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Appellate Division, Second Department Docket No.: 2024-00040

Court of Appeals

of the

State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

JASON WRIGHT,

Defendant-Appellant.

BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT AND THE WILSON CENTER FOR SCIENCE AND JUSTICE AT DUKE LAW IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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. Amicus curiae the Wilson Center for Science and Justice makes the following disclosure: The Wilson Center for Science and Justice at Duke Law is a nonprofit organization, and does not have parent corporations, subsidiaries, or affiliates.

INTEREST OF THE AMICI

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 everyone. 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]

Since its founding in 1992, 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] Mistaken eyewitness identifications 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 leading 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, *Explore the Numbers: Innocence Project's Impac*t, https://innocenceproject.org/exonerations-data/ (last visited Apr. 3, 2025); Innocence Project, *Cases*, https://innocenceproject.org/all-cases/ (last visited Apr. 3, 2025) (filter by state).

[3] Innocence Project, *DNA Exonerations (1989-2020)*, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Apr. 3, 2025) (69%).

The Wilson Center for Science and Justice at Duke Law works to advance criminal justice and fairness through law and science. The Center is led by Faculty Director Brandon L. Garrett,[4] L. Neil Williams, Jr. Distinguished Professor of Law and author of "Convicting the Innocent: Where Criminal Prosecutions Go Wrong," and "Defending Due Process: Why Fairness Matters in a Polarized World." To further the Wilson Center's mission, students and faculty pursue research, policy, and education to improve criminal justice outcomes. One of the Wilson Center's primary focuses is on the accuracy of evidence to prevent wrongful convictions by improving and fundamentally reforming how scientists, the public, judges, lawyers, and jurors understand evidence presented in court and preventing eyewitness misidentification, a leading cause of wrongful convictions. The Wilson Center works to identify reliable ways to inform lawyers, judges, and jurors about the scientific limitations of this type of evidence.

[4] Professor Garrett has been involved with a number of law and science reform initiatives, including the American Law Institute's project on policing, for which he serves as Associate Reporter; he also serves on a National Academy of Sciences Committee concerning eyewitnesses.

PRELIMINARY STATEMENT

Five decades of scientific research have demonstrated that eyewitness memory is malleable. It degrades over time. It can change when witnesses learn information about an event from the police or other witnesses. And it is altered each time a witness is asked to identify a suspect after viewing a showup or lineup.

Researchers have found that simply testing an eyewitness's memory by showing them a suspect contaminates it. Even if proper procedures are used, a showup or lineup creates a memory of that suspect's face and an association of that face to the crime. If witnesses identified that suspect the first time, they are likely to repeat that identification in future identification procedures, regardless of whether that identification is correct. In fact, real-world cases confirm that once a witness has mistakenly identified a suspect, they are likely to identify that same person again *even if they are shown the real culprit*. And even if the witness did not identify the suspect the first time, there is a grave risk that they will identify the suspect in a later identification procedure based on their memory of the first identification procedure (rather than of the event). Accordingly, psychologists have concluded that only the first identification procedure conducted with the same eyewitness and same suspect can provide reliable evidence—and that failing to identify a suspect the first time around is evidence of innocence.

What happened here flouts this scientific consensus. When presented with a lineup, the only witness to identify Jason Wright at trial failed to identify him—even though she had just seen him escorted by police and in handcuffs. This lineup was the closest thing in this case to an uncontaminated, fair identification procedure. It provided the best evidence as to whether the witness could identify Mr. Wright based on an independent memory of the event: she could not. If she had an independent memory of Mr. Wright from the incident, the witness would have identified him in the lineup. Yet rather than heeding the evidence of the witness's first identification, the trial court allowed the witness to identify Jason Wright in a highly suggestive, single-suspect courtroom procedure.

Not only was there no "independent source" for the in-court identification here, but this case also illustrates the broader problem with the independent source doctrine when it comes to identification evidence. Because testing memory contaminates it, there can be *no* source for the witness's courtroom memory of the event that is truly independent of the identification procedure(s) that preceded it.

This Court should therefore follow the Supreme Court of New Mexico in abolishing the independent source doctrine in the context of eyewitness identifications obtained through unduly suggestive identification procedures. At the very least, it should hold there can be no independent source for an in-court identification when the eyewitness failed to identify the defendant out of court.

ARGUMENT

I. Scientific Research on Eyewitness Memory Has Led to Insights that Should Guide Courts in Assessing Eyewitness Identification Evidence.

As Justice Brennan wrote more than forty years ago, "[a]ll 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 and emphasis 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). The importance that jurors place on eyewitness identification testimony means that it plays a central role in criminal trials, including those that result in wrongful convictions. Indeed, this Court has acknowledged that "mistaken eyewitness identification" is the "single greatest cause of wrongful conviction." *People v. Boone*, 30 N.Y.3d 521, 527 (2017) (citation omitted).

A. Fifty years of scientific research has revealed that memory is a reconstruction, which can be affected by all sorts of factors and is prone to error.

Considering the impact of eyewitness identification testimony, it is little surprise that eyewitness identifications have been the subject of intense study by

psychologists since the 1970s. *See* National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification*, at 16 (Nat'l Academic Press 2014) ("*Identifying the Culprit*"), https://nap.nationalacademies.org/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification. Over the course of thousands of studies, "[e]xperimental 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." *New Jersey v. Henderson*, 27 A.3d 872, 916 (N.J. 2011). In the words of the New Jersey Supreme Court, this research "represents the 'gold standard in terms of the applicability of social science research to the law.'" *Id.* (citation omitted).

One of the core findings of this research is that memory is malleable—and subject to change based on information learned after an event. *See, e.g.*, Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 Learning & Memory 361 (2005). Indeed, perhaps "[t]he central principle that has emerged from over 2,000 published studies over the past thirty years is that 'memory 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.'" *Massachusetts v. Gomes*, 22 N.E.3d 897, 911 (Mass. 2015) (alterations in original; citation omitted).

Basic memory research divides memory into three stages: encoding, storage, and retrieval. *Identifying the Culprit, supra*, at 59. Errors can creep in, without our conscious awareness, at each stage. *See id.* at 59–70. During the initial encoding process, memory is "particularly labile . . . . The contents of short-term memory are limited and highly subject to interference by subsequent sensory, cognitive, emotional, or behavioral events; the contents can also be biased by prior knowledge, expectations, or beliefs, resulting in a distorted representation of experience." *Id.* at 61. Then, after that short-term memory is placed into long-term storage, further distortions can occur: "The stability of stored information is continuously challenged and subject to modification. We forget, qualify, or distort existing memories as we acquire new perceptual experiences and encode new content and associations into memory." *Id.* at 62. Finally, the process of memory retrieval "is heavily affected by various sources of noise" and beset by various "source memory failure[s]," in which individuals "attribute later acquisition of information to earlier experiences." *Id.* at 66. For example, "[a]n eyewitness might learn from the police or some other source that a potential suspect has a moustache and then attribute that knowledge to the witnessed events." *Id.* at 66–67.

Not only does the research show that memory is partial, reconstructive, and easily altered, but it has also demonstrated that individuals can develop false memories of events that never occurred. Scientists have illustrated this point by

implanting false memories in individuals who subsequently believe them to be "true." *See* Loftus, *Planting Misinformation in the Human Mind*, *supra.*

In one study, military personnel were placed in a mock prisoner-of-war camp as part of survival-school training. Each trainee underwent 30 minutes of interrogation while alone in a well-lit room with an instructor. Charles A. Morgan III et al., *Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events*, 36 Int'l J. of Law & Psychiatry 11, 12 (2013). After the interrogation, the trainee was placed alone in an isolation cell. *Id.* at 14. A researcher entered the cell about an hour after the interrogation and asked questions about the interrogator while showing the participant a photograph of another man (the "foil"), *id.*, thereby falsely implying that he was the interrogator. About 36 hours later, the trainee's memory was tested using a photo lineup, which contained a picture of the foil but not the actual interrogator. *Id.* at 13, 14. Study participants who had not been exposed to the foil's face following the interrogation mistakenly identified the foil as the interrogator 15 percent of the time. *Id.* at 15–16. By contrast, trainees who had been shown a photograph of the foil's face while being asked about the interrogation mistakenly identified the foil as the interrogator 84 percent of the time. *Id.* In other words, the research team was successfully able to implant a "memory" of something the participants had not actually seen in a majority of those trainees.

In other studies, researchers were able to induce study participants "to falsely remember entire events that never happened, such as being lost in a shopping mall as a child . . . or that they were attacked by a vicious animal." John T. Wixted et al., *Test a Witness's Memory of a Suspect Only Once*, 22 Psychological Science in the Public Interest 1S, 3S (2021) (citations omitted). Researchers have also planted other "rich false memories" in subjects such as that they had an accident at a family wedding as a child or that they had nearly drowned and had been rescued by a lifeguard. Loftus, *Planting Misinformation in the Human Mind*, *supra*, at 363. After "several suggestive interviews filled with misinformation," psychologists found that participants would "recall the false events in quite a bit of detail." *Id.* at 364. And, importantly, such false memories can "feel and appear real." Daniel M. Bernstein & Elizabeth F. Loftus, *How to Tell if a Particular Memory is True or False?*, 4 Perspectives on Psych. Sci. 370, 373 (2009) (concluding that scientists have not yet devised a way to tell the difference between true and false memories).

In sum, rather than being fixed like a video recording, "our memories for real events may be compromised by many factors at all stages of processing, from encoding through storage, to the final stages of retrieval. Without awareness, we regularly encode events in a biased manner and subsequently forget, reconstruct, update, and distort the things we believe to be true." *Identifying the Culprit* at 60.

B. Only the first identification procedure can provide potentially reliable evidence, and repeated viewings taint identifications.

Although much of the research regarding eyewitness memory reveals its fragility, the research also reveals those circumstances under which eyewitness identifications may be reliable. Recent research has found, for example, that *if unbiased identification procedures* are used, eyewitnesses who are highly confident in their identifications at the time of the *initial* identification procedure (not at trial or in later viewings) tend to be accurate. *See* John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychological Science in the Public Interest 10, 55 (2017).

This finding is now widely accepted among psychologists who study eyewitness memory. In a recent survey of experts, 89 percent of scientists surveyed agreed that "[i]f best practices are used during the lineup procedure, an eyewitness's confidence can provide information about the eyewitness's accuracy when obtained immediately after the identification decision." Travis M. Seale-Carlisle et al., *New Insights on Expert Opinion about Eyewitness Memory Research*, 20 Perspectives on Psychological Science 1, 7, 9 (2024). The corollary of this finding that high confidence predicts accuracy on the initial viewing is that the failure of a witness to identify the suspect in an initial identification procedure is "probative of innocence." Wixted & Wells, *supra*, at 50. Such a failure is not a null result. Rather, by rejecting the lineup, the witness has effectively said that no one matching their memory of the

perpetrator is present. *See id*. at 44. In a case like this one, where the witness saw the defendant in handcuffs prior to rejecting the lineup, something that should have only made the witness more likely to select him in the lineup, the witness's failure to identify Mr. Wright is especially telling.

Empirical research provides at least two reasons why the results of the first identification procedure are the most likely to be reliable, if unbiased procedures are used, and why the results of subsequent identification procedures with the same suspect and eyewitness have no independent probative value. First, memory does not improve over time. The research is clear that eyewitness performance on tests of recognition memory such as lineups only declines—or at best remains the same—the longer it has been since the incident. *See* Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. of Experimental Psychology 139, 147–48 (2008); *see also Identifying the Culprit* at 98–99 (discussing "retention interval").

Second, testing a witness's memory can contaminate it. "[T]here is only one *uncontaminated* opportunity for a given eyewitness to make an identification of a particular suspect. Any subsequent identification test with that same eyewitness and that same suspect is contaminated by the eyewitness's experience on the initial test." Gary L. Wells et al*., Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 Law & Human Behavior 3,

25 (2020) ("2020 Scientific Review Paper") (emphasis in original).[5] Seeing a suspect in a showup or lineup can cause witnesses to falsely identify the suspect during a later identification procedure, even if they did not initially identify that suspect—often referred to as "source confusion" or "memory-source error." *Id.* It can also cause witnesses to falsely identify the same innocent person again in later identification procedures—known as the "commitment effect." *Id.*

If a witness does not recognize a suspect in an initial identification procedure but recognizes them in later procedures or in court, that recognition is almost certainly due to the witness remembering the suspect from the prior procedure, not the initial event—*i.e.*, memory contamination. "The essential problem is that on a second test [of memory], an individual can look familiar because of the exposure during the first test, even when it is not the right person." Wixted et al., *Test a Witness's Memory of a Suspect Only Once, supra* at 3S; *accord* Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. of Applied Research in Memory & Cognition 284, 285 (2016).

Decades of research in cognitive science have found that identification procedures leave the eyewitness with a "memory trace" of the suspect's face, and an

[5] This scientific review paper—or "white paper"—was authored by six of the leading researchers in the field and represents the "official position" of the American Psychology-Law Society, a division of the American Psychological Association that includes the leading psychologists studying eyewitness identifications and memory. *See* 2020 Scientific Review Paper at 4.

association of that suspect with the context of the crime. Wixted et al., *Test a Witness's Memory of a Suspect Only Once*, *supra*, at 1S, 5S. This memory may be activated in a later viewing of the same suspect, regardless of whether they are the actual culprit. *Id.* Further, when a witness repeatedly views a suspect, the memory "is likely to feel stronger to the eyewitness each time he or she encounters the person." Wixted & Wells, *supra*, at 47. Repeated viewings can "lead[] to artificially elevated levels of eyewitness confidence." 2020 Scientific Review Paper at 26.

The problem of repeated viewings can be compounded by a witness's commitment to their initial incorrect identification. "[A] mistaken identification in an initial identification procedure tends to be repeated in a second identification procedure if that lineup contains the mistakenly identified person." 2020 Scientific Review Paper at 25. As one court has explained, once a witness identifies a suspect as "the perpetrator, [the witness] becomes attached to her prior identification. As a result, she is more likely to identify him again in a subsequent identification procedure, even if he is innocent." *Young v. Conway*, 698 F.3d 69, 82 (2d Cir. 2012).

Real-world DNA exonerations provide evidence for such a commitment effect. In John Jerome White's case, for example, the victim mistakenly identified him first in a photo array and then again in a corporeal lineup and at trial *even though her real rapist was present in the lineup (as a filler)*. Wixted et al., *Test a Witness's Memory of a Suspect Only Once*, *supra*, at 13S–14S. Similarly, in Ronald Cotton's

case, the victim continued to adhere to her identification of Mr. Cotton as the perpetrator even when confronted with her real rapist, Bobby Poole, at a retrial. When asked if she had ever seen Mr. Poole before, Jennifer Thompson answered, "I have never seen him in my life. I have no idea who he is." But DNA testing later exonerated Mr. Cotton and proved that Bobby Poole was in fact her rapist. Jennifer Thompson, *I Was Certain But I Was Wrong*, N.Y. Times, June 18, 2000, https://www.nytimes.com/2000/06/18/opinion/i-was-certain-but-i-was-wrong.html.

Though scientists have long understood that showing a suspect to a witness increases the chance that the witness will select that suspect in a later identification procedure, regardless of guilt, psychologists have recently come to a new degree of consensus on the dangers of memory contamination posed by repeated viewings. In 2020, for the first time, the American Psychology-Law Society, the subdivision of the American Psychological Association that includes the leading researchers who study eyewitness identifications, made a consensus recommendation to avoid repeated identifications procedures with the same witness and suspect. 2020 Scientific Review Paper at 8, 25–26. This recommendation is based on the insight that eyewitness memory is a form of trace evidence that can be contaminated, much like DNA or fingerprints, and that the process of collecting eyewitness identification evidence by testing memory can itself contaminate that evidence. *See id.* at 25.

Courts, too, have recognized that repeated viewings create a risk of memory contamination—and unreliable courtroom identifications. In the words of the New Jersey Supreme Court, "successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure." *Henderson*, 27 A.3d at 900. Even prior to the advent of modern research into eyewitness memory, the Supreme Court noted that "[r]egardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent . . . courtroom identification." *Simmons v. United States*, 390 U.S. 377, 383–84 (1968).[6]

The real-world implications of these and similar findings are profound. They call into question much about the way courts assess eyewitness identification

[6] *See also, e.g.*, *Foster v. California*, 394 U.S. 440, 443 (1969) (condemning as "suggestive" the use of second lineup when the defendant "was the only person in this lineup who had also participated in the first lineup"); *Dennis v. Sec'y, Pa. Dep't of Corrs.*, 834 F.3d 263, 270 n.4 (3d Cir. 2016) (discussing research that multiple viewings increase misidentifications and inflate witness confidence); *Young*, 698 F.3d at 82 ("[P]rior identifications may taint subsequent in-court identifications due to a phenomenon known as the 'mugshot exposure effect,' or 'unconscious transference,' whereby a witness selects a person in a later identification procedure based on a sense of familiarity deriving from her exposure to him during a prior one."); *Gregory v. City of Louisville*, 444 F.3d 725, 756 (6th Cir. 2006) (noting that "a witness'[s] repeated exposure to a suspect prior to identification so taints the identification that a substantial likelihood of misidentification exists"); *State v. Derri*, 511 P.3d 1267, 1281 (Wash. 2022) ("Numerous courts have recognized the suggestive effects of multiple viewings of the same suspect."); *Oregon v. Lawson*, 291 P.3d 673, 686–87 (Or. 2012) ("The negative effect of multiple viewings may result from the witness's inability to discern the source of his or her recognition of the suspect, an occurrence referred to as source confusion or a source monitoring error.")

evidence, both in this case and more generally. At a minimum, courts should give little or no weight to the results of second and subsequent identification procedures with the same suspect and same eyewitness. Either identifications made after such repeated viewings are simply rehashing the results of the initial procedure, or they are likely a result of memory contamination. High-confidence initial identifications made from "an appropriately administered lineup," on the other hand, are potentially reliable. Wixted & Wells, *supra*, at 55. *But see id.* at 53–54 (discussing why the confidence-accuracy relationship may not hold true at trial due to "the plea effect"); Shari R. Berkowitz et al., *Convicting with Confidence? Why We Should Not Over-rely on Eyewitness Confidence*, 30 Memory 10, 13–14 (2022) (discussing how the relationship between confidence and accuracy can break down in real-world cases).

II. Applying What We Know About Memory to This Case Makes Clear That There Was No Independent Source for the In-Court Identification.

The rulings of the trial court here ran counter to decades of scientific research about memory. Indeed, the court's ruling turns this research on its head. The court credited a highly suggestive in-court identification of Jason Wright but gave no weight to the lineup at which the witness failed to identify him. And it did so even though the witness viewed Mr. Wright shortly before the lineup in the District Attorney's Office, under circumstances strongly suggesting that he was the suspect, and *still* could not identify him in the lineup. The trial court thus erred in allowing an in-court identification based on a supposed "independent source."

A. The circumstances of the showup identification strongly suggested that Mr. Wright was the suspect.

The shooting with which Jason Wright was charged occurred in April 2017. Mr. Wright was arrested in August 2017. Only one eyewitness identified Mr. Wright as the person who fired the gun: Fanny Fabre. The day after Mr. Wright's arrest, he was escorted by the New York City Police Department to a lineup in the Manhattan District Attorney's Office. The police officers escorting Mr. Wright to the lineup room led him, handcuffed, through the reception area, where Ms. Fabre was sitting. Later that same day, Ms. Fabre viewed a six-man lineup that included Mr. Wright, but she did not identify him during that lineup as the shooter, despite having just seen him. Instead, she commented: "No, he's not here. I thought I may have seen him this morning, but maybe you switched him out." A81.

The suggestive impact of viewing Mr. Wright under these circumstances was "obvious." A250–51. It was, in effect, a showup, something this Court has stated on numerous occasions is strongly disfavored precisely because of its suggestiveness. *See, e.g.*, *People v. Riley*, 70 N.Y.2d. 523, 529 (1987). Indeed, it is not hard to imagine the witness, having seen the suspect in handcuffs, paraded through the room by multiple police officers, identifying Mr. Wright as the shooter on that basis alone.

B. The failure of the witness to identify Mr. Wright at the lineup after the highly suggestive showup is probative of innocence.

Yet despite these factors which increased the likelihood that the witness would identify Mr. Wright when he appeared in the lineup, she did not. That the witness failed to identify Mr. Wright under these circumstances is highly significant. It was effectively a statement that "the person I saw several months ago fire a gun is not present." The trial court should have ended its inquiry there. In the best test of the witness's memory, she could not identify Mr. Wright—even though she saw him in handcuffs shortly before the lineup. The lineup answered the relevant question, "Does the witness have an independent memory that Mr. Wright was the shooter?" The answer was: "No." If the witness in fact had an independent memory of seeing Mr. Wright during the incident, she would have identified him in the lineup.

C. The in-court identification of Mr. Wright, two years after the lineup, occurred under highly suggestive circumstances.

Instead of crediting the results of the lineup, however, the court allowed Ms. Fabre to identify Mr. Wright in court—some two years later. But an in-court identification such as this one occurs under the most suggestive of circumstances. As this Court recently noted, any witness will likely know who the defendant is by where they are sitting, and there is a risk "that, faced with the pressures of testifying at trial, the witness will identify the defendant as the perpetrator simply because the defendant is sitting in the appropriate spot, and not because the witness recognizes

the defendant as the same person that they observed during the crime." *People v. Perdue*, 41 N.Y.3d 245, 250 (2023). Or, as the Connecticut Supreme Court put it:

> [W]e are hard-pressed to imagine how there could be a more suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if [s]he can identify the person who committed the crime. If this procedure is not suggestive, then *no* procedure is suggestive.

Connecticut v. Dickson, 141 A.3d 810, 822–23 (Conn. 2016) (emphasis in original).

In contrast to the lineup at which Ms. Fabre failed to identify Mr. Wright, the in-court identification was in effect a single-suspect showup. "The danger of unfairness arising from an in-court showup in these circumstances is considerable. Where eyewitnesses before trial were unable to make a positive identification of the defendant or lacked confidence in their identification, they are likely to regard the defendant's prosecution as confirmation that the defendant is the 'right' person . . .." *Massachusetts v. Collins*, 21 N.E.3d 528, 534 (Mass. 2014).

D. Because the initial ID procedure is the best test of memory, when a witness fails to make an out-of-court identification there can be no independent source for the in-court identification.

Allowing Ms. Fabre to identify Mr. Wright from the witness stand despite having rejected the lineup containing Mr. Wright two years earlier, far closer in time to the initial event, flies in the face of decades of psychological research into social influence and eyewitness memory. Any in-court identification made after the witness fails to identify the defendant in an out-of-court procedure is not the product

of an independent memory of the event, but instead of the suggestiveness of the prior viewing(s) and the in-court identification procedure itself.

In fact, allowing a witness to identify the defendant in court after a prior non-identification is a known risk factor for misidentification—and wrongful conviction. Professor Brandon Garrett conducted an archival study of the first 250 DNA exoneration cases. He found that in 57 percent of the eyewitness misidentification cases where the trial transcripts were available, "the witnesses reported [at trial] that they had not been certain at the time of the earlier identifications," despite confidently identifying the defendant in court. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 49 (2011) (92 out of 161 cases). "Witnesses said that they had been unsure when they first identified the defendant, or they had identified other people, or they had trouble making an identification because they had not seen the culprit's face." *Id.* This figure is almost certainly an undercount, as in some of the cases witnesses likely were never asked at trial about their *initial* level of confidence—and even *retrospective* assessments of confidence can be inflated by post-identification feedback. *See, e.g.*, Nancy K. Steblay et al., *The Eyewitness Post-Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 Psychology, Public Policy & Law 1, 2–3 (2014) (finding that telling witnesses "good, you identified the suspect" after they made an identification results in witnesses reporting, among other things, that they had been more confident

"at the time of the identification" and had a better view of the event; in other words, confirmatory feedback affects not just present confidence but also "retrospective judgments about matters that occurred before the feedback").

The Appellate Division held that the circumstances of the witness's viewing of Mr. Wright during the incident made that viewing a reliable source for her later in-court identification, outweighing her "inability to identify [the] defendant in a lineup." *People v. Wright*, 215 A.D.3d 601, 602 (1st Dept. 2024). But regardless of the factors that may (or may not) have supported the witness's ability to make an accurate identification in the abstract, her memory was put to the test in the lineup. The results of that lineup provide the best evidence of whether she could in fact identify Mr. Wright based on her independent memory of the event: she could not.

As a matter of law and science, when a witness is unable to identify a suspect in an initial identification procedure, there can be no independent source for an in-court identification. The notion that Ms. Fabre's memory could somehow improve over the *two years* between the lineup and trial and thus allow her to make the in-court identification based on an independent memory of the event is fanciful. Recognition memory does not work that way. The prosecution therefore failed to meet its burden to show an "independent source" by clear and convincing evidence.

III. The Independent Source Doctrine Is Contrary to Scientific Research and Should Be Abandoned in Eyewitness Identification Cases.

This Court has been clear over the years that "[t]he rule excluding improper showups and evidence derived therefrom is different in both purpose and effect from the exclusionary rule applicable to confessions and the fruits of searches and seizures." *People v Adams*, 53 N.Y.2d 241, 250 (1981). Although "[i]n the latter cases generally reliable evidence of guilt is suppressed because it was obtained illegally . . . , *the 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 employed by the police." *Id.* at 250–51 (emphasis added). Indeed, this Court has emphasized that unduly suggestive identification procedures violate due process precisely *because* they can result in wrongful convictions: They "increase[] the risk of misidentification by improperly influencing the witness. . . . The unfairness to the defendant and the unreliability of such procedures adversely impact the truth-finding process." *People v Marshall*, 26 N.Y.3d 495, 502–03 (2015).

Nonetheless, this Court has allowed in-court identifications following unduly suggestive out-of-court identifications upon a showing that the in-court identification was "not tainted by the illegal procedure" and instead was "of independent origin." *Id.* at 504 (quoting *People v. Ballott*, 20 N.Y.2d 600, 606 (1967)). But fifty years of scientific research shows that this "independent source

doctrine" rests on flawed foundations—and fatally undermines the goal of preventing wrongful convictions based on misidentifications.

A. Subsequent identifications of the same suspect by the same witness are not independent of prior viewings of that suspect.

The independent source doctrine runs counter to everything we have learned about memory. To reiterate: Instead of being fixed like a video, "memory is highly malleable" and "[e]ach effort to test an eyewitness's memory will reshape that memory." Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 485 (2012). And there is no way "to untangle the exposure to the prior identification task(s) from the witness's original memory of the crime." Steblay & Dysart, *supra*, at 287. Because testing memory contaminates it, "once [memory] has been tested and contaminated, it is not possible to perform a second independent test of the memory of a stranger's face that was formed during the commission of the crime." Wixted et al., *Test a Witness's Memory of a Suspect Only Once, supra*, at 15S. Accordingly, "a memory test conducted in the courtroom is likely to be a test of contaminated memory." *Id.* In other words, "[i]n the courtroom, the eyewitness cannot access a memory of what happened that it is 'independent' of the suggestive [procedure] that came before." Garrett, *Eyewitnesses and Exclusion*, *supra*, at 485.

This problem is particularly acute for highly suggestive procedures, which "have been shown to increase witnesses' confidence in their decisions and belief in their memory for the perpetrator. Thus, the more suggestive the initial identification

procedure, the more likely the witness will appear 'nonetheless reliable' and pass the independent-source test." Steblay & Dysart, *supra*, at 287.

Allowing in-court identifications after unduly suggestive pre-trial identification procedures functionally allows the prosecution to launder suggestiveness. Not only is the witness's memory at trial tainted by the prior suggestive identification procedure, but their testimony is also more likely to appear credible precisely because of the prior viewing. Studies of jury decision making have consistently shown that the most important factor in whether jurors believe eyewitnesses is their confidence at trial. *See, e.g.*, Kylie N. Key et al., *High Confidence is Always Compelling: That's a Problem*, 29 Psychology, Crime & Law 120, 134–35 (2023); Brian L. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Human Behavior 185, 190 (1990). Yet post-identification feedback, repeated viewings, and other factors can inflate witness confidence so that "self-reported confidence *at the time of trial* is not a reliable predictor of eyewitness accuracy." *Identifying the Culprit* at 108 (emphasis added).

B. The origins of the independent source doctrine underscore that it has no place in eyewitness identification cases.

The origins of the independent source doctrine further confirm that it should have no role in determining the admissibility of eyewitness identification evidence when the results of the out-of-court identification have been suppressed because of

the undue suggestiveness of the prior identification procedure.[7] As one scholar has explained, the doctrine arose out of a conflation of two separate lines of Supreme Court cases involving eyewitness identification, Sixth Amendment right-to-counsel cases and Fourteenth Amendment due-process cases. Garrett, *Eyewitnesses and Exclusion*, *supra*, at 483–484. In the Sixth Amendment context, courts held that if a post-indictment lineup resulting in an eyewitness identification was conducted in violation of the defendant's right to counsel, the identification of the defendant is still allowed at trial if it derives from a source independent of the illegal lineup. *See United States v. Wade*, 388 U.S. 218, 241–42 (1967); *Gilbert v. California*, 388 U.S. 263, 272–73 (1967). Those cases, in turn, relied on precedent developed in the context of illegal search and seizure. *See Wade*, 388 U.S. at 241 (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)); *Gilbert*, 388 U.S. at 272–73 (same). In both situations, the policy of deterring police misconduct gave way in large part because the violations did not necessarily taint the evidence the state sought to admit.

New York courts have applied this Sixth Amendment doctrine to cases where evidence is being excluded because a pretrial identification procedure was unduly suggestive. In *People v. Ballott*, this Court relied on *Wade* and *Gilbert* in rejecting

[7] The notion of an independent source for memory likely makes sense in cases involving people who are truly known to one another—family or co-workers for instance—rather than strangers. But New York law already provides that identifications cannot be suppressed when the culprit is familiar to the witness, such that "there is 'little or no risk' that police suggestion could lead to a misidentification." *People v. Rodriguez*, 79 N.Y.2d 445, 450 (1992).

the defendant's argument that an improper police station identification rendered the "in-court identification inadmissible." 20 N.Y.2d 600, 605 (1967). The *Ballott* Court found that the witness's in-court identification did not necessarily need to be excluded because "[i]t may be that she would have been able to make an in-court identification . . . even if there had been no police station show-up." *Id*. at 606. More recently, this Court has continued to rely on *Ballott* (and by extension *Gilbert*) in allowing in-court identifications even after unduly suggestive identification procedures. *See, e.g.*, *Marshall*, 26 N.Y.3d at 504 (quoting *Ballot*, 20 N.Y.2d at 606).

But the rationale that animated the right-to-counsel decisions does not apply to the due process question of the admission of eyewitness identification evidence at trial after an unduly suggestive identification procedure. Here, how the evidence was collected is precisely what taints it. Unlike with an illegally seized gun, the mere act of collecting eyewitness identification evidence can alter the evidence. After an initial identification procedure, eyewitness memory is never the same again, no matter how clearly or confidently it may be expressed. Rather than being like illegally seizing a gun, showing a suspect to a witness in a suggestive procedure is like asking a suspect to touch a gun before testing it. If the eyewitness identifies the suspect in a subsequent procedure, it can never be determined if that identification is a result of the initial memory of the event or of memory contamination, just like the discovery of the defendant's DNA or fingerprints on a gun they handled could

be proof of culpability or contamination. Nevertheless, courts have imported this concept of an independent origin into the due process context without regard for this material difference.

As a result, although the goal of the safeguards this Court has adopted regarding eyewitness identifications is to decrease the risk of misidentifications and wrongful convictions, the independent source doctrine has the opposite effect. No subsequent identification, especially after one involving suggestive procedures, is truly "independent" of the prior identification procedure(s). Instead, every attempt to test a witness's memory reshapes—and contaminates—that memory.

As the Supreme Court of New Mexico has noted, "where law enforcement employs suggestive identification procedures to elicit an identification from an eyewitness, the eyewitness subjected to the suggestive identification procedure[] becomes effectively incapable of accessing a memory of what the eyewitness saw that is independent of that procedure." *New Mexico v. Martinez*, 478 P.3d 880, 904–05 (N.M. 2020). The *Martinez* court, in other words, recognized that an in-court identification following a suggestive out-of-court identification procedure has no source "independent" from a witness's memory of that prior suggestive procedure. The *Martinez* court accordingly abandoned the independent source doctrine "in the context of due process and disputed eyewitness identifications," holding that "[t]he

independent source doctrine. . . lacks legal justification and is contrary to the existing science." *Id.* at 905. This Court should do the same.

CONCLUSION

For the reasons set forth above and in the Appellant's Brief, this Court should hold that there was no "independent source" for the in-court identification in this case and abolish the independent source doctrine in the eyewitness context.

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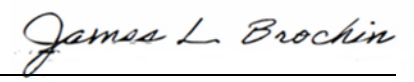
Respectfully submitted,

STEPTOE LLP

By: 

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