

Court of Appeals
of the
State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

JASON WRIGHT,

Defendant-Appellant.

**BRIEF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT**

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TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
ARGUMENT	3
I. Eyewitness Identifications Can Be Inaccurate, Especially When A Witness’s Memory Has Been Contaminated By Subsequent Events	3
II. There Can Be No Independent Source When A Witness Does Not Identify A Person In A Lineup	8
A. A Witness’s Repeated Exposure To A Person Can Contaminate The Witness’s Memory	9
B. A Witness’s Not Picking A Person Out Of A Lineup Is Probative Of Innocence	14
III. The Independent Source Doctrine Contravenes The Scientific Consensus That Human Memory Is Subject To Contamination	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	1
<i>Commonwealth v. Walker</i> , 92 A.3d 766 (Pa. 2014).....	1
<i>Deck v. Missouri</i> , 544 U.S. 622 (2005).....	8
<i>Garner v. People</i> , 436 P.3d 1107 (Colo. 2019).....	1, 13
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	1
<i>Hall v. Florida</i> , 572 U.S. 701 (2014).....	1
<i>Holbrook v. Flynn</i> , 475 U.S. 560 (1986).....	8
<i>Moore v. Texas</i> , 581 U.S. 1 (2017).....	1
<i>Panetti v. Quarterman</i> , 551 U.S. 930 (2007).....	1
<i>People v. Boone</i> , 30 N.Y.3d 521 (2017).....	1, 3, 14
<i>People v. Chipp</i> , 75 N.Y.2d 327 (1990).....	9, 17
<i>People v. Marshall</i> , 26 N.Y.3d 495 (2015).....	7

<i>People v. Marte</i> , 12 N.Y.3d 583 (2009).....	7
<i>People v. Perdue</i> , 41 N.Y.3d 245 (2023).....	7
<i>People v. Thomas</i> , 22 N.Y.3d 629 (2014).....	1
<i>Perry v. New Hampshire</i> , 565 U.S. 228 (2012).....	1
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Bradbury, Shelly, <i>Colorado Judge Erases Man’s Conviction in 2009 Triple Shooting</i> , The Denver Post (Apr. 23, 2025), https://www.denverpost.com/2025/04/23/james-garner-colorado-wrongful-conviction-vacated/	13
Brigham, John C., et al., <i>Disputed Eyewitness Identification Evidence</i> , 36 Ct. Rev. 12 (1999)	4
Clark, Steven E., et al., <i>Regularities in Eyewitness Identification</i> , 32 Law & Hum. Behav. 187 (2007)	15
Costanzo, Mark, <i>Psychology Applied to Law</i> (2004)	20, 21

Deffenbacher, Kenneth A., et al., <i>Mugshot Exposure Effects</i> , 30 Law & Hum. Behav. 287 (2006)	12
Gronlund, Scott D. & Aaron S. Benjamin, <i>The New Science of Eyewitness Memory</i> , 69 Psych. Learning & Motivation 241 (2018).....	20
Hinz, Tiffany & Kathy Pezdek, <i>The Effect of Exposure to Multiple Lineups on Face Identification Accuracy</i> , 25 Law & Hum. Behav. 185 (2001)	12
Johnson, Marcia K., <i>Source Monitoring and Memory Distortion</i> , 352 Phil. Transactions Royal Soc’y B 1733 (1997)	10
Lawson, Victoria Z. & Jennifer E. Dysart, <i>The Showup Identification Procedure: An Exploration of Systematic Biases</i> , 19 Legal & Criminological Psych. 54 (2014).....	12
Loftus, Elizabeth F., et al., <i>Eyewitness Testimony: Civil and Criminal</i> (6th ed. 2024).....	4, 5
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Morgan, C.A., et al., <i>Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events</i> , 36 Int’l J. L. & Psychiatry 11 (2013).....	19, 20
Ross, David F., et al., <i>Unconscious Transference and Mistaken Identity</i> , 79 J. Applied Psych. 918 (1994)	11
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Seale-Carlisle, Travis M., <i>Improving the Diagnostic Value of Lineup Rejections</i> , 252 <i>Cognition</i> 105917 (2024).....	14
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Smith, Andrew M., et al., <i>The Untapped Potential of Lineups</i> , 30 <i>Psych., Crime & Law</i> 1580 (2023).....	12, 13
Smith, Earl & Angela J. Hattery, <i>Race, Wrongful Conviction & Exoneration</i> , 15 <i>J. African Am. Studies</i> 74 (2011).....	21
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Wells, Gary L. & Deah S. Quinlivan, <i>Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science</i> , 33 <i>Law & Hum. Behav.</i> 1 (2009).....	6, 9, 10, 21, 22
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INTEREST OF AMICUS CURIAE

The American Psychological Association is the leading association of psychologists in the United States. A non-profit scientific and professional organization, APA has approximately 174,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's major purposes are to increase and disseminate knowledge regarding human behavior, to advance psychology as a science and profession, and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare.

APA has filed more than 200 amicus briefs in state and federal courts nationwide. *See, e.g., People v. Boone*, 30 N.Y.3d 521 (2017); *Moore v. Texas*, 581 U.S. 1 (2017); *People v. Thomas*, 22 N.Y.3d 629 (2014); *Graham v. Florida*, 560 U.S. 48 (2010). These briefs have been cited frequently by courts, including the U.S. Supreme Court. *See, e.g., Hall v. Florida*, 572 U.S. 701, 710-713, 722-723 (2014); *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). Several of APA's prior amicus briefs addressed eyewitness-identification issues. *See, e.g., Garner v. People*, 436 P.3d 1107 (Colo. 2019); *Boone*, 30 N.Y.3d 521; *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014); *State v. Artis*, 101 A.3d 915 (Conn. 2014); *Perry v. New Hampshire*, 565 U.S. 228 (2012).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether the case is one in which there is sufficient scientific research, data, and literature on a question before a court that APA can usefully contribute to the court's understanding and resolution of that question. APA regards this as one of those cases. The issue here is whether, in a criminal case, the prosecution can meet its burden of establishing an "independent source" for an eyewitness's identification if the eyewitness both (1) was previously exposed to an unduly suggestive identification procedure and (2) does not identify the defendant in a separate pre-trial lineup.

In considering this issue, APA submits that this Court should take into account the extensive body of psychological research dedicated to eyewitness identifications. As explained herein, that research supports defendant-appellant Jason Wright's contention that, after an eyewitness does not identify the defendant as the perpetrator during a lineup procedure, the prosecution cannot meet its burden of establishing an independent source by clear and convincing evidence.¹

¹ APA gratefully acknowledges the assistance of John T. Wixted, Ph.D.; Amy Bradfield Douglass, Ph.D.; Andrew M. Smith, Ph.D.; and Margaret Bull Kovera, Ph.D.

ARGUMENT

I. EYEWITNESS IDENTIFICATIONS CAN BE INACCURATE, ESPECIALLY WHEN A WITNESS'S MEMORY HAS BEEN CONTAMINATED BY SUBSEQUENT EVENTS

Eyewitness testimony often plays an important role in the criminal justice system, providing critical evidence of guilt or innocence. But psychological research has both raised “serious concerns ... about the potential reliability of eyewitness identification evidence” and demonstrated that “[m]istaken eyewitness identification is a primary contributor to criminal convictions of the innocent.” Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 Law & Hum. Behav. 3, 3-4 (2020). This Court has similarly observed that “[m]istaken eyewitness identifications are the single greatest cause of wrongful convictions in this country.” *Boone*, 30 N.Y.3d at 527 (quotation marks omitted). Likewise, the U.S. Supreme Court noted sixty years ago that “[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967).

These judicial observations hold true today, as studies show that eyewitness identifications continue to contribute to wrongful convictions. For instance, a 2015 survey of data from the Innocence Project found that a mistaken eyewitness identification was a contributing factor in 72% of DNA exonerations in the

preceding 25 years. West & Meterko, *Innocence Project: DNA Exonerations, 1989-2014*, 79 Albany L. Rev. 717, 732 (2015).

Psychological research has helped explain why eyewitness identifications can be inaccurate. For example, research has found that the *procedures* by which law enforcement asks an eyewitness to identify a potential suspect can have a substantial impact on the reliability of an identification. Psychologists refer to these procedures as “system variables.” Wells et al., *supra*, at 6.

The ability of these system variables to affect the reliability of an eyewitness identification stems from the complex nature of human memory. As social and cognitive psychologists have recognized, “when we experience an important event, we do not simply record it in our memory as a videotape recorder would.” Loftus et al., *Eyewitness Testimony: Civil and Criminal* §2-2 (6th ed. 2024). “Rather, what is perceived and stored in memory is often incomplete or distorted as a result of the individual’s state of mind or the nature of the event observed.” Brigham et al., *Disputed Eyewitness Identification Evidence*, 36 Ct. Rev. 12, 13 (1999). Thus, psychologists have long recommended that memory be compared not to a videotape but to a fingerprint, hair sample, or other trace evidence from a crime scene. *See, e.g.*, Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 622-623 (2006).

Psychologists analyzing the nature of memory have divided the memory cycle into three discrete steps: (1) the acquisition or encoding stage, when a witness perceives an event and information is thereby entered into the memory system; (2) the retention or storage stage, the period between acquisition and the witness's attempt to recall the information; and (3) the retrieval stage, when the witness attempts to recall the stored information. *See, e.g.,* Loftus et al., *supra*, §2-2. This three-stage analysis is “central to the concept of human memory,” and “[p]sychologists who conduct research in this area try to identify and study the important factors that play a role in each of the three stages.” *Id.* Psychologists have found that system variables can negatively impact memory at each of these stages. Wells et al., *supra*, at 6-7, 9-28.

At the same time, researchers have identified practices through which law enforcement can minimize the negative effects of system variables. Wells et al., *supra*, at 8. These practices include avoiding repeated identification procedures, conducting lineups rather than showups (the latter being unduly suggestive), and avoiding visual or verbal cues that point to one person as the suspect. *Id.* at 8-9. When such practices are followed, eyewitness identification may be a reliable tool for the investigation and prosecution of crimes. Seale-Carlisle et al., *New Insights on Expert Opinion About Eyewitness Memory Research*, Perspectives on Psychol.

Sci. Online 9 (Apr. 18, 2024), <https://journals.sagepub.com/doi/epub/10.1177/17456916241234837>.

One area of research that has informed recommendations regarding law-enforcement practices involves the potential for “suggestive” identification procedures—those that suggest to a witness that a particular person is the perpetrator. “From the perspective of psychological science, a procedure is suggestive if it induces pressure on the eyewitness to make a[n] ... identification ..., fails to relieve pressures on the witness to make a ... selection ..., cues the witness as to which person is the suspect, or cues the witness that the identification response was correct or incorrect.” Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science*, 33 Law & Hum. Behav. 1, 6 (2009). Psychologists have recognized several possible forms of suggestiveness that can induce an eyewitness to identify a particular individual as the suspect. These include “leading or suggestive questioning,” which “can distort [a witness’s] memory” of the culprit. Wells et al., *supra*, at 9. It can also include subtle differences in physical build and clothing that make one person in a lineup stand out. *Id.* at 19.

Both this Court and the U.S. Supreme Court have expressed concerns about suggestive procedures. Indeed, this Court has carefully policed the use of such procedures, recognizing that “most ... cases imposing constitutional limits on

identification procedures ... involve[] suggestiveness originating with law enforcement officers.” *People v. Marte*, 12 N.Y.3d 583, 586 (2009). And “this Court has generally precluded in-court identifications made following an unduly suggestive pretrial identification procedure,” out of “concern ... that suggestive pretrial identification procedures arranged by law enforcement will influence and taint the witness’s subsequent in-court identification of the defendant, resulting in possible misidentification.” *People v. Perdue*, 41 N.Y.3d 245, 249 (2023). For that reason, the Court has “allow[ed] a witness to make an in-court identification” following a suggestive pretrial procedure “only if the People can demonstrate an independent source for the witness’s identification that was not influenced by the suggestive pretrial procedure.” *Id.* That is, the prosecution must show that the later in-court identification “was neither the product of, nor affected by, the improper pretrial procedure.” *People v. Marshall*, 26 N.Y.3d 495, 504 (2015). Consistent with the foregoing, psychologists have warned against allowing an eyewitness to make an identification of a person based solely on indicia connoting criminality, such as being “in handcuffs or in seat of a patrol car.” Wells et al., *supra*, at 27.

Here, the trial court found that the relevant eyewitness, Fanny Fabre, was exposed to an unduly suggestive identification procedure, noting that she saw the defendant being “brought out in custody, surrounded by two detectives, one in front, one in back, in cuffs.” A229. Courts have recognized that these markers—handcuffs

and a law enforcement escort—are suggestive of criminality. Handcuffs and an armed police escort “are unmistakable indications of the need to separate a defendant from the community at large,” *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986), and most people would intuit that an individual subjected to these circumstances is suspected of a crime. In fact, the U.S. Supreme Court has noted that “[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process.” *Deck v. Missouri*, 544 U.S. 622, 630 (2005). The trial court therefore rightly concluded that Ms. Fabre was exposed to an unlawful suggestive identification procedure. A251. That required the prosecution to carry the burden of establishing an independent source for Ms. Fabre’s subsequent in-court identification of Mr. Wright. As explained in the next section, psychological research establishes that no independent source can exist.

II. THERE CAN BE NO INDEPENDENT SOURCE WHEN A WITNESS DOES NOT IDENTIFY A PERSON IN A LINEUP

Two lines of psychological research demonstrate that an independent source cannot be established when the eyewitness previously did not identify a person in a lineup. First, empirical studies show that so-called “memory-source errors”—in which an eyewitness’s familiarity with a person, rather than a specific memory of seeing the person commit a crime—can lead an eyewitness to identify the person as the perpetrator. Second, research establishes that when an eyewitness does not identify any of the people in a lineup, that is probative of innocence—that is, it

suggests that the individuals who appeared in the lineup (including the suspect) did not commit the crime. Taken together, these two lines of research establish that when a witness has not identified the defendant in a lineup, an independent source cannot be shown, certainly not by the clear and convincing evidence that this Court's precedent requires, *see People v. Chipp*, 75 N.Y.2d 327, 335 (1990).

A. A Witness's Repeated Exposure To A Person Can Contaminate The Witness's Memory

Psychological research has consistently shown “that eyewitness’ recollections of an event can be affected by ‘information’ acquired well after the witnessing event has occurred.” Wells & Quinlivan, *supra*, at 14. The effect of such contamination can be striking. In one study, for example, “after witnessing a clean-shaven person commit an act, participant-witnesses who were given information suggesting that he had a moustache incorporated that information into their later descriptions of the person.” *Id.* One type of event that causes contamination is a test of the eyewitness's memory, such as a lineup procedure in which the eyewitness is asked whether the perpetrator is present. Wixted et al., *Test a Witness's Memory of a Suspect Only Once*, 22 Psych. Sci. Pub. Int. 1S, 3S (2021). Psychologists have thus long recognized that “there is only one *uncontaminated* opportunity for a given eyewitness to make an identification of a particular suspect,” because “[a]ny subsequent identification test with that same eyewitness and that same suspect is

contaminated by the eyewitness's experience on the initial test." Wells et al., *supra*, at 25.

Indeed, "repeated identification procedures are inherently suggestive, in that a witness may discern which person is common to both procedures—the police suspect." Steblay & Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. Applied Rsch. Memory & Cognition 284, 285 (2016). Research has shown that "[w]itnesses who encountered a innocent person's photo in an initial identification procedure were more likely to misidentify a different photo of him in a second procedure even if they did not misidentify him in the first procedure." Wells & Quinlivan, *supra*, at 8.

Memory contamination can also be caused by "memory-source errors" (sometimes also called "source-monitoring errors"), which occur when a person remembers an event but attributes that memory to an incorrect source. Put another way, "people sometimes confuse what they inferred or imagined and what actually happened, what they saw and what was suggested to them, one person's actions and another's, what they heard and what they previously knew, and fiction and fact." Johnson, *Source Monitoring and Memory Distortion*, 352 Phil. Transactions Royal Soc'y B 1733, 1733 (1997). These types of errors occur all the time and are well-known even to the public: someone might remember hearing a piece of news from a friend, even though she actually saw it on TV. *See id.* at 1734.

One type of memory-source error is “unconscious transference,” during which “an eyewitness confuses a familiar but innocent person with an actual assailant.” Ross et al., *Unconscious Transference and Mistaken Identity*, 79 J. Applied Psych. 918, 918 (1994). Unconscious transference can occur when a familiar but innocent person is shown to a witness while the witness is thinking about the crime (e.g., during a lineup when the witness is expressly asked to identify the perpetrator). *Id.* This can lead the witness to “incorrectly attribute that person’s familiarity to the crime context,” thereby “transfer[ring]” the familiar person into the memory of the crime. *Id.* Psychologists term this kind of transfer “unconscious” because “the witness misidentifies the familiar [person] without having a conscious recollection of the previous exposure to the [person].” *Id.*

Unconscious transference can occur when the witness sees the innocent person just once, but it is more likely when a witness is exposed to a person multiple times. As a result, unconscious transference arises frequently with eyewitness testimony, because eyewitnesses are often asked to make repeated identifications of a suspect. Steblay & Dysart, *supra*, at 284. For example, an eyewitness may be presented with a photo array including a picture of a suspect before being presented with a lineup that includes that suspect. *Id.* Empirical studies have shown that repeated identification procedures “make certain that the suspect is identified more often, but do not increase the likelihood that the identified suspect is actually guilty.”

Id. at 286. One “meta-analysis”—an analysis that synthesized data from seventeen previous studies—found that eyewitnesses to simulated crimes who were exposed to photographs of people before participating in a lineup were significantly more likely to misidentify one of the people in the photographs as the perpetrator, compared to those who participated in the lineup without first viewing the photographs (37 percent to 15 percent). Deffenbacher et al., *Mugshot Exposure Effects*, 30 Law & Hum. Behav. 287, 299 (2006). Multiple individual studies have yielded similar findings. *See, e.g.*, Lawson & Dysart, *The Showup Identification Procedure: An Exploration of Systematic Biases*, 19 Legal & Criminological Psych. 54 (2014); Steblay et al., *Double Exposure: The Effects of Repeated Identification Lineups on Eyewitness Accuracy*, 27 Applied Cognitive Psych. 644 (2013); Hinz & Pezdek, *The Effect of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 Law & Hum. Behav. 185 (2001). As a 2016 review of these studies recognized, “[t]he results are consistent and compelling.” Steblay & Dysart, *supra*, at 286. In sum, these results illustrate that exposing a witness to the faces of potential suspects can contaminate the witness’s memory of the crime.

Real-world examples confirm that this kind of memory contamination occurs in criminal cases. The wrongful conviction of Larry Mayes is particularly illustrative. *See* Smith et al., *The Untapped Potential of Lineups*, 30 Psych., Crime & Law 1580, 1583 (2023). A rape victim did not identify Mr. Mayes in two separate

live lineups, but later selected his photo out of an array. *Id.* Mr. Mayes was later exonerated by DNA testing after serving two decades in prison. *Id.*; *see also* Loftus, *Memories of Things Unseen*, 13 *Current Directions in Psych. Sci.* 145, 145 (2004). Experts who analyzed Mr. Mayes’s case have explained that it demonstrates how “[r]epeatedly presenting the same suspect to the same witness for identification increases the likelihood of mistaken identification.” Smith et al., *supra*, at 1583. The case of James Joseph Garner is also illustrative. After a bar shooting, three people were shown a photographic array containing Mr. Garner, and none of them identified him as the gunman. *Garner*, 436 P.3d at 1108-1109. However, all three people identified Mr. Garner at his trial three years later, and Mr. Garner was convicted. *Id.* Mr. Garner served 15 years in prison before he was exonerated in April 2025. Bradbury, *Colorado Judge Erases Man’s Conviction in 2009 Triple Shooting*, *The Denver Post* (Apr. 23, 2025), <https://www.denverpost.com/2025/04/23/james-garner-colorado-wrongful-conviction-vacated/>. Similar examples of wrongful convictions after repeated identification procedures are well documented. *See, e.g.*, Wixted et al., *supra*, at 14S-15S; Steblay & Dysart, *supra*, at 284.

Here, Ms. Fabre experienced the repeated exposure to Mr. Wright that can lead an eyewitness to mistakenly identify a suspect as the assailant she saw at the crime scene. Although there is no reason to doubt Ms. Fabre’s sincerity,

psychological research establishes that her repeated interactions with Mr. Wright—in the hallway, at the lineup, and then at trial—could well have affected her memory of the crime. Put simply, her in-court identification of him cannot be deemed independent of her prior viewings of him.

B. A Witness’s Not Picking A Person Out Of A Lineup Is Probative Of Innocence

Another area of psychological research that shows why a genuinely independent source cannot be established after a non-identification by an eyewitness involves studies of the implications of a person not picking anyone out of a lineup. Psychologists often use the term “rejection” to refer to a witness “identif[ying] no one,” *i.e.*, “tell[ing] the police that the perpetrator is not present.” *E.g.*, Seale-Carlisle, *Improving the Diagnostic Value of Lineup Rejections*, 252 *Cognition* 105917, at 1 (2024).

Judges and juries generally understand that an eyewitness’s decision to identify a person as a suspect is probative of guilt. *E.g.*, *Boone*, 30 N.Y.3d at 538 (Garcia, J., concurring); Wells & Lindsay, *On Estimating the Diagnosticity of Eyewitness Nonidentifications*, 88 *Psychol. Bull.* 776, 776 (1980). And as noted, psychologists agree that, when law enforcement adheres to best practices (avoiding suggestiveness, for example), such an identification has evidentiary value. Yet, it is widely assumed by judges and juries that an eyewitness’s non-identification of anyone in a lineup has little or no evidentiary value. Wells & Lindsay, *supra*, at 776.

This assumption stems from “the belief that there are multiple plausible causes for nonidentification,” including a simple lapse in memory. *Id.* Indeed, the prosecution’s brief in this Court echoes this assumption, arguing (p.27) that “there could be any number of reasons for a non-identification, including the witness’s stress or discomfort, or distractions or other confounding circumstances during the lineup that would not necessarily be captured in the record.”

Psychologists, however, have long understood this assumption to be false. Non-identifications are “not merely ‘failures’ to identify the suspect” but instead “are diagnostic of the suspect’s innocence.” Clark et al., *Regularities in Eyewitness Identification*, 32 Law & Hum. Behav. 187, 211 (2007). As such, they “carry important information whose value should not be overlooked.” *Id.* Just as identifications can be probative of guilt (when the identification procedures are not suggestive), non-identifications are probative of innocence—a fact that has been shown time and again by empirical psychological studies. For instance, one meta-analysis of 94 lineup experiments from 49 published studies found that the accuracy of non-identifications (meaning that when no identification was made, the perpetrator was indeed not in the lineup) was “consistently high across analyses.” *Id.* at 190, 206. *See also, e.g.,* Wells & Lindsay, *supra*, at 780-781; Wells et al., *Eyewitness Identification*, 39 Law & Hum. Behav. 99, 105 (2015); Ayala et al., *Beyond the Confidence-Accuracy Relation: A Multiple-Reflector-Variable*

Approach to Postdicting Accuracy on Eyewitness Lineups, 31 J. Experimental Psych: Applied (forthcoming June 2025) (manuscript at 16-23), https://www.researchgate.net/publication/385859238_Beyond_the_Confidence-Accuracy_Relation_A_Multiple-Reflector-Variable_Approach_to_Postdicting_Accuracy_on_Eyewitness_Lineups.

Moreover, psychological research has shown that non-identifications made during suggestive procedures are more probative of innocence than are non-identifications during *non*-suggestive procedure. Studies have shown, for example, that a witness's non-identification of a suspect presented at a showup, during which only the suspect is shown, is stronger evidence of innocence than a non-identification of a suspect at a lineup, during which the suspect is shown alongside fillers. Smith et al., *The Rule Out Procedure: A Signal-Detection-Informed Approach to the Collection of Eyewitness Identification Evidence*, 29 Psych., Pub. Pol'y & Law 19, 23, 26 (2023). That is because a witness who does not identify a person during a suggestive procedure has resisted that suggestiveness to make a positive identification. Here, Ms. Fabre's non-identification of Mr. Wright at the lineup, despite having been exposed to a suggestive viewing in the hallway, suggests that the non-identification carries greater exculpatory value.

Research also shows that certain hallmarks of an eyewitness not identifying anyone in a lineup as the perpetrator can help distinguish between situations in which

such a non-identification is correct (again, meaning the lineup does not in fact include the perpetrator) and when it is incorrect. One recent study found that a confident, affirmative declaration that the perpetrator is not in a lineup (as opposed to a non-identification suggesting mere uncertainty or forgetfulness) is indicative of innocence. That study noted that a non-identification “associated with words that suggest a decisive or absolute rejection of the lineup” was more likely to be correct than a non-identification that was “associated with words that suggest weak memory ... or uncertainty.” Ayala et al., *supra*, at 35. Similarly, that study found that the more confident an eyewitness was in her non-identification and the more quickly she made that decision, the more likely her non-identification was to be correct. *Id.* at 50.

In this case, Ms. Fabre’s reaction to the lineup was an affirmative declaration that the perpetrator is not in the lineup—“No, he’s not here,” she said, A81—which as just explained is a hallmark of a correct non-identification. To be sure, Ms. Fabre’s non-identification of anyone in the lineup does not *conclusively* establish that Mr. Wright was not the shooter. But that of course is not the question. The inquiry is whether, given the suggestive identification procedure to which Ms. Fabre was exposed, the prosecution can show “the existence of an independent source by clear and convincing evidence,” *Chipp*, 75 N.Y.2d at 335. The psychological science discussed indicates that the answer is no.

* * *

Psychological research shows that repeatedly exposing a witness to a person can cause the witness to confuse that person with the assailant that she saw at the crime scene. And research also shows that a witness's non-identification of a person in a lineup is probative of that person's innocence. Together, these two areas of research demonstrate that when a witness has declined to identify a defendant in a lineup, the witness cannot perform a reliable in-court identification.

III. THE INDEPENDENT SOURCE DOCTRINE CONTRAVENES THE SCIENTIFIC CONSENSUS THAT HUMAN MEMORY IS SUBJECT TO CONTAMINATION

Psychological research (including the research discussed above) also supports a broader proposition: that any suggestive procedure renders a subsequent in-court identification unreliable, regardless of how the witness reacted to a lineup. Specifically, the consensus among researchers that human memory is subject to contamination challenges the core premise of the independent source doctrine—that a witness's memory of a crime remains unchanged when the witness is subsequently exposed to a suggestive viewing.

Research shows, to the contrary, that when a witness sees a perpetrator committing a crime and is later exposed to a suggestive viewing of a different person, the witness's original memory of the crime becomes permanently contaminated. As a result, if the witness is later asked to identify the perpetrator of the crime, the witness is likely to identify the person seen in the suggestive viewing. In

psychological terms, the contaminating effect of a suggestive viewing is an example of the “misinformation effect,” which is a well-documented phenomenon that “occurs when misleading suggestions or inaccurate information presented after an event result in [a] distorted memory of the original event.” Schacter & Loftus, *Memory and Law: What Can Cognitive Neuroscience Contribute?*, 16 *Nature Neuroscience* 119, 122 (2013) (citing Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 *Learning & Memory* 361 (2005)).

Empirical research confirms that the misinformation effect can lead to misidentifications. In one study, 861 active-duty soldiers were each subjected to a mock interrogation as part of a training program. Morgan et al., *Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events*, 36 *Int’l J. L. & Psychiatry* 11, 12 (2013). After the mock interrogation, some soldiers were shown a photograph of a person who did not conduct the interrogation and asked several questions falsely implying that this person was the interrogator. *Id.* at 14. Later, every soldier was shown a lineup that included the fake interrogator but not the real interrogator. *Id.* Among the soldiers who were not shown the photograph after the mock interrogation, only 15% selected the fake interrogator in the lineup—consistent with random guessing. *Id.* at 15-16. In contrast, 84% of the soldiers who were shown the photograph of the fake interrogator selected the fake interrogator in

the lineup. *Id.* This study “clearly indicates [that] testing memory with suggestive or otherwise improper procedures contaminates memory.” Wixted et al., *supra*, at 3S. That is particularly true given two points. First, U.S. military personnel are trained to resist misinformation. Morgan et al., *supra*, at 16. And second, the soldiers viewed the real interrogator under relatively favorable circumstances—they spent thirty minutes with the interrogator in an illuminated room, and they were required to maintain eye contact the entire time. *Id.* at 12.

Experts have also identified real-world cases in which an eyewitness’s memory of a perpetrator was contaminated after the crime occurred. One example is the wrongful conviction of Ronald Cotton. In that case, a man broke into a woman’s apartment in the middle of the night and raped her. Costanzo, *Psychology Applied to Law* 170 (2004). Following the rape, the man allowed the victim to get up and go to the bathroom, at which point she turned on the light and used the opportunity to look at his face. *Id.* After the crime, detectives showed the victim a photo array. *Id.* She hesitated for several minutes, “moving back and forth between the photos,” before selecting a photo of Ronald Cotton. Wells, *Psychological Science on Eyewitness Identification and Its Impact on Police Practices and Policies*, 75 *Am. Psychologist* 1316, 1321 (2020). Once she made her identification, the detectives administering the photo array gave her positive reinforcement, telling her that “you did great” and “we thought that might be the guy.” Gronlund &

Benjamin, *The New Science of Eyewitness Memory*, 69 Psych. Learning & Motivation 241, 255 (2018). The victim went on to identify Mr. Cotton in an in-person lineup as well as at trial, and he was convicted. Costanzo, *supra*, at 170. Over a decade later, however, DNA testing exonerated Mr. Cotton and “definitively implicated” a different man. Wells, *supra*, at 1321; Wells & Quinlivan, *supra*, at 15.

As experts analyzing the Cotton case have explained, the detectives’ positive reinforcement following the victim’s hesitant and uncertain selection of Mr. Cotton’s photograph was a form of “suggestive procedure[]” that contaminated the victim’s memory of the crime, leading her to “replace [her] original memory images with the image in the photo.” Wells & Quinlivan, *supra*, at 15 (explaining how the Cotton case demonstrates that “suggestive procedures ... can also happen after the identification”); Smith & Hattery, *Race, Wrongful Conviction & Exoneration*, 15 J. African Am. Studies 74, 85 (2011). And this contamination led the victim to incorrectly identify Cotton as her rapist in subsequent identification procedures: “Once the victim ... replaced her original visual images with a Polaroid of Ronald Cotton, when she was presented with the physical lineup, she immediately identified Mr. Cotton as her attacker. Not because he was, but because her memory of her attacker is now the Polaroid of Mr. Cotton.” Smith & Hattery, *supra*, at 85. Notably, the victim viewed Bobby Poole (the actual rapist) in an identification procedure that

was held three years after the rape (and eight years before the DNA test implicated him), because “credible suspicions that Poole was her attacker” had come to light. Wells & Quinlivan, *supra*, at 15. However, the contaminating effect was so strong that the victim “readily rejected Poole and indicated that she had never before seen the man.” *Id.*

In sum, psychological research and real-world examples show that a witness’s memory of an event can be tainted if the witness is subsequently exposed to a suggestive viewing. And once the suggestive viewing has occurred, the original, untainted memory of the crime no longer exists because it has been contaminated. Thus, her viewing of the crime cannot be a valid “independent basis” for identifying the perpetrator of the crime in court.

CONCLUSION

In resolving this appeal, the Court should take account of the psychological research discussed herein regarding eyewitness identifications and human memory.

Respectfully submitted,



April 25, 2025

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CERTIFICATE OF COMPLIANCE

This brief was prepared by a word-processing system, using 14-point Times New Roman typeface and double-spacing. The total number of words in the brief, including the point headings and footnotes but excluding the brief cover, disclosure statement, table of contents, table of authorities, signature block, and certificate of compliance, is 4973.

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

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

On April 25, 2025

deponent served the within: **MOTION FOR LEAVE TO APPEAR AS AMICUS
CURIAE IN SUPPORT OF DEFENDANT-APPELLANT**
upon:

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the address(es) designated by said attorney(s) for that purpose by depositing 1 true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on this 25th day of April 2025



MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026



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