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Court of Appeals

of the

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

KENNETH GARCIA,

Defendants-Appellant.

BRIEF OF *AMICUS CURIAE* THE INNOCENCE PROJECT IN SUPPORT OF DEFENDANT-APPELLANT

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Pursuant to Rule 500.1(f) of this Court's Rules of Practice, 22 N.Y.C.R.R. § 500.1(f), amicus curiae the Innocence Project makes the following disclosure: Innocence Project, Inc., is a not-for-profit organization with no parents, subsidiaries, or affiliates.

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INTEREST OF THE AMICUS

The Innocence Project is a nonprofit organization that works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for all. In addition to litigating individual cases, it pursues administrative, legislative, and court reform by advocating for the innocent and participating as amicus curiae in cases of broader significance.[1]

Over the past thirty-two years, the Innocence Project's post-conviction work has led to the exoneration or release of more than 250 innocent people, including over two dozen New Yorkers.[2] Eyewitness misidentifications contributed to the majority of these wrongful convictions. Indeed, mistaken identifications are a leading cause of wrongful convictions nationwide, implicated in nearly 70 percent of all wrongful convictions overturned by DNA evidence.[3] As a prominent advocate for the wrongfully convicted, the Innocence Project has a compelling interest in this case because it highlights the risk factors that contribute to misidentifications and presents an opportunity to provide guidance to courts statewide about how to assess the reliability of eyewitness identification evidence.

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[1] Neither party's counsel contributed to the content of this brief or participated in the brief's preparation. No party or counsel to any party or any person other than amicus curiae and its members or counsel contributed money intended to fund preparation or submission of this brief.
[2] Innocence Project, Our Impact: By the Numbers, https://innocenceproject.org/exonerations-data/ (last visited Sept. 22, 2024); Innocence Project, Cases, https://innocenceproject.org/all-cases/ (last visited Sept. 22, 2024) (filter by state).
[3] Innocence Project, DNA Exonerations (1989-2020), https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Sept. 22, 2024) (69%).

PRELIMINARY STATEMENT

Judges have long cast a suspicious eye on uncorroborated eyewitness identifications. The Supreme Court cautioned that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). And then-Professor Frankfurter warned: "The identifications of strangers are proverbially untrustworthy." Felix Frankfurter, *The Case of Sacco and Vanzetti* 27 (1927).

The advent of DNA testing has shown that this suspicion was justified. In this Court's words, "[m]istaken eyewitness identifications are 'the single greatest cause of wrongful convictions in this country.'" *People v. Boone*, 30 N.Y.3d 521, 527 (2017) (citation omitted). Misidentifications have played a part in more than two-thirds of the wrongful convictions overturned by DNA, far more than any other cause.[4]

Driven in large part by the proven risk of misidentifying the innocent, a body of scientific research has emerged that helps explain the fallibility of eyewitness memory. Over the course of thousands of studies since the 1970s, psychologists have discovered a set of variables that affect the accuracy and

[4] Innocence Project, DNA Exonerations (1989-2020), https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Sept. 22, 2024).

reliability of eyewitness identifications. This research provides, for the first time, a scientific basis for identifying those eyewitness identifications that are especially unreliable—and likely to lead to wrongful convictions. Courts across the country have accepted this body of research and incorporated it into their jurisprudence.

The science of eyewitness identification and memory indicates that the identification of a stranger here was patently unreliable. It involved a cross-racial identification made after a highly stressful incident involving multiple perpetrators, during which the complainant focused on the knife being wielded by one of Appellant's co-defendants—all factors that, as discussed below, researchers now recognize reduce the accuracy of identifications. Moreover, the complainant could only describe the assailant later identified as Appellant as a "Hispanic male" to the police, and only identified Appellant after a highly suggestive collective showup, where he was surrounded by police and clumped next to two other men matching the complainant's more detailed descriptions—a procedure that has been demonstrated to increase the likelihood of mistaken identification. And Complainant's identification was uncorroborated.

A conviction that rests solely on such an identification is too weak to stand. This Court should adopt a rule analogous to the rules that apply to accomplice testimony and confessions: Uncorroborated stranger identifications that show substantial scientific indicia of unreliability are legally insufficient for conviction.

Relying on such unreliable evidence alone poses an unacceptable risk of wrongful conviction.[5]

[5] Though amicus agrees with Appellant that the group showup identification procedure here was unduly suggestive, amicus will address only the legal sufficiency of the evidence in this brief.

ARGUMENT

I. THE SCIENCE EXPLAINING MISTAKEN EYEWITNESS IDENTIFICATIONS—A LEADING CAUSE OF WRONGFUL CONVICTIONS—HAS BEEN ACCEPTED BY COURTS ACROSS THE COUNTRY AND SHOULD BE ACCEPTED BY THIS COURT.

A. Eyewitness identifications are incredibly persuasive to juries, but scientific research shows that they are often unreliable.

As Justice Brennan wrote more than forty years ago: "All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing [] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders,* 449 U.S. 341, 352 (1981) (dissenting op.) (citation omitted). Subsequent studies of juror decision-making have confirmed this statement, finding that "[f]ew categories of evidence are as compelling to members of a jury as eyewitness evidence." Carolyn B. Semmler et al., *Jurors Believe Eyewitnesses*, *in Conviction of the Innocent: Lessons from Psychological Research* 185, 185 (Brian L. Cutler ed., 2012).

Indeed, the power of eyewitness identifications is so great that it has even caused juries to convict innocent people in the face of exculpatory DNA evidence. In Clarence Elkins' case, for example, a jury convicted him of rape and murder based entirely on his six-year-old niece's identification of him as the culprit even though DNA testing before trial had excluded him as the contributor of pubic hairs

found at the scene. *See, e.g.*, Innocence Project, Clarence Elkins, https://innocenceproject.org/cases /clarence-elkins/ (last visited Sept. 22, 2024).

Considering both the impact and ubiquity of eyewitness identification testimony in criminal trials, it is no surprise that facial recognition and eyewitness memory have been the subject of intense study by psychologists and other social scientists. Since the 1970s, an entire sub-field of applied psychology has grown around this subject, which has "identified key variables that affect the accuracy and reliability of eyewitness identifications." National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 3, 16 (2014), https://nap.nationalacademies.org/catalog/18891 ("Nat'l Research Council, *Identifying the Culprit*"). From this research, a consensus has emerged that eyewitness memory is far more fragile and fallible than commonly recognized.

This body of scientific research has shown that human perception and memory "does not capture a perfect, error-free 'trace' of a witnessed event." Nat'l Research Council, *Identifying the Culprit* at 15. Instead, what a person perceives—which may be "influenced by bias, expectations, emotions, and prior experiences," among other things—"must be encoded into memory, stored and retrieved." *Id.* Memories become "less stable" with the passage of time. *Id.* Meanwhile, "suggestion and the exposure to new information [after the witnessed event] may influence what the witness believes she or he has seen." *Id.* Instead of memory

functioning like a video recorder, in other words, it gets taped over each time it is retrieved: "Despite the vividness and the sense of reliving that characterizes retrieval of emotional memories," scientists have found that "memories are . . . an ever-evolving account of our experiences" and "prone to errors." *Id.* at 62–64.

After decades of research, it is now generally accepted that an eyewitness's memory can be affected by both factors outside the control of the criminal legal system—known as "estimator variables"—and the methods used by the police and prosecutors to elicit and evaluate eyewitness identifications—known as "system variables." Nat'l Research Council, *Identifying the Culprit* at 1. Some estimator variables that increase the likelihood of misidentification include: whether the identification was cross-racial, high levels of stress, focus on a weapon, and the presence of multiple perpetrators. System variables that degrade the reliability of eyewitness identifications include: the use of showups (instead of lineups or photo arrays), identification procedures that are not double blind (or blinded), flawed lineup construction, repeated viewings, suggestive questioning, and post-identification feedback. *See State v. Lawson*, 291 P.3d 673, 685–87 (Or. 2012).

Studies have shown, however, that jurors struggle to identify the risk factors known by scientists to undermine the reliability of eyewitness identifications—and thus to assess the veracity of eyewitness testimony. A "meta-analysis assessing lay knowledge concluded that 75% of 16 factors known to influence eyewitness

identification accuracy are not common sense to jurors." Angela M. Jones et al., *Comparing the Effectiveness of Henderson Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence*, 13 J. EXPERIMENTAL CRIMINOLOGY 29, 31 (2017). For instance, "eyewitness testimony offered with confidence is likely to be believed by jurors." Elizabeth F. Loftus et al., 1 *Eyewitness Testimony: Civil and Criminal* § 8-2 (6th ed. 2023). Witness confidence has been shown to strongly affect jurors' decisions and even cause them to disregard other evidence pointing to the unreliability of an identification. *Id.* But "self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy." Nat'l Research Council, *Identifying the Culprit* at 108.

B. Courts throughout the country have adopted this scientific research and applied it in assessing eyewitness identification evidence.

In a pathbreaking decision, the New Jersey Supreme Court recognized in 2011 that the scientific literature in the field of human memory cast doubt on prior caselaw governing the admissibility of eyewitness identifications. *State v. Henderson*, 27 A.3d 872 (N.J. 2011). Calling this body of research "the gold standard in terms of the applicability of social science research to the law," the *Henderson* Court emphasized that "[s]tudy after study reveal[s] a troubling lack of reliability in eyewitness identification," concluding that "the record proves that the possibility of mistaken identification is real." *Id.* at 877–78, 916. The New Jersey Supreme Court held that the federal due process test for assessing the admissibility

of eyewitness identification testimony did not adequately measure the reliability of such evidence—and overestimated the jury's ability to reliably evaluate eyewitness identification testimony. *Id.* at 878. Accordingly, it adopted a different test under the state constitution, which "allow[ed] for a more complete exploration of system and estimator variables to preclude sufficiently unreliable identifications from being presented and to aid juries in weighing identification evidence." *Id.* at 928.

Since *Henderson*, courts across the country have accepted the body of scientific research on system and estimator variables that undermine the reliability of eyewitness identifications and incorporated this research into their jurisprudence. For example, in 2012, the Supreme Court of Oregon relied on developments in both the law and science of eyewitness identifications to revise its similarly outdated standard for the admissibility of eyewitness identifications, this time relying on state evidentiary law (rather than the state constitution's due process clause as in *Henderson*). *Lawson*, 291 P.3d at 677. The *Lawson* Court "conclude[d] that the scientific knowledge and empirical research concerning eyewitness perception and memory has progressed sufficiently to warrant taking judicial notice of the data contained in those various sources as legislative facts that we may consult for assistance in determining the effectiveness of our existing test for the admission of eyewitness identification evidence." *Id.* at 685.

Similarly, the Supreme Court of Connecticut incorporated the generally accepted legal and scientific developments surrounding eyewitness identifications into its caselaw in *State v. Guilbert*, 49 A.3d 705 (Conn. 2012) and *State v. Harris*, 191 A.3d 119 (Conn. 2018). *Guilbert* held that eyewitness expert testimony was admissible, reversing its prior precedent, explaining that there is "extensive and comprehensive scientific research" that "convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification." 49 A.3d at 720–21. *Harris* further modified existing law "to conform to recent developments in social science and the law," following *Henderson* in holding that the due process guarantees of the state constitution provide broader protection than the federal constitution with respect to the admissibility of eyewitness identification testimony. 191 A.3d at 123.

Massachusetts's highest court has also embraced this body of scientific research. Relying on a report from a special study group it had convened to examine the issues with eyewitness identifications, the Supreme Judicial Court adopted a new set of jury instructions that sought to educate juries about the many ways that eyewitness identification testimony can be unreliable. *Commonwealth v. Gomes*, 22 N.E.3d 897 (Mass. 2015). The *Gomes* Court noted: "[T]he research makes clear that common sense is not enough to accurately discern the reliable

eyewitness identification from the unreliable, because many of the results of the research are not commonly known, and some are counterintuitive." *Id.* at 909.

In the federal realm, the Second Circuit applied this body of research in the habeas context in *Young v. Conway*, 698 F.3d 69, 78 (2d Cir. 2012). The *Young* court held that the defendant's constitutional rights were violated due to the admission of tainted eyewitness identification evidence at trial, relying on the extensive body of scientific research on eyewitness memory in analyzing whether there was an "independent source" for the identification. Quoting the New Jersey Supreme Court's decision in *Henderson*, *Young* noted that "'social scientists, forensic experts, law enforcement agencies, law reform groups, legislatures and courts' routinely rely upon the research during legal proceedings regarding eyewitness testimony" because it has been repeatedly "reviewed, replicated, and retested, and is generally accepted in the research community." *Id.* at 79.

This Court should follow *Henderson*, *Lawson*, *Guilbert*, *Harris*, *Gomes*, *Young*, and the many other decisions that have recognized and relied upon the body of scientific research showing the ways that identifications can be unreliable.[6] This case is an opportunity to provide guidance to lower courts on the importance

[6] *See, e.g.*, *State v. Derri*, 511 P.3d 1267 (Wash. 2022) (incorporating scientific research into the due process test for admissibility of eyewitness identification evidence); *State v. Martinez*, 478 P.3d 880 (N.M. 2020) (same); *State v. Kaneaiakala*, 450 P.3d 761 (Haw. 2019) (same); *Young v. State*, 374 P.3d 395 (Alaska 2016) (same); *State v. Almaraz*, 301 P.3d 242 (Idaho 2013) (same).

of this research—and apply it to the question here of whether the single-eyewitness identification of a stranger was sufficient, standing alone, to sustain a conviction.

II. MANY OF THE SCIENTIFICALLY IDENTIFIED RISK FACTORS THAT AFFECT THE ACCURACY AND RELIABILITY OF IDENTIFICATIONS WERE PRESENT HERE.

As courts across the country have acknowledged, decades of scientific research have resulted in the discovery of a set of risk factors (or "variables") empirically shown to affect the accuracy and reliability of eyewitness identifications. The application of this body of research to this case shows that the stranger identification that is the sole basis for conviction is dangerously unreliable.

In this case, both estimator and system variables likely impaired the complainant's ability to make an accurate identification. Looking first at estimator variables: The likelihood of misidentification is increased where, as here, the witness and suspect are not of the same race; the witness's observations took place during a highly stressful assault; there were multiple perpetrators; and the witness, by his own account, focused on the person who wielded a weapon—a perpetrator who is, notably, not Appellant.[7] Next, system variables: The danger of mistaken identification is further heightened when the police display a suspect to the witness

[7] Because there were two co-defendants with the surname "Garcia," to avoid any confusion appellant Kenneth Garcia will be referred to as "Appellant" throughout this brief.

as part of a highly suggestive collective showup procedure—as happened here. And because repeated viewings contaminate memory, the in-court identification of Appellant cannot provide evidence that the initial identification was correct.

A. Estimator variables affected the accuracy of the identification.

1. Own-race bias

One of the most well-established findings in the scientific literature is the cross-race effect—or "own-race bias." The "faces of people of races different from that of the eyewitness are harder to discriminate (and thus harder to identify accurately) than are faces of people of the same race." Nat'l Research Council, *Identifying the Culprit* at 96–98. Although the theoretical reasons for this phenomenon remain contested, it has repeatedly been demonstrated in laboratory studies. *See, e.g.*, Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 PSYCH., PUB. POL'Y & LAW 3 (2001). A meta-analysis of 39 papers, involving nearly 5,000 participants, found that individuals are "1.56 times more likely to falsely identify a novel other-race face when compared with performance on own-race faces." *Id.* at 15. This effect has also been found in archival research: A study of DNA exoneration cases found that *42 percent* of misidentifications were cross-racial. Innocence Project, DNA Exonerations (1989-2020), https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Sept. 22, 2024).

Empirical research has shown that cross-racial identifications are even less accurate when the other-race faces are presented to a witness in a group—as occurred here with the collective showup. One study found both (a) that presenting three faces in a group "impaired cross-race but not same-race recognition memory," and (b) that presenting faces of the same other race together produced a higher rate of mistaken identifications (or "false alarms") than presenting faces of different races together. Kathy Pezdek et al., *Cross-Race (but Not Same-Race) Face Identification is Impaired by Presenting Faces in a Group Rather Than Individually*, 36 LAW & HUMAN BEHAVIOR 488, 493 (2012). One explanation for this latter finding is that viewing a person of a different race alongside other people of that same race makes a witness focus more on race and less on each person's "individuating features," resulting in "lower recognition accuracy." *See* Mollie McGuire & Kathy Pezdek, *Birds of a Feather Get Misidentified Together: High Entitativity Decreases Recognition Accuracy for Groups of Other-Race Faces*, 21 LEGAL & CRIMINOLOGICAL PSYCH. 202, 203 (2016).

A follow-up study examined what happens if you tell witnesses that a group of people are "friends who do things together": Other-race faces were recognized less well than if you told witnesses that the same group of people were merely in line at the bank together. *Id.* at 209. In other words, "when cross-race faces are presented in groups, telling subjects that each group is a cohesive one" resulted in

witnesses seemingly focusing more on social categorization than individual characteristics, "consequently impairing subsequent face recognition accuracy." *Id.*

Consistent with this research, the record here suggests that the complainant focused on the perceived race of his assailants—and may have had difficulty individually identifying Appellant. When asked to describe his three assailants, the complainant, whose family is from Bangladesh, testified that the man in the yellow shirt was "Spanish," A320, and as to the other two assailants, "I would say they would be Spanish." A321. He also described one of the men as wearing a red shirt and said that the men in the red shirt and the yellow shirt were about the same height. A320–21. But tellingly, although the complainant identified them at trial as "[t]he three suspects," A340, he never provided any description of the third assailant—the man identified as Appellant. Nor did he give any description of the third man to the responding officers. Sergeant Boyce testified that the complainant said he had been assaulted by "three male Hispanics from late teens to twenties; one was wearing a yellow shirt and one was heavyset." A031. But the complainant did not describe their height or anything else about their appearance. A066–067. Similarly, Officer Anderson testified that the complainant did not tell her the height of his assailants, their age, their weight, or whether they had facial hair. A615–16. Instead, he described only their perceived race and an article of clothing:

"Three male Hispanics, he said one of them has on a yellow shirt. He is the one that [was] cutting me. So more he was giving me a clothing [description]." A615.

The complainant's initial description to the police and trial testimony thus reveals that he was focused on race, and unable to remember any additional details other than age about his third assailant—the man he identified as Appellant.

2. Stress

Like own-race bias, "high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUMAN BEHAVIOR 687, 699 (2004). This phenomenon especially holds true when a witness's stress levels are particularly elevated. Though it is difficult for scientists to replicate the level of stress that accompanies violent crimes, given the ethical limitations on laboratory studies, one study found that "[t]he correct identification rate went from 75 percent for those with low-state anxiety to 18 percent . . . for those with high-state anxiety." Nat'l Research Council, *Identifying the Culprit* at 95.

A study of military "survival school," in which participants undergo both a "low-stress" and a "high-stress" interrogation while being held in a mock prisoner-of-war camp, found similar results. While most participants were able to correctly identify their interrogators in a lineup or photo array 24 hours after the low-stress

interrogation, they were about *twice as likely* to make a misidentification as a correct identification 24 hours after the high-stress interrogation. Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J. OF LAW & PSYCHIATRY 265, 273 (2004). "Contrary to the popular conception that most people would never forget the face of a clearly seen individual who had physically confronted them and threatened them for more than 30 min[utes], a large number of subjects in this study were unable to correctly identify their perpetrator." *Id.* at 274. This provides "robust evidence that eyewitness memory for persons encountered during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error." *Id.*

Importantly, scientists have found that high levels of stress make witnesses susceptible to suggestion—even when the suggestions are false. In a follow-up study of military survival school, researchers investigated "whether human memory for recently experienced, personally relevant, high stress events would be altered by exposure to suggestive misinformation." Charles A. Morgan III et al., *Misinformation Can Influence Memory for Recently Experienced, Stressful Events*, 36 INT'L J. OF LAW & PSYCHIATRY 11 (2013). About one hour after the high-stress interrogation, a researcher asked some (but not all) of the participants questions about their interrogator while showing them a photograph of a "foil"— someone

who was not the interrogator—thereby suggesting that he was the interrogator. *Id.* at 14. About 36 hours later, the participants viewed a nine-person photo array that included a photo of the foil but not the real interrogator. *Id.* Although participants who had not been shown the foil's face after the interrogation identified the foil as their interrogator 15 percent of the time, participants who had been exposed to the foil's face identified him as their interrogator *84 percent* of the time. *Id.* at 15.

The complainant's testimony about the incident understandably suggests that he found it to be highly traumatic. He described that he "felt the cuts and felt the blood dripping," and recounted that the assailants were all punching and kicking him. A323–26. He also described the incident as a "10" on the pain scale. A342.

The complainant's friend, Faysal Alam, testified similarly. Alam testified that the complainant was "in shock," not "acting like himself," and "just repeating things." A630–31. The prosecutor, too, highlighted the stress the complainant experienced, stating that "the victim was concerned about his physical well-being. He was concerned with trying to track the defendants down. He was getting treated by the EMTs. He was . . . stammering. He was in a little bit of shock." A808–09.

3. Weapon focus

The presence of a weapon can further increase the stress of a situation and lead a witness to focus on and remember the weapon rather than the culprit's facial features. "[F]ew details are as salient as a weapon," which "captures the attention

of eyewitnesses" and results in "poor recall and recognition of the perpetrator." Jonathan M. Fawcett et al., *Of Guns and Geese: A Meta-Analytic Review of The 'Weapon Focus' Literature*, 19 PSYCH., CRIME & LAW 1, 2 (2013). Studies have found that "the presence of a weapon reduced both identification accuracy and feature accuracy," with a larger effect "observed in threatening scenarios than in non-threatening ones." Nat'l Research Council, *Identifying the Culprit* at 93. Further, much like with event stress, it may not be possible to "sufficiently test" the weapon focus effect "in the laboratory because of limitations on human participant research that use realistic and heightened threats." *Id.* at 94.

The complainant's own account conveys that his attention was on the knife. He focused in his testimony on a "sharp object" that one of the men allegedly "pulled out" and "cut" him with "seven times." A323, 325. He repeatedly said that the man in a yellow shirt had "cut" him. A323–26. Officer Anderson also testified that the complainant had told her when she first responded to the incident: "these guys jumped me and that one of them, he cut me. He cut me. He was very adamant about that." A614. In the prosecutor's words, the complainant "linked empathetically . . . the individual in the yellow shirt with the knife, the knife that was at one point produced during this encounter and used against him." A783.

The prosecutor's argument "that the adrenaline, the fear, emotions that materialized in that moment, forced him to pay attention to who it was that had that

knife," *id*., stands in stark contrast to the research. Indeed, the opposite is true: the presence of a weapon would likely cause a witness to pay more attention to the weapon than the culprits—as the complainant's testimony suggests in fact occurred.

4. Multiple perpetrators

The presence of multiple perpetrators, too, gives a witness less opportunity to perceive and encode the appearance of each culprit, making identification errors more likely. Studies have found a marked decrease in witnesses' ability to identify unfamiliar faces when they are shown multiple strangers. *See, e.g.*, Ahmed M. Magreya & A. Mike Burton, *Recognising Faces Seen Alone or with Others: When Two Heads Are Worse than One*, 20 APPLIED COGNITIVE PSYCH. 957, 970 (2006). Indeed, "all research that has compared eyewitness memory for single perpetrators and multiple perpetrators has demonstrated that 1) eyewitness memory is worse when more perpetrators are involved, 2) eyewitness memory worsens as the number of perpetrators increase, and 3) the decrease in identification accuracy is nonlinear, implying that accuracy decreases drastically with each additional perpetrator." Alicia Nortje et al., *Eyewitness Identification of Multiple Perpetrators*, 33 S. AFR. J. CRIM. JUST. 348, 358 (2020). The presence of three assailants in this case, then, made misidentification considerably more likely.

Moreover, the complainant's inability to describe the assailant identified as Appellant beyond "Spanish"—when he was able to provide some physical description of his other two assailants and their clothing—suggests that his attention was focused on the other two men. This makes sense: The complainant would be expected to focus his attention on the man cutting him with a knife. But this lack of identifying detail suggests that he never encoded a detailed memory for the face of the third assailant—the man he identified as Appellant in a highly suggestive group showup.

B. System variables undermined the reliability of the identification.

1. Showups

Layered on top of the estimator variables, the use of a group showup here made a mistaken identification even more likely. There is a consensus among scientists that showups are "extremely suggestive." Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 Law & Human Behavior 1, 26 (2020) ("2020 White Paper"). Studies have consistently found that "lineups [or photo arrays] are clearly superior to showups in terms of the . . . ability to distinguish between innocent and guilty suspects." *Id.* Showups are more likely to result in a false positive because they lack a crucial safeguard: "[I]naccurate identifications from showups always fall on the innocent suspect, whereas in lineups such

inaccurate choices tend to spread across the known-innocent fillers." *Id.*[8] This Court, too, has noted the problems inherent with showups and has labeled them "strongly disfavored" precisely because they are so suggestive. *See, e.g.*, *People v. Riley*, 70 N.Y.2d 523, 529 (1987).

Recent research into real-world showups has found that "the risk of mistaken identification when using this identification procedure in the field may be even higher than previously thought [based on laboratory research]." Mitchell L. Eisen et al., *An Examination of Showups Conducted by Law Enforcement Using a Field-Simulation Paradigm*, 23 PSYCH., PUB. POL'Y & LAW 1, 17 (2017). In a field-simulation study, where participants witnessed a (staged) theft and then were asked to identify a suspect by police officers, researchers found that while 13 percent of participants identified an innocent suspect in a showup under laboratory conditions, "the false-identification rate in the field-simulation condition was consistently quite high," ranging from 34 to 40 percent. *Id.* The rate of false identification was "even greater after removing the participants who expressed doubts about the authenticity of the crime and investigation." *Id.* Researchers found that witnesses were far more likely to make an identification decision, right or wrong, given the "hot affective processes" of a real criminal event. *Id.*

[8] Studies of real police lineups have found that, among witnesses who make an identification (many don't), "over one-third (36.8%) selected a known innocent filler." 2020 White Paper at 5.

Participating in what the witnesses believed to be a real police investigation appears to "rouse[] motivations and emotions" that are not present in lab settings, such as a desire for wrongdoers to be caught and pressure to identify *someone*. *Id.* Subsequent studies have confirmed these results: "[W]hen led to believe their identifications were being made as part of an actual police investigation, witnesses at show ups lowered their criterion for choosing and were overconfident in their identification decisions." Mitchell L. Eisen et al., *Comparing Witness Performance in the Field Versus the Lab: How Real-World Conditions Affect Eyewitness Decision-Making*, 46 LAW & HUMAN BEHAVIOR 175, 187 (2022).

The complainant appears to have experienced just the kind of motivations and emotions that lead to such high rates of mistaken identifications in showups. The showup took place shortly after the assault, when he was still in pain and an apparent state of shock. He had called the police, pursued the man who had cut him on foot and in a car, and no doubt wanted his assailants arrested.

Moreover, the showup here was likely even more suggestive than standard because it was a group showup. The complainant testified that the police "brought three people out" from "inside the building." A340. And Sergeant Boyce testified that the three suspects were "clump[ed]" together. A086. Although amicus is aware of little research studying such group presentations of suspects—likely because the danger that witnesses will falsely identify innocent suspects simply because they

are standing next to someone that the witness recognizes is so self-evident—the studies cited above have found that they lead to a higher rate of misidentifications when it comes to cross-racial identifications like this one. *See* II(A)(1), *supra*.

2. Repeated viewings

Finally, there is the issue of repeated viewings. Although the complainant identified Appellant in court as well as in a showup, this in-court identification provides no proof of reliability. Instead, it can be likened to an act of theater, re-enacting for the jury a choice already made. "Whether the eyewitness is asked to make an identification with a showup or a lineup, there is only one uncontaminated opportunity to make an identification of a particular suspect. Any subsequent identification test with the same eyewitness and that same suspect is contaminated by the eyewitness's experience on the initial test." 2020 White Paper at 25.

In cases where witnesses identify a suspect in the initial viewing, like this one, research has shown that repeated viewings produce a "commitment effect." *Id.* In other words, "the initial identification, even if mistaken, causes the witness to simply repeat the same identification in the second identification procedure." *Id.* This commitment effect holds whether the second procedure is an out-of-court or an in-court identification—which is, in effect, a type of showup. *Id.* at 25, 27. In fact, "there is evidence that the act of identifying an innocent person in an initial identification procedure changes the eyewitness's memory away from the culprit

and toward the person identified, a process that is intensified if the witness is given confirming feedback following the initial mistaken identification." *Id.* at 25. "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in memory the image [from the initial identification procedure] rather than of the person actually seen, reducing the trustworthiness of [any] subsequent lineup or courtroom identification." *People v. Marshall*, 26 N.Y.3d 495, 503 (2015) (quoting *Simmons v. United States*, 390 U.S. 377, 383 (1968)).

* * *

These risk factors are cumulative. The presence of multiple estimator and system variables compounds the unreliability of the ensuing identification.

Although most studies have focused on isolating the impact of individual estimator variables, the presence of multiple estimator variables can lead to a greater decline in eyewitness identification accuracy than any single variable by itself. *See, e.g.*, Thomas J. Nyman et al., *A Stab in The Dark: The Distance Threshold of Target Identification in Low Light*, 6 COGENT PSYCH. 1, 18–19 (2019) (discussing the compounding effect of both low light and distance on identification accuracy); Brian L. Cutler et al., *The Reliability of Eyewitness Identification-The Role of System and Estimator Variables*, 11 LAW & HUMAN BEHAVIOR 233 (1987) (testing the effect of various estimator and system variables on identification accuracy). For instance, both weapon focus and the presence of multiple

perpetrators can divide a witness's attention, causing them to less accurately encode and recall the details of a stranger's face. This finding of a compounding effect has been confirmed in real cases: "In a review of known exoneration cases involving eyewitness identification, it was found that most of the cases involved deficiencies in multiple estimator variables." Amber M. Giacona et al., *Estimator Variables Can Matter Even for High-Confidence Lineup Identifications Made Under Pristine Conditions*, 45 LAW & HUMAN BEHAVIOR 256, 259 (2021).

Similarly, as the military survival school study discussed above shows, "[t]he effects of suggestion may be particularly important when the original memory is of a highly stressful event." Nat'l Research Council, *Identifying the Culprit* at 95. Indeed, "the effect of any given system variable can depend on the level of one or more estimator variables." Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial Memory Strength*, 28 Pysch., Crime & Law 473, 474 (2012). When the initial memory is stronger, "context effects on recognition memory decrease"—and thus the distorting effect of suggestive procedures diminishes. *See* David M. Zimmerman et al., *Memory Strength and Lineup Presentation Moderate Effects of Administrator Influence on Mistaken Identifications*, 23 J. OF EXPERIMENTAL PSYCH: APPLIED 460, 462, 470

(2017) (finding that "witnesses were most likely to make false identifications when they had weaker memory" *and* suggestive identification procedures were used).

Given the estimator variables degrading his ability to make an accurate identification—and his inability to describe the third assailant in any more detail than "Spanish"—the complainant was primed to make a misidentification when the police displayed Appellant to him in a group showup. There was a grave risk that the complainant would have identified *any* young Hispanic male shown to him next to two men who matched his more detailed descriptions as his third assailant.

Such an untrustworthy identification, standing alone, is too thin a reed to provide the requisite proof beyond a reasonable doubt. Due process cannot countenance a conviction resting on such a shaky foundation.

III. CONVICTIONS THAT RELY SOLELY ON EYEWITNESS IDENTIFICATIONS THAT SHOW SUBSTANTIAL SCIENTIFIC INDICIA OF UNRELIABILITY VIOLATE DUE PROCESS.

This Court has long expressed concern that unreliable eyewitness identifications lead to wrongful convictions. In holding that the state constitution provides greater protection than its federal counterpart against the admission of identification evidence procured by police suggestion, the Court stated in *People v. Adams*: "[T]he rule excluding improper pretrial identifications bears directly on guilt or innocence. It is designed to reduce the risk that the wrong person will be convicted as a result of suggestive identification procedures . . . ." 53 N.Y.2d 241,

251 (1981). The *Adams* Court elaborated: "Permitting the prosecutor to introduce evidence of a suggestive pretrial identification can only increase the risks of convicting the innocent . . . . [T]he defendant's conviction should not rest solely upon evidence of a pretrial identification made under circumstances which were likely to produce an unreliable result." *Id.* Rearticulating these concerns in *People v. Marshall*, this Court emphasized: "Wrongful convictions based on mistaken eyewitness identifications pose a serious danger to defendants and the integrity of our justice system." 26 N.Y.3d at 502.

Allowing a conviction to rest only on a stranger identification that shows substantial scientific indicia of unreliability—like this one—poses the same "risks of convicting the innocent" and "danger to . . . the integrity of our justice system." Even if this Court holds that the group showup here was not "unduly suggestive"—and thus the identification was admissible at trial—that is not the end of the matter. That evidence is admissible does not mean it is sufficient to sustain a conviction.

New York courts should treat stranger identifications that show substantial scientific indicia of unreliability like accomplice testimony and confessions: insufficient, standing alone, to sustain a conviction. The law has long "viewed accomplice testimony with a suspicious eye" because "it may often lack the inherent trustworthiness of the testimony of a disinterested witness." *People v. Berger*, 52 N.Y.2d 214, 218 (1988). Thus, although such evidence is admissible at

trial, "the uncorroborated testimony of an accomplice [does] not suffice for a conviction." *Id.*; *see also* N.Y. Crim. Proc. Law § 60.22 (codifying this common-law rule). Similarly, under the common-law "corpus delicti" rule, the confession of a defendant alone is not enough for a conviction because of "[t]he danger that a crime may be confessed when in fact no crime has been committed by any one." *People v. Reade*, 13 N.Y.2d 42, 45 (1963) (cleaned up) (citation omitted); *see also* N.Y. Crim. Proc. Law § 60.50 (codifying this common-law rule too). Stranger identifications that show significant scientific indicia of unreliability pose a similar, if not greater, risk of convicting the innocent—and warrant a similar rule.

Although the rules for accomplice testimony and confessions are categorical, the rule amicus proposes is more narrowly targeted. It would apply only to those stranger identifications where generally accepted estimator or system variables show that there is a substantial risk of misidentification—and therefore wrongful conviction. In a case where no such variables are present, or they do not cast substantial doubt on the accuracy of the identification, the testimony of a single eyewitness alone would remain sufficient for conviction.[9] Although eyewitness

[9] Some scholars and judges have argued for the broader rule that, given the known infirmities of eyewitness identification testimony, single-eyewitness identifications by strangers should *never* be enough for proof beyond a reasonable doubt absent some additional corroborating evidence. *See* Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1545 (2008); Jon O. Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. REV. 979, 998–99 (1993). But it is not amicus's position that *all* eyewitness identifications, no matter the circumstances, are unreliable. For

identification research cannot say whether any specific identification is correct or erroneous, the progress of science has given us the tools to separate out those identifications that are most likely to be mistaken—and are thus unreliable. This Court should take note of this research and apply it in a way that protects the integrity of the justice system.

If, as this Court has repeatedly held, a conviction based on the admission of evidence from an unduly suggestive pretrial identification procedure violates due process because it runs too high a risk of convicting the innocent—*see, e.g.*, *Adams*, 70 N.Y.2d at 251; *Marshall*, 26 N.Y.3d at 503—then a conviction that rests only on an identification that is characterized by a series of scientifically validated signs of unreliability and was induced by a suggestive identification procedure must also violate due process. The single-eyewitness identification of Appellant by a stranger here was unreliable in light of the science, poses a grave risk of misidentification and wrongful conviction, and thus, by itself, is legally insufficient to establish guilt beyond a reasonable doubt.

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instance, research shows that *if* "pristine identification procedures are used," identifications made with high confidence at the *initial* identification—before any distorting influences— "are highly accurate." John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 PSYCH. SCI. PUB. INT. 10, 11 (2017).

CONCLUSION

For the foregoing reasons, this Court should reverse Appellant's conviction, and hold that single-witness stranger identifications that show substantial scientific indicia of unreliability cannot be the sole basis for a conviction.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c)(1) that the foregoing brief was prepared on a computer. A proportionally spaced typeface was used as follows.

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September 25, 2024

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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