

**STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Michigan Supreme Court No. 156189
Court of Appeals No. 332190
Saginaw County No. 15-041848-FC

TRAVIS TRAVON SAMMONS,

Defendant-Appellant.

**BRIEF OF *AMICI CURIAE* KENNETH WYNIEMKO
AND THE INNOCENCE PROJECT**

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INTERESTS OF *AMICI CURIAE*¹

Kenneth Wyniemko is a Michigan resident who spent nearly nine years in state prison after being wrongfully convicted for criminal sexual conduct, breaking and entering, and armed robbery. Although no physical evidence connected Mr. Wyniemko to the crime scene, the use of highly suggestive identification procedures led to his misidentification. On June 17, 2003, Mr. Wyniemko was released from prison and had all charges against him dismissed after post-conviction DNA testing of biological evidence conclusively established that he did not commit the crimes for which he had been wrongfully convicted.

The Innocence Project is an organization dedicated to providing pro bono legal and investigative services to indigent prisoners whose actual innocence may be established primarily through post-conviction DNA evidence. The Innocence Project also seeks to prevent wrongful convictions by researching their causes and pursuing legislative, administrative, and judicial reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. These reforms include those designed to prevent wrongful convictions based on mistaken eyewitness identifications. The Innocence Project has served as counsel or provided assistance in hundreds of successful post-conviction exonerations of innocent persons nationwide.

Amici have a strong interest in the outcome of this case, which involves suggestive and unreliable eyewitness identification procedures. They file this brief to bring to the Court's attention the importance of preventing wrongful convictions based on mistaken eyewitness identification,

¹ No part of this brief was drafted by counsel for either party, nor did either party or their counsel contribute financially to its preparation. No entity contributed, financially or otherwise, to the preparation of this brief other than amici and counsel for amici.

as they are the leading contributing cause of wrongful convictions rectified through DNA testing, and a leading cause of wrongful convictions generally.²

² See Kaitlin Jackson & Samuel Gross, *Tainted Identifications*, Nat'l Registry of Exonerations (Sept. 22, 2016), available at <https://www.law.umich.edu/special/exoneration/Pages/taintedids.aspx> (accessed July 09, 2019); The Innocence Project, *DNA Exonerations in the United States*, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed July 09, 2019).

INTRODUCTION

The scientific community has reached consensus that showups³—and in particular, stationhouse showups—are inherently suggestive, dispense with scientifically-sound practices, and profoundly impact the reliability of eyewitness identification. Thus, it should be no surprise that mistaken identifications from showups have led to a large number of wrongful convictions. *See* Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 55 (2011) (finding that among the first 250 wrongful conviction cases established by DNA evidence, 33 percent of mistaken identification cases involved a showup). The admission of highly unreliable testimony stemming from impermissibly suggestive stationhouse showup identifications casts significant doubt on the integrity of convictions such as that of Mr. Sammons. Indeed, given the close association between showups, witness misidentification, and wrongful convictions, showups should rarely—if ever—be conducted. In the limited circumstances in which evidence of a showup may be deemed admissible, courts should still review whether officers conducting the showup followed appropriate protocols.⁴

This Court has asked the parties to address: (1) if the stationhouse showup identification procedure here was impermissibly suggestive; (2) if the identification itself was sufficiently reliable so that it was properly admitted even if the procedure itself was impermissibly suggestive; and (3) if the identification was improperly admitted, whether it was more probable than not that the erroneous admission of the identification affected the outcome of the trial. Otherwise put, this

³ A showup consists of a one-on-one confrontation where police present an eyewitness with a single person, either live or photographically for purposes of identification. Typically, a showup is conducted in close spatial and temporal proximity to the crime. In contrast, a lineup identification consists of a presentation of multiple individuals to the witness either in person or through photographs.

⁴ *See* Garrett, *Convicting the Innocent* 56 (noting that showups conducted after the crime occurred and away from the crime scene area are unjustified).

Court must decide if, under the totality of the circumstances involved in this case, the stationhouse showup caused a substantial likelihood of misidentification. *People v Kurylczuk*, 443 Mich 289, 302; 505 NW2d 528 (1993). In doing so, this Court must consider advances in scientific research that indicate that showups are profoundly suggestive, inherently unreliable, and present an elevated risk of wrongful conviction. If this Court finds the stationhouse showup was impermissibly suggestive and it was not necessary to conduct such a procedure, *Perry v New Hampshire*, 565 US 228, 238-239 (2012), it must then determine whether, under the totality of the circumstances, the witness's ability to identify the offender is so reliable that it outweighs the corrupting effect of the suggestive circumstances. *See id.* at 232.

At the time that the showup was conducted in this case, Mr. Sammons was already in custody and being interviewed by the police, while the witness was available and already at the stationhouse with his legal guardian. Thus, it was completely unnecessary for the police to forgo the use of a proper, nonsuggestive lineup procedure⁵ and instead to use an inherently suggestive showup that scientific research now shows undoubtedly increased the chances of misidentification.

A properly-designed photo array that would test the accuracy of the witness's memory was abandoned in favor of a highly suggestive showup. The witness thus very likely concluded that law enforcement must have had a reason for singling Mr. Sammons out, and the pressure to identify Mr. Sammons was only intensified when the witness was escorted past the interrogation room without his legal guardian present while being spoken to by law enforcement.

Most crucially, the witness himself did not identify Mr. Sammons as the shooter in court and testified that he could not and never did identify Mr. Sammons as the shooter. Therefore, the

⁵ A lineup procedure consists of a presentation of multiple witnesses to a witness. Scientific research generally refers to both a live lineup presentation and a photographic presentation (or photographic array), whether sequential or simultaneous, as a "lineup." We use "lineup" to refer to both live lineups and photographic arrays unless otherwise indicated.

only testimony that the witness ever identified Mr. Sammons came from the detective who conducted the unconstitutionally suggestive showup. That testimony, which derives directly from the tainted showup procedure, cannot possibly erase the corrupting effect of the showup that took place in this case.

ARGUMENT

I. Because showups are so suggestive, they are inherently unreliable and present an increased likelihood of eyewitness misidentification and wrongful conviction.

Decades of scientific research have helped law enforcement agencies to develop identification practices that enhance the reliability of eyewitness identifications by minimizing suggestiveness. These practices include:

- the double-blind or blinded administration of live and photographic lineups, where the administrator of the procedure does not know who the suspect is (double-blind) or does not know when the witness is viewing the suspect (blinded);
- pre-lineup instructions to deter the eyewitness from assuming that the suspect is present in the procedure;
- fair lineup composition that includes the proper selection of fillers that ensure that the suspect does not stand out;
- obtaining a statement of confidence articulating the level of confidence the witness has in the identification immediately after making it; and
- properly documenting the details of the identification procedure.

See Nat'l Res. Council of the Nat'l Academies, *Identifying the Culprit: Assessing Eyewitness Identification* (2014) at 72-74; *accord* Int'l Ass'n of Chiefs of Police, Nat'l Law Enforcement Pol'y Center Eyewitness Identification Model Policy (2010); *see also* Cicchini & Easton, *Reforming the Law on Show-Up Identifications*, 100 J. Crim. L. & Criminology 381 (2010).

Showups dispense with all of these scientifically-sound practices: they present the eyewitness with only one choice, implicitly signaling that the perpetrator has been identified by

law enforcement, and they neglect to include safeguards that prevent against the risk of misidentification. Rather than test an eyewitness's memory by presenting them with innocent fillers, showups only provide an eyewitness with one suspect. When a showup is conducted, blind administration is impossible because there is only one suspect included; and instructions that the perpetrator may or may not be present become meaningless when a single police suspect is so starkly presented to the eyewitness. In a showup, the eyewitness knows that the person being shown is the suspect, so the witness naturally concludes that he or she must be "the one." Law enforcement may also further contaminate what is already considered a suggestive practice by either failing to provide the eyewitness with proper admonitions or saying something to reinforce an identification. Wells, et al., *Eyewitness Identification Procedures*, 22 L. & Hum. Behav. 603, 615 (1998); *see id.* at 629-630.⁶ Moreover, scientific research also indicates that when eyewitness are children or juveniles and are asked leading questions (such as those often used in a showup), they are particularly vulnerable to suggestion. *See* Garrett, *Convicting the Innocent* 75.

In consideration of these concerns, courts across the country have long recognized that showups are inherently suggestive. *See, e.g., Stovall v Denno*, 388 US 293, 302 (1967) (finding that the "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned"); *Graham v Solem*, 728 F2d 1533, 1542 (8th Cir 1984) (reiterating that a show-up is "the most suggestive, and therefore the most objectionable method of pre-trial identification") (citations omitted); *State v Lawson*, 291 P3d 673, 686 (Oregon 2012) ("Showups are widely regarded as inherently suggestive—and therefore less reliable than

⁶ *See also* Garrett, *Convicting the Innocent* pp. 59-60 (finding that among the first 250 wrongful conviction cases established by DNA evidence, police made suggestive remarks in 27 percent of mistaken identification cases).

properly administered lineup identifications.”). Starkly put, showups “make it easier to make mistakes.” *State v Henderson*, 27 A3d 872, 903 (NJ 2011).

Scientific research confirms the showup is “the most grossly suggestive identification procedure now or ever used by the police.” Wall, *Eye-witness Identification in Criminal Cases* 28 (Springfield: Charles C. Thomas, 1965) —and also clearly demonstrates their resultant and fundamental lack of reliability. First and foremost, showups result in higher rates of misidentification than properly-constructed lineups. *See* Wells, et al., *Eyewitness Identification Procedures*, 22 L. & Hum. Behav. 603, 630-631 (1998). Researchers have conducted a number of peer-reviewed studies examining showups, including several meta-analytic reviews, which have established that while “common sense might lead one to expect witnesses to display a showup advantage at a short retention interval, the data contradict this supposition.” *See* Neuschatz, et al., *A Comprehensive Evaluation of Showups*, *Advances in Psych. & Law* 49 (Cham, Switzerland: Springer Int’l Publishing, 2016). When comparing showups conducted immediately after the event with lineups conducted more than a day after the event, showups resulted in fewer correct identifications and more false identifications than did the lineups. *Id.* This held true even with lineups that were conducted at a longer delay: “discrimination [being able to distinguish between guilty and innocent suspects] was significantly worse in showups conducted immediately. . . compared to simultaneous lineups after a 2-day delay.” *Id.* at 53-54.

Otherwise put, even though they are typically conducted more quickly than a lineup, showups are much less reliable. Rather than providing the assumed benefit of protecting the innocent by quickly exonerating them, showups in the immediate wake of a crime put innocent suspects at risk of misidentification. In one study, authors analyzed the choice often available to law enforcement to either conduct a showup quickly or to delay in order to construct a lineup. *See* Wetmore, et al., *Effect of Retention Interval on Showup and Lineup Performance*, 4 J. of App. Res.

In Memory & Cognition 8 (2015). **The study’s findings showed that witnesses in every form of lineup—whether immediate or delayed—outperformed witnesses in any showup.** *Id.* at 12. Showups were never better at obtaining identification of the guilty suspect, and they also yielded more false identifications. *Id.*; see also Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & Hum. Behav. 459, 464 (1996) (finding that in a field experiment, 58 percent of witnesses failed to reject an “innocent suspect” in a photo showup held just two hours after an encounter). Given that witnesses are more likely to erroneously identify an innocent suspect from a showup than they would if presented with a lineup, showups are significantly less likely to actually exonerate innocent suspects or ensure that the suspect identified in a showup is the actual perpetrator. Moreover, showups fail to provide a safeguard against witnesses with poor memories or those inclined to guess because *every* mistaken identification in a showup will point to the suspect (rather than a filler in a lineup who is known to be innocent). There is no way to determine if a witness is guessing when they participate in a showup because there will never be a verifiably false-positive response. See *Lawson*, 291 P3d at 707 (2012).

Scientific research also shows that showups artificially inflate witness confidence in their identifications even though those identifications are less accurate. One recent study analyzing showup identifications in laboratory and field conditions found that witnesses in field identifications “tended to be highly confident regardless of whether they made correct or incorrect identifications.” Eisen et al., *An Examination of Showups Conducted by Law Enforcement Using a Field-Simulation Paradigm*, 23 Psych. Pub. Pol. & Law 1, 27 (2017). When comparing field conditions in which witnesses were led to believe their identification will result in the arrest and prosecution of the suspect to lab conditions in which the participants understood that the identification is being made for research purposes, witnesses in the field: (1) were more likely to choose the person presented to them; (2) were more confident in their identification decisions

regardless of accuracy; and (3) felt more pressure to make an identification of the person being presented. *Id.* at 32.

In addition to artificially inflating confidence, showups also lead witnesses to alter their memory of the event itself to conform to their inflated confidence. A recent study examined how showups (as opposed to lineups) impact a witness' self-reporting not only about confidence, but about their opportunity to view, attention paid, description accuracy, and time to view the suspect. Key, et al., *The Effect of Post-Identification Feedback on Retrospective Self-Reports in Showups*, 32 J. Pol. Crim. Psych. 369, 369 (2017). In other words, witnesses who participated in showups were not only disproportionately confident in their identification, they also disproportionately believed that they had a great view of the perpetrator's face, were paying close attention, had described the person accurately, and had enough with the perpetrator to make a reliable identification. *Id.* at 375. **However, those who believed all of these things most strongly were also only correct 47% of the time. *Id.***

An eyewitness's artificially-inflated confidence in the accuracy of the identification, along with artificially-inflated self-reporting about viewing conditions, significantly complicates the court's task of assessing reliability and therefore admissibility; and moreover, at trial, it undermines the jury's ability to accurately assess witness reliability. Cross-examination is not an effective tool against mistaken eyewitnesses who have been misled by the identification procedures. *See, e.g., Lawson*, 291 P.3d at 695 (“‘traditional’ methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence.”).

Thus, it should come as no surprise that showups often lead to faulty or mistaken eyewitness identification—a leading contributing factor to wrongful conviction nationwide. **In Michigan alone, mistaken witness identification was a contributing factor in the conviction**

of at least 22 people who were later exonerated. See Nat'l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (accessed July 9, 2019). These tragedies represent a double injustice: the misidentification of an innocent suspect not only leads to a wrongful conviction, but it also often means that law enforcement has halted their investigation for the actual perpetrator, putting public safety at risk.

II. Given the fundamental unreliability of evidence obtained from a showup, such evidence should be considered inadmissible unless the presence of exigent circumstances necessitates that a showup be conducted.

In *Stovall*, the Supreme Court condemned the use of showups generally but upheld the admission of evidence that resulted from a showup in that case only because the imminent death of the eyewitness truly necessitated the use of an immediate procedure. 388 US 293 at 301- 302. The corollary, then, is that evidence should never be permitted from a showup when time and circumstances allowed for the creation and administration of a fair and nonsuggestive lineup. That is, identification evidence from a showup should only be admissible where the showup was necessitated by an exigency and when it was conducted in a manner designed to scrupulously avoid additional suggestiveness. See, e.g., *State v Dubose*, 699 NW2d 582 (Wis 2005).

In *Dubose*, the Wisconsin Supreme Court held that evidence obtained from a showup is not admissible unless the State can prove that, based on a totality of the circumstances, the showup was *necessary*, and that a showup is necessary only if: (1) the police lacked probable cause to make an arrest; or (2) if it was not possible to conduct a lineup or photo identification as a result of other exigent circumstances. See 699 NW2d at 594 (2005). We urge this Court to adopt a similar ruling.

There are two rationales for this court to adopt a rule similar to the rule adopted in *Dubose*. First of all, this rule would ensure the reliability of evidence that comes before the court. *Manson v Brathwaite*, 432 US 98, 114 (1977) (“Reliability is the linchpin in determining admissibility of

eyewitness identification evidence.”); *Dubose*, 699 NW2d at 92-93 (“It is now clear to us that the use of unnecessarily suggestive evidence resulting from a showup procedure presents serious problems in Wisconsin criminal law cases.”). And second, this rule would deter law enforcement from using inherently suggestive and unreliable showups where a proper line-up procedure was possible. The Supreme Court has held that a “primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances is to deter law enforcement use of improper procedures in the first place. Alerted to the prospect that identification evidence improperly obtained may be excluded . . . police officers will ‘guard against unnecessarily suggestive procedures.’” *Perry v New Hampshire*, 565 US 228, 241-42 (2012) (citations omitted). Thus, a carefully-crafted exclusionary rule would ensure that inherently suggestive and unreliable showups, that elevate the risk of misidentification, are used only when absolutely necessary.

In this case, the stationhouse showup was completely unnecessary and produced an unreliable eyewitness identification that the witness himself refused to endorse in his testimony in court. Therefore, the “identification” should be considered inadmissible.

III. In the rare situation in which a showup is allowed due to the presence of exigent circumstances, the Court should lay out strict requirements about how these procedures should be conducted.

In the rare situation in which it may be necessary that the police conduct a showup because of the presence of exigent circumstances, the showup should be conducted in accordance with best practices that minimize the chances of misidentification. The International Association of Chiefs of Police (IACP) crafted a model policy for eyewitness identification procedures that includes specific protocols for showups. While the IACP model policy agrees that “the use of showups should be avoided whenever possible in preference for the use of a photo array or a lineup,” it also describes proper police procedures to mitigate the suggestiveness of the procedure. Int’l Ass’n of

Chiefs of Police, Nat'l Law Enforcement Policy Center Eyewitness Identification Model Policy (2010). The suggested procedures include:

- taking a description of the suspect before conducting a showup;
- not conducting a showup when the suspect is seated in the police car or in a jail cell;
- not showing the suspect in suggestive clothing or in handcuffs;
- using carefully scripted instructions indicating that this person may not be the suspect and that the investigation is ongoing;
- law enforcement should not discuss the showup with the witness; and
- law enforcement should request that the witness provide their level of certainty of the identification if the witness gives a positive identification.

Id.

Even when exigent circumstances exist, courts should still consider whether the police followed proper police procedures to determine if an identification is reliable enough to be admissible in court. This Court should rule that when showups are conducted and exigent circumstances have been established, showups will only be deemed reliable when conducted in accordance with these proper practices.

Here, absolutely no exigent circumstances were established by law enforcement to indicate that they needed to conduct a showup. Mr. Sammons was in custody at the stationhouse and available to be included in a regular lineup. The eyewitness was also available at the stationhouse and able to participate in a regular lineup. Unlike in *Perry v New Hampshire*, 565 US at 239, the police-orchestrated showup was completely unnecessary given the situation at hand.

Even if there had been exigent circumstances in this case, the showup was not conducted in accordance with best practices that would have minimized the chances of misidentification. Instead, law enforcement pointed Mr. Sammons out to the witness at the stationhouse while Mr.

Sammons was seated in an interrogation room and spoke to the witness in a misleading way after the witness's guardian left to use the restroom. Moreover, law enforcement did not record the identification or indicate the witness' level of certainty about the identification.

Finally, this Court should rule that the erroneous admission of unreliable identification evidence impacted the outcome of the trial given the lack of evidence used to convict Mr. Sammons, including gaping inconsistencies between Mr. Sammons and the description of the perpetrators provided by the sole eyewitness. Mr. Sammons was convicted largely on the testimony of the detective who administered the procedure and claimed that the 16-year-old eyewitness—the only witness capable of providing a description of the perpetrator of the crime—identified Mr. Sammons as the shooter. There was no in-court identification by the witness because the witness testified that he could not and never did identify Mr. Sammons as the perpetrator. Because of the unreliability of this showup—and consequently, the detective's testimony—it is more likely than not that the outcome would have been different if the detective's testimony was not admitted.

CONCLUSION

Given the inherent unreliability of showup identifications, this Court should exclude the use of witness identifications that are the product of showups absent the existence of exigent circumstances. Moreover, this Court should rule that even when exigent circumstances are present, trial courts must consider whether a showup was conducted following appropriate protocol in order to determine if the identification is admissible.

The identification should have never been admitted in this case given the suggestive nature of the showup identification and the fact that there were no exigencies involved.

For the foregoing reasons, Amici respectfully request that this Court grant appellant's requested relief, constrain the use of showup identifications in Michigan, and mandate procedural protections in the rare situations where showups might still be used.

Respectfully Submitted,

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