STATE OF WISCONSIN

SUPREME COURT

Case No. 2016AP1276-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NELSON GARCIA, JR.,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals Affirming a Judgment of Conviction Entered in the Circuit Court for Milwaukee County, the Hon. William S. Pocan, Presiding

---

BRIEF OF *AMICI CURIAE* OF THE INNOCENCE PROJECT, INC., AND THE WISCONSIN INNOCENCE PROJECT OF THE FRANK J. REMINGTON CENTER, UNIVERSITY OF WISCONSIN LAW SCHOOL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

G.L. Wells, et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688 (1981). 8

Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 63 J. APPLIED PSYCHOL. 347 (1983). 7

New Jersey Jury Instructions, Identification: In-Court and Out-Of-Court Identifications (Sep. 4, 2012), https://www.innocenceproject.org/wp-content/uploads/2017/06/NJ-Jury-Instruction.pdf 5

J.T. Wixted & G.L. Wells, *The Relationship Between Eyewitness Confidence & Identification Accuracy: A New Synthesis*, 18 PSYCH. SCI. PUB. INT. 10 (2017) 9

Massachusetts Statement of the Supreme Judicial Court Model Jury Instructions (Nov. 16, 2015), https://www.mass.gov/files/documents/2016/11/sk/model-jury-instructions-on-eyewitness-identification-november-2015.pdf 5

Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, *Report & Recommendations to the Justices* (July 25, 2013), http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf 8, 9

Mitchell L. Eisen et al., *Does Anyone Else Look Familiar? Influencing Identification Decisions by Asking Witnesses to Re-Examine the Lineup*, 42 LAW & HUM. BEHAV. 306 (2018) 1, 2, 9

Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283 (1997). 3

National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (2014). 3

Ruth Horry et al., *Predictors of Eyewitness Identification Decisions from Video Lineups in England: A Field Study,* American Psychology-Law Society, 2011, LAW & HUM. BEHAV., DOI 10.1007/s10907-011-9279-z. 2

Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 4 (2005). 3

Gary L. Wells and Elizabeth A. Olson, *Eyewitness Identification: Information Gain from Incriminating and Exonerating Behaviors*, 8 J. OF EXPERIMENTAL PSYCHOL.: APPLIED 155 (2002). 8

ARGUMENT

I. Offering a Witness Another Look at a Line-up Is Unduly Suggestive, Undermines the Reliability of a Subsequent Identification, and Warrants Suppression.

In 2010, the Wisconsin Department of Justice ("DOJ") adopted a Model Policy and Procedure for Eyewitness Identification in order "to implement the most reliable method for the collection of eyewitness evidence" because "research and nationwide experience have demonstrated that eyewitness evidence can be a particularly fragile type of evidence, and that eyewitnesses can be mistaken." Wisconsin Dep't of Justice, *Model Policy and Procedure for Eyewitness Identification,* 1-2 (Apr. 1, 2010).[1] The Model Policy recommends a number of scientifically-sound procedures to reliably gather identification evidence. *Id.* at 3-6.

A. Wisconsin's Model Policy Admonishes Administrators Not to Suggest an Additional Viewing of a Line-Up.

Among these other recommendations, the Model Policy states that a line-up administrator "should never suggest an additional viewing" of an identification procedure as "this can diminish the reliability of the identification." *Id.* at 11. This admonition reflects scientific research that has found that prompting witnesses to re-examine the lineup can often lead witnesses to change their identification decisions, and that when the altered choice is reinforced, witnesses will often stay with that influenced decision over time, asserting it with a high degree of confidence. Mitchell L. Eisen et al., *Does Anyone*

[1] Available at https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf.

Else Look Familiar? Influencing Identification Decisions by Asking Witnesses to Re-Examine the Lineup, 42 LAW & HUM. BEHAV. 306 (2018). "Simply suggesting that witnesses re-examine the photos after they have already provided a response (by either choosing a picture or rejecting the lineup), has the very real potential of inducing doubt in their initial choices." *Id.* at 316.

Even more troublingly, taking a "second lap" is correlated with increased misidentification rates: in one study, witnesses who took a second look at a line-up were 250% more likely to identify innocent fillers than witnesses who did not take a second look, "cast[ing] doubt on the reliability of suspect identifications, as they suggest high guessing rates." Ruth Horry et al., *Predictors of Eyewitness Identification Decisions from Video Lineups in England: A Field Study,* American Psychology-Law Society, 2011, LAW & HUM. BEHAV., DOI 10.1007/s10907-011-9279-z.

In the instant case, neither of the two eyewitnesses identified Garcia as the bank robber after viewing a line-up. (R89: 43-48; 81). The detective then asked if they would like to see the lineup a second time. (R86: 74-75). One eyewitness still circled "no" under Garcia's photo, (R89: 46-48), but the second eyewitness circled "yes." (R89: 81). According to the Court of Appeals, the eyewitness subsequently asserted "'one hundred percent' certainty" in that identification. *State v. Garcia*, 382 Wis.2d 269, ¶ 42 (2018). The problem identified in the research literature and Model Policy seems to have unfolded in textbook fashion: an initial non-identification turned into a highly confident identification after the detective suggested a second look – with all the attendant risks of misidentification.

B. Wisconsin's Model Policy for Eyewitness Identification Recommends the Use of Pre-Lineup Instructions.

The Model Policy also recommends the use of pre-lineup instructions that warn the eyewitness, *inter alia*, that the perpetrator may or may not be in the line-up, and that the administrator does not know whether the police suspect is included. *See* Model Policy at 10. As the DOJ explains:

> Eyewitnesses may feel pressure to identify someone from a lineup or array because they believe the police would not be presenting the individuals if all were innocent. When the true perpetrator is not present, this tendency may influence eyewitnesses to identify an innocent person. Studies show that telling the witness that the perpetrator may or may not be present counteracts the tendency to identify the person who looks the most like the perpetrator and reduces mistaken identification rates by as much as 41.6%.

Id. at 4.

The Model Policy reflects scientific consensus that pre-lineup instructions decrease the pressure witnesses may feel to make a selection, which has been shown to contribute to misidentification by increasing guessing and therefore placing innocent suspects at greater risk. *See, e.g., State v. Henderson*, 208 N.J. 208, 250 (2011); *accord State v. Lawson,* 352 Or. 724, 780 (2012). The failure to use pre-line-up instructions increases the risk that witnesses will misidentify innocent suspects who simply look *more* like the perpetrator than other lineup members, because they assume the perpetrator is present in the line-up. National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 12, 18, 20, 73 (2014); Steven E. Clark, *A Re-examination of the Effects of Biased Lineup Instructions in Eyewitness Identification*, 29 LAW & HUM. BEHAV. 4, 395 (2005); Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283 (1997).

Asking an eyewitness to look at a line-up for a second time – particularly after that witness has failed to identify the suspect – fundamentally undermines these goals. Suggesting another look implicitly signals to the witness that the perpetrator is in fact present in the line-up, that the administrator knows this to be the case, and that the witness should, in essence, "try again." A pre-line-up instruction designed to counteract witness assumptions that the perpetrator must be present is thereby rendered meaningless. Thus, not one but *two* of the Model Policy's central provisions are undermined by suggesting a second look.

C. This Court Should Adopt a Rule that Substantial Deviations from the Model Policy Result in Suppression.

Wisconsin's Model Policy captures "the best techniques for accurately capturing and preserving eyewitness memories thereby enhancing the reliability of criminal investigations and prosecutions." Model Policy at 2. By endorsing these scientifically-sound identification procedures, the DOJ has laudably embraced the lessons from wrongful conviction cases and has sought to enhance the quality of identification evidence and prevent miscarriages of justice using scientific principles.

The U.S. Supreme Court, meanwhile, 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 U.S. 228, 241-42 (2012) (citations omitted).

In light of the DOJ's stated purpose and the Supreme Court's observations about deterrence, this Court should craft a rule that presumes that deviations from the Model Policy that

fundamentally undermine its purpose should result in suppression, because doing so would deter law enforcement from using improper procedures. *Amici* respectfully suggest the following framework:

> *First*, for substantial deviations from the core provisions of the Model Policy, suppression should be the appropriate remedy, absent a good faith and compelling reason for failing to use proper procedures, documented at the time of the procedure.
>
> *Second*, for non-egregious but unjustified violations, the Court should provide the jury with cautionary instructions, explaining how the Model Policy was violated and how that impacts the reliability of the identification.[2]
>
> *Finally*, courts should consider, whenever appropriate, other intermediate remedies, including limitations on eyewitness testimony (such as limiting an eyewitness's testimony to their observations rather than allowing them to make an identification), or allowing for expert

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[2] For example, New Jersey has a model instruction explaining that juries should consider "whether the identification procedure was properly conducted." *See* New Jersey Jury Instructions, Identification: In-Court and Out-Of-Court Identifications (Sep. 4, 2012), https://www.innocenceproject.org/wp-content/uploads/2017/06/NJ-Jury-Instruction.pdfThe instructions go on to address deviations from proper police practices; for example, on pre-line-up instructions, the model instruction explains, "Identification procedures should begin with instructions to the witness that the perpetrator may or may not be in the array and that the witness should not feel compelled to make an identification. The failure to give this instruction can increase the risk of misidentification. If you find that the police [did/did not] give this instruction to the witness, you may take this factor into account when evaluating the identification evidence." *Id.*; *see also* Massachusetts Statement of the Supreme Judicial Court Model Jury Instructions (Nov. 16, 2015), https://www.mass.gov/files/documents/2016/11/sk/model-jury-instructions-on-eyewitness-identification-november-2015.pdf

testimony to help jurors understand the effects of the non-compliant procedures.

These remedies would give teeth to the Model Policy, ensuring that it is treated with appropriate seriousness by law enforcement agencies.

II. Should this Court Decline to Adopt Such a Rule, it Should Provide Guidance to Trial Courts About the Scientifically-Sound Analysis of Eyewitness Reliability.

Should this Court decline to find that substantial violations of the Model Policy should result in suppression, it should take this opportunity to provide the lower courts with guidance on scientifically-sound principles that should guide their application of the *Manson/Powell* balancing test for admissibility of eyewitness evidence. While scientific research has contradicted many of the assumptions underlying the balancing test, *see, e.g.*, *Henderson*, 208 N.J. at 285, this case provides an opportunity to address three key concepts.

A. Suggestive Identification Procedures Corrupt Eyewitness Reliability.

In its opinion in this matter, the Court of Appeals discussed the suggestiveness of the identification procedure, and then discussed the "reliability factors," ultimately finding that each reliability factor weighed against the likelihood of misidentification. *Garcia*, 382 Wis.2d, ¶¶ 39-42. In doing so, the Court of Appeals did not consider the corrupting influence of suggestion on the reliability factors themselves.

Isolating reliability from suggestiveness in this way is untenable. Scientific research has demonstrated that suggestive identification procedures and feedback create a risk of misidentification by artificially inflating a witness's memory of viewing conditions *and* their confidence in an identification.

See G.L. Wells & D.S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 16 (2009); Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 266 (2000) ("[A]ccuracy may be influenced by factors such as misleading post-event information while confidence may be affected by factors such as biased testing instructions."). *See also* G.L. Wells & E.P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 785 (1995); Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 63 J. APPLIED PSYCHOL. 347, 347 (1983). Memory of viewing conditions and confidence are, of course, key factors that courts use to assess reliability. *See State v. Powell*, 86 Wis.2d 51 (1978).

Additionally, research has shown that suggestion also affects a witness's memory of the identification procedure, improving the witness's perception of how easy it was to make an identification. *See* G.L. Wells & A.L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 372–75 (1998). As the New Jersey Supreme Court concluded, "[t]he irony of the [*Manson*] test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions." *Henderson*, 208 N.J. at 286.

Consistent with these scientific findings, this Court should instruct the lower courts to consider the corrupting effect of suggestive identification procedures on the reliability factors themselves.

B. Eyewitness Certainty Is Malleable and Only Correlates with Accuracy at an Identification Proceeding that Comports with the Model Policy.

Below, the Court of Appeals held that the eyewitness's "'one hundred percent' certainty" after her second viewing as weighing against the likelihood of misidentification. *Garcia*, 382 Wis.2d, ¶ 42. This finding contradicts scientific research that establishes that suggestive proceedings artificially inflate confidence, and that eyewitness confidence only correlates with accuracy in limited circumstances.

It is well-recognized that confident eyewitnesses are frequently inaccurate. "Mistaken identification by eyewitnesses was the primary evidence used to convict innocent people whose convictions were later overturned by forensic DNA tests." G.L. Wells, et al., *The Confidence of Eyewitnesses in Their Identifications from Lineups*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 151, 151 (2002). In that study, "three fourths of these convictions of innocent persons involved mistaken eyewitness identifications, and, in every case, the mistaken eyewitnesses were extremely confident, and, therefore, persuasive at trial." *Id.* at 153.

"Despite widespread reliance by judges and juries on the certainty of an eyewitness's identification, studies show that, under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy." *Lawson*, 352 Or. at 776. This is because witness confidence is susceptible to significant inflation by suggestion and post-confirmation feedback. G.L. Wells, et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688, 693 (1981) ("confidence in a false memory can be enhanced," which "requires nothing on the order of high-powered persuasion techniques"); *see also* Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, *Report & Recommendations to the*

Justices, 70, (July 25, 2013), http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf (witness confidence is susceptible to "manipulation by suggestive procedures or confirming feedback"). A "simple comment to an eyewitness who has made an identification" can lead to "*immediate strong inflation* of the witness's confidence." *See* J.T. Wixted & G.L. Wells, *The Relationship Between Eyewitness Confidence & Identification Accuracy: A New Synthesis*, 18 PSYCH. SCI. PUB. INT. 10, 18 (2017) (emphasis added).

Confidence inflation can also result from suggesting a second look at a line-up. As explained *supra*, prompting witnesses to re-examine a lineup often leads witnesses to change their identification decisions, with increased misidentification rates; when that altered choice is reinforced, it is "generally asserted with a high degree of confidence." Eisen et al., at 314.

Scientists have found that witness certainty *can* correlate with accuracy under conditions that minimize the opportunities for suggestion and post-confirmation feedback — including blind administration, the use of pre-procedure instructions, fair composition, and contemporaneous collection of a confidence statement. *See* Wixted & Wells, at 20. Notably, each of these is required by the DOJ's Model Policy. *See* Model Policy at 8-12. Only under these circumstances, and absent other suggestive conditions, can a witness's initial statement of high confidence signal an accurate identification. *Id.* at 30 ("our conclusions about the relationship between confidence and accuracy apply to initial IDs made from fair lineups without undue influence from a lineup administrator.").

This Court should therefore instruct the lower courts that eyewitness confidence should only be considered as evidence of reliability when it is gathered consistent with the provisions of the Model Policy.

C. Non-Identifications Are Diagnostic of Innocence.

In this case, neither of the two eyewitnesses identified Garcia as the bank robber after viewing a line-up. (R89: 43-48; 81). Only after being asked if they would like a second look at the lineup did one of them identify Garcia. (R86:74-75, R89: 46-48, 81). The Court of Appeals, however, did not address the significance of these initial non-identifications.

The factors courts must use to assess eyewitness reliability only "include" those enumerated in *Neil v. Biggers,* 507 U.S. 619 (1993) – others may be considered. *See Powell,* 86 Wis.2d at 65. Initial non-identifications are critical variables, as they can be diagnostic of the suspect's innocence. As researchers explain, "nonidentifications are not merely 'failures' to identify the suspect, but rather carry important information whose value should not be overlooked." Clark et al., *Regularities in Eyewitness Identification,* 32 LAW & HUM. BEHAV. 187, 211 (2008). A 2002 study, for instance, found that no-choice/"don't know" responses and filler identifications all have probative value with respect to the suspect's innocence; indeed, no-choice and filler identifications can have *more* probative value for innocence than positive identifications of the suspect have for guilt. *See* Gary L. Wells and Elizabeth A. Olson, *Eyewitness Identification: Information Gain from Incriminating and Exonerating Behaviors,* 8 J. OF EXPERIMENTAL PSYCHOL.: APPLIED 155 (2002). As one study bluntly observed, "[n]on-identifications also are straightforward. They are diagnostic of the suspect's innocence." Clark et al., at 211.

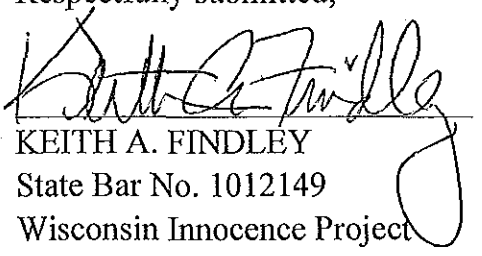
In light of these scientific findings, this Court should instruct the lower courts to consider the significance of an initial non-identification when assessing the reliability of identification evidence.

CONCLUSION

For the reasons set forth above, Amici respectfully urge this Court to adopt a rule that presumes that deviations from the Model Policy that fundamentally undermine its purpose should result in suppression. In the alternative, this Court should instruct lower courts to rigorously apply scientific research when determining the admissibility of eyewitness evidence, as outlined above.

Dated this 28th day of March, 2019.

Respectfully submitted,



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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 11 pages and 2,692 words.

Dated this 28th day of March, 2019.

KEITH A. FINDLEY

CERTIFICATION REGARDING ELECTRIONIC BRIEF PURSUANT TO SECTION 809.19(12)(f), STATS.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of section 809.19(12), Stats. I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated this 28th day of March, 2019.

KEITH A. FINDLEY