No. 100038-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

CHRISTOPHER DERRI,
A.K.A. JOHN STITES
Petitioner.

AMICI CURIAE BRIEF OF THE INNOCENCE PROJECT, INC. AND WASHINGTON INNOCENCE PROJECT

David S. Frankel
Aaron L. Webman
Andrea Maddox
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Counsel for Amici Curiae *The Innocence Project, Inc. Washington Innocence Project*

Lara Zarowsky
WSBA NO. 40745
WASHINGTON INNOCENCE PROJECT
P.O. Box 85869
Seattle, Washington 98145
(206) 739-9333

Anton Robinson
THE INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, New York 11213
(212) 364-5974

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INTEREST OF *AMICI CURIAE*

The Innocence Project, Inc. (the "Innocence Project") is a non-profit organization dedicated to providing pro bono legal and related investigative services to indigent people whose innocence may be established through post-conviction DNA testing. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration, by post-conviction DNA testing, of more than 375 people.

Washington Innocence Project ("WashIP") was the third organization established in the United States to pursue post-conviction claims of actual innocence. It is an independent nonprofit organization that provides free legal services to people in Washington State who have been wrongfully convicted, helps prevent wrongful convictions through education and policy reform, and supports exonerees and freed individuals as they rebuild their lives in freedom. WashIP has been instrumental in advocating for improvements to the criminal justice system in Washington State, including important reforms and new laws for

more reliable eyewitness identification procedures, preservation of crime scene evidence, access to post-conviction DNA testing, and mandating the recording of custodial interrogations. WashIP has secured the full exoneration of 15 innocent men and women who served more than 100 years in prison for crimes they did not commit.

Because erroneous eyewitness identifications are a leading contributing cause of wrongful convictions, *amici* have a compelling interest in ensuring that courts evaluate eyewitness identification evidence in light of applicable scientific principles.

INTRODUCTION

Mistaken eyewitness identification is a leading cause of wrongful convictions. Nationally, approximately 69% of DNA exonerations – at least 258 people – followed convictions based in whole or in part on mistaken eyewitness identification.[1] These wrongful convictions give rise to a double injustice: The State deprives an innocent person of his liberty while allowing a guilty person to go free, potentially committing additional crimes. Moreover, wrongful convictions undermine public trust in the criminal justice system. In Washington State, individuals wrongfully convicted based on erroneous identifications, and who were later exonerated based on post-conviction DNA evidence, served a combined 42 years in

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[1] DNA Exoneration in the United States, The Innocence Project, https://innocenceproject.org/dna-exonerations-in-the-united-states/.

prison.[2] Because DNA exonerations are rare – there is no dispositive DNA evidence available in most cases and resources for the post-conviction review of cases are limited – the true cost of wrongful conviction based on mistaken eyewitness testimony is certainly much greater.

Washington State has adopted the test established by the Supreme Court in *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), and *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), to determine the admissibility of eyewitness identifications obtained through unnecessarily suggestive procedures. *State v. Vaughn*, 101 Wn.2d 604, 607, 682 P.2d 878 (1984). *Manson* sets forth a two-part inquiry. First, was the challenged identification obtained

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[2] The National Registry of Exonerations, University of Michigan, Detailed View, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

through an unnecessarily suggestive police procedure? Even if it was, the identification may nevertheless be admitted, if the trial court finds that it is reliable under the totality of the circumstances, focusing on particular criteria set forth in *Manson* and *Biggers*: the opportunity of the witness to view the perpetrator at the time of the crime; the witness's degree of attention; the accuracy of the witness's prior description of the perpetrator; the level of certainty demonstrated by the witness at the time of the identification; and the length of time between the crime and the identification. 432 U.S. at 114 (citing *Biggers*, 409 U.S. at 199-200).

The *Manson* test depends on the premise that an eyewitness identification that is the product of highly suggestive law enforcement procedures may nonetheless be reliable if the enumerated indicia of reliability are present. But in the forty-plus years since *Manson*, a robust body of scientific research, now routinely relied on by courts, has undermined that premise.

In light of this science, a number of state high courts have ceased using the *Manson* analysis for determining the admissibility of eyewitness identifications. In its place, they have adopted new evidentiary rules which comport with the accepted scientific consensus regarding how eyewitness memory and perception work. *Amici* submit that this Court should do the same. Specifically, the Court should hold that when a defendant moves to suppress an eyewitness identification, the trial court should evaluate the reliability of the identification under the totality of *all* of the circumstances – that is, both the circumstances of the identification procedure ("system variables," as described below) and of the witness's encounter with the perpetrator ("estimator variables," also described below).

ARGUMENT[3]

I. A robust body of more than 40 years of scientific research concerning eyewitness memory and perception has identified the factors that result in unreliable identification testimony.

Researchers have identified the circumstances that lead to unreliable identification testimony. They have divided them into system variables and estimator variables. These findings provide courts the tools to determine whether a proffered eyewitness identification may be relied upon by jurors. A number of state high courts have used this information to reform their standards for admitting or excluding eyewitness identification testimony.

A. Both system and estimator variables bear upon the reliability of eyewitness identifications.

System variables "refer to the circumstances surrounding the identification procedure itself that are generally

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[3] *Amici* refer the Court to the parties' submissions and the decision below for a fuller recitation of the facts of the case.

within the control of those administering the procedure." *State v. Lawson*, 352 Or. 724, 740, 291 P.3d 673 (2012). Among the circumstances that make identification evidence less reliable are:

- failure to use blind administration (*i.e.*, having someone who knows the suspect's identity administer the identification procedure);
- failure to give pre-identification instructions designed to prevent pressuring the witness;
- lineups constructed in a way that makes the suspect stand out, including "showups," in which a single suspect is shown to the witness, and photo arrays in which the subject is distinctive or in which the "fillers" (persons other than the one police have concluded is a suspect) do not match the description of the perpetrator;
- feedback that suggests the witness correctly identified the suspect; and
- failure to make a contemporaneous recording of the witness's confidence.

Estimator variables "generally refer to characteristics of the witness, the alleged perpetrator, and the environmental conditions of the event that cannot be manipulated or adjusted by state actors." *Lawson*, 352 Or. at 740. These include:

- cross-race bias (witnesses have more difficulty making accurate identifications of persons of a different race);
- stress;
- witness attention;
- duration of exposure;
- environmental viewing conditions (distance and lighting);
- perpetrator characteristics (distinctiveness, disguise);
- "weapon focus" (the tendency of a witness to have his attention distracted by a weapon brandished by the perpetrator, away from the perpetrator);
- speed of identification (how quickly the witness identifies the perpetrator); and
- memory decay (time between the event and the identification procedure).

Both system and estimator variables influence the accuracy of eyewitness identifications, and both should be considered in determining the admissibility of this evidence. Disregarding unnecessarily suggestive procedures that lead to a person being identified as a suspect, where a court finds the identification evidence is otherwise reliable, is inconsistent with

the science. Moreover, the "reliability" factors identified in *Manson* are not in fact good indicators of reliability.

B. State high courts have replaced the *Manson* test with rules for the admission of eyewitness identifications based upon the science of estimator and system variables.

In *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011), the New Jersey Supreme Court appointed a Special Master to evaluate the science relating to eyewitness identifications. Based on the Special Master's report, which included an in-depth analysis of system and estimator variables, the court found that the *Manson* test "does not adequately meet its stated goals: it does not provide a sufficient measure for reliability; it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony." *Id.* at 285.

The *Henderson* court explained the fatal flaw in *Manson*'s core premise: that suggestive law enforcement procedures may be disregarded if certain external indicia of reliability are present. The court noted that three of the five

Manson "reliability" factors – the opportunity to view the crime, the witnesses' degree of attention, and the level of certainty at the time of the identification – rely on self-reporting by eyewitnesses, which can itself be skewed by suggestive procedures. *Id.* at 286. Researchers have called this feature of the *Manson* test "ironic," because "these *Manson* reliability factors come into consideration by courts under precisely the circumstances in which they are least likely to be indicators of reliability due to their having been distorted by the suggestive procedure itself." Gary L. Wells & Deah 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. 16-17 (2008) ("*30 Years Later*"). Because the use of suggestive procedures thus actually makes it *more* likely the identification will be deemed reliable at *Manson*'s second step, there is "almost no threat of exclusion resulting from the use of suggestive procedures" and

administrators have little incentive to conform to best practices. *Id.* at 17.[4]

Accordingly, the New Jersey Supreme Court discontinued that state's use of the two-part *Manson* framework. Instead, once a defendant presents some evidence of suggestive law enforcement procedures, the trial court is to consider all of the relevant system and estimator variables. The identification must be suppressed if the defendant shows a very substantial likelihood of misidentification under the totality of circumstances. *Henderson*, 208 N.J. at 288-92.

Addressing similar issues, the Oregon Supreme Court looked to the *Henderson* opinion and the New Jersey Special Master's report "to inquire into the factors affecting the

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[4] Indeed, the scientific research since *Manson* reveals that witness certainty – which is especially persuasive evidence with jurors – correlates well with accuracy *only* when non-suggestive identification procedures are used. *See* Point II(C) *infra*.

reliability of eyewitness identification evidence." *Lawson*, 352 Or. at 740 n.3. Like *Henderson*, *Lawson* includes a thorough discussion of both the system and estimator variables that affect the reliability of eyewitness identification evidence. *Id.* at 739-746. In light of the scientific evidence, the Oregon Supreme Court also revised that state's legal framework for the admission of eyewitness testimony. *Id.* at 749-63. Trial courts are now required, before admitting eyewitness testimony, to determine its relevance and probative value in light of the estimator and system variables at play. *Id.*

Even before the *Henderson* Special Master's work and the New Jersey Supreme Court's decision, Massachusetts had recognized the infirmities in the *Manson* test. In *Commonwealth v. Johnson*, 420 Mass. 458, 650 N.E.2d 1257 (1995), observing that "studies conducted by psychologists and legal researchers since [*Manson*] have confirmed that eyewitness testimony is often hopelessly unreliable," the Supreme Judicial Court held that the *Manson* test did not satisfy the requirements

of the state's due process clause. The Court re-affirmed its *per se* rule that predated *Manson*: identifications obtained through unnecessarily suggestive procedures are inadmissible. *Id.* at 467, 471-72 (citing, among others, E.F. Loftus, Eyewitness Testimony (1979); Wells & E.F. Loftus, Eyewitness Testimony: Psychological Perspectives (1984)).

Thereafter, the Supreme Judicial Court convened a Study Group on Eyewitness Evidence and, in *Commonwealth v. Gomes*, 470 Mass. 352, 354, 22 N.E.3d 897 (2015), adopted its findings on the "scientific principles regarding eyewitness identification," which closely tracked those in *Henderson*.[5] The court held that certain scientific principles relating to eyewitness identification testimony were "so generally accepted" that they

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[5] *See also Commonwealth. v. Crayton*, 470 Mass. 228, 241-42, 21 N.E.3d 157 (2014) (extending *Johnson*'s holding to first-time in-court identifications, based, in part, on the scientific research discussed in the Study Group Report).

were to be incorporated into the state's model jury instructions. *Id.* at 369-76. Having reviewed the wealth of evidence on eyewitness identification, the court concluded: "The central principle that has emerged from over 2,000 published studies over the past thirty years is that memory does not function like a videotape, accurately and thoroughly capturing and reproducing" an image. *Id.* at 369. Instead, the research "demonstrates that the memories of witnesses for events and faces, and witnesses' confidence in their memories, are highly malleable and can readily be altered by information received by witnesses both before and after an identification procedure." *Id.* at 373.[6]

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Justice Marshall's dissent in *Manson* was prescient, predicting that "the Court's totality test [would] allow seriously

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[6] "Before and after an identification procedure" refers to both statements made or instructions given before the procedure and confirmatory feedback provided to the witness after.

unreliable and misleading evidence to be put before juries," thus permitting "dangerous criminals to remain on the streets while citizens assume that police action has given them protection." 432 U.S. at 128 (Marshall, J., dissenting). Although the *Manson* test – in particular, the separate, consecutive treatment of system and then estimator variables – may have seemed not unreasonable, even logical, at the time of its adoption, science and experience in the intervening decades have exposed its flaws.[7]

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[7] In addition to New Jersey, Oregon and Massachusetts, numerous other courts have embraced the science and revised their rules relating to the treatment of eyewitness identifications. *See, e.g., State v. Kaneaiakala*, 145 Haw. 231, 242-47, 450 P.3d 761 (2019) (revising the factors a judge should consider in addressing whether an impermissibly suggestive eyewitness identification is nonetheless reliable, based on a "robust body of scholarship and empirical research"); *State v. Harris*, 330 Conn. 91, 129, 131, 191 A.3d 119 (2018) (following New Jersey's *Henderson* framework using estimator variables in evaluating the reliability of an identification; noting that "courts in Alaska, Kansas, Massachusetts, New Jersey, New York, Utah and Wisconsin

have held as a matter of state constitutional law that the *Biggers* framework insufficiently protects against the risk of misidentification" and that "the courts of Georgia and Oregon have reached the same conclusion as a matter of state evidentiary law"); *Young v. State*, 374 P.3d 395, 417 (Alaska 2016) (replacing the *Biggers* factors with a list that takes into account system variables and estimator variables); *State v. Almaraz*, 154 Idaho 584, 595, 301 P.3d 242 (2013) (adding system and estimator variables to its own test determining whether an out-of-court-identification violates due process rights because the "research has convincingly shown [the variables] impact the reliability of eye-witness identification"); *see also People v. Lemcke*, 11 Cal. 5th 644, 647, 486 P.3d 1077, 278 Cal. Rptr. 3d 849 (2021) (prohibiting the use of a jury instruction on witness certainty because "there is now near unanimity in the empirical research" that eyewitness confidence is an unreliable indicator of accuracy); *State v. Carpenter*, 605 S.W.3d 355, 361 (Mo. 2020) (allowing expert testimony about the factors that affect the reliability of an eyewitness's identification partly because the "scientific community, and its findings and conclusions are as nearly unanimous as it is possible to be"); *State v. Martinez*, 478 P.3d 880, 895, 906 (NM 2020) (requiring law enforcement agencies "to adopt and follow scientifically supported protocols and practices to minimize mistaken identifications," and also mentioning a "near consensus among experts" that certain system and estimator variables "inherently impair the ability of witnesses to accurately process what they observe"); *State v. Discola*, 207 Vt. 216, 231, 184 A.3d 1177 (2018) (formally abandoning witness certainty as a factor in the reliability determination of

C. Washington's legislature and courts have recognized the validity of the scientific data showing the risk of wrongful convictions based on eyewitness identifications.

Recognizing the substantial risk of error created by the failure to use proper eyewitness identification procedures, the Legislature passed – by unanimous votes in both the House and Senate – SB 5714, establishing the Legislative Work Group on Eyewitness Evidence and instructing it to develop guidelines for collecting eyewitness evidence based on scientific research.[8] The Legislature found that "mistaken identification by witnesses to crime . . . h[as] contributed to the conviction of the innocent in Washington state." RCW 10.56.010. The Legislature directed the Washington Association of Sheriffs & Police Chiefs

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eyewitness identifications citing scientific evidence and numerous other state courts that have done so).

[8] Washington State Legislature, https://apps.leg.wa.gov/billsummary/?BillNumber=5714&Year=2019&Initiative=false.

("WASPC") to lead a work group composed of legislators, police officers, prosecutors, defense lawyers, a representative from WashIP, and a member of the scientific community, to establish guidelines that must:

> be based on credible field, academic, or laboratory research on eyewitness memory; be designed to reduce erroneous eyewitness identifications and enhance the reliability and objectivity of eyewitness identifications; and include standards for blind administration of the identification procedure, filler selection, instructions to the witness, and documenting a statement of witness confidence immediately following any positive identification

RCW 10.56.020. This legislation codified standards the WASPC and Washington Association of Prosecuting Attorneys ("WAPA") adopted in 2015, in collaboration with WashIP. *Id.* (specifying that the model guidelines must be "consistent with the model policies adopted in 2015 by the [WASPC] and the [WAPA]"). Consistent with this legislative command, the Work Group released its Final Report in April 2020, providing model guidelines, standard operating procedures, a law enforcement training curriculum, and a pilot project. SB 5714 Legislative

Work Group on Eyewitness Evidence, *Final Report: Guidelines for the Collection of Eyewitness Evidence and Recommendations for Law Enforcement Training* (Apr. 19, 2020), https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=2019%20Eyewitness%20Evidence%20Work%20Group%20Final%20Report_0c6ae144-514e-48bc-ad2d-065893c7b948.pdf ("Work Group Report"). The Work Group Report was based on the same scientific principles and research that *amici* urge the Court to adopt here.

Even before SB 5714, this Court had recognized that "mistaken eyewitness identification is a leading cause of wrongful conviction." *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008) ("The vast majority of [studied] exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect.")). And in *State v. Allen*, this Court cited the scientific research and evidence demonstrating the inherent unreliability of

eyewitness identification put forth by the Respondent and *amici curiae*, noting that "the State [did] not provide contrary evidence or research nor seriously question [that] scientific data[.]" 176 Wn.2d 611, 621, 621 n.4, 294 P.3d 679 (2013).

A number of individual judges and justices have gone the further step of recognizing that current Washington law fails to properly employ this empirical evidence in evaluating the admissibility of proffered eyewitness identification testimony.

For example, Justice Wiggins noted that "[t]here is a large body of persuasive scientific research concluding that eyewitness testimony is frequently unreliable. . . . Research shows jurors are unable to correctly distinguish between reliable and unreliable eyewitness identification testimony, and jurors consistently over-believe such testimony." *Allen*, 176 Wn.2d at 639 (Wiggins, J., dissenting). Addressing the identification issue presented in *Allen*, he advocated for a jury instruction on cross-race identification whenever eyewitness identification was a central issue in the case, there was little evidence corroborating

the identification, and the defendant specifically asked for the instruction. *Id.* at 637, 643.[9]

Judge Fearing's dissent in *State v. Scabbyrobe*, 16 Wn. App. 2d 870, 482 P.3d 301 (2021), is a strong and informed criticism of the current jurisprudence in light of the scientific record. Among other things, he explained that jurors place great weight on eyewitness confidence, even though such confidence is a poor gauge of accuracy when law enforcement procedures

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[9] Cross-race bias is an estimator variable with consequential discriminatory impact. Given the disproportionate rate of incarceration of black Americans, a modified rule that more holistically considers estimator variables could help advance racial justice. *See* Bryan S. Ryan, *Alleviating Own-Race Bias in Cross-Racial Identifications*, 8 Wash. U. Juris. Rev. 115, 119 (2015); *see also* Open letter by the Washington Supreme Court (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf (advocating for an administration of justice and court rules "that bring[ ] greater racial justice to our system as a whole.").

are suggestive – in other words, exactly the circumstances in which *Manson* deems witness confidence to be an indicator of reliability. *Id.* at 897 (Fearing, J., dissenting). The *Manson* Court simply did not have the benefit of the science on this issue.

D. Mistaken identifications obtained using suggestive procedures have led to hundreds of wrongful convictions, including at least eight in Washington.

There have been 375 DNA exonerations in the United States. Of these, 69% have involved eyewitness misidentification. At least eight wrongful convictions resulting in part from eyewitness misidentification have occurred in Washington State,[10] but the number is likely much higher. *See 30 Years Later* at 2 (explaining why "known DNA exoneration

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[10] The National Registry of Exonerations, University of Michigan, Detailed View, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.

cases can only be a fraction of the innocent people who have been convicted based on mistaken eyewitness identification evidence"). The *Manson* framework failed to prevent these wrongful convictions.

The Clark County case of Larry Davis and Alan Northrop[11] serves as a warning against including the same suspect in multiple identification procedures with the same witness. Both men were included in a photographic array that officers showed to a rape victim who tentatively identified Davis, but not Northrop. Later, the victim picked both men out of a subsequent live lineup in which they were the only holdovers from the array. Although the men maintained their innocence, a Washington jury found them guilty of kidnapping, burglary, and

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[11] *See* Larry Davis, The National Registry of Exonerations, University of Michigan, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3159 (last updated 12/31/2019).

rape. They served more than seventeen years before they were exonerated by DNA evidence.

The case of Joseph Reichert[12] in King County demonstrates that misidentification is possible even when there are multiple confirming witnesses. After a robbery, police detectives created a still image from surveillance video and circulated a bulletin with that image. An acquaintance of Reichert's called the police to say that the person in the bulletin looked like Reichert. Police showed the robbery victim and another witness a photographic lineup that contained Reichert's picture. They both identified Reichert as the robber. Reichert was convicted, but his conviction was later vacated when an expert reviewed the surveillance tape and determined that Reichert

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[12] *See* Joseph Reichert, The National Registry of Exonerations, University of Michigan, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5193 (last updated 06/29/2020).

could not be the robber because his height did not match that of the man in the video.

Mr. Reichert's experience is surprisingly common. Even where, as in this case, multiple witnesses testify that a certain person committed a crime, they can be mistaken. A study of the first 190 DNA exonerations found that in 36% of these cases, the exoneree had been "identified by multiple eyewitnesses, some by as many as three or four or five." Brandon L. Garrett, Convicting the Innocent 50 (2011).

II. In this case, a number of estimator and system variables, in combination with the witnesses' certainty statements, cast doubt on the reliability of the eyewitness identifications.

This case well illustrates the importance of considering both system and estimator variables in assessing the reliability of an eyewitness identification. The scientific research makes clear that either or both may contribute to an unreliable identification, and that they need to be considered as a whole. Moreover, the five enumerated *Manson* criteria for assessing

whether the witness was in a position to correctly identify the perpetrator are only some of the relevant estimator variables; three of the five are, as noted, the result of self-reporting by the eyewitness, which scientific research has shown can itself be distorted by suggestive police procedures; and one of the five – witness confidence in the accuracy of the identification – is only well-correlated with accuracy when *non*-suggestive procedures are employed.

A. System variables

1. Mr. Stites was the only person in the photo montages with a tattoo.

In each of the photomontages presented to the witnesses, Mr. Stites' photograph was the only one showing a neck tattoo. CP 44-58, 69-91. Two witnesses, Ms. Amdahl and Mr. Hilden, cited the tattoo as a reason they believed their identifications were accurate. CP 288, 304.

Mistaken eyewitness identifications are more likely to occur when the suspect stands out from other members of a

lineup due to a distinctive physical feature. Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, in 2 The Handbook of Eyewitness Psychology: Memory for People 155-56 (2007). In that case, "uncertain eyewitnesses may be cued to identify the suspect based simply on his distinctiveness rather than a true match between their memory of the culprit and that lineup member." *Id.* at 157. Instead, a proper approach to creating a lineup is to either duplicate or eliminate the unique feature. In this instance, to avoid bias, the other men in the lineup with Mr. Stites should have had their photographs digitally altered either to include a similar neck tattoo, or all photos should have had the same portion of the neck covered. Work Group Report at 11[13] ("If a suspect has a unique feature such as a scar or tattoo, technology may be used to duplicate the suspect feature on the

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[13] Page 11 of the Work Group Report corresponds to page 5 of 7 of the Model Guidelines contained therein.

fillers, or the suspect feature may be covered (not removed), with that same cover replicated on each of the fillers in the same manner and location."); s*ee also* Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 Law & Hum. Behav. 18 (2020) ("*Recommendations*") (describing same best practice).

As Judge Coburn noted in her concurring opinion below, Detective Carter created the montage knowing that Mr. Stites was the only person with a visible neck tattoo in the montage. He could easily have cut off the photos below the chin or created a montage in which all individuals had neck tattoos. Because the montage focused undue attention on Mr. Stites, it was impermissibly suggestive. *State v. Derri*, 17 Wn. App. 2d, 376, 414, 486 P.3d 901 (2021) (Coburn, J., concurring).

2. Multiple identification procedures, including initial photomontages in which the witness did not identify anyone as the perpetrator, as well as inherently suggestive showups that tainted subsequent photomontages, increased the risk of a mistaken identification.

Mr. Stites was the only person who appeared in successive photomontages shown to the witnesses. Both Chase Bank tellers, Mr. Fletcher and Mr. Price, were shown an initial montage containing a picture of Mr. Stites. Significantly, neither witness identified him. CP 6, 41. More than a week later, they each were shown another montage, again with Mr. Stites' picture – but a different, more recent picture of him. CP 26, 77-95; *see also Derri*, 17 Wn. App. 2d at 383-84. Mr. Stites was the only holdover from the first montage. As noted, he was also the only one with a tattoo. Only after this second viewing did Mr. Fletcher identify him as the perpetrator. CP 44-58, 77-91.

After the HomeStreet robbery, the bank manager, who was not present at the time of the robbery, but who recognized Mr. Stites' name as that of a former classmate,

searched Facebook for a photo of him, which he then showed to the tellers, Mr. Hilen and Ms. Amdahl. CP 251, 257-59. This was tantamount to a highly-suggestive showup. Two days later, the detective leading the investigation showed Mr. Hilen a blurry surveillance photo of the Chase Bank robber before showing him a montage of multiple suspects. The suggestive identification procedures left the witnesses predisposed to identifying Mr. Stites in the photomontage. Mr. Hilen, having focused on the shape of the chin in those photographs, as well as on the tattoo that only Mr. Stites and no other person in the photomontage had, identified Mr. Stites. CP 69-75, 292, 302-04. As noted, Ms. Amdahl was also shown the Facebook photo by her manager. The next day, Detective Carver showed her a photomontage. CP 60-67, 286-88. She initially stated that she thought another

person might have been the perpetrator, but when she saw Mr. Stites' tattoo, she said "yes," identifying him. CP 60, 67, 287.[14]

"Only one identification procedure should be conducted with each victim/witness for each suspect." Work Group Report at 9. Research has shown that multiple viewings of a suspect's photo increases the likelihood of mistaken identification. A meta-analysis of studies revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, the percentage increased to 37% if the witness had seen the innocent person in a prior lineup. Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source*

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[14] Though not at issue on appeal, the bias engendered by the Facebook viewing is also a form of private actor interference. Co-witnesses and other "private—that is, non-State—actors can affect the reliability of eyewitness identifications, just as the police can." *Henderson*, 208 N.J. at 268. Third party feedback may cause a person to form false memories of details she never actually observed. *Id.* (citing studies).

Confusion, and Unconscious Transference, 30 Law & Hum. Behav. 287, 299 (2006) ("*Mugshot Exposure Effects*"). Moreover, "[w]itnesses who encountered a[n] innocent person's photo in an initial identification procedure were more likely to misidentify *a different photo of him* in a second procedure even if they did not misidentify him in the first procedure." *30 Years Later* at 8 (emphasis added).

Moreover, Ms. Amdahl's meeting with Mr. Stites two weeks prior to the HomeStreet robbery potentially further tainted her identification of him in the montage, which may have been the product of unconscious transference.[15] Ms. Amdahl told the officers that she recognized the robber as a man she met with

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[15] Unconscious transference happens outside the identification procedure but is a phenomenon similar to "mugshot exposure effect," whereby the witness, rather than confusing an earlier-viewed mugshot as being that of the perpetrator's, confuses a face they saw close in time to the crime, with that of the perpetrator's. *See Mugshot Exposure Effects* at 306.

two weeks earlier when he came into the bank to ask about opening an account. CP 242. She wrote herself a note after this meeting, that the man's name was "John Stites." *Derri*, 17 Wn. App. 2d at 908. Ms. Amdahl did not see a tattoo on the robber because his hood was up, but claimed she did see a tattoo on Mr. Stites' neck when he came into the bank two weeks prior. Because she believed Mr. Stites and the robber to be the same, after viewing the tattoo in the montage, she stated she was 100% certain in her identification. CP 288.

Multiple viewings of the same suspect increase the risk of mistaken selection as a witness may not remember the source of their previous exposure to the suspect's image. They confuse viewing the suspect in the previous lineup – or, also in this case, a previous encounter – with viewing the suspect during the actual crime in question. *Mugshot Exposure Effects* at 288. Studies have found that witnesses who incidentally but innocently encounter a suspect prior to an identification procedure may unconsciously transfer that individual to the role

of the perpetrator in their memory. *See* David F. Ross et al., *Unconscious Transference and Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person*, 79 J. Applied Psychol. 918 (1994).

3. The administration of the procedures was not double-blind.

The detective who spoke with the witnesses and created and showed them the photomontages, knew that Mr. Stites was the suspect. CP 5, 6, 44-58, 218, 229.

As noted by the New Jersey Supreme Court in *Henderson*, double-blind lineup administration – the practice of having someone who does not know the identity of the suspect administer the procedure – is "the single most important characteristic" of an eyewitness identification procedure. 208 N.J. at 248. Researchers agree that this is the "best way of ensuring that any information that administrators have about which lineup member is the suspect will not influence the witnesses' behavior, including any identification decision they

might make or their confidence in that decision." *Recommendations* at 14; *see also* Work Group Report at 11 ("When the administrator does not know the identity of the suspect, any actual or perceived suggestiveness in the procedure is reduced, and the administrator is safeguarded from influencing the victim/witness with verbal or nonverbal cues."). A number of studies in recent years have confirmed that when the administrator knows which lineup member is the suspect, there is a higher likelihood that the witness will identify the suspect known to the administrator of the procedure, even if the administrator's influence is inadvertent or unconscious. *Id.* This is true irrespective of whether the suspect is truly the culprit. *Id.*

B. Estimator variables

1. The witnesses had a short time for viewing.

The robberies were brief, lasting between thirty seconds and three minutes. RP 346, 410, 465. Studies demonstrate that eyewitnesses are more likely to overestimate short durations of time in stressful situations than in low-stress

situations. Elizabeth F. Loftus et al., *Time Went by so Slowly: Overestimation of Event Duration by Males and Females*, 1 Applied Cognitive Psychol. 3 (1987). Mr. Hilen, in an FBI interview two days after the robbery, said that the robber "spent maybe fifteen seconds in front of both [the] teller lines[.]" CP 296. Even this estimate may well have been inflated. Moreover, Mr. Hilen told the jury at Mr. Stites' trial that he thought the entire encounter lasted three minutes, a dramatically different estimate and one likely to have been inflated. RP 346. Further, the time in which the witnesses were actually looking at the robber was even less given that the witnesses' attention was necessarily directed away from the robber while they were looking down to reach into drawers to collect money and then put it on the counter. *See Derri*, 17 Wn. App. 2d at 381-83.

A brief view of an individual is less likely to result in an accurate identification as compared to a prolonged exposure. *See Henderson*, 208 N.J. at 264. Studies have found "that longer exposure to faces results in higher recognition

accuracy than shorter exposure, presumably because witnesses have a longer time to encode the information, thereby forming a stronger initial memory trace." Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial Memory Strength*, 18 Psychol., Crime & L. 473, 475 (2012). While the *Manson* test recognizes that the opportunity to view the criminal is important, it misses the nuance that stress and weapon focus detract from what may otherwise be an adequate time to record an accurate memory. *See* 432 U.S. at 114.

2. The witnesses were under stress and believed the robber was armed.

The bank robberies were stressful events for the witnesses. Mr. Price admitted that he was "very shaken up" and both of the HomeStreet bank tellers were "shocked" and scared. CP 34, 280, 294. Although Mr. Hilen testified that the suspect did not show or threaten to use a weapon, he did state in his

interview after the robbery that he was worried the robber may have had a weapon in his pocket. RP at 345-46; CP 294.

There is "considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687, 699 (2004). The presence of a weapon at the crime scene has been found to have a similar negative effect on witness perception and memory. Nancy M. Steblay, *A Meta–Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413, 415–17 (1992). The Special Master relied on by the *Henderson* court concluded that an eyewitness under high stress or focused on a weapon is less likely to make a reliable identification of the perpetrator. *Henderson*, 208 N.J. at 904-05.

3. The robber's hairline was covered.

During the robberies at both banks, the robber was wearing a hood pulled over his head. CP 236, 241. During the

HomeStreet robbery, he was wearing both a baseball hat and a hood over the hat. CP 241.

"Simple disguises, even those as minor as covering the hair, result in significant impairment of eyewitness identification." Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 281 (2003); *see also* Brian L. Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 332 (2006) ("In data from over 1300 eyewitnesses, the percentage of correct judgments on identification tests was lower among eyewitnesses who viewed perpetrators wearing hats (44%) than among eyewitnesses who viewed perpetrators whose hair and hairlines were visible (57%).").

C. Witness certainty

Manson identifies witness certainty as a factor supposedly tending to show that an identification procedure that was suggestive may nonetheless have produced a reliable

identification. And in this case, both the trial court and the Court of Appeals, in determining that the tellers' identifications were reliable and should be admitted, relied on testimony that the witnesses expressed confidence in the accuracy of their identifications. *See Derri*, 17 Wn. App. 2d at 398 ("Furthermore, the trial court's finding that each of the witnesses showed a high level of certainty in identifying Derri is supported by the evidence that was before the trial judge.").

Yet the science shows that what may have seemed like a common sense proposition to the *Manson* Court – that witness certainty can serve to negate the impact of a suggestive identification procedure – is wrong. The research reflects that in the absence of proper procedures, the witness's self-reported confidence in an identification is not a reliable indicator of accuracy. *See generally* John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. in the Pub. Interest 10 (2017) ("*A New Synthesis*").

The State is correct that a confidence statement may be reliable only if it is made at the time of the identification. *See* Supplemental Brief of Respondent (Dec. 22, 2021) at 30. Critically, however, the State fails to note that a reliable confidence statement also must follow a procedure that included several simple safeguards: (1) only one suspect is included in the lineup, (2) that suspect does not stand out, (3) the witness is cautioned that the offender may not be present, and (4) the procedure is double blind. *A New Synthesis* at 14-17.[16] Because at least two of these safeguards were not present here, the witnesses' confidence statements do not suggest their identifications were reliable and should not have weighed in favor of admissibility. *Id.* at 55 ("A contaminated eyewitness memory test, like a contaminated DNA test, is not reliable.").

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[16] These safeguards are included in the Work Group Report at pp. 10-11.

Not only is the witness's self-reported confidence an inappropriate basis for admitting an identification that resulted from a suggestive procedure; once admitted, the witness's testimony that he or she is confident is likely to unduly influence the jury. The wrongful convictions based on erroneous eyewitness identifications have – consistently – been accompanied by the witness's statement of high confidence in the accuracy of his or her identification. Gary L. Wells et al., *The Confidence of Eyewitnesses in Their Identifications from Lineups*, 11 Current Directions in Psychol. Sci. 151, 153 (2002) (citing a study showing that all wrongful convictions that involved mistaken eyewitness identification involved a witness who was extremely confident in his or her identification). And such eyewitness confidence is the most important single determinant of whether jurors will credit the eyewitness's testimony. *Lawson*, 352 Or. at 778 (citing Gary L. Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. Applied Psychol. 440, 446 (1979); Michael

R. Leippe et al, *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre–Identification Memory Feedback Under Varying Lineup Conditions*, 33 Law & Hum. Behav. 194, 194 (2009)) ("Studies show that eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification.").

The problem of jurors' misplaced reliance on confidence statements is made worse by the fact that the expression of confidence (or, in many cases, certainty) is made in good faith by a witness who sincerely believes what she is saying. In other respects, a witness's credibility may be fairly evaluated by a jury and be vulnerable to attack on cross-examination. But this is not true where the witness believes in the accuracy of her testimony, but is in fact wrong – as is often the case with eyewitnesses. *Henderson*, 208 N.J. at 236 ("[M]ost eyewitnesses think they are telling the truth even when their testimony is inaccurate, and '[b]ecause the eyewitness is

testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness.'") (quoting Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross–Examination*, 36 Stetson L. Rev. 727, 772 (2007)). Because of its effect on jurors, a witness's statement of high confidence following a suggestive procedure should be treated with skepticism and should not weigh in favor of admitting the identification testimony.

III. This Court should replace the *Manson* framework with a totality of the circumstances test that considers all relevant system and estimator variables in light of the extensive scientific research.

The Supreme Court's decision in *Manson* makes clear that defendants have a due process right to not be convicted based on unreliable identification evidence. *See generally Manson*, 432 U.S. 98 (assessing eyewitness evidence in the context of the Fourteenth Amendment); *see also Perry v. New Hampshire*, 565 U.S. 228, 237-39, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012) ("The Constitution, our decisions indicate, protects a

defendant against a conviction based on evidence of questionable reliability[.]"). Washington State courts, too, have recognized that the admissibility of eyewitness identification testimony implicates due process concerns. *See, e.g., State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002) (considering whether an identification photomontage procedure violated defendant's due process rights).

The *Manson* test fails to take into account the modern scientific understanding of memory and the variables that affect the reliability of identifications. *Amici* respectfully submit that this Court should replace the two-part *Manson* test with a true totality of the circumstances analysis. When the defendant moves to suppress an eyewitness identification, the parties may raise and the trial judge should consider *all* relevant system and estimator variables to determine if the evidence should be admitted.

CONCLUSION

For the reasons stated, this Court should replace the two-part *Manson* test with a totality of the circumstances analysis.

This brief is proportionately spaced using 14-point, Times New Roman font and contains approximately 7,074 words (word count by Microsoft Word).

DATED: January 13, 2022

By: _____

Lara Zarowsky
WSBA NO. 40745
WASHINGTON INNOCENCE PROJECT
P.O. Box 85869
Seattle, Washington 98145
(206) 739-9333

Anton Robinson
THE INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, New York 11213
(212) 364-5974

David S. Frankel
Aaron L. Webman
Andrea Maddox
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Counsel for Amici Curiae
The Innocence Project, Inc.
Washington Innocence Project

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