

No. 104984-6

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IN THE SUPREME COURT  
OF WASHINGTON

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STATE OF WASHINGTON,

*Respondent,*

v.

SHAYNE CURTIS BAKER,

*Petitioner.*

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**BRIEF OF AMICUS CURIAE THE AMERICAN  
PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF  
PETITIONER**

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## **IDENTITY AND INTEREST OF AMICUS CURIAE**

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 190,000 members and affiliates, including most psychologists holding doctoral degrees from accredited universities in the United States. Among APA’s major purposes are to increase 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., Andersen v. King County*, 158 Wn.2d 1 (2006) (en banc); *Moore v. Texas*, 581 U.S. 1 (2017); *McWilliams v. Dunn*, 582 U.S. 183 (2017); *People v. Wright*, 277 N.E.3d 614 (N.Y.

2025). 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).

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 identifications upon which the conviction here largely rested.\*

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## INTRODUCTION

The question presented here is whether first-time in-court identifications violate due-process principles. Answering that question requires the Court to consider both the suggestiveness of in-court identifications and (relatedly) their reliability. That is because due process “compels [the] exclusion of eyewitness identification evidence that (1) was obtained by an unnecessarily suggestive police procedure and (2) lacks reliability under the totality of circumstances.” *State v. Derri*, 199 Wn.2d 658, 673 (2022) (en banc) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)). A significant body of “relevant, widely accepted modern science,” *id.* at 675, bears on both the suggestiveness and the reliability of in-court identifications. That science, which is discussed herein, should inform the Court’s answer to the granted question.

Within a day of a shooting for which petitioner Shayne Baker was convicted, the police separately asked

two eyewitnesses to identify the perpetrator from an array of six photographs, including Mr. Baker's. The eyewitness who claimed to have spent extended time with the perpetrator said that person was "definitely not" in the array. The second eyewitness stated he was "not sure." But at Mr. Baker's trial nearly a year later, both witnesses for the first time identified him as the perpetrator.

Modern psychological research shows that in-court eyewitness identifications like these are inherently unreliable—especially where a witness excluded the defendant in an earlier identification procedure—yet highly influential with juries. The unreliability stems from several factors.

First, memory can only weaken by the time of trial. Memory decays with time, and it is affected by what a person encounters during that time, including a defendant's photograph from previous identification procedures. Seeing a suspect in an initial lineup or photo

array—or on the news—can thus contaminate a witness’s memory, causing the witness to misattribute the suspect’s familiarity to the scene of the crime rather than such intervening exposures. Psychologists therefore agree that the first identification procedure maximizes reliability. They also agree that initial *rejections*—such as an eyewitness’s definitive exclusion of Mr. Baker as the culprit immediately after the crime—are not irrelevant failures to identify but probative of a person’s innocence.

Second, in-court identifications are unreliable not only because they typically occur long after the witnessed event (allowing ample opportunity for forgetting and contamination), but also because they take place in an exceedingly suggestive setting. Witnesses are asked to identify the perpetrator from a room in which there is only one unmistakably accused person. There are no fillers—i.e., no known-innocent stand-ins whose selection might expose memory issues—and the procedure cannot be

administered blind, because everyone knows who the defendant is. Witnesses also face the pressure of a watching jury, judge, and prosecutor. This pressure may not only compel the witness to say what is expected (that the defendant is the perpetrator), but also contaminate the witness's memory of the original event in ways the witness may not recognize. These multiple sources of suggestiveness, moreover, affect eyewitness memory of other factors bearing on reliability, including the witness's view of the perpetrator, degree of attention she paid, and certainty in her identification.

Though unreliable for these reasons, in-court identifications, as noted, are often a powerful factor driving a jury to convict—in part because such identifications are frequently made with great confidence even though research shows that confidence may itself reflect the suggestive courtroom setting rather than accuracy. The combination of unreliability and

persuasiveness makes in-court identifications a leading contributor to wrongful convictions.

### **STATEMENT OF THE CASE**

Petitioner Shayne Baker was convicted of murder and assault arising from two shootings. *State v. Baker*, 36 Wn. App. 2d 1010, 2025 WL 3709804, at \*1-2 (2025). Shortly after the shootings, two witnesses viewed a photo array containing Mr. Baker's photo, but neither identified him. *Id.* at \*2 & n.1.

The first eyewitness (Trent Wood), who had spent significant time with the shooter on the day of the crime, stated he "definitely" did not see the perpetrator in the photo array. *Baker*, 2025 WL 3709804, at \*1-2 & n.1. The second eyewitness (Steven Ahrnkiel) told officers he had seen the perpetrator and would be able to recognize him. *Id.* at \*2 n.1. Then, when shown an array including Mr. Baker's photo, he stated he was not "sure" whether the perpetrator was pictured. *Id.* A year later at Mr. Baker's

trial, however, both identified Mr. Baker. *See id.* Mr. Wood did so only after “hesitati[ng],” *id.*, asking “[d]id you give him a haircut” and “[i]s it this gentleman right here” before finally saying “[i]t sure looks like him to me[,]” Baker Petition for Review 9-10 (Jan. 21, 2026) (citing 5/1/23RP 1898-1899).

## **ARGUMENT**

### **I. IN-COURT IDENTIFICATIONS FOLLOWING BOTH REPEATED EXPOSURES TO A SUSPECT AND THE PASSAGE OF SIGNIFICANT TIME ARE LIKELY UNRELIABLE**

Contrary to common belief, memory does not 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), [www.nationalacademies.org/read/18891/](http://www.nationalacademies.org/read/18891/). Memory retention is imperfect due to both the

passage of time and the receipt of new information that can contaminate memory. Kaplan & Puracal, *Who Could It Be Now?*, 105 J. Crim. L. & Criminology 947, 957-958 (2015). As a result, the act of remembering eventually becomes less a matter of genuine recollection and more a process of “reconstruction,” with perceptions and information gathered after an event 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).

Two sources of memory errors are particularly relevant here. First, in-court identifications typically follow prior exposures to a suspect—either through earlier identification procedures, the media, or both. These prior

exposures can contaminate memory, causing a witness to misattribute a defendant's familiarity to the crime scene. Second, the passage of time degrades memory, making it more vulnerable to these and other sources of contamination. Because of these sources of memory error, psychological research indicates initial identification procedures are the most—perhaps only—reliable memory tests, and initial exclusions are probative of innocence.

**A. Exposure To A Suspect Contaminates Memory And Subsequent Identification Procedures**

First-time in-court identifications are unreliable because they typically occur after the eyewitness has already seen the defendant (in person or in a photograph) at some point after observing the crime. Such exposures—whether through a pretrial lineup, photo array, or otherwise—typically occur when the witness is actively thinking about the crime, thereby associating a suspect's face with the crime. *See infra* pp.13-14; *see* Steblay &

Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. Applied Rsch. Memory & Cognition 284, 285 (2016); accord Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science*, 33 Law & Hum. Behav. 1, 8 (2009).

Indeed, experimental research has shown that “[w]itnesses who encountered an *innocent* person’s photo in an initial identification procedure were more likely to” pick him as the perpetrator “in a second procedure” than someone they had not seen in the first procedure. Wells & Quinlivan, *supra*, at 8 (emphasis added) (citing studies); see also Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 Law & Hum. Behav. 287, 289 (2006). And “once an eyewitness has mistakenly identified someone, that person ‘becomes’

the witness' memory and the error will simply repeat itself.” Wells & Quinlivan, *supra*, at 9.

Empirical studies have also shown that repeated identification procedures produce no gain in accuracy; in other words, they “do not increase the likelihood that the identified suspect is actually guilty.” Steblay & Dysart, *supra*, at 286. For example, one analysis synthesizing 25 years of studies found that eyewitnesses to simulated crimes who were shown photographs of people before participating in a lineup were significantly more likely to misidentify one of the photographed people as the perpetrator (37% of the time) than witnesses who participated in the lineup without first viewing the photographs (15%). Deffenbacher, *supra*, at 299. More recent studies have yielded similar findings. *See, e.g.*, Lawson & Dysart, *The Showup Identification Procedure*, 19 Legal & Criminological Psych. 54, 62 (2014); *see*

generally Steblay et al., *Double Exposure*, 27 *Applied Cognitive Psych.* 644 (2013).

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. 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 lineup, when the witness is expressly asked to call upon their memory of the crime. *Id.*; Wixted et al., *Test a Witness’s Memory of a Suspect Only Once*, 22 *Psychol. Sci. Pub. Int.* 1S, 4S (2021). This

can lead a witness to sincerely believe that she previously saw the defendant at the crime when she saw him only during the identification.

This can also occur through exposure to news reports about a crime that mention or show a photograph of the suspect. Yilmaz et al., *The Science of Human Memory Versus the Federal Rules of Evidence*, 32 Psych. Pub. Pol’y & Law 153, 154 (2026). 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. Ross, *supra*, at 918.

Because in-court identifications typically follow at least one prior identification procedure—such as a lineup or (as here) a photo array—any positive in-court identification involving “th[e] same eyewitness and ... suspect” is “contaminated.” Wells et al., *Policy and Procedure Recommendations for the Collection*

*and Preservation of Eyewitness Identification Evidence*,  
44 Law & Hum. Behav. 3, 25 (2020).

**B. The Passage Of Time Degrades Memory**

The reliability of in-court identifications is further weakened by the passage of time, which erodes memory.

Memory does not “stor[e] an exact replica” of an event; instead, people “combine ... perceptions with elements of existing knowledge and experience to form a reconstructive memory” which they then “retriev[e].” Kaplan & Puracal, *supra*, at 957; *see also 2019 Report of the United States Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications*, 92 Temp. L. Rev. 1, 25-26 (2019). As post-event contamination increasingly interferes with memory, access to the original, true memory diminishes. Yilmaz et al., *supra*, at 154. 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, *supra*, at 63.

Of particular relevance here, recent research shows that when a witness views a suspect in a lineup or photo array, 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. Godfrey & Clark, *Repeated Eyewitness Identification Procedures*, 34 Law & Hum. Behav. 241, 255 (2010). Witnesses can initially distinguish between the two traces, and selectively retrieve information from one or the other. *Id.* But over time, the two memories become less distinguishable, the memory of the initial event degrades, and eyewitnesses can lose the ability to selectively retrieve the memory trace of the true perpetrator. *Id.* And the problem may be exacerbated by “succeeding events,” including “other people’s ... suggestions.” Kaplan & Puracal, *supra*, at 960. The

“questioning used to elicit information,” for example—such as by police during a lineup or photo array—“has been found to have a serious impact on a person’s memory.” *Id.* at 958. With a witness asked to identify a suspect in court after the passage of significant time, therefore, “[b]y the time [her] memory is reconstructed (at the time of the identification), the witness has often unconsciously filled in h[er] vague recollections with the image of the person in ... a photograph, or seated at the defense table.” *Id.* at 960.

**C. In-Court Identifications Following Initial Non-Identifications Are Particularly Unreliable As Initial Non-Identifications Are Probative Of Innocence**

Given the contamination and degradation of memory that follows an initial identification procedure, the first eyewitness identification procedure is the most reliable with subsequent ones less so. And when a witness who participates in such a procedure does *not* identify the

defendant as the perpetrator—as happened with both witnesses here—that is not a failure of memory but rather probative evidence of innocence. In-court identifications that follow such initial non-identifications are particularly unreliable because the witness’s memory was likely contaminated by the initial identification procedure.

Judges and juries, however, widely assume that a witness’s exclusion of the defendant—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 a belief that a witness can initially fail to identify the defendant as the culprit due to a momentary lapse in memory but then accurately identify the defendant as the culprit at another time. *See*

Wells & Lindsay, *supra*, at 776. That is not how memory operates in the context of eyewitness identifications.

Identifications are a form of “recognition,” not “recall,” memory. Wells & Quinlivan, *supra*, at 13. Recall memory—describing a suspect’s face from memory, for example—requires individuals to search their memory to find the relevant information. Yilmaz et al., *supra*, at 158. 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. “[F]ace-recognition memory,” on the other hand, 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 of a face is

“automatically experienced in the moments after [a] face is perceived.” *Id.*

Initial rejections are thus “not merely ‘failures’ to identify the suspect.” Clark et al., *Regularities in Eyewitness Identification*, 32 Law & Hum. Behav. 187, 211 (2008). They instead “are diagnostic of the suspect’s innocence.” *Id.* For instance, one analysis of 94 lineup experiments from 49 published studies found that the rate at which non-identifications were accurate (i.e., the perpetrator was indeed not in the lineup) was “consistently high.” *Id.* at 190, 206. Such 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); see Ayala et al., *The Rule Out Procedure*, 11 J. Applied Rsch. Memory & Cognition 489 (2022).

Not surprisingly, rejections are particularly probative of innocence when they occur during a witness’s

first identification procedure, before “memory [becomes] almost invariably ... contaminated by a variety of factors and ... therefore highly error prone.” Wixted, *supra*, at 1S. Indeed, the initial identification procedure in which a witness does not identify the defendant may itself contaminate memory, leading to future misidentifications. In such circumstances, the “only relevant eyewitness evidence” is the witness’s initial non-identification. *Id.* at 15S.

As a result of these and other recent studies, there has emerged an expert consensus that “even in real-world cases ... initial nonidentifications provide more reliable evidence of innocence than previously believed.” Yilmaz et al., *supra*, at 157. Indeed, eyewitness-identification experts 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).

This research is relevant here because, as noted, the eyewitnesses' in-court identifications were made after the witnesses were exposed to Mr. Baker's photograph in an initial photo array in which they did *not* identify him as the perpetrator. Both witnesses' initial non-identifications reflect the most reliable evidence of their memory, and their subsequent in-court identifications were likely tainted by memory contamination (including from the initial identification procedure) and by the suggestive courtroom setting. This may explain why the one eyewitness who had spent extended time with the perpetrator (riding in his truck) initially said Mr. Baker was "definitely" not the perpetrator, then gave a hesitant in-court identification at odds with that initial, confident rejection. *See supra* pp.7-8.

## **II. IN-COURT IDENTIFICATIONS ARE INHERENTLY SUGGESTIVE—FURTHER UNDERSCORING THEIR UNRELIABILITY**

### **A. The Suggestiveness Of The Courtroom Setting May Lead To Incorrect Identifications**

In-court identifications are highly unreliable not only for the reasons given in Part I, but also because they are made in the “inherently” suggestive courtroom setting. Kaplan & Puracal, *supra*, at 950. Indeed, such identifications are quite similar to out-of-court single-suspect “showup” procedures, *id.* at 955, which this Court and others have cautioned are “highly suggestive” and therefore “widely condemned,” *Derri*, 199 Wn.2d at 684-685; *accord, e.g., Stovall v. Denno*, 388 U.S. 293, 302 (1967).

Both procedures are suggestive partly because they involve presenting the witness with a “single suspect.” *Derri*, 199 Wn.2d at 685. And there is “no debate among eyewitness scientists” that failing to “embed the suspect

among known-innocent fillers” produces less accurate identifications. Wells, *supra*, at 7; *see also* Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 Law & Hum. Behav. 459, 459 (1996). The absence of “fillers” means there is no “safeguard” whereby a witness with a poor memory has the opportunity to select someone known by police *not* to be the perpetrator. Kaplan & Puracal, *supra*, at 984-985. In other words, in-court identifications (like showups) “do not reliably test an eyewitness’ memory” partly because the witness cannot fail by selecting a filler. National Research Council, *supra*, at 36 n.28.

In-court identifications also “cannot be double-blind” (meaning that neither the witness nor the person administering the procedure knows who the suspect is) or even “single-blind” (meaning that the witness does not know who the suspect is). Wells, *supra*, at 27. Double- or single-blind procedures are critical safeguards against

misidentifications because they prevent inadvertent suggestions of guilt during an identification procedure. *See* Kovera & Evelo, *The Case For Double-Blind Lineup Administration*, 23 Psych. Pub. Pol’y & Law 421, 423-425 (2017). To the contrary, in court, as in a showup, everyone “knows which person is the suspect,” *id.* at 431. The defendant is typically “isolated at the defense table and is often the only person in the courtroom matching the perpetrator’s description.” Kaplan & Puracal, *supra*, at 950; *accord United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997). The witness certainly knows that the defendant is not the person holding a gavel and wearing a robe, the bailiff or other armed official standing nearby, the person who administered the oath, and so on. All these “suggestive circumstances” greatly heighten “the risk of misidentification.” Kaplan & Puracal, *supra*, at 955. And that risk is in no way ameliorated by the fact that the witness can see the defendant in person during an in-court

identification (rather than in a photograph). Researchers have found “no evidence to indicate that the principles governing photo lineups and live lineups are different.” Wells, *supra*, at 7; *accord* Yarmey, *supra*, at 473.

Moreover, eyewitnesses testifying in court may, despite uncertainty, feel pressure from “others in a position of trust” (such as a prosecutor) to do what is “expected” of them or “what others” in their position “have done,” by “identifying the person seated at the defense table.” Mandery, *Due Process Considerations of In-Court Identifications*, 60 Alb. L. Rev. 389, 416 (1997). Just as witnesses viewing a lineup “are likely to presume ... the police must have a strong suspect,” Wells et al., *supra*, at 20, witnesses may reasonably assume a prosecutor has good cause to charge the defendant.

Pressure to do what is expected is “at its peak” where—as in a courtroom—“judgments are made without anonymity.” Mandery, *supra*, at 416. And the

unfamiliarity of testifying at trial, the “presence of the jurors[,] and the formality of the trial” can create significant “potential for self-persuasion”—i.e., convincing oneself that the person seated at the defense table is the perpetrator. *Id.*

Put simply, the inherent suggestiveness of the courtroom setting renders in-court identifications unreliable even apart from the reasons given in Part I, including those this Court and others have recognized. This suggests that the two in-court identifications at issue were not reliable tests of the witnesses’ memory—particularly following their initial non-identifications and given that Mr. Wood’s in-court identification was hesitant even in the face of the courtroom’s suggestive influence, *see supra* p.8.

**B. The Suggestiveness Of The Courtroom Setting Also Compromises Tests Of Reliability**

The reliability, and thus admissibility, of identification testimony is assessed based on considerations such as the witness's "opportunity to view" the perpetrator, "degree of attention," and "level of certainty." *Brathwaite*, 432 U.S. at 114-115. But the procedures used to elicit in-court identifications can, as discussed, contaminate a witness's memory in ways that lead to inflated confidence and distort witness recollection of the very factors used to assess the reliability of their identification. Thus, in the context of in-court identifications, the standard test for reliability is itself unreliable.

Several factors can falsely inflate eyewitness confidence. For example, through a process known 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 before or at trial, can inflate witness confidence. *Id.* at 196; Kaplan & Puracal, *supra*, at 987. Even non-leading questions at trial can inflate confidence. At trial, the very fact that a prosecutor continues asking questions to elicit further details about the basis for the witness's in-court identification "tells the witness ... she was 'right'" to identify the defendant, leading to "false confidence." Kaplan & Puracal, *supra*, at 987.

Cross-examinations, generally considered the gold standard for testing witness credibility, can also inflate witness 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, *supra*, at 416 n.196. Moreover, even contaminated memory may be vivid, coherent, and sincerely held. Cross-examination is not well equipped to reveal such contamination because the witness may be accurately reporting what she now (mistakenly) remembers. See Yilmaz et al., *supra*, at 155.

Accordingly, psychologists have found that the confidence of in-court identifications “is not a useful measure” of their accuracy. Katzman et al., *In-Court Identifications Affect Juror Decisions Despite Being Unreliable*, 49 Law & Hum. Behav. 376, 377 (2025). Indeed, for in-court identifications, “[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, *supra*, at 962. One study, for example, found that “witnesses were likely to be equally confident in their correct choices of [culprits] and false selections of innocent suspects,”

especially when (as at trial) presented with only one suspect to identify. Yarmey, *supra*, at 467. And a review found that “20 to 30%” of “highly confident witnesses” can be wrong about their identifications. Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. Pub. Int. 45, 66 (2006).

Courtroom dynamics may also distort a witness’s recollection of other details often used to assess the reliability and thus admissibility of identification testimony. Questions about the witness’s “view” of the perpetrator and their “degree of attention,” for example, *see Brathwaite*, 432 U.S. at 114, may not effectively root out unreliable testimony because the same factors that may inflate confidence in a false identification can also distort a witness’s perception of these other measures. In one study, when witnesses to a simulated crime identified an innocent person in a lineup as the culprit, hearing that they “identified the suspect” led them to report having had a

better view of the culprit than they actually did and to “inflat[e] their reports of how much attention they paid” to the perpetrator during the witnessed event. Wells & Quinlivan, *supra*, at 10-11.

Memory contamination may also infect a witness’s recollection of their initial rejection of the defendant. A witness whose memory has been contaminated may later sincerely remember having recognized the defendant during an initial test, or may sincerely remember an incorrect explanation for their prior rejection. Yilmaz et al., *supra*, at 161-162. This could explain eyewitness Wood’s claim at trial that “he did not initially identify Baker ... because he did not trust the police and had not trusted the accuracy of their photos.” *Baker*, 2025 WL 3709804, at \*2 n.1.

The research just described suggests that “it is impossible to know” if first-time in-court identifications—like those here at issue—are “a product of [witnesses’]

original memory” or “post-event memory distortion and decay” and “the extraordinarily suggestive circumstances created by the in-court identification procedure.” Kaplan & Puracal, *supra*, at 955. And that suggestiveness contaminates not just a witness’s memory of the defendant, but also her memory of the very factors used to assess the reliability of identification testimony. Research thus casts doubt on whether traditional tests for the reliability of eyewitness testimony are adequate safeguards with respect to first-time in-court identifications.

### **III. IN-COURT IDENTIFICATIONS, THOUGH PRONE TO SUGGESTION AND UNRELIABLE, ARE HIGHLY INFLUENTIAL WITH JURIES, HEIGHTENING THE DUE-PROCESS PROBLEM WITH SUCH IDENTIFICATIONS**

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) (emphasis in original). And indeed, 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-court identifications sway jurors in several ways. Studies show, for example, 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. Katzman, *supra*, at 383. “Jurors are highly persuaded by eyewitness

confidence” in particular. *Id.* at 377. Jurors remember confident witnesses as “having paid more attention to a crime and having had a better view.” Greenspan & Loftus, *supra*, at 194.

The problem is that in-court identifications, as explained, are highly unreliable. This combination of persuasiveness and unreliability underscores the due-process concerns that such identifications raise, because the combination means that in-court identifications—particularly those (as here) following non-identifications by the same witness(es)—create a “substantial likelihood of misidentification,” *Brathwaite*, 432 U.S. at 106. And “[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country.” *State v. Henderson*, 27 A.3d 872, 885, 889 (N.J. 2011) (alteration in original). Indeed, “more than half of the DNA exoneration cases that turned on eyewitness misidentification featured an incorrect in-court

identification.” Katzman, *supra*, at 383. In-court identifications therefore create a significant risk that a jury will find an innocent defendant guilty.

### **CONCLUSION**

In ruling on petitioner’s claim, the Court should be guided by the principles discussed herein and the extensive body of psychological research underlying them.

### **CERTIFICATE OF COMPLIANCE**

I certify that this document contains 4,984 words, in compliance with Rule of Appellate Procedure 18.17.

Respectfully submitted this September 11, 2026.

*s/ Siddharth Velamoor*

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