Rosales was recalling the high school yearbook photo published by The Post. *Cf. Bundy v. State*, 455 So. 2d 330, 343-44 (Fla. 1984), *abrogated on other grounds by Fenelon v. State*, 594 So. 2d 292 (Fla. 1992) (finding that eyewitness identification was properly admitted, despite viewing newspaper photos, because photos in paper were not profiles, whereas her view of the suspect was a profile, as was the photo she selected in the lineup). This is an example of a process known as "retrofitting." *See Guilbert*, 49 A.3d at 715 (summarizing expert testimony that, "When a subject is exposed to information about the remembered event during the storage phase—for example, when, following the event, the subject discusses the observation with someone else or sees a photograph of the person in the newspaper—the subject may incorporate the information into his or her memory and come to believe that the information actually was obtained at an earlier time."). Under section 90.403, the Court should preclude the State from introducing these purported statements of identification made over nine months after The Post published these photographs.

For these reasons, the Court should preclude any witness from offering the 1991 out-of-court statements at trial as substantive evidence or as prior consistent statements to bolster the 1990 purported statements of identification.

V. The Court should preclude the State from eliciting in-court identifications by Small or Rosales because any such identifications would be tainted by the unnecessarily suggestive procedures used during the 1990 lineups and by decades of intervening media exposure.

When police have obtained a pretrial identification through an unnecessarily suggestive procedure, the Court must ensure that the suggestive pretrial procedure does not taint an in-court identification. *See Hamilton v. State*, 303 So. 2d 656, 657 (Fla. 2d DCA 1974). An in-court identification may be admitted only if: (1) it is found to be reliable; and, (2) based solely on the witness's independent recollection of the suspect at the time of the crime, uninfluenced by the intervening illegal confrontation. *Edwards v. State*, 538 So. 2d 440, 442 (Fla. 1989). "It is the state's burden to show by clear and convincing evidence that the courtroom identification had an independent source . . . ." *Id.* at 444. The Court must consider all the surrounding circumstances to determine whether the in-court identification is grounded upon a basis independent of the suggestive pretrial procedure. *State v. Sepulvado*, 362 So. 2d 324, 327 (Fla. 2d DCA 1978) (citations omitted).

In this case, the actions of the SAO, rather than removing the taint of the of suggestive lineup procedure in 1990, compounded the harm. In June 1991, ASA Moyle repeatedly pressed the Spotlight witnesses to commit themselves further to their original uncertain identifications. By that point, Rosales and Small had known for approximately a year that police considered Sheila Keen-Warren a suspect in the murder and had been exposed to her photos in the media and in the news clippings displayed at the business where they worked. From media coverage on the one-year anniversary of the murder, Small and Rosales also knew that prosecutors needed more evidence before they could charge Ms. Keen-Warren. *See State v. Gomez*, 937 So. 2d 828, 833 (Fla. 4th DCA 2006). According to Napoleon, Rosales and Small never considered the possibility

that Marlene Warren's murderer was anyone other than the woman to whom they sold the clown costume on May 24, 1990.[60] Asking for an eyewitness to commit to an identification under those circumstances, or to estimate their certainty about the prior identification, was unnecessarily suggestive. Now, more than thirty years and several interviews later, the witnesses' memories of a ten-minute encounter in 1990 are gone, replaced by the scripts of their earlier interviews and reconstructed with details borrowed unconsciously from media reports. Because the State cannot demonstrate that either Rosales or Small's in-court identifications would rest on an independent and untainted foundation, the Court should preclude such testimony from both witnesses. *See Hamilton*, 303 So. 2d at 657.

CONCLUSION

For these reasons, all evidence related to the Spotlight purchases is irrelevant, inadmissible hearsay, inadmissible out-of-court identifications, in-court identifications tainted by unnecessarily suggestive lineup procedures, and/or evidence which, because unreliable, has probative value that is outweighed by the danger of unfair prejudice. Admitting this evidence at trial would violate Ms. Keen-Warren's right to a fair trial under the Sixth Amendment to the United States Constitution and Article I, section 16 of the Florida Constitution and her right to due process under the Fourteenth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution.

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[60] Napoleon Dep. 46:3-9.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to the Office of the State Attorney, Division "MCU," at FELMCU@sa15.org; Reid Scott, Assistant State Attorney, at RScott@sa15.org; Kristen Grimes, Assistant State Attorney, at KGrimes@sa15.org; Amy Morse, Esq., Attorney for the Defendant, at Amy@morselegal.com; and Greg Rosenfeld, Esq., Attorney for the Defendant, at Greg@rosenfeldlegal.com, on this 1st day of November, 2022.

/s/ Jesse W. Isom
Jesse W. Isom, Esq.
LAW OFFICES OF GREG ROSENFELD, P.A.