No. 127670

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JASON L. CONWAY, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-2090. There on appeal from the Circuit Court of Cook County, Illinois , No. 15 CR 19055. Honorable Charles P. Burns, Judge Presiding.

APPELLEE'S REPLY IN SUPPORT OF REQUEST FOR CROSS-RELIEF

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ARGUMENT

Conway's conviction should be reversed because, as a matter of law, the distance at which Officer Story saw the shooter was too far to enable an identification reliable enough to sustain a conviction.

(reply to Argument IV in State's cross-response)

This case turns on the proposition that an identification of a stranger based on seeing his face from 150 feet away is inherently unreliable. The State's response does not refute this common-sense conclusion, which is validated by scientific research. Instead, it distorts the issues, misrepresents Conway's arguments, disregards the science, and ignores any evidence that undermines its theory of the case. Even assuming that Officer Story's identification of Conway was made in good faith, the fact remains that he saw the shooter from an estimated distance of 150 feet. A trier of fact could fairly suspect that Conway was the shooter, but it could not rationally find that the evidence left no reasonable doubt that he was. For that reason, due process requires Conway's conviction to be reversed outright.

A. The State's response distorts the *Jackson* standard for constitutionally sufficient evidence.

The parties agree that the evidence is sufficient to sustain a criminal conviction only if, when viewed in the light most favorable to the prosecution, a rational trier of fact could find that every element of the offense has been proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). (Conway's Br. 12; State's Resp. 36.) The State does not dispute that sufficiency involves a *legal* question, not a factual one. *See Musacchio v.*

United States, 577 U.S. 237, 243 (2016). (Conway's Br. 12.) Its analysis, however, departs from this standard in two significant ways.

First, the State often reframes the issue as whether a "rational" (or "reasonable") "trier of fact" (or "person") "could credit" (or "could believe") Story's identification testimony. (State's Resp. 39, 40, 49, 50.) This framing distorts the inquiry because it improperly emphasizes the deferential component of the *Jackson* test to the exclusion of its demanding counterweight, which is the requirement of proof beyond a reasonable doubt. That exacting standard, which requires near-certainty in order to convict, is a "vital" component of "the American scheme of criminal procedure" because, by giving the presumption of innocence "concrete substance," it guards against the conviction of innocent people. *Jackson*, 443 U.S. at 315 (quoting *In re Winship*, 397 U.S. 358, 363 (1970)). The point of sufficiency review is to make sure that this essential constitutional protection is, in practice, "rationally appl[ied]." *Id.* at 317. The reasonable-doubt standard must be the touchstone of any sufficiency inquiry. To ignore it or even relegate it to a secondary role defeats the purpose of *Jackson* itself.

Second, this same framing incorrectly assumes that the issue is whether it would be rational to "credit" or "believe" Story's testimony. Story's credibility certainly matters, but it's not the whole of the inquiry. To get a conviction, the State did not have to convince the trier of fact that Story was *honest*, it had to prove that *Conway was the shooter*. A rational trier of fact should understand that "most eyewitnesses think they are telling the truth even when their testimony is inaccurate." *State v. Henderson*, 208 N.J. 208, 236 (2011) (citing Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 772 (2007)). That's why jurors are instructed to evaluate not just "the

believability of the witnesses" but also "the weight to be given to the testimony of each of them." Illinois Pattern Jury Instructions, Criminal, No. 1.02. Thus, when reviewing the sufficiency of the evidence in a criminal case, the question is not merely "whether a fact finder could reasonably accept" a witness's testimony but whether it "could reasonably accept [the testimony] *as proof beyond a reasonable doubt*." *People v. Cunningham*, 212 Ill. 2d 274, 282–83 (2004) (emphasis added).

Finally, although it does not expressly invoke forfeiture, the State notes that Conway's legal argument on appeal is not precisely the same as defense counsel's closing argument before the trier of fact. (State's Resp. 40.) To be clear, it is settled that claims of insufficient evidence—which is what Conway's argument is—are not subject to forfeiture and can be raised for the first time on appeal. *See, e.g.*, *People v. Cregan*, 2014 IL 113600, ¶ 16 (citing *People v. Enoch*, 122 Ill. 2d 176, 190 (1988)). And Conway has already explained that the notion that counsel "admitted that it was possible to credit Story's testimony" misinterprets counsel's unremarkable acknowledgment of the trier of fact's role in assessing credibility. (State's Resp. 40; Conway's Br. 27–28.) In short, nothing that happened in the trial court prevents Conway from raising this argument on appeal.

B. This Court can and should consider scientific authority to the extent it informs the legal judgment about what a rational trier of fact could find.

Although not strictly necessary to Conway's argument, scientific research on eyewitness identification shows that the 150-foot distance between Story and the shooter inherently undermined the reliability of his later identification of Conway to the point that it could not, on its own, rationally be deemed as proving identity beyond a reasonable doubt.

(Conway's Br. 16–19; *see infra* Part C at 12–16.) This Court should reject the State's request for it to ignore that research. (State's Resp. 40–46.) That request is premised on the State's mistaken belief that any information that is factual in nature constitutes "evidence." (State's Resp. 36, 39, 40, 43, 44, 46.) This ignores the distinction between the *adjudicative* facts of the case, which need to be introduced as evidence at trial, and the *legislative* facts of life that courts regularly rely on when exercising legal judgment, which don't. (Conway's Br. 20–23.) The scientific research cited in this case involves legislative facts because, rather than going to the *factual* dispute over the shooter's identity, it speaks to the *legal* issue of whether Story's identification of Conway could rationally permit a finding that there was no reasonable doubt about who the shooter was.

Two examples drawn from the State's brief usefully illustrate the distinction between adjudicative and legislative facts. In the first example, the State argues that "the actual distance [between Story and the shooter] might have been closer to 100 feet" because, during a pretrial hearing, Story estimated that the distance was "[p]robably 150 feet, maybe a hundred feet." (State's Resp. 43; Sup R 18.) That distance, however, is an operative fact that is specific to this particular case. In other words, it is an adjudicative fact that must be proven by introducing evidence. And, just as defense counsel failed to introduce readily available evidence that the distance was nearly 250 feet, if not more,[1] the State never elicited Story's lowball estimate of 100

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1. Story watched the shooting from his car, which was parked on the west side of Hamlin just north of Monroe roughly where the crosswalk was. (R 65, 77–78.) His testimony and the location where fired shell casings were found place the shooter just east of the rear bumper of the Pontiac parked in front of 3822 West Monroe, which was the second building on the north side of Monroe looking west. (R 67, 84, 106–07, 115; State's

(continued...)

feet at trial. Because neither adjudicative fact was introduced through evidence, they cannot properly be considered in the sufficiency analysis. In the second example, the State asks this Court to consider "the normal process for writing appellate opinions." (State's Reply 7.) That's obviously factual information that wasn't introduced through evidence at trial. But, unlike the distance between Story and the shooter, the normal opinion-writing process is a matter of generalized knowledge, not a specific fact of this particular case. It is therefore entirely proper to, as the State requests, consider that information as a legislative fact when evaluating the legal effect of the appellate court's opinion.

The distinction between adjudicative and legislative facts is not some kind of novel theory invented for this case. (State's Resp. 43.) Conway's

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1. (...continued)
Exs. 1, 5.) A conservative estimate would put Story at the curb on Hamlin where the crosswalk would be, and it would put the shooter at the midpoint between the concrete walkways that lead to the curb in front of 3820 and 3822 West Monroe. According to Google Maps, those two points are approximately 246 apart. (App'x A1, fig.1.)

This measurement is consistent with the City of Chicago's plat map of the block in question. (App'x A1, fig.2.) *See* W.½ N.W.¼ SEC.14-39-13, *available at* https://gisapps.cityofchicago.org/gisimages/80acres/pdfs/wnw143913r.pdf (last accessed Feb. 21, 2023). 3822 West Monroe is the third lot west of the alley; the first lot was vacant at the time of the incident. (State's Ex. 1.) According to the plat map, the distance from the southeast corner of that lot (#12) to the southeast corner of the lot at the east end of the block (#46) is 221.66 feet. That distance, of course, is an underestimate because Story's car was parked in the street, not on the sidewalk at the edge of the property line.

Both of these distances are subject to judicial notice, but neither was introduced into evidence at trial. *See People v. Stiff*, 391 Ill. App. 3d 494, 503–04 (5th Dist. 2009) (taking judicial notice of Google Maps calculation that distance between two residences was 295 feet); *Lubershane v. Village of Glencoe*, 63 Ill. App. 3d 874, 878 & n.1 (1st Dist. 1978) (taking judicial notice of plat map as public record).

principal brief does not "vaguely describe[]" what a legislative fact is; it *directly quotes* the definition that is found in *an opinion of this Court*. *See People v. Davis*, 65 Ill. 2d 157, 162–63 (1976) (quoting Fed. R. Evid. 201, advisory committee's note to 1972 proposed rules). (Conway's Br. 20.) Our legal tradition has formally recognized the conceptual distinction between legislative and adjudicative facts since World War II. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 402 (1942). Judges have been using legislative facts for much longer than that—centuries, even. *See id.* at 406 (citing *Lewis v. Rucker*, 2 Burr. 1167, 1171, 97 Eng. Rep. 769, 772 (K.B. 1761)). This Court has routinely done so, as have other Illinois courts and the United States Supreme Court. (Conway's Br. 21–23.)

The State insists that sufficiency claims should be uniquely exempted from this accepted practice, but it offers no reason why that should be so. (State's Resp. 44–45.) In fact, this Court foreclosed that argument three days after the State filed its response when, in *People v. Heineman*, 2023 IL 127854, it relied on outside scientific information to reverse a criminal conviction on the ground of insufficient evidence. The defendant in that case had been charged with a version of aggravated DUI requiring proof that his whole-blood alcohol concentration was at least 0.080 grams per deciliter (g/dL). *Heineman*, 2023 IL 127854, ¶¶ 5, 63. The evidence at trial showed that, after the crash giving rise to the charge, medical personnel determined that the defendant's blood-*serum* alcohol concentration was 0.155 g/dL, but his *whole*-blood concentration wasn't tested. *Id.* ¶ 32. The State sought to provide the missing link by eliciting testimony from a police officer that, according to a provision of the Illinois Administrative Code, a whole-blood equivalent could be calculated by dividing the serum (or plasma)

concentration by 1.18, which meant that the defendant's whole-blood alcohol concentration was 0.131 g/dL. *Id.* ¶¶ 35, 38. The defendant was convicted, and his conviction was affirmed by the appellate court.

This Court granted leave to appeal, and it agreed with the defendant that the police officer's testimony was inadmissible because he was not an expert in toxicology. *Id.* ¶¶ 71–75. But, instead of reversing and remanding for a new trial, this Court went further and found that the officer's testimony about the conversion factor was not merely inadmissible but *insufficient to prove* the defendant's whole-blood alcohol concentration. *Id.* ¶¶ 84–86. Relying on scientific information discussed in a law-journal article, this Court found that the proper factor for converting serum-alcohol concentration to whole-blood alcohol concentration is not a specific number, as the officer had testified. Instead, this Court noted that the conversion factor varies between 1.12 and 1.20 depending on the individual, and it discussed in detail the scientific basis for that determination. *Id.* ¶¶ 61–65 (citing Carol A. Roehrenbeck & Raymond W. Russell, *Blood Is Thicker than Water*, 8 (Fall) Crim. Just. 14, 15 (1993)).[2] Based on the scientific fact that there are a range of conversion factors, not any one specific one, this Court held that the officer's testimony about a single conversion factor "in no way proved" the defendant's actual whole-blood alcohol concentration. *Id.* ¶ 84. Hence, the evidence was insufficient to sustain the conviction. *Id.* ¶ 92.

Heineman shows that there is nothing improper about a reviewing court evaluating the legal sufficiency of the evidence in light of outside scientific

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2. This Court also cited appellate cases that, in turn, relied either on the Roehrenbeck article or expert testimony about the same facts. *See People v. Green*, 294 Ill. App. 3d 139, 146 n.2 (1st Dist. 1997) (citing Roehrenbeck & Russell); *People v. Menssen*, 263 Ill. App. 3d 946, 953 (4th Dist. 1994); *see also People v. Thoman*, 329 Ill. App. 3d 1216, 1218–19 (5th Dist. 2002) (citing both *Green* and *Menssen*).

information that was not before the trier of fact. But it also shows that, contrary to the State's argument, there is "a limit" to how a court can properly consider general factual information not introduced into evidence. (State's Resp. 44.) That limit is the purpose to which the information can put. As just explained, this Court relied on scientific knowledge about blood-component conversion ratios for the purpose of evaluating the legal question of whether the trial evidence could sustain a conviction. But it also refused to consider that *exact same information* as a substitute for evidence when it rejected the State's argument that, no matter which scientifically valid conversion factor was applied, the defendant's whole-blood-alcohol concentration would exceed the legal limit. Though that may have been true, this Court explained that it was "of no consequence" because the scientifically valid range was never introduced into evidence at trial. *Id.* ¶ 91. Thus, without invoking the formal terminology, this Court's opinion in *Heineman* shows that outside information can be used *legislatively* to inform legal determinations but not *adjudicatively* as a substitute for evidence.

People v. Cline, 2022 IL 126383, cited by the State, turned on this same distinction. (State's Resp. 41–42.) There, an expert witness opined that a single latent fingerprint found at the scene of a burglary came from the defendant. At trial, he explained the process by which he had reached that conclusion, but he evidently was never asked whether his work had been verified by a second examiner. *Cline*, 2022 IL 126383, ¶¶ 9–12. On appeal, the defendant asked this Court to judicially notice the ACE-V method for fingerprint analysis, which calls for secondary verification. *Id.* ¶ 29. Explaining that "judicial notice cannot be used to introduce new evidentiary material not considered by the fact finder during its deliberations," this Court properly declined that request. *Id.* ¶ 32. Although presented in the guise of a

sufficiency claim, the defendant's argument was really an after-the-fact attempt to impeach the particular forensic examiner who worked on that specific case as though he was still sitting on the witness stand. The fundamentally adjudicative nature of the outside information in *Cline* is laid bare by the defendant's request that this Court take judicial notice, which is necessary only for adjudicative facts, not legislative ones. *See* Ill. R. Evid. 201(a). Unlike the defendant in *Cline*, Conway is not attempting to impeach Story's credibility with new evidentiary material; he is simply citing general scientific knowledge in support of his argument that a trier of fact could not rationally find that Story's identification left no reasonable doubt about who the shooter could be.

In a footnote, the State supports its request that this Court ignore general scientific knowledge by citing *People v. Magee*, 374 Ill. App. 3d 1024 (1st Dist. 2007), and *People v. Peters*, 2018 IL App (2d) 150650, ¶ 51. (State's Resp. 42 n.3.) It fails to note, however, that *Peters* is plainly distinguishable from this case because the "extra-record evidence" there was *a video recording of the defendant* that the defendant claimed contradicted a specific factual finding that the trial court had entered after a hearing. *Peters*, 2018 IL App (2d) 150650, ¶ 51. That's indisputably adjudicative in nature, so the court properly refused to consider the video on appeal.

Magee, by contrast, is on point—but it's wrong. In *Magee*, the defendant challenged an instruction directing the jury to consider "the eyewitnesses' level of certainty and the accuracy of their prior descriptions." *Magee*, 374 Ill. App. 3d at 1025–26. That challenge was apparently premised on scientific research showing that neither factor was a good predictor of accuracy or reliability. *See id.* at 1029–30. Whether an instruction accurately conveys the law is, of course, a legal question. *See People v. Parker*, 223 Ill. 2d 494, 501

(2006). It follows that it was entirely proper for the defendant to cite scientific authority as legislative facts bearing on the legal issue of whether the jury should be instructed to consider specific factors.[3] The appellate court, however, accepted the State's recharacterization of those authorities as "evidence" and struck the portions of the defendant's brief citing them. *Magee*, 374 Ill. App. 3d at 1029–1030. That decision was contrary to the long-established practice of relying on legislative facts in the course of deciding a legal issue. (Conway's Br. 21–23.) *Magee* should be overruled, not followed.

One final point. The State concedes that, in evaluating whether the evidence was sufficient, this Court can rely on common sense, but it never explains how that's any different than relying on scientific authority. (State's Resp. 43.) And that's because, fundamentally, it isn't. Just like scientific authority, common sense is a source of information outside of the evidence. Nobody would seriously contend that judges can only employ whatever common sense that a witness happened to testify to at trial. The only significant difference between common sense and scientific knowledge is that one of them—the one the State wants this Court to ignore—is more likely to be right.

C. Standing alone, Story's long-distance identification could not rationally prove identity beyond a reasonable doubt.

The State does not dispute that Officer Story's identification was based entirely on a partial view of the shooter's face. (Conway's Br. 14.) It follows that his identification of Conway was insufficient to sustain a conviction on

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3. This puts aside, of course, that the appellate court was not free to disregard this Court's precedent identifying those factors as relevant when assessing the weight to give identification testimony. *See People v. Slim*, 127 Ill. 2d 302, 307–08 (1989).

its own unless it can rationally be concluded that, from a distance of 150 feet, it is possible to make out a stranger's face in enough detail to permit a later identification that is so reliable that it proves identity beyond a reasonable doubt.

In arguing otherwise, the State repeatedly misrepresents Conway's position, which is not that it is utterly *impossible* to accurately identify somebody after seeing that person's face from a distance of 150 feet.[4] (State's Resp. 36, 39, 40.) Indeed, the scientific literature confirms that, just like a hole-in-one in golf, a correct identification from that distance is *possible*—but it's also *highly unlikely*. (Conway's Br. 17–19.) Conway's actual argument is more limited: a facial identification from 150 feet away is so likely to be wrong that it cannot sustain a finding of guilt on its own. Resolving that argument does not require discerning a specific "cutoff" point past which an identification can no longer prove identity beyond a reasonable doubt. (State's Resp. 47, 50.) This Court need only decide, in light of the distance involved in *this* case, whether, when viewed in the light most favorable to the State, it would be rational to deem Story's identification so likely to be right that it leaves no reasonable doubt about who the shooter was.

Purely as a matter of common sense, the answer is *no*. (Conway's Br. 14–15.) That common-sense conclusion, moreover, is validated by scientific authority showing that a facial identification from 150 away is more likely to be *wrong* than right. (Conway's Br. 17–19.) Nothing the State says undermines these damning findings.

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4. It is, however, functionally impossible at that distance to "make out the fine facial features that distinguish one person from another." (Conway's Br. 15.)

The State observes that the results of the Lindsay and Nyman studies indicate that accurate identifications are possible at 150 feet. (State's Resp. 48–50.) Certainly, but the question here is not whether it is theoretically possible that Story's identification was correct. Again, under *Jackson*, the question is whether the trier of fact could have rationally concluded that his identification was so likely to be correct that it proved identity beyond a reasonable doubt. That Story *might* have been right does not answer that question.

The State's analysis of the results of those studies, moreover, is deeply flawed. The State argues that only participants who were "confident enough" to attempt identifications should count, but it never explains why it makes sense to ignore those who have enough self-awareness not to attempt an identification that can't reliably be made. (State's Resp. 48–49.) Lindsay, in fact, specifically highlighted its "concern" with the sheer number of participants who "chose to guess" even though they "were too far from the target to permit an accurate identification decision." R.C.L. Lindsay *et al.*, *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 L. & Hum. Behav. 526, 535 (2008). Nyman similarly found that participants were more likely to attempt an identification (instead of rejecting a lineup) when they had seen the target from farther away, suggesting "that participants were not good at taking into account the difficulty of the task." Thomas J. Nyman *et al.*, *The Distance Threshold of Reliable Eyewitness Identification*, 43 L. & Hum. Behav. 527, 537 (2019). That result, Nyman explained, might actually be an effect of seeing the target from a long distance. The difficulty of discerning faces beyond short distances means that being farther away leads to "a less detailed memory

trace." *Id.* at 529. That reduction in "memory strength" means that more lineup photographs can appear to be matches. *Id.* at 537.

Regardless of the reason, this observed increase in attempted identifications at longer distances predictably means that, when you look only at participants who have the "confidence" to attempt an identification, accuracy rates go *down*, not up. In Lindsay, 34.0% of the participants either identified the target (if present in the lineup) or correctly rejected the lineup (if not). In Nyman, that rate was only 30.6%. Among the subset of participants who attempted identifications, though, those rates fell to 27.8% in Lindsay and 15.5% in Nyman.[5] (App'x A2, A3.) The State apparently arrives at the significantly higher rates quoted in its brief (41% for Lindsay and 32% for Nyman) by excluding, *sub silentio*, target-absent lineups, which resulted in an astonishingly high incidence of false identifications—more than 50% in both studies.[6]

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5. The percentages used in this analysis are drawn from the two studies' result tables, which are reproduced in the appendix to this reply. The specific numbers are noted below, with attempted identifications underlined.

   Lindsay ("long" distance and "immediate" judgment conditions):

   > Target-present (N=94): <u>ID suspect</u>: 35 (37.2%); <u>ID foil</u>: 37 (39.4%); incorrect rejection: 13 (13.8%); not sure: 9 (9.6%).
   >
   > Target-absent (N=97): <u>incorrect ID</u>: 54 (55.7%); correct rejection: 30 (30.8%); not sure: 13 (13.4%).

   Nyman (ages 18 to 44; distance of 45 meters (147 feet, 8 inches)):

   > Target-present (N=76): <u>target ID</u>: 15; <u>filler ID</u>: 32; rejection: 29.
   >
   > Target-absent (N=84): rejection: 34; <u>filler ID</u>: 42; <u>designated innocent ID</u>: 8.

6. The 41% figure quoted for Lindsay was apparently computed by

(continued...)

The State also critiques the experimental designs of Lindsay and of Loftus and Harley, but, notably, not of Nyman. That's especially curious given that the Nyman group's research was intended to help fill in gaps in the published literature that had been left by previous research "on the impact of distance on eyewitness identification accuracy and especially on the distance threshold," including those very articles. *See* Nyman, *supra* p.12, at 528, 529. The reason the State shies away from criticizing Nyman is clear, though: it addresses the State's complaints about those other authorities. Unlike Loftus and Harley, Nyman's subjects viewed "live targets," not digitally filtered portraits. *Id.* at 529. (*See* State's Resp. 47–48.) And unlike Lindsay, Nyman provided its subjects with "optimal viewing conditions" that would "almost never occur[] in actual criminal cases," including: (1) no interruptions or other attention-diverters; (2) a straight-line view; (3) twenty seconds to observe the subject, who turned to offer views from both sides as well as head-on, and (4) "optimal and naturalistic" lighting. *Id.* at 529, 532. (*See* State's Resp. 48–49.) Nyman, in short, is precisely the study that the State says it wants. It shows that, even under the best conditions, at a distance of just under 150 feet, an eyewitness is far more likely to make a *false* identification than a true one. (Conway's Br. 18–19.) And Officer Story—who only saw the "left and front side" of the shooter's face "as he was coming diagonally" (R 83) and was faced with the highly distracting

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6. (...continued)
excluding "not sure" responses (9) and then calculating the share of correct identifications (35) from what remains (85). The 31% figure quoted for Nyman was apparently computed by excluding inaccurate rejections (29) and calculating the share of correct identifications (15) from what remains (47).

circumstance of active gunfire in his vicinity—operated under circumstances far less than ideal.

That said, the State's complaints about the other authorities cited by Conway miss the mark. Even accepting the State's speculative theory that, in the midst of the shooting, Story calmly anticipated a future identification task, whatever minor advantage that might have given him over the test subjects in Lindsay was easily outweighed by several significant disadvantages. (State's Resp. 49.) The subjects in Lindsay viewed their targets at distances ranging from 20 to 50 meters (roughly 66 to 164 feet). Lindsay, *supra* p.12, at 529. Story's distance from the shooter was at the top end of that range. (R 66.) Ths subjects in Lindsay were given a head-on view of the target. *Id.* at 528. Story only got some kind of diagonal or side-angle view. (R 83.) The subjects in Lindsay were asked to identify who they had seen right away, with no passage of time.[7] *Id.* Story didn't make an identification until after other officers had responded to the scene, entered the wrong building, and been redirected to the right one by Story, who had to tell them where to go in person because he didn't have a police radio.[8] (R 69–70, 95–96.) Most significantly, there were no biasing circumstances in the Lindsay study. Story, on the other hand, only identified Conway as the shooter after seeing the shooter's sweatshirt sitting on the floor near him. (R 71.) *See Foster v. California*, 394 U.S. 440, 443 (1969) (noting the inherent suggestiveness in having a suspect wear a jacket during a lineup that is similar to one that was worn by the shooter).

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7. The results discussed in the parties briefs were those generated under the "immediate" judgment condition. (Conway's Br. 18 n.5.)

8. As noted in Conway's opening brief, Story testified at a pretrial suppression hearing that it took eight or ten minutes for officers to arrive on the scene. (Sup R 20; Conway's Br. 4 n.1.)

As for the Loftus and Harley article, it is certainly true that their research involved digitally filtered images instead of live subjects. (State's Resp. 47.) But that was the *point*. They were testing their theory that it was possible to simulate the "information loss" associated with viewing a face from a distance by filtering images of faces. Geoffrey R. Loftus & Erin M. Harley, *Why Is it Easier to Identify Someone Close Than Far Away?*, 12 Psychonomic Bull. & Rev. 43, 44, 47, 51 (2005). The article discusses that theory, including its basis in previous research into the human visual perception system, at some length before hypothesizing that filters could be used to generate images of faces that, for identification purposes, would be functionally equivalent to seeing those same faces at a distance. *Id.* at 45–51. They then performed experiments that confirmed that hypothesis. *Id.* at 51–64. This research was published more than 17 years ago, and the State has found nothing that contradicts its conclusion. That includes the Nyman article, which did not, as the State claims, "call [the] methodology into question." (State's Resp. 47.) To the contrary, the Nyman article deemed Loftus and Harley's research notable. Nyman, *supra* p.12, at 528. Nyman's observation that, because Loftus and Harley's research involved photographs instead of live targets, its applicability to "real-life settings" remained "uncertain," is a statement of the obvious, not one of disapproval. *See id.*

The State's remaining analysis of Story's identification is a brief discussion of the *Slim–Biggers* factors. (State's Resp. 38–39.) Notably, its discussion of Story's opportunity to see the shooter omits any mention of the fact that he was 150 feet away. That distance is the single most important fact in this case. If Story was too far away to get a good enough look at the shooter's face to enable an identification that could rationally establish identity beyond a reasonable doubt—and he absolutely was—nothing else

matters: not how sunny it was, not whether there was shrubbery to contend with, and not any other factor. Even so, the State's analysis of those other factors contains three serious flaws.

First, the State's theory that Story "knew he would have to apprehend the shooter to protect the public" is pure speculation. (State's Resp. 38.) To be sure, the State tries to disguise its speculation as a reasonable inference from the testimony by claiming that Story "testified that he paid attention to the shooter." But he didn't testify to that. Instead, as all witnesses do, Story testified about what he saw. (R 65–68.) Does that support an *inference* that he was paying some degree of attention? Sure. But the fact remains that Story never testified that he was paying attention. Testimony that doesn't exist can't be deemed "credible", nor can it support any inferences.

Second, somewhat surprisingly, the State emphasizes that "Story had a high degree of certainty in his identification." (State's Resp. 38.) It has long been known that the correlation between confidence and accuracy is weak, at best, and maybe even nonexistent. *See generally* Richard S. Schmechel *et al.*, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics 177, 198–99 & n.83 (2006) (citing two articles from the 1980s). Confidence is actually primarily a product of innate personality traits and social factors. *Id.* at 199. And whatever relationship might exist between confidence and accuracy is easily destroyed by factors arising *after* the event that can increase or decrease confidence without the witness realizing it. *Id.* In light of this knowledge, courts in some states have rejected the degree-of-certainty factor entirely. *See, e.g.*, *People v. Lemcke*, 11 Cal. 5th 644, 647–48 (2021) (ordering California courts to omit certainty from pattern identification instruction in view of "near unanimity in the empirical research" that it is not a reliable factor). As far as Conway is aware, this

Court has yet to take that step, but the time would certainly be ripe for it to do so.

Third, *In re M.W.*, 232 Ill. 2d 408 (2009), does not support the State's argument that Story's identification was sufficient because it was close in time to the shooting. (State's Resp. 38–39.) The State has overlooked a crucial difference between this case and that one. In *M.W.*, the witness—a passenger who witnessed a group beating on a bus—never lost sight of the accused. While some of the other apparent participants fled the bus before the police boarded it, the accused wasn't one of them, and she was still there when the witness identified her. *See M.W.*, 232 Ill. 2d at 432–34. In this case, by contrast, Story lost sight of the shooter almost immediately following the shooting. Unlike the witness in *M.W.*, he couldn't rely on keeping his eyes on the suspect for a short time. All he had to go on was his memory of whatever he was able to discern about the shooter's face from 150 feet away.

And that, ultimately, is what everything comes back to. At that distance, a witness *might* get a facial identification right, but the chances are low, and they're certainly not good enough to rationally supply proof of identity beyond a reasonable doubt. That's true as a matter of common sense, and it's true as a matter of scientific knowledge. Officer Story's identification showed that Conway might have been the shooter, but it was not strong enough on its own to sustain a conviction.

D. Even when viewed in the light most favorable to the State, the other evidence did not rationally leave no reasonable doubt about the shooter's identity.

Because Story's identification was not sufficient on its own to rationally support a finding that Conway was the shooter beyond any reasonable doubt,

the ultimate question is whether the other evidence adduced at trial was enough to get there. The State identifies five circumstances that it claims support the conclusion that Conway was the shooter. (State's Resp. 39.) Conway has already explained why, in light of *other* relevant facts, these circumstances do not rationally allow a conclusion that he was the shooter. (Conway's Br. 28–31.) The only point made by the State that merits a response is its misleading suggestion that the basement where the shooter's gun was found was part of the same "house" that Conway was found in. (State's Resp. 39.) Actually, as Officer Story testified at trial, the basement was a *separate unit*, not a part of the same residence that Conway was in when he was arrested. (R 100; Conway's Br. 29.) The State does not otherwise dispute the facts that undermine its arguments; instead, it asks this Court to ignore them. (State's Resp. 51–52.) This Court should decline that invitation. Sufficiency review "must include consideration of *all* of the evidence, not just the evidence convenient to the State's theory of the case." *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007); *accord Jackson*, 443 U.S. at 319 (instructing courts to "review *all of the evidence*").

The State's cavalier treatment of the other evidence illustrates just how thin it was. In the end, this case turned on Story's identification of Conway as the shooter, which was based on a less-than-direct view of the shooter's face for a matter of seconds during and immediately after the shooting from a distance of 150 feet. That distance naturally limited his ability to reliably make an accurate identification. Criminal convictions require proof beyond a reasonable doubt, and no rational trier of fact could have found that standard satisfied given the inherent unreliability of long-distance identifications such as Story's. The evidence here was not sufficient to sustain Conway's conviction. This Court should reverse outright.

CONCLUSION

For the foregoing reasons, defendant–appellee Jason Conway respectfully requests that this Court reverse his conviction outright.

Alternatively, if this Court does not reverse outright, Conway respectfully requests that it either affirm the appellate court's judgment or else grant the relief requested in his Appellee's Brief. (*See* Conway's Br. 61.)

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,931 words.

/s/Gavin J. Dow
GAVIN J. DOW
Assistant Appellate Defender

APPENDIX TO THE REPLY BRIEF

Distance Measurements

Figure 1. Screenshot of Google Maps depicting 3800 block of West Monroe Street. The measured distance between the blue markers is 246.05 feet.

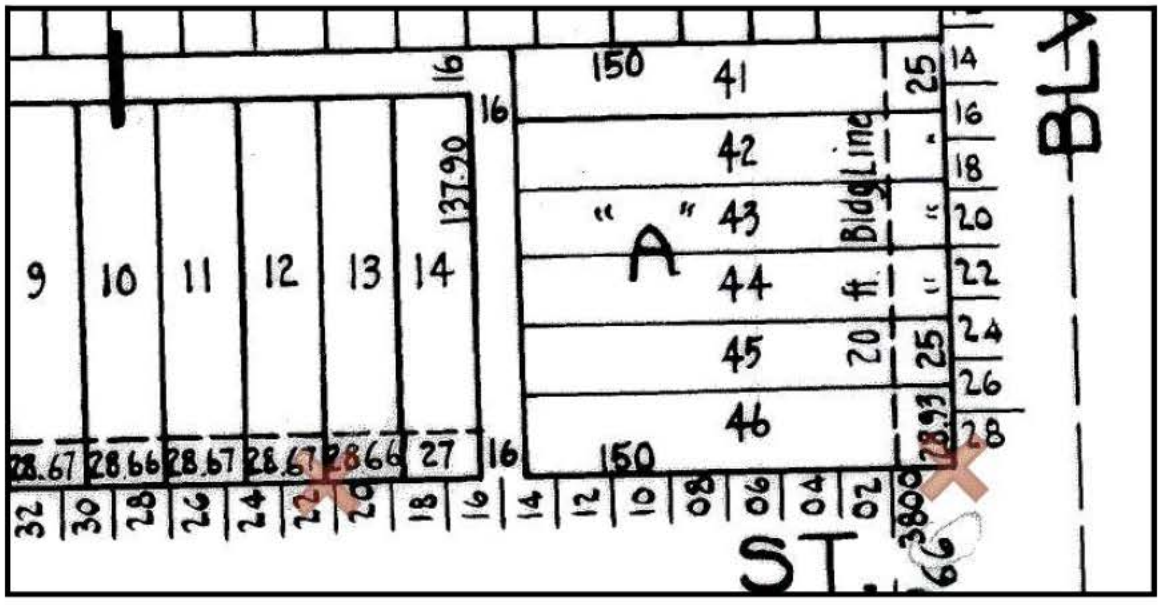

Figure 2. Detail of 80-acre plat map depicting the same location. Based on the measurements recorded on the plat map, the distance between the two *x*-shaped markers is 221.66 feet.

Lindsay Result Tables

Table 3 Identification response (%) as a function of target presence and distance and judgment conditions

Target presence[a]	Distance condition					
	Short			Long		
	Target-present					
View condition	Percep	Immed	Delayed	Percept	Immed	Delayed
ID suspect	61.3	63.3	58.6	34.9	37.2	38.2
ID foil	20.8	21.1	14.3	39.5	39.4	17.9
Incorrect rejection	11.3	9.2	18.6	12.8	13.8	20.2
Not sure	6.6	6.4	8.6	12.7	9.6	23.6
N	106	109	70	86	94	89
	Target-Absent					
View condition	Percep	Immed	Delayed	Percept	Immed	Delayed
Incorrect ID	57.3	45.5	43.0	58.3	55.7	45.9
Correct rejection	35.4	42.7	47.1	26.2	30.8	39.6
Not sure	7.3	11.8	9.9	15.5	13.4	14.4
N	96	110	121	84	97	111
Diagnosticity[b] ratio (choosers)	6.42	8.35	8.18	3.59	4.01	4.99
Diagnosticity ratio (non-choosers)	3.13	4.64	2.53	2.05	2.23	1.96

[a] Lineup type (target-absent or target-present) was not recorded for 17 participants

[b] Diagnosticity of choosers (Wells and Lindsay 1980) is the ratio of the correct identification rate to the false identification rate. False identification rates were estimated by dividing the false positive choice rate from target-absent lineups by the nominal size of the lineup (6). Diagnosticity of non-choosers is the ratio of correct rejection rates to incorrect rejection rates

Source: R.C.L. Lindsay *et al.*, *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 L. & Hum. Behav. 526, 535 tbl.3 (2008), *available at* http://www.burtthompson.net/uploads/9/6/8/4/9684389/lindsay_et_al._2008_distance_and_eyewitness.pdf (last accessed Feb. 21, 2023).

Nyman Result Tables

Age group 18-44

Distance (meters)	Trials		TP						TA					
	TP	TA	Target ID		Filler ID		Rejection		Rejection		Filler ID		Designated Innocent ID	
			SIM	SEQ	SIM	SEQ	SIM	SEQ	SIM	SEQ	SIM	SEQ	SIM	SEQ
5	90	83	28	23	7	10	12	10	28	33	9	9	2	2
10	68	92	32	13	3	5	8	7	26	37	10	11	2	6
15	95	94	25	18	8	11	8	25	22	29	19	15	5	4
20	70	88	17	10	13	10	8	12	25	23	14	15	6	5
25	88	101	17	18	13	13	10	17	34	28	8	23	5	3
30	74	100	18	9	13	10	9	15	18	29	19	21	8	5
35	85	77	12	11	19	11	15	17	12	20	24	15	3	3
40	76	85	10	7	15	10	12	22	21	17	15	21	7	4
45	76	84	5	10	18	14	13	16	19	15	20	22	6	2
50	72	90	7	5	21	18	8	13	16	19	27	19	6	3
60	90	81	12	6	20	23	12	17	15	13	20	24	6	3
70	93	95	8	11	21	30	9	14	20	19	21	23	7	5
80	89	71	6	5	29	24	11	14	17	10	18	17	4	5
90	91	100	11	8	17	22	13	20	13	16	28	30	6	7
100	82	76	5	8	18	23	18	10	14	12	20	18	5	7
110	97	73	3	3	27	28	15	21	15	11	20	23	2	2

Age group 45-77

Distance (meters)	Trials		TP						TA					
	TP	TA	Target ID		Filler ID		Rejection		Rejection		Filler ID		Designated Innocent ID	
			SIM	SEQ	SIM	SEQ	SIM	SEQ	SIM	SEQ	SIM	SEQ	SIM	SEQ
5	34	31	13	7	2	5	5	2	1	12	8	7	2	1
10	39	51	8	15	5	5	0	6	10	11	18	5	4	3
15	49	33	14	8	5	7	3	12	8	6	8	9	1	1
20	39	37	4	11	7	8	2	7	7	10	10	9	1	0
25	42	41	6	6	6	11	6	7	7	8	12	9	3	2
30	31	37	4	3	3	9	8	4	5	5	9	11	4	3
35	37	39	2	4	6	9	10	6	3	13	7	12	3	1
40	48	43	5	4	8	10	12	9	7	5	9	14	4	4
45	39	52	4	0	6	11	10	8	8	7	15	17	2	3
50	31	45	2	4	5	9	5	6	6	8	11	14	2	4
60	36	29	4	3	9	10	7	3	2	3	8	11	1	4
70	40	44	4	3	10	11	5	7	7	7	10	15	4	1
80	33	44	3	1	8	10	6	5	6	15	6	10	2	5
90	41	42	3	1	13	12	7	5	6	7	9	15	3	2
100	44	48	1	0	10	17	9	7	9	5	13	13	3	5
110	36	29	1	4	7	12	8	4	4	5	9	8	2	1

Only the results for adults are shown. Data concerning confidence estimates, response times, hit and false-alarm rates, and response bias has been omitted.

Source: Thomas J. Nyman *et al.*, *The Distance Threshold of Reliable Eyewitness Identification*, 43 L & Hum.Behav. 527, appendix B, *available at* https://supp.apa.org/psycarticles/supplemental/lhb0000342/LHB-2018-0072_Nyman_3.xlsx (last accessed Feb. 21, 2023).

No. 127670

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JASON L. CONWAY, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, No. 1-17-2090. There on appeal from the Circuit Court of Cook County, Illinois , No. 15 CR 19055. Honorable Charles P. Burns, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 22, 2023, the Reply in Support of Request for Cross-Relief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply in Support of Request for Cross-Relief to the Clerk of the above Court.

/s/Alicia Corona
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