No. 10-854

IN THE

Supreme Court of the United States

RICHARD ROSARIO,
Petitioner,
v.

PATRICK GRIFFIN, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY, AND ANDREW M. CUOMO, ATTORNEY GENERAL OF NEW YORK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE INNOCENCE PROJECT IN SUPPORT OF PETITIONER

PETER J. NEUFELD
BARRY SCHECK
DAVID LOFTIS
THE INNOCENCE PROJECT
100 Fifth Avenue
3rd Floor
New York, NY 10011
(212) 364-5966

JAMES W.B. BENKARD
Counsel of Record
NEERAJ K. GUPTA
SAMIR KAUSHAL
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Counsel for Amicus Curiae

January 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 10-854

RICHARD ROSARIO,
Petitioner,
v.
PATRICK GRIFFIN, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY, AND ANDREW M. CUOMO, ATTORNEY GENERAL OF NEW YORK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE INNOCENCE PROJECT IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Innocence Project (the "Project") is a nonprofit legal clinic and criminal justice resource center. Founded at the Benjamin N. Cardozo School of Law in 1992, the Project, among other activities, provides

[1] The parties received timely notification of *Amicus*'s intent to file this brief and have consented to its filing. Pursuant to Supreme Court Rule 37, *Amicus* states that its counsel authored this brief in its entirety. No person or entity other than *Amicus*, its supporting organizations, and its counsel made a monetary contribution to the preparation of this brief.

pro bono legal services to indigent prisoners, with a special emphasis on using DNA testing to exonerate wrongfully convicted individuals.

The Project's work on post-conviction DNA exonerations has confirmed decades of social science research exposing the unreliability of eyewitness identification. A disturbingly high percentage of wrongful convictions—by the Project's research, about 75%—involve eyewitness misidentifications. Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce a Chance of a Misidentification* 3 (2009), http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf (last visited Jan. 17, 2011).

As one of the nation's leading authorities on wrongful convictions, the Project has a particularly strong interest in ensuring that eyewitness testimony offered against criminal defendants is viewed in light of scientific fact. The Project's work has consistently shown that individuals who witness crimes, despite their good intentions, too often misidentify the criminal perpetrator.

SUMMARY OF ARGUMENT

On June 19, 1996, the day George Collazo was shot and killed in the Bronx, New York, four individuals saw the petitioner, Richard Rosario, in Deltona, Florida, over 1000 miles away. Another four individuals saw Rosario in Florida on the days surrounding June 19, 1996. Despite Rosario's averments that he was in Florida at the time of the crime, defense counsel failed to investigate fully his alibi, mistakenly believing that the Trial Court had denied the investigation fee application. Without critical alibi testimony from disinterested witnesses to counter the

Prosecution's two stranger eyewitness identifications, Rosario was convicted of second degree murder and sentenced to the maximum sentence of 25 years to life.

After his conviction, Rosario moved for relief under New York's post-conviction relief statute, N.Y. Crim. Proc. Law § 440.10, arguing that his counsel provided ineffective assistance. The Post-Conviction Court denied his motion, determining that the two alibi witnesses called at trial were sufficient to present adequately his alibi defense and that additional alibi witnesses—though they were to testify to markedly different events on different days and were not classically interested witnesses—would have been cumulative. Notably, all the Federal courts that reviewed this decision reached the opposite conclusion—that, under *Strickland*, defense counsel's representation constituted deficient performance and caused prejudice. *See Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). Nevertheless, Rosario was denied relief because the Federal courts ruled that the Post-Conviction Court's application of *Strickland* was not unreasonable under 28 U.S.C. § 2254(d)(1). Yet, it is plain that the Post-Conviction Court did not apply *Strickland* at all, but instead applied the flawed New York standard.

Petitioner contends that the Post-Conviction Court's decision amounted to an unreasonable application of *Strickland*. Defense counsel inexplicably failed to realize that the investigation fee application had been granted and failed to investigate and present additional alibi evidence. That alibi evidence was the best response to the eyewitness testimony that convicted Rosario—proof, which this brief will demonstrate, is notoriously unreliable. For the

reasons set forth below, *Amicus* submits that the Post-Conviction Court's decision does, indeed, constitute an unreasonable application of *Strickland* and perpetuates an injustice.

As to the performance prong of the *Strickland* test, defense counsel's failure to investigate and present the additional alibi evidence "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688. *See id.* at 690-91 (explaining counsel's duty to investigate); *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003) (same); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (concluding that counsel's failure to uncover mitigating evidence at sentencing could not be justified as a tactical decision); ABA Standards for Criminal Justice 4-4.1, *available at* http://www.abanet.org/crimjust/standards/dfunc_blk.html#4.1 (last visited Jan. 19, 2011) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case[.]").

Regarding the prejudice prong of *Strickland*, but for defense counsel's failure to investigate and present the additional alibi evidence, there was a reasonable probability that "the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694. Although the Post-Conviction Court believed that additional alibi witnesses would have been cumulative, all the Federal courts reviewing this case agreed that defense counsel's error prejudiced Rosario. The Federal courts denied relief only in deference to the Post-Conviction Court. But as Petitioner has argued, this deference was given to a decision infected by considerations alien to a proper *Strickland* analysis. That decision, prompted by the Post-Conviction Court's understanding that the "New

York rule" permitted it to deny relief if counsel's representation was overall satisfactory, presents a serious conflict between the State and Federal standards.

Evaluating prejudice requires considering the totality of evidence. *See Wong v. Belmontes*, 130 S. Ct. 383, 386 (2009) (per curiam) (stating that a prejudice analysis requires "consider[ing] *all* the relevant evidence that the jury would have had before it if [defense counsel] had pursued the different path") (emphasis in original); *Strickland*, 466 U.S. at 695 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury."); *see also id.* at 696. In this case, prejudice analysis requires looking not just at the additional alibi witnesses that Rosario could have presented, but also at the two eyewitness identifications presented by the Prosecution.

Conducting that analysis makes clear that Rosario suffered prejudice. The Prosecution's entire case relied on two eyewitness identifications. Psychological research shows that these identifications were made under conditions and elicited from police procedures that heightened the risk of misidentification. Psychological research also shows that additional alibi testimony from disinterested witnesses would have strengthened Rosario's alibi defense by presenting new proof of its truthfulness, substantially enhancing its credibility in the eyes of the jury. Against the backdrop of a weak prosecution, there was—at the very least—a reasonable probability that Rosario's strengthened alibi defense would have raised reasonable doubt as to his guilt.

Indeed, juxtaposing the Prosecution's eyewitness testimony and Rosario's would-be alibi testimony shows that any *Strickland* analysis denying the existence of prejudice is unreasonable. Alibi testimony counterbalances eyewitness testimony. "Eyewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a thin thread to shackle a man [and] is precisely the sort of evidence that an alibi defense refutes best." *Griffin v. Warden*, 970 F.2d 1355, 1359 (4th Cir. 1992); *Bigelow v. Williams*, 367 F.3d 562, 574-75 (6th Cir. 2004); *Montgomery v. Peterson*, 846 F.2d 407, 415 (7th Cir. 1988). Neutralizing eyewitness testimony is especially important because it is often "accord[ed] more weight . . . than . . . other testimony." Elizabeth F. Loftus et al., *Eyewitness Testimony: Civil and Criminal* 128 (4th ed. 2007). "An eyewitness account typically consists of a rich and detailed description of the events, thus providing much material for the mental construction of the events in the minds of the jurors." *Id.* This evidence is difficult to attack, unless, of course, the defense can present similar first-person narratives of interactions with the defendant at the time of the crime, such as alibi testimony.

ARGUMENT

Balancing (I) the unreliability of eyewitness identification and (II) the substantial risk that Rosario was misidentified against (III) the effect the numerous unused disinterested alibi witnesses would have had on the credibility of Rosario's alibi reveals that the Post-Conviction Court's *Strickland* prejudice analysis was severely and unreasonably flawed. Given the deficiencies in the Prosecution's eyewitness-driven case, a properly-corroborated alibi defense would

"have made all the difference in the world." *Rosario v. Ercole*, 601 F.3d 118, 135 (2d Cir. 2010) (Straub, J., dissenting).

I. EYEWITNESS IDENTIFICATIONS ARE UNRELIABLE

Eyewitness identification is notoriously unreliable. *See United States v. Wade*, 388 U.S. 218, 228 (1967). Indeed, over the past century, cognitive and social psychologists have amassed a large body of empirical data establishing the unreliability of eyewitness identifications as a scientific fact.

First, scientific research into human perception and memory has exposed the unreliability of eyewitness identification. Cognitive science has revealed that the mechanisms governing perception and memory employ heuristics—fast, frugal, but error-prone shortcuts that trade accuracy for efficiency and thereby enable the mind to process an otherwise overwhelming cacophony of stimuli. *See* Steven Pinker, *How the Mind Works* (1997); *cf.* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1131 (1974) ("[H]euristics are highly economical and usually effective, but they lead to systematic and predictable errors.").

Perception is selective. We attend to only a small fraction of the visual field; we fail to detect salient objects in the scene (inattentional blindness) and obvious changes to the scene (change blindness). Daniel J. Simons, *Attentional Capture and Inattentional Blindness*, 4 Trends Cognitive Sci. 147 (2000) (reviewing research on inattentional blindness); Daniel J. Simons & Ronald A. Rensink *Change Blindness: Past, Present, and Future*, 9 Trends Cognitive Sci. 16

(2005) (reviewing research on change blindness); *see also* Daniel J. Simons & Christopher F. Chabris, *Gorillas in Our Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 Perception 1059 (1999) (observing failure to detect large gorilla—i.e., student in a gorilla suit—during counting task).

What the mind does not perceive, of course, it cannot encode. But even of what the mind does perceive, memory is—like perception—selective. Unlike a videotape recorder, the mind does not record an event and preserve it for future use. Elizabeth F. Loftus, *Eyewitness Testimony* 21 (1979). Instead, the mind reconstructs, changes, and embellishes mental images—filling in missing information. *See id*. In turn, although we can see and recall the big picture, we tend to miss or misremember the details. Memory and perception thus widen the gap between the objective truth of an event and our subjective recollection of it. We perceive only some of what is before us; we accurately remember only some of what we perceive; the residue left in the mind is only a fraction of a fraction of what happened. Because eyewitness identification is the product of a systematically and predictably fallible process, the inescapable inference is that eyewitness identification is systematically and predictably unreliable.

Second, an extensive and ever-growing body of experimental research has directly demonstrated the unreliability of eyewitness identification. In field experiments presenting eyewitness-subjects with photo arrays or lineups, false positive identifications are common. An eyewitness will often identify a filler when a known target is in the lineup (target-present condition) and will often make an identification when no target is in the lineup (target-absent

condition). *See* Ralph N. Haber and Lyn Haber, *Experiencing, Remembering, and Reporting Events*, 6 Psychol. Pub. Pol'y & L. 1057, 1080 (2000) (summarizing data collected from approximately 100 lineup experiments and finding: average false positive rate of 25% when target-present; average rate of 50% when target-present and when criminal elements are simulated; average rate of 60% when target-absent; average rate of 90% when target-absent and when police suggestion and poor observation conditions are simulated).

The unreliability of eyewitness identification is not confined to the laboratory. Actual eyewitnesses observing actual photo arrays and lineups select an innocent filler supplied by the police about 30% of the time. Gary L. Wells, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & Hum. Behav. 1, 6 (2009). Notably, this figure does not account for the more serious version of the false positive identification: when an eyewitness selects a factually innocent suspect who is not a filler supplied by the police. Exoneration research, however, reveals that eyewitnesses are misidentifying innocents at an unacceptable rate.

Since 1932, one exoneration study after another has confirmed that eyewitness misidentification is the leading cause of convicting the innocent. *See, e.g.,* Brandon L. Garrett*, Judging Innocence*, 108 Colum. L. Rev. 55 (2008) (evaluating the first 200 DNA exonerations and finding that "the vast majority of the exonerees (79%) were convicted based on eyewitness testimony"); Samuel R. Gross et al*., Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542 (2005)

(evaluating 340 exonerations and concluding that "the most common cause of wrongful convictions is eyewitness misidentification"); Edwin M. Borchard, *Convicting the Innocent* xiii (1932) (evaluating sixty-five wrongful convictions and suggesting that "the major source of these tragic errors is an identification of the accused by the victim of a crime of violence"). The advent of DNA testing has brought the problem of eyewitness misidentification into sharp focus. Data from the Innocence Project, for example, show that of the more than 230 convictions overturned by DNA evidence, over 75% involved eyewitness misidentification. Innocence Project, *supra*, at 3. In 38% of the misidentification cases, multiple eyewitnesses misidentified the same innocent person. *Id.* Furthermore, since countless violent crimes yield no testable DNA, the "false convictions that come to light are the tip of an iceberg." Gross, *supra*, at 530.[2]

---

[2] As this Court has observed, "the hazards of [eyewitness] testimony are established by a formidable number of instances[.]" *Wade*, 388 U.S. at 228. To illustrate, DNA exonerations have overturned the eyewitness-based convictions of the following persons: Ronald Cotton, who served 10.5 years for rape and burglary, whom the victim picked out from a photo array and lineup, and of whose guilt the victim was certain; Larry Fuller, who served 19.5 years for aggravated rape based on a certain identification; and Kirk Bloodsworth, who served 8 years (two on death row) for first-degree murder, sexual assault, and rape, and of whose guilt five witnesses were certain. *See* Innocence Project, *supra*, at 7-15. Notably, these cases highlight that witness certainty does not guarantee identification accuracy. Indeed, the victim who misidentified Cotton, Jennifer Thompson-Cannino, has since become an advocate for eyewitness identification reform. *Id.* at 13.

II. THE TWO STRANGER EYEWITNESS IDENTIFICATIONS CARRY A SUBSTANTIAL RISK OF MISIDENTIFICATION

A. The eyewitness identifications in this case were made under conditions that increased the risk of misidentification

Psychological research has not only established the general unreliability of eyewitness identification, but has also delineated factors that can undermine the reliability of any specific identification. *See* Loftus et al., *Eyewitness* (2007). Crimes, such as the shooting that Michael Sanchez and Robert Davis witnessed, often involve several of these accuracy-diminishing factors:

> Events surrounding a crime differ in many ways from those you normally encode. Every one of these differences can make you less likely to be able to give an accurate report later. Usually strangers are involved, instead of familiar people. Your view of the criminal and the crime is likely to be brief, not prolonged. The event itself is extremely unfamiliar. Further, it is frightening and usually traumatic. If a weapon is present, you may attend to little else, in contrast to your normal mindset.

Haber, *supra*, at 1089-90. Sanchez and Davis were unfamiliar with the shooter, had brief exposure to the shooter, were under extreme stress, and observed the scene in the presence of a gun. Research shows that each of these factors decreases identification accuracy. Working in concert here, these accuracy-diminishing factors strongly increase the likelihood that Sanchez and Davis misidentified Rosario.

1. Unfamiliarity

Neither Sanchez nor Davis had any prior familiarity with the shooter. As common sense suggests, and as science confirms, unfamiliarity decreases identification accuracy. *See* Haber, *supra*, at 1062-63. Sanchez and Davis were not asked to identify a familiar face; they were asked to identify a complete stranger. Their unfamiliarity with the shooter heightens the risk that their subsequent identifications were inaccurate.

2. Exposure Duration

Sanchez and Diaz were not only unfamiliar with the shooter, but their exposure to the stranger was brief. According to psychological research, exposure duration to the perpetrator is correlated with identification accuracy:

> Some crimes occur in a matter of seconds or minutes (in such cases the eyewitness's opportunity to view the perpetrator is very brief), while others unfold over hours or—such as in the case of kidnapping—days. Not surprisingly, the more time an eyewitness has to view a perpetrator, the more time she has to encode the perpetrator's characteristics into memory, and the more likely she is to make a correct identification at a later time.

Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 331 (2006); *see also* Peter N. Shapiro & Steven D. Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. 139 (1986) (meta-analyzing 128 studies involving almost 17,000

eyewitness-subjects and finding that exposure duration predicted identification accuracy).

Sanchez only had approximately sixty seconds to encode the shooter's face; the argument between Sanchez, Collazo, the shooter, and the fourth person lasted for "about a minute." C.A. App. A-546. Davis's opportunity to encode the shooter's face was even more brief—a few seconds. Sanchez's and Davis's brief exposure to the shooter further amplifies the risk that they misidentified Rosario.

3. Eyewitness Stress

During their brief exposure to the unfamiliar shooter, Sanchez and Davis were under a considerable amount of stress. Psychological research shows that extreme stress tends to narrow the eyewitness's attention, impair the eyewitness's memory of the event, and reduce the eyewitness's identification accuracy. Loftus et al., *Eyewitness* (2007), *supra*, at 30-32; *see also* Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & Hum. Behav. 687, 699 (2004) (meta-analyzing twenty-seven experiments involving 1700 eyewitness-subjects and finding "considerable support for the hypothesis that high levels of stress negatively impact [the] accuracy of eyewitness identification").

In this case, Sanchez and Davis endured an extremely stressful ordeal. First, Sanchez was locked in a heated exchange that monopolized his attention. Preoccupied with the argument, it was unlikely that his mind considered it an important cognitive task to stare into the shooter's face and memorize it. Once the shooter targeted Collazo, the stress of the situation would have demoted that cognitive priority even

further. With a gun pointed in his direction, Sanchez's primary concern would have been survival—not encoding the shooter's face. Meanwhile, the stress of the situation would have extended to Davis, encountering an extraordinary tableau of events. Once the shooter shot Collazo, the stress of the situation markedly increased. Sanchez admitted at trial that he was scared because he was afraid that he would be next. C.A. App. A-569. Davis's testimony captured the chaos: "I seen blood was coming from his face and his friend was like screaming and hollering and everything please help me. Please help me." C.A. App. A-103. Given the commotion of the scene—one that featured a quarrel, blood, death, screaming, and a deadly weapon—the identifications of Rosario are even less reliable.

4. Weapon Focus

When the shooter drew his gun and aimed for Collazo—intensifying the stress of an already stressful situation—Sanchez's and Davis's focus likely moved toward the gun itself. Psychological research has established the existence of the "weapon focus" effect: If a weapon is in the eyewitness's visual field, it will grab the eyewitness's attention; because the eyewitness's attention is pulled toward the weapon, the eyewitness will focus less attention on the characteristics of the persons in the scene, including the wielder of the weapon. *See* Elizabeth F. Loftus et al., *Some Facts About "Weapon Focus"*, 11 L. & Hum. Behav., 55 (1987). Therefore, if a weapon is visibly present during a crime, a subsequent identification is less likely to be accurate. *See* Nancy M. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 L. & Hum. Behav. 413, 421 (1992) (meta-analyzing nineteen experiments involving over 2000 eyewit-

ness-subjects in crime situations, finding that weapon focus effect had a statistically significant impact on "identification accuracy and feature accuracy," and noting that "the weapon effect does reliably occur, particularly in crimes of short duration in which a threatening weapon is visible").

In a representative illustration of the "weapon focus effect," eyewitness-subjects observed videotaped, simulated robberies in which a weapon was either present or absent. Thomas E. O'Rourke et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations*, 13 L. & Hum. Behav. 385 (1989). When the subjects were asked to identify the robber in a lineup, 55% made an accurate identification in the weapon-absent condition, whereas only 37% made an accurate identification in the weapon-present condition. *Id.* at 391.

When Sanchez turned around and saw that the shooter had drawn his weapon, his attention would have been drawn away from the shooter's face—interfering with his ability to encode the shooter from that point onward. By the time that Davis entered the scene, moreover, the shooter was already removing his gun from his jacket pocket. C.A. App. A-470. Since the weapon was in Davis's field of view throughout his observation of the event, it was unlikely that he focused his attention on the shooter. Thus, the weapon focus effect further weakens Sanchez's and Davis's identification of Rosario as the shooter.

B. The eyewitness identifications were elicited from police procedures that increased the risk of misidentification

There is no suggestion in this case that the police acted improperly. But psychological research has revealed that certain post-incident police procedures heighten the risk of misidentification. *See* Innocence Project, *supra*. Because the police employed these error-correlated procedures to identify Rosario, the risk that he was misidentified is substantial.

1. Relative Judgment

Sanchez and Davis selected Rosario's picture from a "mug book," which presents photos simultaneously. Research shows that eyewitnesses tend to make identifications based on "relative judgment," especially when presented with simultaneous photo arrays or lineups. Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. Applied Soc. Psychol. 89 (1984); s*ee also* Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analysis Comparison*, 25 L. & Hum. Behav. 459 (2001) (meta-analyzing 28 available tests and supporting the notion that simultaneous lineups, compared to sequential lineups, promote relative judgment and impair identification accuracy). Rather than making an absolute judgment about each individual photo, an eyewitness will compare and contrast the various photos, eventually settling on the photo that resembles a mental image of the perpetrator more closely than the other photos. Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 618 (2006). But there is always someone who more closely resembles the perpetrator than the others; as such, if the actual perpetrator is absent, relative judgment will cause

the eyewitness to settle on an unlucky innocent who happens to be the best match. *Id.*

In one study exposing the danger of relative judgment, 200 eyewitness-subjects observed a staged crime and then viewed either a six-person lineup with the offender or a five-person lineup without the offender. Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 Am. Psychologist 553, 561 (1993). In the offender-present condition, 54% picked the offender, 21% of the witnesses made no selection, 13% picked a particular filler, and the remaining witnesses picked other fillers. *Id.* In the offender-absent condition, 32% made no selection and 38% picked the particular filler who had garnered a 13% vote in the other condition. *Id.* Put differently, the 54% who had picked the offender when he was present did not opt to make no selection when he was absent; instead, "removing the offender from the lineup led witnesses to shift to the 'next best choice,' nearly tripling the jeopardy of that [innocent] person." Wells, *Eyewitness* (2006), *supra*, at 619.

Because Sanchez and Davis selected Rosario from mug books, they may well have employed relative judgment—perusing pages and comparing and contrasting photos until they settled on a picture that most closely resembled their mental image of the shooter. Therefore, although Sanchez and Davis both selected Rosario's photo, the police's identification procedure left open the possibility that Rosario was an unlucky innocent whose photo happened to resemble the shooter more closely than the rest.

2. Unintentional Influence

Research also shows that non-double-blind administration of photo arrays increases the risk of misidentification. Non-double-blind testing is problematic because it increases the risk that the administrator will subtly and unintentionally influence the eyewitness to select the photo that the administrator has in mind. Wells, *Suggestive*, *supra* at 9 (citing studies showing that, when lineup administrators are led to believe that a particular innocent lineup member is the perpetrator, witnesses are more likely to select that person). In fact, "the need for double-blind lineup testing is particularly critical for photo lineups," given the "close face-to-face interaction between the tester and the person being tested." Wells, *Eyewitness* (2006), *supra*, at 629. To explain:

> The eyewitness might call out the number of a filler photo, and the lineup administrator, knowing that the photo is a mere filler, might urge the witness to make sure she has looked at all the photos before making a decision. Whether intended or not, the message is clear to the witness that the suspect is one of the other photos. In contrast, the mere utterance of the number of the suspect's photo could yield a very different reaction from the lineup administrator, such as "Good, tell me what you remember about that guy." That would lead the witness to stick with that photo . . . . Even without speaking, a lineup administrator can influence an eyewitness through facial expressions . . . . Furthermore, the lineup administrator has a great deal of discretion in deciding when the identification session is over. If the witness picks a filler, the

> tendency might be to wait to see if she changes her mind or ask if there is anyone else who stands out. If the witness picks the suspect, in contrast, the session is quickly ended.

Wells, *Suggestive*, *supra*, at 8 (adding that "[t]hese discretionary behaviors by the lineup administrator are not necessarily intentional," but are "natural behaviors that testers display when they think that they know the correct answer").

The police did not administer a double-blind photo test to Davis. At 2:30 p.m. on June 19, the day of the shooting, Detective Martinez and Detective Whitaker displayed mug books to Davis. C.A. App. A-42-43. After spending some time looking, Davis was unable to make an identification. C.A. App. A-475. Later that day, at around 4:30 p.m., Detective Cruger displayed mug books to Sanchez. C.A. App. A-77. Sanchez selected Rosario's photo from a book of Hispanic males born in the 1970s. C.A. App. A-79. Soon thereafter, Detective Martinez was made aware that a positive identification had been made in that particular mug book. C.A. App. A-15, A-41-42. Equipped with that knowledge, at around 6:00 p.m., Detective Martinez traveled to Davis's work location to show Davis that specific book, after Davis had already viewed multiple books and had not identified a suspect. C.A. App. A-15. Davis then identified Rosario. C.A. App. A-477.

These facts make clear that the second photo administration to Davis was not double-blind. When Detective Martinez returned to Davis's workplace to show him another mug book, he knew that the book contained a photo for which a positive identification had been made. Due to the heightened risk of subtle

albeit unintentional cuing, the reliability of Davis's identification of Rosario must be discounted.

Indeed, the timing and urgency of the second administration likely impressed upon Davis that he must make a selection from that particular mug book. In fact, defense counsel raised the issue of possible undue influence. C.A. App. A-103. Consider the facts from Davis's perspective. At the precinct, Davis had flipped through numerous mug books, but had failed to identify anyone. A few hours later, Detective Martinez took the time to travel to Davis's office location personally, bearing one particular mug book. Davis testified that he "kept looking," "trying to find the person." C.A. App. A-475. Understandably, Davis would have been motivated to select a photo from that special book.

To summarize, these error-correlated police procedures may well have interacted to increase the likelihood that Rosario was misidentified. If Sanchez selected a photo based on relative judgment, then he selected Rosario because Rosario most closely resembled the shooter—not because he remembered Rosario. If Detective Martinez's unintentional cuing influenced Davis, and if Davis also employed relative judgment, then it was inexorable that Davis would select the very same photo. That is, Davis compounded Sanchez's initial erroneous selection, earning the prosecution two eyewitnesses.

Furthermore, because Sanchez and Davis were precommitted to Rosario's photo from the mug book, selecting him from the lineup was preordained. *See* Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 L. & Hum. Behav. 287, 290 (2006) (meta-

analyzing several studies and finding that, if an eyewitness selects a photo from a mug book, then the eyewitness tends to be cognitively committed to that image and will be more likely to select that person from a subsequent lineup).

While the jury credited the eyewitnesses, the jury was not made aware of the foregoing factors—which, science and experience have demonstrated, materially diminished the force and reliability of the eyewitness testimony. Nevertheless, the Post-Conviction Court upheld Rosario's conviction because it found that this proof was sufficiently strong to overcome the prejudice caused by defense counsel's inadequate performance. The Federal courts held that the deference due that decision required denying Rosario relief. Thus, the flawed eyewitness testimony and its determinative effect lies at the heart of this case.

III. THE UNUSED ALIBI WITNESSES WOULD HAVE GREATLY STRENGTHENED THE CREDIBILITY OF ROSARIO'S ALIBI BECAUSE THOSE WITNESSES WERE LESS INTERESTED THAN THE ALIBI WITNESSES CALLED AT TRIAL

Defense counsel, due to his admittedly negligent investigation, failed to identify the best alibi witnesses and call them at trial. As the trial was a "credibility battle" between the prosecution and defense witnesses, defense counsel prejudiced Rosario's defense by presenting the jury with "two alibi witnesses who were good friends with Rosario," rather than the "additional witnesses [who were] less interested in the outcome of the trial" and who thus were "less vulnerable to impeachment as interested

witnesses." *Rosario*, 601 F.3d at 132-33 (Straub, J., dissenting).

Disinterested alibi witnesses are powerful supporting evidence for an alibi defense. A very similar case, *Montgomery*, explains the importance of defense counsel presenting a disinterested alibi witness to win a credibility battle, even where that defense had already presented twelve other alibi witnesses. In *Montgomery*, the Seventh Circuit reasoned that the defense's failure to present the one disinterested witness was prejudicial error because, like Rosario's prosecution, the prosecution's case "basically boiled down to a swearing match between a prosecution witness . . . and the petitioner," and "[t]he jury was presented with a straightforward credibility choice" where "[e]very one of [petitioner's twelve] witnesses had a reason to be biased," and "independent corroboration by a neutral, disinterested witness would perforce be extremely significant." 846 F.2d at 413-14. The Seventh Circuit explained that "the jury might well have viewed the otherwise impeachable testimony of the twelve witnesses who were presented at . . . trial in a different light had the jury also heard the testimony of th[e] disinterested witness" because a "[disinterested witness's] testimony may . . . transform[] a weak case into a strong one merely by corroborating the testimony of . . . other defense witnesses." *Id.* at 415; *see also Foster v. Ward*, 182 F.3d 1177, 1200 (10th Cir. 1999) ("I have discovered no case and the majority has cited none in which a court under these circumstances found no prejudice in the failure to present testimony from a disinterested corroborating alibi witness.") (Seymour, J., dissenting) (citing other cases).

The Federal courts' respect for disinterested alibi witnesses has been validated in a recent line of psychological studies, where psychological research has consistently found that juries believe disinterested alibi witnesses over alibi witnesses with a closer relationship to the defendant. In the first study examining this issue, researchers found that in mock cases where the defendant's case rested only on alibi testimony, without any exonerating physical evidence, participants were more likely to believe the testimony of a disinterested alibi witness (e.g., store cashier, bank teller, taxi driver) than that of an interested alibi witness (e.g., mother, brother, best friend). Elizabeth A. Olson & Gary L. Wells, *What Makes a Good Alibi? A Proposed Taxonomy*, 28 L. & Hum. Behav. 157, 172 (2004). A second study that same year found that mock jurors would acquit defendants at a higher rate when the defendant had a disinterested alibi witness, as compared to alibi witnesses described as either the girlfriend or the relative of the defendant. Scott E. Culhane & Harmon M. Hosch, *An Alibi Witness's Influence on Mock Jurors' Verdicts*, 34 J. Applied Soc. Psychol. 1604, 1614 (2004).

These results were discussed and confirmed in a recent study that evaluated the credibility of alibi witnesses by the degree of their relationship to the defendant; the study found that mock jurors were more likely to believe an alibi witness with a more distant relationship to the defendant, and that mock jurors expected alibi witnesses with closer relationships to the defendant to be more likely to lie for the defendant. Harmon M. Hosch et al., *Effects of an Alibi Witness's Relationship to the Defendant on Mock Jurors' Judgments*, L. & Hum. Behav. (Apr. 22, 2010), http://www.springerlink.com/content/

421916501113p2x1/. Because almost all of Rosario's seven unused alibi witnesses had more distant relationships to him than the two alibi witnesses defense counsel presented, the jury would have been more likely to believe the unused alibi witnesses' testimony and acquit Rosario of the murder charge had those witnesses been called by defense counsel.

In this case, a disinterested alibi witness—like Michael Serrano, the corrections officer who saw Rosario in Florida on June 20—would not only have directly strengthened Rosario's alibi defense by his testimony, but would also have indirectly legitimized the testimony of John Torres and Jenine Seda, the more interested alibi witnesses that were called. The same holds true for the other unused alibi witnesses, like Fernando Torres, the father of John Torres, and Chenoa Ruiz, a neighbor of John Torres (both of whom saw Rosario in Florida on the day of the crime). Significantly, this common sense conclusion was never mentioned by the Post-Conviction Court.

CONCLUSION

The Post-Conviction Court's review of defense counsel's assistance failed to account for the fallibility of eyewitness identifications and simultaneously discounted the impact that disinterested alibi witnesses would have had on the jury's evaluation of Rosario's alibi defense. These cumulative errors rendered unreasonable that court's conclusion that Rosario received effective representation under *Strickland*. It is also evident that the Post-Conviction Court was more likely to reach its unreasonable conclusion given the confusion engendered by the New York standard—a standard susceptible to the interpretation that a single, serious error by counsel can be "forgiven" by an otherwise satisfactory

performance. Rosario's petition for a writ of certiorari should be granted to provide much-needed guidance to the New York courts on the application of the New York standard and *Strickland*.

Respectfully submitted,

PETER J. NEUFELD
BARRY SCHECK
DAVID LOFTIS
THE INNOCENCE PROJECT
100 Fifth Avenue
3rd Floor
New York, NY 10011
(212) 364-5966

JAMES W.B. BENKARD
Counsel of Record
NEERAJ K. GUPTA
SAMIR KAUSHAL
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Counsel for Amicus Curiae

January 2011