

Court of Appeals
of the
State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

DAVID VAUGHN,

Defendant-Appellant.

**BRIEF OF *AMICUS CURIAE* THE INNOCENCE PROJECT,
INC. IN SUPPORT OF DEFENDANT-APPELLANT
DAVID VAUGHN**

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INTEREST OF AMICUS CURIAE

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. Since its founding in 1992, the Innocence Project has used DNA and other scientific advances to prove innocence. Beginning with Glen Woodall, it has helped to free or exonerate more than 250 people.

The advent of DNA testing has provided scientific proof that wrongful convictions are not isolated or rare events. The Innocence Project has long studied the causes of these injustices and has found that erroneous eyewitness identifications are a leading cause of wrongful convictions, contributing to nearly 70 percent of convictions overturned by DNA evidence, more than any other type of evidence.¹ The Innocence Project's extensive experience with misidentification cases has led it to advocate for a variety of reforms intended to enhance the truth-seeking function of the criminal legal system, including improving police procedures, proposing model legislation, and changing judicial standards for the admissibility of eyewitness identification evidence and eyewitness expert testimony. Because eyewitness identification evidence has proven to be so often mistaken, yet remains so highly persuasive to juries, the Innocence Project has an interest in seeking to ensure that jurors are given the appropriate tools to assess the reliability of eyewitness identification evidence, including expert testimony.

¹ The Innocence Project, *DNA Exonerations in the United States (1989-2020)*, <https://innocenceproject.org/dna-exonerations-in-the-united-states/>.

INTRODUCTION

Eyewitness identification testimony is some of the most compelling evidence a jury can hear, but it can also be some of the most unreliable. A review of DNA exoneration cases demonstrates that mistaken identifications are a leading cause of wrongful convictions. The scientific study of eyewitness identification and memory helps to explain why. Researchers have unearthed a set of risk factors that make witnesses more likely to be mistaken—known as “estimator” and “system” variables.

Yet despite the frailties of eyewitness identification testimony, recognized by this Court and courts across the country, it remains powerfully persuasive to jurors. Juries have even convicted innocent individuals based on mistaken identifications in the face of exculpatory DNA evidence. Moreover, although the scientific community has come to a consensus about certain variables that make eyewitness identifications less likely to be accurate, many of their findings continue to prove counterintuitive to laypeople. Expert testimony is needed to educate jurors about these risk factors.

This Court has recognized the role that misidentifications play in wrongful convictions and “encouraged” the admission of eyewitness expert testimony. *People v. Santiago*, 17 N.Y.3d 661, 669 (2011). Nonetheless, lower courts (like the courts here) have taken this Court’s decision in *People v. LeGrand*, 8 N.Y.3d 449 (2007), as license to exclude eyewitness experts whenever the trial court thinks there is “sufficient corroborating evidence” supporting the identification—even when expert testimony

would in fact aid the jury. This corroboration rule treats eyewitness expert testimony unlike any other type of evidence and is fundamentally flawed.

Precluding or limiting eyewitness expert testimony based on the supposed strength of the other evidence—evidence that has not yet been tested at trial — deprives jurors of the opportunity to make fully informed judgments about the evidence and, accordingly, increases the probability of wrongful convictions. In cases where identification is at issue and estimator or system variables are implicated, experts can offer crucial evidence, explaining the frequent flaws of eyewitness identifications and illuminating the often-counterintuitive factors that undermine their reliability. The admissibility of such probative evidence should not depend on how a court views the strength of the prosecution’s case, but instead on whether it would aid the jury in making a reliable determination.

ARGUMENT

I. EXPERT TESTIMONY ABOUT THE SCIENCE OF EYEWITNESS IDENTIFICATION AND MEMORY HELPS SAFEGUARD AGAINST THE RISK OF WRONGFUL CONVICTIONS.

A. Eyewitness Identification Testimony is Often Unreliable—and is One of the Leading Causes of Wrongful Convictions.

Hundreds of exonerations and several decades of social science research have demonstrated that eyewitness identifications are often mistaken—even when offered with complete confidence at trial—and misidentifications are a leading cause of wrongful convictions. “Study after study reveal[s] a troubling lack of reliability in

eyewitness identifications. From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real.” *State v. Henderson*, 27 A.3d 872, 877–78 (N.J. 2011). Indeed, this Court has recognized the frailties of eyewitness testimony, remarking that “[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).

An analysis of the first 375 DNA exonerations found that mistaken identifications were implicated in more than two-thirds of these wrongful convictions (69%), far outpacing all other causes. The Innocence Project, *DNA Exonerations in the United States (1989-2020)*, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Sept. 9, 2024). Misidentifications play a leading role in wrongful convictions where there is no DNA evidence, too, contributing to 976 (or 27%) of all 3584 known wrongful convictions recorded by the National Registry of Exonerations. See Nat’l Registry of Exonerations, *Exonerations in the United States Map*, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> (last visited Sept. 9, 2024). Mistaken eyewitnesses have played a part in 131 (or 35%) of the 374 identified wrongful convictions in New York since 1989. *Id.* At last count, mistaken identifications have stolen at least 12,817 years from the wrongfully convicted—an average of 13.1 years in prison per person. *Id.*

The scientific study of eyewitness identification and memory helps explain the causes of these wrongful convictions. Over the course of thousands of laboratory

trials since the 1970s, psychologists have investigated how eyewitnesses perceive, encode, and recognize the faces of strangers. This research “represents the ‘gold standard in terms of the applicability of social science research to the law.’

Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings.” *Henderson*, 27 A.3d at 916.

Scholars have concluded that “mistaken identification rates can be very high under certain conditions” and “identified some of the more problematic sets of conditions that can lead to such errors in real-world circumstances.” Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 *Law & Hum. Behav.* 1, 4 (2020) (“2020 White Paper”).

The basic problem this research reveals is that humans neither mentally record nor recall events exactly as they occurred. “[M]emory does not function like a videotape, accurately and thoroughly capturing and reproducing a person, scene or event. Memory is, rather, a constructive, dynamic, and selective process.”

Commonwealth v. Gomes, 22 N.E.3d 897, 911 (Mass. 2015) (cleaned up).

The memory of witnesses is affected by a variety of factors that occur from the time of the incident onwards—and it can easily be contaminated. The accuracy of eyewitness identifications is affected by variables present at the time of the crime such as the race of the witness and culprit, the presence of a weapon during the crime, and the degree of stress the witness experienced during the event. Eyewitness memory is

also influenced by post-event information, such as confirmatory feedback, information learned from the police, and discussions with other witnesses.

Researchers divide the risk factors for mistaken identifications into two basic categories—“estimator variables” and “system variables.” 2020 White Paper at 6. Estimator variables are characteristics of the witness, the culprit, or the event that “affect the reliability of eyewitness identification evidence,” but “are not under control of the justice system.” *Id.* System variables are variables “that relate to the reliability of eyewitness identification over which the justice system has (or can have) control.” *Id.* Courts across the country have accepted the scientific consensus that such estimator and system variables increase the likelihood that an eyewitness is mistaken—and have incorporated it into their jurisprudence. *See e.g., State v. Derri*, 511 P.3d 1267 (Wash. 2022) (relying on scientific research in revising due process test for admissibility of eyewitness identification evidence, and incorporating system and estimator variables into this analysis); *State v. Harris*, 191 A.3d 119 (Conn. 2018) (same); *Young v. State*, 374 P.3d 395 (Alaska 2016) (same); *State v. Almaraz*, 301 P.3d 242 (Idaho 2013) (same); *Henderson*, 27 A.3d at 895–908 (same).

Although this body of research on the reliability of eyewitnesses is “widely accepted by scientists,” and increasingly accepted by courts, these findings “are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive.” *State v. Guilbert*, 49 A.3d 705, 723 & nn.21–22 (Conn. 2012) (collecting cases and articles). For instance, “the average person is likely to believe that

eyewitnesses held at gunpoint or otherwise placed in fear are likely to have been acutely observant and therefore more accurate in their identifications.” *Id.* at 724 & n.23 (same). But empirical studies reveal the opposite is true: “[H]igh 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 & Hum. Behav.* 687, 699 (2004).

B. Because Eyewitness Identification Evidence is Often Unreliable Yet Highly Persuasive to Jurors, Expert Testimony is Crucial to Educate the Jury When There are Indicia of an Unreliable Identification.

Despite how often eyewitnesses are mistaken, research on juror decision-making has found 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, “[s]tudy after study demonstrates that . . . jurors routinely overestimate the accuracy of eyewitness identifications.” *Perry v. New Hampshire*, 565 U.S. 228, 264 (2012) (Sotomayor, J., dissenting). Eyewitness evidence “has been shown to be comparable to or more impactful than physical evidence, character evidence, polygraph evidence, and even sometimes confession evidence.” Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in 2 *Handbook of Eyewitness Psychology: Memory for People* 501, 505 (2007) (internal citations omitted). Studies also show that “eyewitness identification increases the perceived strength of the other evidence presented.” *Id.*

Strikingly, as noted above, eyewitness identification testimony can be so persuasive that it has even caused juries to convict innocent people in the face of exculpatory DNA evidence. For example, Clarence Elkins was convicted of rape and murder based entirely upon his six-year-old niece's identification of Elkins as the perpetrator, even though DNA testing had excluded Elkins as the contributor of pubic hairs found on the victims' bodies. The Innocence Project, Clarence Elkins, <https://innocenceproject.org/cases/clarence-elkins/>. Similarly, a jury convicted Ryan Matthews of murder based in part on eyewitness identification evidence despite hearing that testing excluded Mr. Matthews from a DNA profile recovered from the mask the gunman wore. Convicting the Innocent: DNA Exonerations Database, Ryan Matthews, <https://convictingtheinnocent.com/exoneree/ryan-matthews/>.

Psychological research shows that jurors tend to be unable to accurately discriminate between correct and honest but mistaken eyewitnesses. Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 Psych. Pub. Pol'y & L. 909, 925 (1995). In one classic study, mock jurors who watched the videotaped cross-examination of an eyewitness believed the witness 80 percent of the time when the witness correctly identified the culprit *and* 80 percent of the time when the witness made a mistaken identification. Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. Applied Psych. 440, 444, 447 (1979).

Jurors' apparent inability to assess the accuracy of eyewitnesses stems from their tendency to "rely heavily on eyewitness factors that are *not* good indicators of

accuracy.” Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System?: A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, 2 *Handbook of Eyewitness Psychology: Memory for People* 453, 484 (2007). Many laypeople have “basic misunderstandings about the way memory works in general and about specific factors that can affect the reliability of eyewitness identifications.” Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 *Jurimetrics J.* 177, 204 (2006). A meta-analysis 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). In short, “the 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.” *Gomes*, 22 N.E.3d at 909.

For instance, jurors are unduly compelled by an eyewitness’ certainty in their identification at trial. Mock juror experiments have found that “jurors are insensitive to the factors that influence eyewitness memory,” but “g[i]ve disproportionate weight to the confidence of the witness.” Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 *Law & Hum. Behav.* 185, 190 (1990). Indeed, “studies have shown that eyewitness confidence can distort jurors’ perceptions of other aspects of the testimony” and “may overwhelm the effect of other factors on jury assessments of

eyewitness reliability.” Brandon L. Garrett et al., *Factoring the Role of Eyewitness Evidence in the Courtroom*, 17 J. Empirical Legal Stud. 556, 558 (2020). Yet empirical research shows that “self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy.” Nat’l Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 108 (2014), available at <http://nap.nationalacademies.org/18891>.

Expert testimony is crucial, then, as “eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror.” *Guilbert*, 49 A.3d at 720. Indeed, “juries are generally unaware of these deficiencies in human perception and memory.” *State v. Clopten*, 223 P.3d 1103, 1108 (Utah 2009).

Because eyewitnesses are typically testifying honestly—even when they are wrong—cross-examination and closing argument are not acceptable substitutes. “Cross-examination . . . often is not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs.” *Guilbert*, 49 A.3d at 725 & n.25; accord *Clopten*, 223 P.3d at 1110.

Moreover, “although cross-examination may expose the *existence* of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the *import* of these factors.” *Guilbert*, 49 A.3d at 726 & n.26. For example, if jurors do not understand that high stress impairs memory for faces—or even believe that fear improves recall—it will do little good for counsel to elicit the traumatic nature of the event. And without expert testimony, the familiar argument that the

victim will “never forget the suspect’s face” due to the stress of having a gun pointed at them—which the prosecution in fact made here—will continue to mislead jurors.

Expert testimony regarding eyewitness identifications is especially critical in cases, like this one, where the identity of the perpetrator is a contested issue and estimator or system variables indicate that the identification bears scientific indicia of unreliability. Without being educated about these risk factors by expert testimony, jurors have inadequate tools to assess powerful, yet often unreliable, identification evidence and are unable to make fully informed judgments about the accuracy of eyewitness testimony—resulting in an unacceptably high risk of wrongful conviction.

II. EYEWITNESS EXPERT TESTIMONY SHOULD BE ADMITTED IF IDENTIFICATION IS AT ISSUE AND ESTIMATOR OR SYSTEM VARIABLES ARE IMPLICATED.

A. The “Corroboration Rule” is Anomalous and Deprives the Jury of Probative Evidence, Thereby Usurping its Role as Factfinder.

In *People v. LeGrand*, this Court held that the admissibility of expert testimony about the science of eyewitness memory and identifications depended upon the presence or absence of “sufficient corroborating evidence to link defendant to the crime.” 8 N.Y.3d 449, 459 (2007). *LeGrand* allowed trial courts discretion to preclude eyewitness identification expert testimony whenever the judge found there to be “sufficient corroborating evidence.” *See id.* Later, in *Santiago*, this Court described *LeGrand* as setting out a “two-stage inquiry.” 17 N.Y.3d at 669. At the first step, courts are to consider “whether the case ‘turns on the accuracy of eyewitness

identifications and there is little or no corroborating evidence connecting the defendant to the crime.” *Id.* (quoting *LeGrand*, 8 N.Y.3d at 452). Only if the answer is “yes” must courts go on to the second step and examine if the proposed testimony is admissible under the *Frye* test applicable to all expert evidence. *Id.*²

The Court has since loosened this corroboration rule. In *People v. McCullough*, this Court held: “To the extent *LeGrand* has been understood to require courts to apply a strict two-part test that initially evaluates the strength of the corroborating evidence, it should instead be read as enumerating factors for trial courts to consider in determining whether expert testimony on eyewitness identification would aid a lay jury in reaching a verdict.” 27 N.Y.3d 1158, 1161 (2016) (internal quotation marks omitted). But, as counsel for Vaughn explains, few lower courts have heeded this lesson. *See* Vaughn Br. at 45–45. On the contrary, the decisions of the trial court and Appellate Division here illustrate that in practice courts continue to apply *LeGrand*’s two-step test. *See id.*; *People v. Vaughn*, 217 A.D.3d 781, 783 (2d Dept. 2023).

Though *McCullough* modified *LeGrand* by making corroboration merely a factor for courts to consider, the core problem remains the same: The stronger the supposed corroboration is, the weaker the case is for admission of expert testimony. Trial courts retain substantial discretion to preclude eyewitness experts based on a judge’s pretrial

² Eyewitness expert testimony is admissible at *LeGrand*’s second step if it is “(1) relevant to the witness’s identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror.” *LeGrand*, 8 N.Y.3d at 452.

assessment of the strength of the prosecution’s non-identification evidence. But, as discussed below, expert testimony can be especially important in cases involving some corroboration because of the tendency for identification evidence to lend credence to other evidence (and vice versa). Moreover, wrongful conviction cases show that purportedly corroborating evidence sometimes paints a false picture of guilt.

Whether eyewitness expert evidence is admissible should not hinge on a judicial assessment of the strength of the other evidence—before any adversarial testing. Expert testimony about eyewitness memory is highly probative, passes the *Frye* test, and has been accepted by New York courts for decades. *See, e.g., People v. Lee*, 96 N.Y.2d 157, 162 (2001). There is no need for a special rule for such expert testimony; instead, it should be subject to the same evidentiary rules as any other expert evidence. In the words of the Connecticut Supreme Court, “the law of evidence does not grant trial courts the liberty to decide what evidence is admissible *based, either in whole or in part, on the strength of the state’s case.*” *Guilbert*, 49 A.3d at 738 n.44; *see also In re L.C.*, 92 A.3d 290, 297–99 (D.C. 2014) (holding that corroboration is “irrelevant to the question of the admissibility of appellant’s proffered [eyewitness] expert testimony”).

As this Court has itself noted, “[c]ourts do not normally exclude relevant evidence merely because the case against the defendant is strong.” *People v. Oddone*, 22 N.Y.3d 369, 379 (2013). Expert testimony is typically admitted if it passes the *Frye* test and is not unduly prejudicial, without regard to corroboration. Nor can courts curtail cross-examination simply because the witness’ testimony is supposedly corroborated

by other evidence. Precluding eyewitness expert testimony “because the eyewitness seems reliable given corroboration is no different than barring cross-examination of the eyewitness on the same grounds (for example, cross-examination regarding eyesight or a prior perjury conviction). . . . But that is not how a criminal trial works.” Matthew Bova, *The Court of Appeals Should Abandon the Corroboration Rule Governing the Admissibility of Expert-Identification Testimony*, 24 CUNY L. Rev. 62, 74 (2021).

Moreover, the corroboration rule effectively usurps the jury’s fact-finding role. Although this Court called expert evidence about the risk factors for mistaken identifications “collateral” in *Oddone*, 22 N.Y.3d at 379, such testimony goes directly to the central question in many cases: Whether the eyewitness correctly identified the accused. Barring defense experts—and defense experts only³—from providing information relevant to assessing this issue “usurps the jury’s power to determine the identification’s accuracy—a quintessential jury question.” Bova, *supra*, 24 CUNY L. Rev. at 74. The jury may determine that the eyewitness is correct because the identification is corroborated by other evidence, but that is for the jury to decide.

Of course, there may be cases where the defense proffers an eyewitness expert to testify about irrelevant factors or where identity is not truly contested, but in such likely rare cases the trial court can always limit or exclude the proffered testimony by “applying the standard balancing test of prejudice versus probative value.” *McCullough*,

³ Though the prosecution can (and sometimes does) call eyewitness identification experts, the corroboration rule has no bearing on whether or when prosecution experts can testify.

27 N.Y.3d at 1161 (internal quotation marks omitted). The ordinary rules of evidence applicable in all cases suffice to exclude eyewitness expert testimony that would be irrelevant or confusing to the jury in a particular case. *See e.g., People v. Perdue*, 41 N.Y.3d 245, 252 (2023) (“Trial courts may exclude relevant evidence if its probative value is outweighed by the prospect of trial delay, undue prejudice to the opposing party, confusing the issues, or misleading the jury.” (brackets omitted)).

By keeping relevant eyewitness expert testimony from the jury in cases where the prosecution’s case appears strong, focusing on corroboration denies jurors the tools they need to reliably assess identification evidence. To help safeguard against the risk of wrongful convictions, this Court should provide clear guidance that the presence or lack of corroboration has no bearing on the admissibility of such testimony. Instead, the only questions should be whether the proposed eyewitness expert testimony meets the *Frye* test and “would aid a lay jury.” *McCullough*, 27 N.Y.3d at 1161. When identity is at issue and a qualified expert proposes to testify about generally accepted system or estimator variables that are relevant to the case and beyond the ken of the jury, the answer to both questions is “yes.”

B. Confirmation Bias and Co-Witness Contamination Can Make Purported “Corroborating Evidence” Appear Far More Robust.

Allowing trial courts to preclude or limit eyewitness expert testimony when they think there is “sufficient corroborating evidence” rests on flawed assumptions,

which are contrary to scientific research—that each piece of evidence is collected independently, and that judges evaluate each piece of evidence in a vacuum.

Decades of scientific study shows that all humans, including forensic examiners, police officers, and judges, have a tendency toward “confirmation bias”—meaning that “people tend to seek, perceive, interpret, and create new evidence in ways that verify their preexisting beliefs.” Saul M. Kassin et al., *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. Applied Rsch. in Memory and Cognition 42, 44 (2013). Even the evaluation of forensic evidence like fingerprints “may be subject to bias.” *Id.* at 46. In a series of experiments, researchers found that the judgments of fingerprint examiners about whether fingerprints were a “match” varied depending on whether they were given no extraneous information about the case, information pointing to innocence, or information pointing to guilt. *Id.* In one study, for example, five forensic analysts were shown sets of fingerprints they had previously judged “to be a match” and told they “were taken from a high-profile case of erroneous identification.” *Id.* After being given this information, “only one of the five experts [still] judged the fingerprints to be a match.” *Id.*

An initial misidentification that is credited by law enforcement officers can result in additional errors during the investigative process that may lead, however inadvertently, to the collection or creation of unreliable evidence that appears to “corroborate” the identification. For instance, one mistaken eyewitness report can consciously or unconsciously influence a second eyewitness to misidentify the same

person, causing both identifications to appear more reliable when taken together. Research has consistently found that eyewitnesses are highly influenced by information they are told after an event, which can even alter their memories. *See, e.g.,* Daniel B. Wright et al., *When Eyewitnesses Talk*, 18 *Current Directions in Psych. Science* 174, 174 (2009) (discussing how “eyewitnesses are affected by what other people say” through a process of “social contagion of memory” or “memory conformity”). Indeed, “people will report information suggested [to them] after an event because they have developed a false memory for it.” *Id.* Although it is likely beyond the ken of the average juror, such “co-witness contamination” is common: A study of real-life cases found that, in cases with multiple witnesses, more than half of witnesses admitted to discussing the incident with at least one other eyewitness. Elin M. Skagerberg & Daniel B. Wright, *The Prevalence of Co-Witnesses and Co-Witness Discussions in Real Eyewitnesses*, 14 *Psych., Crime & Law* 513, 513 (2008). Eyewitness reports can also be altered by post-event information learned from the police. In one study of witnesses “who had made a selection [in a lineup] but were [then] told that another lineup member confessed, 61% changed their identifications—and did so with confidence.” Kassin et al., *The Forensic Confirmation Bias*, *supra*, at 46.

The confluence of faulty evidence means that multiple forms of unreliable or erroneous evidence can collectively paint a strong and coherent (though false and misleading) picture of guilt, leading to the conviction of an innocent person. *See id.* at 45–47. Ambiguously inculpatory evidence, such as possession of a generic brown

sweatshirt, may appear to corroborate the eyewitness reports, creating a “bias snowball effect.” *Id.* at 46. Other evidence, such as low-quality surveillance footage, is then interpreted in light of this evidence—and, in turn, bolsters it. When video is too blurry to make an unequivocal identification, it is subject to human analysis, interpretation, and bias: Studies have shown that “prior exposure to images of a face or a body [such as seeing a suspect in court] . . . can bias what people see in an ambiguous figure.” *Id.* at 44. “[A]mbiguous stimuli prove particularly susceptible to confirmation biases” because “expectations shape perception.” *Id.* at 44–45.

Yet such weak or ambiguous evidence, which draws its supposed strength from the eyewitness identification, can, under current law, be used to justify the exclusion of expert testimony that would show the unreliability of the identification. This is the very definition of bootstrapping, and it poses a grave risk of wrongful conviction.

C. Wrongful Conviction Cases Show that the Risk of Misidentification is Not Eliminated by the Existence of Corroborating Evidence.

The annals of wrongful conviction are replete with cases where the accused was exonerated by DNA evidence despite being identified by more than one eyewitness, or some other kind of evidence supposedly corroborating the identification.

In fact, 32 percent of DNA exoneration cases involving mistaken identifications featured multiple witnesses misidentifying the same innocent person.

The Innocence Project, *DNA Exonerations in the United States (1989-2020)*,

<https://innocenceproject.org/dna-exonerations-in-the-united-states/>. Frequently,

these identifications are not independent, and instead result from the kind of “co-witness contamination” or information imparted by the police discussed above. But when multiple misidentifications occur, the testimony of one eyewitness may bolster the credibility of another simply by virtue of its existence and may, in turn, lead to a wrongful conviction. The following cases illustrate the pervasiveness of the problem:

- Alan Newton, a New York man, was wrongly convicted of assault and rape after being mistakenly identified by both the victim and a convenience store clerk. He was exonerated by DNA evidence after serving 21 years in prison. Nat’l Registry of Exonerations, Alan Newton, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3505>.
- Kirk Bloodsworth, a former United States Marine, was convicted of raping and murdering a young girl in Baltimore County, Maryland, and sentenced to death, based on the mistaken identifications of *five* eyewitnesses. He was the first person on death row to be exonerated by DNA evidence. Nat’l Registry of Exonerations, Kirk Bloodsworth, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3032>.
- Dennis Maher, a sergeant in the United States Army, was convicted of a series of rapes based on misidentifications by three separate victims. He

served 19 years in prison before being exonerated by DNA evidence.

Nat'l Registry of Exonerations, Dennis Maher,

<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3404>.

Similarly, the risk of mistaken identification remains high in cases involving some other kind of corroborating evidence. Of the Innocence Project's 251 victories, over half of the wrongful convictions based on misidentifications were accompanied by some sort of purported corroboration that proved unfounded.⁴ For example:

- Steven Barnes, a New York man, was wrongly convicted of rape and murder after several people identified him as being in the vicinity of the victim on the night she was murdered. The prosecution also relied on testimony that two hairs collected from Barnes' truck were "similar" to those of the victim, and testimony from a jailhouse informant. Barnes, who was 19 at the time of his arrest, served 20 years in prison—over half his life—before being exonerated. The Innocence Project, Steven Barnes, <https://innocenceproject.org/cases/steven-barnes/>.
- Jimmy Ray Bromgard served more than 14 years in prison after his wrongful conviction for the rape of a child. Bromgard's conviction, based in part on the victim's identification, was also based on expert

⁴ This statistic is based on internal research on file with amicus the Innocence Project.

testimony that hairs found on the bed sheets were indistinguishable from his hair. The Innocence Project, Jimmy Ray Bromgard,

<https://innocenceproject.org/cases/jimmy-ray-bromgard/>.

- James O'Donnell served two years in prison following his wrongful conviction for the assault and attempted rape of a woman in a Staten Island park. O'Donnell's conviction was premised upon the victim's identification of O'Donnell as her assailant along with testimony from a forensic examiner that a bite mark on the victim's hand was consistent with his teeth. The Innocence Project, James O'Donnell, <https://innocenceproject.org/cases/james-odonnell/>.

Such cases demonstrate the peril of maintaining a rule that invites trial courts to consider the presence of corroboration when deciding whether to admit eyewitness expert testimony. Instead, this Court should adopt a simple holding: When identity is at issue and a qualified expert proposes to testify about generally accepted system or estimator variables that are relevant to the case and beyond the ken of the jury, this eyewitness expert testimony would aid the jury—and is therefore admissible.

III. EXPERT TESTIMONY ABOUT STRESS, WEAPON FOCUS, AND WITNESS CONFIDENCE WOULD HAVE AIDED THE JURY IN ASSESSING THE EVIDENCE.

The expert testimony in this case was erroneously limited to the single issue of cross-racial identifications. Several additional scientifically-validated estimator and system variables implicated in eyewitness misidentifications are relevant to the facts of

this case—including stress, weapon focus, and the relationship between confidence and accuracy. The defense’s eyewitness identification expert, Dr. Michael Leippe, should have been permitted to educate the jury about these findings, too.

As an initial matter, testimony about each of these variables is “(1) relevant to the witness’[] identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror.” *LeGrand*, 8 N.Y.3d at 452. This Court has already held that expert testimony about the correlation between confidence and accuracy, as well as confidence malleability, is admissible. *See Santiago*, 17 N.Y.3d at 672; *People v. Abney*, 13 N.Y.3d 251, 268 (2009). Other courts in this state have held that expert testimony about the effects of weapon focus and event stress is admissible. *See, e.g., People v. Abney*, 31 Misc. 3d 1231(A), at *29–35 (Sup. Ct. N.Y. Cty. 2011). So have “[c]ourts across the country.” *Jones v. United States*, 262 A.3d 1114, 1125–26 & nn.9–10 (D.C. 2021) (collecting cases). This Court should do the same.

The relevant scientific community accepts that both high stress and the presence of a weapon make mistaken identifications more likely. In a 2001 survey of psychologists who study eyewitness identification and memory, 87 percent thought the statement that “[t]he presence of a weapon impairs an eyewitness’[] ability to accurately identify the perpetrator’s face” was reliable and 97 percent thought there was a “research basis” for this proposition. Saul M. Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 American

Psych. 405, 408, 412 (2001). In the same survey, 60 percent of experts thought the statement that “[v]ery high levels of stress impair the accuracy of eyewitness testimony” was reliable and 98 percent thought there was a research basis for this proposition. *Id.* In a more recent survey, 78 percent of experts agreed with the proposition that “[h]igh levels of stress impair the accuracy of an eyewitness’[] memory for an event.” Travis M. Seale-Carlisle et al., *New Insights on Expert Opinion About Eyewitness Memory Research*, 18 *Perspectives on Psych. Science* 1, 5, 7 (2024).

Further, the effects of both stress and weapon focus on memory are beyond the ken of the average juror. A survey of more than 1,000 potential jurors found that more of them “thought that event violence would make a witness’ memory for event details more reliable” than “correctly understood that event violence tends to make an eyewitness’ memory for details less reliable.” Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 *Jurimetrics J.* 177, 197 (2006). The same was true when it came to the “presence of a weapon.” *Id.*⁵

A. Testimony About Stress Would Have Aided the Jury.

Had Dr. Leippe been allowed to testify about this factor, he could have told the jury that high levels of stress can impair the accuracy of eyewitness identifications and memory. *See* Nat’l Research Council, *Identifying the Culprit, supra*, at 94. Moreover, laboratory studies likely underestimate the size of this effect due to ethical constraints

⁵ Because there appears to be no dispute that these factors were relevant to the identification and that Dr. Leippe is a qualified expert, amicus will not address those factors.

on the degree of stress researchers can inflict—researchers can show mock witnesses a video of an armed robbery, but they cannot simulate rape or murder. *See id.*

A real-world study of military personnel who were interrogated at a mock prisoner of war camp during training found that severe levels of stress have an even more dramatic effect on memory than laboratory studies had found. *See* Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 265 (2004). Each participant at “survival school” underwent both a “low-stress” and a “high-stress” interrogation. *Id.* at 268. The interrogations were conducted in optimal conditions for making an identification—in a well-lit room, for 40 minutes. *Id.* Researchers then showed the participants either a photo array or a live lineup of their interrogators 24 hours later. *Id.* at 269. High levels of stress were so detrimental to witnesses’ ability to make an accurate identification that *for every soldier who identified their high-stress interrogator correctly the next day, approximately two soldiers identified the wrong person.* *Id.* at 273. In comparison, the survival school participants were far more likely to correctly identify their low-stress interrogator the next day than to falsely identify someone else. *Id.*

B. Testimony About Weapon Focus Would Have Aided the Jury.

Had Dr. Leippe been able to testify about this factor, he could have explained to the jury that the presence of a gun can impair an eyewitness’ ability to identify the culprit. Though counterintuitive, the explanation for this effect is simple: “[T]he presence of a weapon . . . captures the visual attention of the witness and impedes the

ability to attend to other important features of the visual scene, such as the face of the perpetrator.” Nat’l Research Council, *Identifying the Culprit, supra*, at 93. 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.” *Id.* 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.

C. Testimony About Witness Confidence Would Have Aided the Jury.

Finally, had Dr. Leippe been allowed to testify about witness confidence, he would have been able to explain to the jury that “confidence at the time of trial is not a reliable predictor of eyewitness accuracy.” *Id.* at 108. To be sure, *if* fair testing procedures are used, confidence at the time of an *initial* out-of-court identification is correlated with accuracy. 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). But, many factors can artificially inflate confidence by the time of trial. Indeed, “confidence malleability” is one of the core findings of eyewitness research.⁶

Much, if not most, of this confidence inflation is caused by “post-identification feedback”—or “information given to eyewitnesses about their identification after they have made an identification decision.” Gary L. Wells & Laura Smalarz, *Lives Destroyed*

⁶ In the 2001 survey of experts, 95 percent declared this finding to be reliable. Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research, supra*, 56 *American Psych.* at 412.

by *Distorted Recollections of Fluency, Attention, View, and Confidence: A Sin of Bias in Eyewitness Identification*, 11 J. Applied Rsch. Memory & Cognition 461, 461 (2022). In the initial studies of the post-identification feedback effect, witnesses were shown a video of a simulated crime and then asked to pick the perpetrator out of a culprit-absent lineup—meaning that anyone who made an identification picked the wrong person. *Id.* Witnesses who were told “good, you identified the suspect” after making an identification “showed a shocking degree of distortion in their recall of the ease with which they were able to pick the person out of the lineup, how good their view was, how much attention they paid during witnessing, and the confidence they had *at the time of identification.*” *Id.* (emphasis added). This effect has consistently been replicated: Confirmatory feedback distorts and amplifies witness confidence. Nancy K. Steblay et al., *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 Psych., Pub. Pol’y & L. 1, 2 (2014). A meta-analysis found that witnesses who received such feedback reported being highly confident 29 percent of the time, compared to only 6 percent for witnesses who received no feedback. *Id.* at 9.

Because it artificially inflates the confidence of mistaken witnesses—and jurors so heavily rely on witness confidence—post-identification feedback prevents jurors from distinguishing between accurate and mistaken identifications. Studies have shown mock jurors can “significantly discriminate between accurate and mistaken eyewitnesses when the witnesses had not received confirming postidentification

feedback.” Laura Smalarz & Gary L. Wells, *Post-identification Feedback to Eyewitnesses Impairs Evaluators’ Abilities to Discriminate Between Accurate and Mistaken Testimony*, 38 Law & Hum. Behav. 192, 199 (2014). But if eyewitnesses are told “good job, you got the suspect” after making an identification, “the ability of evaluators to discriminate between accurate and mistaken testimony was totally eliminated.” *Id.* at 200.

Further, even if the police say nothing after the identification procedure, witnesses will likely infer whether they picked the “right” person based on how the case progresses. Margaret Bull Kovera et al., *Science-Based Recommendations for the Collection of Eyewitness Identification Evidence*, 58 Ct. Rev.: J. Am. Judges Ass’n 130, 137 (2022). “Simply asking a witness to testify in court can function as a form of confirming feedback, as it confirms that the witness correctly identified the police’s suspect.” *Id.* Such feedback “may cause witnesses to forget the initial uncertainty they felt . . . and express extreme confidence during their in-court testimony.” *Id.*

* * *

Expert testimony about each of these three topics would have undoubtedly aided the jury in its task of assessing the identification evidence at the heart of this case. Scientific information about confidence malleability and the confidence-accuracy relationship would have been particularly critical given that jurors tend to rely on witness confidence above all when evaluating eyewitness identifications. *See* IB, *supra*.

Instead, because Dr. Leippe was not allowed to properly educate the jury about the science of eyewitness identification and memory, the prosecutor was free in her

summation to mislead the jury. The precluded expert testimony, for instance, allowed the prosecutor to argue that the eyewitness identifications were reliable because the robber pointed a gun at the complainants. She claimed: “[M]embers of the jury, the question here isn’t how Mr. Jiang and Mr. Chen remember. How could they forget. How could they forget the face of the man who held a gun to them.” A624. Such an argument may appeal to jurors’ “common sense,” but it is squarely contradicted by the science about the detrimental effects of stress and weapon focus on memory.⁷

CONCLUSION

For the foregoing reasons, this Court should reverse Appellant’s conviction and, in so doing, revisit the standard for the admission of eyewitness expert testimony. The presence or lack of corroborating evidence should play no part in this analysis.

⁷ She also argued: “[W]hen someone has a gun pointed directly at you, every second feels like a lifetime.” A638. But, again, weapon focus impairs memory; it does not enhance it.

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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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A handwritten signature in blue ink, appearing to be 'R. Hirschhorn', written over a horizontal line.

September 18, 2024

Russell L. Hirschhorn