No. 25-6774

(CAPITAL CASE)

IN THE

Supreme Court of the United States

CHARLES DON FLORES,

Petitioner,

v.

TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF CERTIORARI

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INTEREST OF AMICUS CURIAE[1]

The American Psychological Association ("APA") 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 most psychologists holding doctoral degrees from accredited universities in the United States. Among APA's major purposes are to increase

[1] No counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, and its counsel made a monetary contribution intended to fund this brief's preparation or submission. Counsel of record for the parties received notice of amicus's intent to file this brief 10 days prior to its due date.

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 courts nationwide, including this Court. *See, e.g.*, *Moore* v. *Texas*, 581 U.S. 1 (2017); *McWilliams* v. *Dunn*, 582 U.S. 183 (2017). These briefs have been cited frequently by courts, again including this one. *See, e.g.*, *Hall* v. *Florida*, 572 U.S. 701, 710-713, 722-723 (2014); *Panetti* v. *Quarterman*, 551 U.S. 930, 962 (2007).

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. Substantial recent psychological research addresses the reliability of the eyewitness identification upon which petitioner's conviction and death sentence primarily rested.[2]

SUMMARY OF ARGUMENT

Eyewitness identifications are a crucial part of many prosecutions—including this one—and accurate identifications can greatly further the ends of our criminal-justice system. But as extensive psychological research has made clear, eyewitness identifications are often not accurate—and "[m]istaken eyewitness identification is a

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[2] APA gratefully acknowledges the assistance of Gary L. Wells, Ph.D.; Amy Bradfield Douglass, Ph.D.; and Andrew M. Smith, Ph.D.

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 is true partly because memory does not (contrary to many people's belief) record, preserve, and replay events with high fidelity, "as a videotape recorder would." Loftus et al., *Eyewitness Testimony* §2-2 (7th ed. 2025). Rather, memory "may be compromised by many factors at all stages of processing, from encoding through storage, to the final stages of retrieval." National Research Council, *Identifying the Culprit* 60 (2014).[3] Humans' limited capacity to process information at a given time means that initial perception is selective. Kaplan & Puracal, *Who Could It Be Now*, 105 J. Crim. L. & Criminology 947, 957-958 (2015). And memory retention is imperfect due to both the passage of time (memory assuredly does not improve over time) and the receipt of new information that can contaminate memory. *Id.* Put simply, the act of remembering (particularly as time passes) is less a matter of genuine recollection and more a process of "reconstruction," with perceptions and information gathered after an event likely altering the memory of it. *Id.* at 957. Memory is thus "as fragile, if not more so, as various types of physical trace evidence[,]" and likewise "can be tampered with, destroyed, lost, distorted, or contaminated by the procedures that are used to collect [evidence from] it." Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 622-623 (2006).

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[3] *Available at* https://www.nationalacademies.org/read/18891/chapter/1.

Recognizing this, psychological researchers have drawn several conclusions relevant here about when eyewitness identifications are more or less reliable.

First, as recent empirical research has confirmed, initial tests of an eyewitness's memory are the most reliable, because they occur before the witness's memory has become contaminated. Furthermore, because recognizing a face is a matter of familiarity rather than dredging up a memory, research has shown that it is unlikely a witness would not recognize a person at one time but later correctly identify that same person as someone the witness had previously seen. Initial *non*-identifications—where a witness participating in a line-up or photo array does not identify a particular person as the perpetrator—are thus particularly probative of innocence.

Second (and conversely), identifications made in subsequent procedures are much less reliable than those made in initial ones, for a number of reasons. First, seeing a suspect in an initial line-up or photo array can contaminate a witness's memory, making it more likely the witness will misidentify that suspect in a second identification procedure—because the witness misattributes the suspect's familiarity to the crime rather than to the earlier identification procedure. This phenomenon, moreover, is not limited to prior identification procedures; seeing a suspect on the news, and then at trial, can likewise lead to a sense of familiarity that a witness may incorrectly attribute to having seen the suspect at the crime rather than later. And beyond simple familiarity, suggestive investigative procedures—including leading questions, hypnosis, or a photo array in which a suspect's photo stands out somehow—can alter a witness's memory of the perpetrator and lead him or her to incorrectly inculpate an innocent suspect. While a person's true memory may initially be strong enough to withstand

suggestive procedures in a first test, these problems compound over time, as original memories decay and are reconstituted through new information and experiences.

Third, in-court eyewitness identifications—where a witness identifies the defendant at trial as the perpetrator—are particularly unreliable. This is especially so where the witness previously saw the defendant in a pretrial identification procedure, and all the more so where the witness did not recognize the defendant in that prior procedure. Such in-court identifications likely result not only from multiple memory contaminations over time but also the inherently suggestive setting: At trial, it is typically quite easy for a witness to discern just from seating locations which person in the courtroom is the defendant. And witnesses may feel pressure to do what they think is expected of them, which is to identify the defendant as the perpetrator. These same circumstances often lead in-court identifications to be made with confidence—which can have a particularly powerful effect on jurors. But because the same processes that often undermine the reliability of an in-court identification also frequently create a false sense of confidence, research has shown that an eyewitness's confidence in her in-court identification has little correlation with its accuracy.

These conclusions (and the underlying social-science research more generally) bear on this case because petitioner's conviction and death sentence rested to a significant extent on the in-court eyewitness identification by Jill Barganier. In ruling on the petition, APA submits that the Court should take account of the robust body of research and literature regarding the reliability (and frequent lack thereof) of in-court eyewitness identifications.

BACKGROUND

On January 29, 1998, Jill Barganier saw two white males with long hair exit a car in her neighbor's driveway and enter the house through the garage. Pet.App.12. Police found her neighbor murdered later that morning. Pet.App.13. Barganier arrived at the scene shortly thereafter and described the men's appearance to investigators. Pet.App.239. She described both men as "'white male[s]'" with "'long brown hair.'" *Id.*

The next day, Barganier helped police create a composite sketch of the car's driver. Pet.App.15. Investigators used the sketch, which depicted a white male with long hair and blue eyes, to identify Richard Childs. *Id.* Barganier then picked Childs out of two photographic lineups. *Id.*; Pet.App.16. He later confessed to shooting the victim. Pet.App.99.

Six days after the murder, Barganier went to the police station to be hypnotized, supposedly to help her identify the vehicle's passenger. Pet.App.16, 18. By this time, petitioner was the police's leading suspect. Pet.App.16. At the start of the hypnosis, the hypnotist—a patrol officer conducting his first hypnosis, Pet.App.18—told Barganier to imagine she was "seeing a documentary" of the events of January 29, and that she could control the documentary, including by "'pan[ning]' in" on the faces of the of the men she saw, Pet.App.19, 168. During the hypnosis, she again described the passenger's hair as "[a] lot like his friend's," "[d]ark" and "long." Pet.App.170-171. Despite this, the hypnotist asked whether his hair was "neatly cut" or "trimmed." Pet.App.171. Barganier said his hair was "to his shoulders." *Id.* At the end of the session, the hypnotist told Barganier that she might remember more later. Pet.App.175-176.

Barganier then used a computer program to create a digital composite sketch of the passenger, depicting a white male with shoulder-length hair. Pet.App.21. The police nonetheless then showed her a photo array containing six *Hispanic* males, all with very short or shaved hair. Pet.App.22. The array included petitioner's photo in the top center. *Id.* Barganier did not recognize anyone in the array as the passenger. *Id.*

Over the next several months, images of petitioner appeared in news reports—at least one of which Barganier saw—identifying him as a murder suspect. Pet.App.22-23, 251. Approximately 13 months after the murder, Barganier testified at petitioner's trial and, for the first time, identified him as the passenger she had seen exiting the car. Pet.App.23, 25. The jury did not hear evidence of Barganier's initial recollection of the passenger as a white male with long hair, her initial composite sketch of the passenger consistent with that description, or the initial photo array where she did not recognize Flores as the passenger. Pet.App.89. Despite the absence of physical evidence linking him to the murder and despite three tests of Barganier's memory indicating that she had not seen petitioner at the crime scene (her description, the composite, and the photo array), petitioner was convicted and sentenced to death. Pet.App.25, 28-29.

ARGUMENT

Over a half-century ago, this Court recognized 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). That observation has only gained force over time: In the decades since, psychologists have compiled a vast and robust body of research regarding

eyewitness identification, including the nature of human memory (and its limits) and the circumstances that tend to make such identifications more or less reliable. This research shows that the reliability of an eyewitness identification may depend critically on *when* and *how* a witness's memory is tested. It also offers insights into how features of the identification process itself—many within the control of law enforcement—can substantially affect (often negatively) the probative value of any resulting eyewitness testimony.

Several aspects of this research, including recent developments in the field, bear directly on the eyewitness identification at the heart of this case. In particular, recent research demonstrates that initial *non*-identifications (procedures in which a witness does not identify a particular person as the perpetrator) are highly probative of innocence; that subsequent identifications may be the result of memory contamination—including from the initial identification procedure—rather than accurate reflections of a witness's memory; and that in-court identifications are particularly suspect as, by the time of trial, the witness's memory has likely been affected by not only contamination over time but also the highly suggestive nature of the courtroom setting itself. In light of all this, there is an emerging consensus among psychologists that the result of an eyewitness's first identification procedure—here, that was Ms. Barganier's non-identification of petitioner—is more reliable than subsequent procedures involving the same witness. For the same reason, eyewitness evidence that precedes any identification procedures, such as Barganier's contemporaneous descriptions of what she saw and her composite sketch of the passenger, is likewise reliable.

I. EYEWITNESSES' NON-IDENTIFICATIONS ARE HIGHLY PROBATIVE OF INNOCENCE

As discussed, Jill Barganier's first identification procedure to identify the passenger of Mr. Childs's car was a photo array in which she saw six photos, including petitioner's, and did not recognize any of the six individuals. Recent psychological studies have cast new light on the significance of such non-identifications by eyewitnesses.

While judges and juries generally view an eyewitness identification as probative of guilt, they widely assume that a *non*-identification—meaning where a witness "tells the police that the perpetrator is not present in the lineup" or similar procedure, Seale-Carlisle, *Improving the Diagnostic Value of Lineup Rejections*, 252 Cognition 105917, at 1 (2024)—has little or no evidentiary value. Wells & Lindsay, *On Estimating the Diagnosticity of Eyewitness Nonidentifications*, 88 Psychol. Bull. 776, 776 (1980). This assumption stems from "the belief that there are multiple plausible causes for nonidentification," including a simple lapse in memory. *Id.*

But that is not how memory operates in the context of eyewitness identifications. Eyewitness identification is a form of "recognition," not "recall," memory. Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science*, 33 Law & Hum. Behav. 1, 13 (2009). Recall memory—for example, describing a suspect's face from memory—requires individuals to search their memory to find the relevant information. Yilmaz et al., *The Science of Human Memory Versus the Federal Rules of Evidence* 6, Psych., Pub. Pol. & Law (2025)

("*Science of Human Memory*").[4] This "search process is probabilistic," and so may fail at one time but succeed at another. *Id.* That explains the common experience of struggling to remember something for hours or even days, only to later have a sudden flash of recollection. But "face-recognition memory does not work th[at] way." *Id.* Recognition requires not conjuring up a specific memory of a particular face, i.e., a particular occasion when a face was seen, but simply determining whether a face looks familiar. *Id.* "No search of memory is required" for that, because the familiarity or not of a face is "automatically experienced in the moments after [a] face is perceived." *Id.*

Non-identifications (particularly ones early in an investigation, when any memory contamination is hopefully limited) are thus "not merely 'failures' to identify the suspect." Clark et al., *Regularities in Eyewitness Identification*, 32 Law & Hum. Behav. 187, 211 (2008). They "are diagnostic of the suspect's innocence." *Id.* One analysis of 94 line-up experiments from 49 published studies found that the rate at which non-identifications were accurate (i.e., the perpetrator was indeed not in the line-up) was "consistently high across analyses." *Id.* at 190, 206. Put more simply, studies show that "a rejection of the lineup provides evidence of innocence." Ayala et al., *Beyond the Confidence-Accuracy Relation*, 31 J. Experimental Psych: Applied 204, 205 (2025).

Recent research has identified certain conditions under which non-identifications are especially probative of innocence. For example, non-identifications made during suggestive procedures are even more probative of innocence than those made absent suggestiveness.

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[4] *Available at* https://dx.doi.org/10.1037/law0000478.

Smith et al., *The Rule Out Procedure*, 29 Psych., Pub. Pol'y & Law 19, 23, 26 (2023). Non-identifications are also more probative of innocence than are *mis*identifications of an innocent individual included in a line-up or photo array as a "filler" or a "foil." Wells & Lindsay, 88 Psychol. Bull. at 781. And non-identifications are most probative of innocence when a photo array contains images unlike the witness's memory of the culprit. Smith et al., *Absolute-Judgment Models Better Predict Eyewitness Decision-Making Than Do Relative-Judgment Models*, 251 Cognition 1, 27 (2024) (Table 2).

Finally, non-identifications are particularly probative of innocence when they occur during a witness's *first* identification test, before "memory [becomes] almost invariably … contaminated by a variety of factors and … therefore highly error prone." Wixted et al., *Test a Witness's Memory of a Suspect Only Once*, 22 Psych. Sci. Pub. Int. 1S, 1S (2021). An eyewitness's memory can be contaminated—in the ways described in Part II—or simply diminished by the passage of time, such that the eyewitness misidentifies a person as the perpetrator of a crime after initially rejecting them. In such circumstances, the "only relevant eyewitness evidence" may be the witness's initial non-identification. *Id.* at 15S.

As a result of these and other recent studies, what psychologists have long demonstrated—that non-identifications have probative value—has recently crystallized into an expert consensus that "even in real-world cases … initial nonidentifications provide more reliable evidence of innocence than previously believed." Yilmaz, *Science of Human Memory* 5. Indeed, experts who hold a wide range of views on many eyewitness-identification issues recently listed as one of six consensus statements regarding the state of the science that "lineup rejections are exculpatory." Lindsay et al.,

Eyewitness Suspect Identification, 33 Memory 757, 759-760 (2025).

That consensus is relevant here because, again, the witness whose mid-trial identification of petitioner was so central to the prosecution did *not* recognize petitioner during her first identification procedure involving his image—before her memory was either contaminated by another procedure (or other sources) or diminished by the passage of time. And the witness's non-identification was especially notable because it reaffirmed her earlier descriptions and composite sketch of the passenger, which did not remotely resemble petitioner.

II. EYEWITNESS IDENTIFICATIONS MADE AFTER REPEATED EXPOSURE TO THE SUSPECT, SUGGESTIVE PROCEDURES, AND/OR THE PASSAGE OF TIME ARE LIKELY UNRELIABLE

Jill Barganier's mid-trial identification of petitioner occurred over a year after the murder, after she had repeatedly been exposed to petitioner—including through the initial photo array. Established psychological research shows that these circumstances (passage of time and prior exposure, including through the investigation itself, which can include suggestive procedures) reduce the reliability of an identification.

A. Repeated Exposure To A Suspect Can Lead To Misidentification

Repeatedly seeing a suspect can lead a witness to misidentify that suspect as the perpetrator of a crime. This includes repeated exposures engendered by multiple tests of an eyewitness's memory, such as repeated line-up procedures involving the same suspect. Wixted, 22 Psych. Sci. Pub. Int. at 3S. "[R]epeated identification procedures are inherently suggestive" because the

witness may notice that only the suspect is "common to both procedures." Steblay & Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. Applied Rsch. Memory & Cognition 284, 285 (2016) (emphasis omitted). That alone can "suggest strongly to the eyewitness which person to identify." Wells & Quinlivan, 33 Law & Hum. Behav. at 8. Indeed, experimental research has shown that "[w]itnesses who encountered an innocent person's photo in an initial identification procedure were more likely to misidentify a different photo of him [i.e., pick him as the perpetrator] in a second procedure even if they did not misidentify him in the first procedure." *Id.* (citing studies). And "once an eyewitness has mistakenly identified someone, that person 'becomes' the witness' memory and the error will simply repeat itself." *Id.* at 9.

Empirical studies have also shown that repeated identification procedures unduly bias outcomes *without* any corresponding gain in accuracy; in other words, they "make certain that the suspect is identified more often, but do not increase the likelihood that the identified suspect is actually guilty." Steblay & Dysart, 5 J. Applied Rsch. Memory & Cognition at 286. For example, one analysis synthesizing twenty-five years of studies found that eyewitnesses to simulated crimes who were shown photographs of people before participating in a line-up were significantly more likely to misidentify one of the people in the photographs as the perpetrator (37% of the time) than witnesses who participated in the line-up without first viewing the photographs (15%). Deffenbacher et al., *Mugshot Exposure Effects*, 30 Law & Hum. Behav. 287, 299 (2006). Additional studies have yielded similar findings. *See, e.g.*, Lawson & Dysart, *The Showup Identification Procedure*, 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). Taken together, these studies provide "consistent and compelling" evidence that showing a witness the face of a suspect contaminates the witness's memory of the crime itself. Steblay & Dysart, 5 J. Applied Rsch. Memory & Cognition at 284.

In addition to simply increasing the familiarity of a face, memory contamination through exposure can be caused by "memory-source errors" (sometimes called "source-monitoring errors"), which occur when a person remembers something but attributes that memory to an incorrect source—e.g., a witness who has met another person only at, say, a party (and hence does have an actual memory of the person) but mistakenly identifies the person as a perpetrator, thinking that she remembers the person from the crime scene. One type of such error is "unconscious transference," where "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—as during a line-up when the witness is expressly asked to call upon their recognition memory to identify the perpetrator. *Id.* This can also occur through exposure to news reports about a crime that mention or show a photograph of the suspect. Yilmaz, *Science of Human Memory* 2. These kinds of exposures can lead the witness to "incorrectly attribute that person's familiarity to the crime context," thereby "transfer[ring]" the now-familiar person into the memory of the crime itself. Ross, 79 J. Applied Psych. at 918. 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.*

In sum, psychological research shows 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 th[e] same eyewitness and … suspect is contaminated by the … initial test." Wells, 44 Law & Hum. Behav. at 25.

B. Investigative Procedures Can Be Suggestive

"From the perspective of psychological science, a[n eyewitness-identification] procedure is suggestive if it induces pressure on the eyewitness to make a[n] identification …, fails to relieve [such] pressures …, cues the witness as to which person is the suspect, or cues the witness that the identification response was correct or incorrect." Wells & Quinlivan, 33 Law & Hum. Behav. at 16. These practices include "leading or suggestive questioning" by police, which "can distort" an eyewitness's memory of the culprit through the creation of false memories. Wells, 44 Law & Hum. Behav. at 9. Indeed, study after study has revealed that leading questions can have a striking impact on human memory. In one study, for example, participants who viewed a car accident and were asked whether one car passed another "while it was stopped at the stop sign" were far more likely to later report that they saw a stop sign, even though the accident actually did not involve a stop sign. *Id.* at 14. Similarly, participants in another study who "witness[ed] a clean-shaven person commit an act" but were then "given information suggesting that [the perpetrator] had a moustache incorporated that information into their later descriptions of the person." Wells & Quinlivan, 33 Law & Hum. Behav. at 14.

Suggestiveness can also occur in more subtle ways. For example, investigators may suggest a particular suspect to an eyewitness by using line-up fillers with minor differences in physical build or clothing so that the suspect stands out. Wells & Quinlivan, 33 Law & Hum. Behav. at 9, 19. Similarly, subtle verbal and non-verbal cues by a line-up administrator can affect a witness's decision. If a witness selects a filler, for example, an administrator's comment to the witness to make sure she "has looked at all the photos before making a decision" could signal to the witness that the suspect is in a different photo. *Id.* at 8.

Research further indicates that individuals under hypnosis are more susceptible to suggestion, meaning that even subtle suggestions can lead to false memories. In particular, "[p]reconceptions of the interviewer," i.e., the hypnotist, can "suggest various interpretations or events" that are then "produced as [the hypnotized individual's] own memories." Rowley, *Forensic Hypnosis*, 3 Med. & Law 183, 187 (1984). Studies show, for example, that people exposed to misleading questions during hypnosis had the lowest rates in accurate recollections but were also more likely to affirmatively respond (even if incorrectly) to questions testing their memories, demonstrating that leading questions during hypnosis contributes to the creation of confident, false memories. Scoboria et al., *Effects of Misleading Questions and Hypnotic Memory Suggestions on Memory Reports*, 54 Intl. J. of Clinical & Experimental Hypnosis 340, 343 (2006). Common techniques used in hypnosis—such as asking individuals to "zoom in" on someone's face," can further contribute to the creation of false memories. As an example, individuals asked during hypnosis to remember details of a person they had seen from 100 yards away by looking through imaginary binoculars

sometimes report details—like a scar or tattoo—that they could not have actually seen from that distance. Orne et al., *The Forensic Use of Hypnosis* 2-3, National Institute of Justice (Dec. 1984).[5] And they will later recall those details as if they were actual memories. *Id.*

C. Time Degrades Memory And Compounds Any Contamination

Psychological research has long recognized that memory weakens with the passage of time. Empirical studies show that as time passes after an event, an identification concerning it becomes increasingly unreliable—that is, the memory "decays." Deffenbacher et al., *Forgetting the Once-Seen Face*, 14 J. Experimental Psychol. 139, 147-148 (2008). But the "decay function is not linear." Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 336 (2006). Rather, "more memory is lost in the first hour than in the second hour, more in the first day than the second day, … and so on." Wells & Quinlivan, 33 Law & Hum. Behav. at 13. And the degradation begins as soon as a witness has observed an event: Gaps of as little as a few hours or one day between exposure and identification can lead to identifications that "are likely to be unreliable." Yarmey et al., *Accuracy of Eyewitness Identification in Showups and Lineups*, 20 Law & Hum. Behav. 459, 469 (1996). Indeed, studies show that a "show-up"—where police present a single person to a witness and ask the witness if that person is the perpetrator—conducted 2-24 hours after a crime is approximately three times more likely to produce a

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[5] *Available at* https://www.ojp.gov/pdffiles1/Digitization/96336NCJRS.pdf.

misidentification as one done immediately after the crime. *Id.* at 465.

The most significant determinant of memory decay is interference, or the extent to which new information is introduced after an event. *See* McGeoch, *Forgetting and the Law of Disuse*, 39 Psychol. Rev. 352 (1932). As post-event contamination increasingly interferes with memory, access to the original, true memory correspondingly diminishes. Yilmaz, *Science of Human Memory* 2. New information may be acquired but the source of that information forgotten, such that a witness may "attribute [her] updated memories to the originally witnessed events" rather than subsequent interference. National Research Council, *Identifying the Culprit* 63. Recent research on repeat identification procedures shows that this decay and contamination can be explained by the ways in which human memory encodes information. Godfrey & Clark, *Repeated Eyewitness Identification Procedures: Memory, Decisionmaking, and Probative Value*, 34 Law Hum. Behav. 241, 255 (2010). When a witness views a suspect in a lineup, the witness stores information about the suspect in a memory trace that is distinct from the memory trace representing the witness's view of the perpetrator during the crime. *Id.* Because the two traces are initially distinct, witnesses can initially distinguish between their memory of the perpetrator and their memory of the lineup, and can selectively retrieve information about the perpetrator. *Id.* But over time, the two memories become less distinguishable, the memory of the initial event degrades, and the eyewitness loses the ability to selectively retrieve the memory trace of the true perpetrator. *Id.*

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Empirical psychological research shows that an eyewitness's memory of an event can be unreliable for a variety of reasons, including repeated exposure to a suspect, suggestive investigative procedures (leading questioning, hypnosis, etc.), and the passage of time. This research is highly relevant here because Barganier's in-court identification of petitioner—and in-court identification is itself a suggestive procedure, as discussed in the next section—came after repeated exposure to petitioner, potentially suggestive procedures, and after significant time following the murder had passed.

III. IN-COURT IDENTIFICATIONS ARE INHERENTLY SUGGESTIVE AND HENCE HIGHLY PRONE TO INACCURACY

In-court identifications of a defendant are deeply unreliable yet often highly influential with juries. They are unreliable because witnesses may be swayed by the highly suggestive courtroom context and by the memory decay and contamination that occurs between a crime and resulting trial. But they are influential because they are often made with confidence—confidence that may itself reflect suggestive procedures rather than accuracy. Because confident in-court identifications are both unreliable and persuasive to juries, they are a leading contributor to wrongful convictions. Katzman at al., *In-Court Identifications Affect Juror Decisions Despite Being Unreliable*, 49 Law & Hum. Behav. 376, 383 (2025).

A. In-court identifications have been criticized as unreliable for decades. Katzman, 49 Law & Hum. Behav. at 383. They are "inherently" unreliable because they can be shaped by the "suggestive setting" of the courtroom itself. Kaplan & Puracal, 105 J. Crim. L. & Criminology at 950. In the courtroom, "[t]he witness is well aware that the individual seated at the defense

table is not only *a* suspect, but is also *the* suspect and the only one on trial." *Id.* at 954. And like show-ups (which have been widely discredited as unduly suggestive, Wells, 44 Law & Hum. Behav. at 7), the absence of "fillers" with an in-court identification means there is no "safeguard" whereby a witness with poor memory has at least an opportunity (and in fact a good statistical chance where a procedure has multiple fillers) to select someone known not to be the perpetrator. Kaplan & Puracal, 105 J. Crim. L. & Criminology at 984-985. In-court identifications thus "do not reliably test an eyewitness' memory," because the witness cannot fail by selecting a filler. National Research Council, *Identifying the Culprit* 36 n.28. Additionally, witnesses at trial who are uncertain may nonetheless make an identification because they feel pressure to do what is "expected" of them, by "identifying the person seated at the defense table." Mandery, *Due Process Considerations of In-Court Identifications*, 60 Alb. L. Rev. 389, 416 (1997).

As discussed, moreover, the passage of time both decays memory and creates many opportunities for contamination. By the time of trial, for example, a witness may have seen the defendant in one or more prior identification procedures and/or in the news, and may have been subject to suggestive procedures throughout the investigation and in trial preparations. In light of these considerations, psychological research has concluded that when a witness makes an identification at trial, "it is impossible to know if the witness's identification of the defendant is a product of his or her original memory" or "post-event memory distortion and decay" and "the extraordinarily suggestive circumstances created by the in-court identification procedure." Kaplan & Puracal, 105 J. Crim. L. & Criminology at 955.

B. Many of the same factors that undermine the reliability of in-court identifications can also artificially inflate the confidence with which those identifications are made. For example, through a process referred to as "post-identification feedback," a witness who had low confidence in a pre-trial identification may exhibit high confidence at trial if investigators said or suggested that the identification was accurate. Greenspan & Loftus, *Eyewitness Confidence Malleability*, 44 Law & Hum. Behav. 194, 195 (2020). Similarly, leading questions by police during interviews conducted after an identification, or by prosecutors during trial preparations, can inflate confidence. *Id.* at 196; Kaplan & Puracal, 105 J. Crim. L. & Criminology at 987. And at trial, the very fact that a prosecutor continues asking questions following the witness's in-court identification "tells [her] … she was 'right'" to identify the defendant, leading to "false confidence." Kaplan & Puracal, 105 J. Crim. L. & Criminology at 987. Accordingly, psychologists have found that the confidence of in-court identifications "is not a useful measure" of their accuracy. Katzman, 49 Law & Hum. Behav. at 377. Indeed, "[t]he lack of a connection between accuracy and confidence in an eyewitness is one of the most consistent findings in the memory research literature." Kaplan & Puracal, 105 J. Crim. L. & Criminology at 962 (quotation marks omitted).

Misplaced confidence bears not just on a witness's identification, but also the methods used in court to test its reliability. For example, suggestive procedures before and during a trial can alter the witness's memory of the very factors—such as their "view" of the perpetrator and their "degree of attention"—courts use to assess the reliability and thus admissibility of identification testimony, *Manson* v. *Brathwaite*, 432 U.S. 98, 114 (1977). In particular, studies show that where witnesses to a

simulated crime wrongly identify someone in a line-up as the culprit, being told that they "identified the suspect" will lead them not only to report having had a better view of the culprit than they actually did, but also to "inflate their estimates of how much attention they paid to the culprit during the witnessed event." Wells & Quinlivan, 33 Law & Hum. Behav. at 10-11. And while cross-examination is generally considered the gold standard for testing witness credibility, it too can inflate confidence: Studies show that eyewitnesses who are told they will be cross-examined become more certain in their identifications than those not so informed. Mandery, 60 Alb. L. Rev. 389 at 416 n.196.

C. Despite being unreliable, in-court identifications—particularly those made confidently—have a substantial effect on the outcome of criminal trials. As Justice Brennan observed decades ago, "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) (Brennan, J., dissenting). Psychological research confirms this, showing that "[j]urors are highly persuaded by eyewitness confidence." Katzman, 49 Law & Hum. Behav. at 377. In-court identifications, in fact, affect jurors' assessments of a case overall: Studies show that where there is an in-court identification, jurors "rate[] the prosecution's case as stronger," "rate[] the eyewitness as more credible," and even rate poor out-of-court identification procedures—such as suggestive photo arrays—as more fair. *Id.* at 383. Similarly, jurors remember confident witnesses as "having paid more attention to a crime and having had a better view." Greenspan & Loftus, 44 Law & Hum. Behav. at 194. And studies have shown that a confident in-court identification contributes substantially more to a decision to

convict than other considerations previously thought weightier, including the confidence of the eyewitness's initial out-of-court identification, the presence or absence of jury instructions or expert testimony regarding eyewitness evidence, and the race of the eyewitness and defendant. Garrett et al., *Factoring the Role of Eyewitness Evidence in the Courtroom*, 17 J. Empirical Legal Stud. 556, 567 (2020).

In sum, psychological research shows that in-court identifications like the one made in this case—coming after multiple earlier (and hence more reliable) tests of the witness's memory indicated that the suspect was *not* the perpetrator—are highly unreliable. That is particularly so here as Ms. Barganier's in-court identification was inconsistent with three initial tests of her memory (her contemporaneous description of the passenger, the composite sketch, and the photo array), each of which indicated that she had not seen petitioner at the crime scene. Research also shows that even unreliable in-court identifications are often made with high confidence, and are often a powerful factor driving a jury to convict.

CONCLUSION

The petition for a writ of certiorari should be granted and the Court, in ruling on the merits of petitioner's claim, should be guided by the principles discussed herein and the extensive body of psychological research underlying them.

Respectfully submitted,

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MARCH 2026