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SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 12CA2540

JAMES JOSEPH GARNER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

▲ COURT USE ONLY ▲

Karen A. Newirth, NY Bar No. 4115903
THE INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013
Telephone: (212) 364-5349
knewirth@innocenceproject.org

Lawrence S. Bader, NY Bar No. 1561257
MORVILLO ABRAMOWITZ GRAND IASON & ANELLO PC
565 Fifth Avenue
New York, NY 10017
Telephone: (212) 880-9440
lbader@maglaw.com

Eric K. Klein, CO Bar No. 42185
Amy D. Trenary, CO Bar No. 46148
JOHNSON & KLEIN, PLLC
1470 Walnut Street, Suite 101
Boulder, Colorado 80302
Telephone: (303) 444-1885
eklein@johnsonklein.com
atrenary@johnsonklein.com

Attorneys for Amicus Curiae The Innocence Project

Case No.: 16SC75

BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules.

The brief complies with C.A.R. 29(d). It contains 4,747 words.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32.

s/Amy D. Trenary

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INTEREST OF AMICUS CURIAE

The Innocence Project, Inc. is a non-profit organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through postconviction DNA testing. The work of the Innocence Project and affiliated organizations has led to the exoneration of 350 individuals. The Innocence Project thus has a compelling interest in ensuring that criminal trials reach accurate determinations of guilt and promote justice.

The Innocence Project is also dedicated to improving the accuracy and reliability of the criminal justice system. To that end, the Innocence Project researches the causes of wrongful convictions and pursues reforms designed to enhance the truth-seeking functions of the criminal justice system. Eyewitness misidentification is the leading contributing cause of wrongful convictions. In-court identifications—particularly by witnesses who were unable to previously identify the defendant—pose an enhanced risk of misidentification and, because of their persuasiveness to jurors, an enhanced risk of wrongful conviction. Thus, the Innocence Project has a compelling interest in ensuring that courts apply a legal framework that adequately protects criminal defendants from this substantial risk of wrongful conviction by guarding against the admission of inherently unreliable

in-court identification procedures, particularly when there is little to no corresponding probative value.

SUMMARY OF ARGUMENT

The Court should limit the availability of first time, in-court stranger identifications in light of four decades of robust, peer-reviewed scientific research, hundreds of wrongful convictions based on mistaken eyewitness identifications, and recent decisions of sister states. These in-court identifications violate due process because they are unnecessarily suggestive and present a grave risk of irreparable mistaken identification. They are also highly prejudicial while lacking probative value and tend to confuse the jury, making them precisely the type of evidence CRE 403 guards against.

Among first-time, in-court stranger identifications, those preceded by non-suggestive out-of-court procedures in which the witness was unable to identify the defendant present a special risk of wrongful conviction due to misidentification because the in-court identification will most likely be based *only* on the suggestive circumstances of the in-court procedure, not the witness's memory. But all in-court identifications enhance the already significant risk of mistaken identification and can easily lead to wrongful conviction.

Amicus curiae the Innocence Project urges the Court to establish a new rule of law limiting the availability of in-court identifications to those cases where (i) identity is a contested issue, and (ii) the State can establish that the witness has identified the defendant in a prior, non-suggestive out-of-court procedure, and (iii) there is good reason for the in-court identification.

ARGUMENT

I. A robust body of social science research demonstrates why eyewitness misidentification is the leading contributing cause of wrongful convictions established by DNA.

Postconviction DNA testing has resulted in 350 exonerations to date. Of these, eyewitness misidentification was present in more than 70 percent, making it the leading contributing cause of DNA-confirmed wrongful convictions. The Innocence Project, *DNA Exonerations in the United States*, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/.

This case bears many hallmarks of misidentification cases. For example, in at least 40 percent[1] of the first 190 DNA exonerations involving misidentification, witnesses did not initially identify the innocent suspect. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 64 (2011)

[1] This figure may be understated, as it represents only those cases for which trial records were available (160 of the first 190 misidentification cases), and for which there was eyewitness testimony regarding non-identifications in initial procedures.

("*Convicting the Innocent*"). But most if not all of the witnesses positively identified the innocent suspect in a subsequent procedure—often with great certainty. Nancy K. Steblay et al., *The Eyewitness Post-Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications,* 20 Psychol. Pub. Pol'y & L. 1, 2 (2014) ("*Feedback Effect*") (in DNA exonerations, "witness confidence grew across time, culminating in convincing trial testimony being leveled against innocent individuals"). Many mistaken witnesses (62 percent) also provided descriptions that diverged or did not match the innocent suspect, including with respect to prominent features. *Id.* at 68-69. Furthermore, many cases involved other factors present here, including witnesses who experienced high levels of stress at the time of observation, observed perpetrators with visible weapons, and had little or no opportunity to observe the perpetrator's face. *Id.*; *see also* Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989–2014: Review of Data and Findings from the First 25 Years,* 79 Alb. L. Rev. 717 (2016). Multiple witnesses misidentified the same innocent person in 36 percent of the first 190 misidentification cases overturned by DNA. *Convicting the Innocent* at 50.

More than four decades of robust, generally accepted and peer-reviewed social science research explains why factors such as these appear frequently in misidentification cases, and why eyewitnesses often make mistakes that lead to

wrongful convictions. Human memory is not like a videotape. Rather, it is a creative, constructive, malleable process subject to factors that can decrease its reliability (many of which are often present during crimes). National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* 59-60 (2014) ("*NAS Report*").[2] Despite this understanding of memory and its limitations, factfinders tend to overvalue eyewitness memory, particularly when it is offered confidently.

Courts evaluating challenged identification evidence today routinely rely on this body of research. The most complete examples of judicial recognition of the scientific research can be found in *State v Lawson*, 291 P.3d 673 (Or. 2012) and *State v Henderson*, 27 A.3d 872 (N.J. 2011). In these cases, state supreme courts conducted exhaustive reviews of the scientific literature, finding it reliable, valid, and generally accepted in the scientific community. *See Lawson*, 291 P.3d at 685-88; *Henderson*, 27 A.3d at 894-917. Their summaries of the research findings are helpful. *See also Young v. State*, 374 P.3d 395 (Alaska 2016).

Recognizing this research and acting on the concern that suggestive identification procedures are a significant cause of erroneous convictions, the

[2] *Available at* https://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.

Colorado General Assembly passed section 16-1-109, C.R.S. (effective July 1, 2015) in an effort to improve eyewitness identification procedures. The legislature declared:

> (a) Over the past forty years, a large body of peer-reviewed scientific research and practice has demonstrated that simple systematic changes in the administration of eyewitness identification procedures by all law enforcement agencies can greatly improve the accuracy of those identifications and strengthen public safety while protecting the innocent;
>
> (b) The integrity of Colorado's criminal justice system benefits from adherence to peer-reviewed research-based practices in the investigation of criminal activity; and
>
> (c) Colorado will benefit from the development and use of written law enforcement policies that are derived from peer-reviewed scientific research and research-based practices, which will ultimately improve the accuracy of eyewitness identification and strengthen the criminal justice system in Colorado.

§ 16-1-109(1).

II. In light of the social science research, the Court should join sister state supreme courts in limiting in-court identifications.

A. Colorado law is out of step with social science research.

This Court has long recognized the risk of wrongful conviction presented by suggestive eyewitness identification procedures. *See*, *e.g.*, *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002) (examining DNA exonerations and scientific research and noting that "mistaken eyewitness identification is responsible for more of these

wrongful convictions than all other causes combined" and "eyewitness identification evidence is among the least reliable forms of evidence and yet is persuasive to juries" and "recognition accuracy was found to be poorer when the perpetrator was holding a weapon") (citations and internal quotations omitted). Since *Bernal*, there have been significant advances in the research and a veritable explosion in the number of DNA exonerations.[3] This new information warrants revisiting the court's jurisprudence on in-court identifications. *See People v. Theus-Roberts*, 2015 COA 32, ¶ 47 (Berger, J., specially concurring), *cert. denied*, No. 15SC385 (Colo. Aug. 22, 2016) (noting, in another context, that the "supreme court's earlier cases do not analyze in depth the scientific, judicial, and scholarly work that casts doubt on the reliability of certain eyewitness identifications because much of this body of work did not exist at the time the court addressed this issue").

This Court has also specifically recognized the inherent suggestiveness of in-court identifications. *People v. Walker*, 666 P.2d 113, 119 (Colo. 1983) ("under some circumstances an in-court identification may constitute an impermissible one-on-one confrontation which is unnecessarily suggestive and conducive to

[3] In 2002, 127 people had been exonerated by DNA. Now, at least 350 have been. *See* https://www.innocenceproject.org/all-cases/#exonerated-by-dna.

irreparable mistaken identification"). The Court has declined to "adopt a rule that one-on-one confrontations are per se violations of due process." *Id.* Amicus curiae does not now urge a per se ban; rather, we encourage the Court to adopt a rule that permits in-court identifications in cases where the witness and the defendant are not well-known to each other only where the state can show that the witness can identify the defendant in a non-suggestive out-of-court procedure and that there is good reason[4] for the in-court identification.

Such a shift in the law is compelled by current research:

> The accepted practice of in-court eyewitness identifications can influence juries in ways that cross-examination, expert testimony, or jury instructions are unable to counter effectively. Moreover, as research suggests . . . , the passage of time since the initial identification may mean that a courtroom identification is a less accurate reflection of an eyewitness' memory. In-court confidence statements may also be less reliable than confidence judgments made at the time of an initial out-of-court identification; as memory fails and/or confidence grows disproportionately. The confidence of an eyewitness may increase by the time of the trial as a result of learning more information about the case, participating in trial preparation, and experiencing the pressures of being placed on the stand.

[4] *See Com. v. Collins*, 21 N.E.3d 528, 536 (Mass. 2014) (good reasons are rare; examples include prior familiarity and circumstances where the witness failed to previously identify the defendant out of fear or refusal to cooperate); *accord State v. Dickson*, 141 A.3d 810, 836 n.30 (Conn. 2016).

NAS Report at 110; *see also id.* at 65 (knowledge about memory "calls into question the validity of in-court identifications and their appropriateness as statements of fact").

The research makes clear that many of the Court's conclusions in *Bernal* and its progeny were based on assumptions about eyewitness testimony that have since been shown to be incorrect.

First, the Court has drawn a distinction between in-court identifications tainted by unnecessarily suggestive out-of-court procedures and other in-court identifications. *See Bernal*, 44 P.3d at 204-07. This distinction is flawed. While unnecessarily suggestive out-of-court procedures can harm memory in unique ways—contemporary research calls into question the validity of the "independent source" test[5]—out-of-court identification procedures that are not "unnecessarily suggestive" can also contaminate memory. *Convicting the Innocent* at 485 ("Each effort to test an eyewitness's memory will reshape that memory.") This is true even where the out-of-court identifications (i) are admissible under *Neil* v. *Biggers,* 409 U.S. 188 (1972), or (ii) resulted in no identification or misidentification of a filler. This is because "false identification rates increase, and accuracy on the

[5] *See* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 485 (2012).

whole decreases, when there are multiple identification procedures." Ryan D. Godfrey & Steven E. Clark, *Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value*, 34 Law & Human Behav. 241, 241, 256 (2010) (attributing this to "misplaced familiarity due to the memory of the suspect" as opposed to the memory of the perpetrator, or to "heightened expectations and suggestiveness").

Critically, scientific research has shown that non-identifications of a suspect by an eyewitness (as in this case) provide important evidence of innocence. *See* Gary L. Wells & R.C. Lindsay, *On Estimating the Diagnosticity of Eyewitness Nonidentifications*, 88 Psychol. Bull. 776 (1980) (not only are non-identifications probative of innocence, but as compared to filler selections, lineup rejections are more predictive of innocence); S.E. Clark et al., *Regularities in Eyewitness Identification,* 32 Law & Human Behav. 187 (2007) (meta-analysis affirming that non-identifications are strongly diagnostic of innocence). Even where a suspect is not innocent, a witness's failure to identify him can offer important information about the quality of the witness's memory: it is poor. Regardless, a subsequent unnecessarily suggestive procedure that creates a risk of misidentification—whether in or out of court—should not be permitted.

Second, the Court has often credited a witness's confidence at trial as an indicator of identification accuracy. *See Bernal*, 44 P.3d at 208. Research findings reject this reliance on certainty at trial as a proxy for accuracy. While eyewitness confidence at the time of initial identification may be correlated with accuracy, that is so only in "cases in which the eyewitness-identification test procedures were pristine."[6] John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. Pub. Int. 10, 19 (2017) ("*New Synthesis*").

Where the identification procedure was not "pristine," the confidence statement was not recorded immediately and prior to any feedback, or there was a prior identification procedure, even high-confidence identifications are error prone. *Id*. at 14, 20, 51-52. Thus, "any later expression of confidence (including the confidence expressed by the eyewitness at trial in front of a jury) should be ignored, because doing otherwise works against the cause of justice." *Id.* at 50. For these reasons, the Colorado legislature now requires that law enforcement polices include "[p]rotocols regarding the documentation of the eyewitness' level

[6] "Pristine" refers to a fair, non-suggestive lineup conducted with a double-blind administrator and pre-lineup instructions. *New Synthesis* at 12-21. Of course, an in-court identification can never be conducted by a double-blind administrator, nor can the other safeguards required by the statute be employed. *See* § 16-1-109.

of confidence as elicited at the time he or she first identifies an alleged perpetrator or other person and memorialized verbatim in writing." § 16-1-109(3)(a)(V).

However, research shows that jurors will likely believe eyewitness testimony offered with confidence. Indeed, confidence is the single most important factor—and in some cases the only factor—affecting juries' decisions. Elizabeth F. Loftus et al., *Eyewitness Testimony: Civil and Criminal* 120, 121 n.4 (5th ed. 2013) ("*Eyewitness Testimony*") (citing Brian L. Cutler et al., *Juror Decision-Making in Eyewitness Identification Cases*, 12 Law & Human Behav. 41 (1988)). To make matters worse, suggestiveness increases certainty more in mistaken eyewitnesses than in accurate ones, *see Feedback Effect* at 11, and can eliminate jurors' ability to distinguish between accurate and mistaken testimony. Laura Smalarz & Gary L. Wells, *Post-Identification Feedback to Eyewitnesses Impairs Evaluators' Abilities to Discriminate Between Accurate and Mistaken Testimony*, 38 Law & Human Behav. 194, 200 (2014); *see also Com. v. Collins,* 21 N.E.3d 528, 534-35 (Mass. 2014). Thus, witnessing an in-court identification hinders jurors' accurate assessment of the evidence rather than enhances it. *State v. Dickson*, 141 A.3d 810, 823 (Conn. 2016) ("[A] first time in-court identification procedure amounts to a form of improper vouching.").

Third, the Court has often concluded that jurors can evaluate in-court identifications and that cross-examination and argument are sufficient to protect due process rights. *See People v. Monroe*, 925 P.2d 767, 772 (Colo. 1996) ("Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." (quoting *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)); *accord People v. Horne*, 619 P.2d 53 (Colo. 1980). This view has also been undermined by research. In addition to improperly relying on witness confidence, jurors are often uninformed or hold mistaken views about eyewitness memory. As Judge Berger has recognized:

> The accuracy, or inaccuracy, of eyewitness identification testimony rests more upon the workings of the human brain than the typical factors that are addressed in the general credibility instruction. Much of this is not intuitive (and some of it actually is counterintuitive). *See*, *e.g.*, *Commonwealth v. Gomes*, 22 N.E.3d 897, 909, 470 Mass. 352 (2015). Most persons, and virtually all lay jurors, have no knowledge or experience in this area. As the Connecticut Supreme Court has stated: "[W]hile science has firmly established the inherent unreliability of human perception and memory, . . . this reality is outside the jury's common knowledge and often contradicts jurors' commonsense understandings." *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705, 723 n.22 (2012) (internal quotation marks omitted).

Theus-Roberts, ¶ 49 (Berger, J., specially concurring).

Cross-examination, argument, and even expert testimony are inadequate to expose misidentifications and to counteract the significant impact live eyewitness testimony has on jurors. *See* Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727 (2007).

Finally, courts have historically underappreciated several unique dangers of in-court identifications: their extreme suggestiveness, the passage of time, and the absence of any "wrong answer." It is obvious that "[t]he presence of the defendant in the court room is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime." *Com. v. Crayton*, 21 N.E.3d 157, 166 (Mass. 2014); *accord Dickson*, 141 A.3d at 823. Faced with the pressures of testifying in court, a witness may identify the defendant out of reliance on the prosecutor's conclusion rather than his or her own memory, or simply to conform to perceived expectations of what a witness should do. *Crayton*, 21 N.E.3d at 237.

In-court identifications generally occur months, if not years, after the original observation. Research has shown that memory erodes over time and never improves. *See Henderson*, 27 A.3d at 907. The passage of time also exposes the

witness to post-event information—including information that seemingly confirms the defendant is the perpetrator—whether through other witnesses, media reports, or, most dangerously, trial preparation. "An extensive body of studies 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." *Gomes*, 22 N.E.3d. at 914; *accord Eyewitness Testimony* at 121.

Finally, the absence of any "fillers" and the fact that the defendant is often the only person in the courtroom matching the perpetrator's description makes it impossible to know whether a witness is making a correct or incorrect identification rather than simply guessing. *Crayton*, 21 N.E.3d at 236 n.13.

In-court identifications simply do not offer a reliable test of a witness's memory. *Com. v. Johnson*, 45 N.E.3d 83, 92 (Mass. 2016) ("a subsequent in-court identification cannot be more reliable than the earlier out-of-court identification, given the inherent suggestiveness of in-court identifications and the passage of time").

B. Sister states considering the research have limited in-court identifications.

Two state supreme courts have recently realigned the law concerning in-court identifications with this robust body of scientific research.[7] In a case bearing striking similarities to this one, the Connecticut Supreme Court held that first-time in-court identifications implicate the Due Process Clause's ban on introducing unduly unreliable identifications where identity is contested. *Dickson* found the in-court identification particularly troubling because the witness had previously failed to identify the defendant but had "no difficulty doing so when the

[7] The majority of federal circuit courts have applied *Manson v. Brathwaite* to in-court identifications, but some courts have held otherwise. *See Dickson*, 141 A.3d at 827 n.14, 829 n.16 (Zarella, J., concurring) (citing cases). The 10th Circuit, joining the 11th Circuit, recently held that in-court identifications are excluded from due process review because they are not "arranged by law enforcement" as required under *Perry v. New Hampshire,* 565 U.S. 228 (2012). *See United States v. Thomas*, 849 F.3d 906 (10th Cir. 2017); *accord United States v. Whatley*, 719 F.3d 1206, 1214-17 (11th Cir. 2013). This reading of *Perry* cannot stand. First, prosecutors are both law enforcement and state actors; when they ask witnesses to make an identification, they are "arranging" a procedure. Second, had the Supreme Court intended to overrule the majority of circuits that apply *Manson* to in-court identifications, it would have explicitly said so as it did with pre-*Perry* cases applying *Manson* to identification procedures not arranged by state actors. *See Perry,* 565 U.S. at 236 n.4. Notably, the court in neither *Thomas* nor *Whatley* had before it the social science research presented here. This is critical because "[t]he best guidance for legal regulation of eyewitness identification evidence comes not, however, from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision makers." *NAS Report* at 44. Both *Thomas* and *Whatley*, like *Perry*, acknowledge the importance of evidentiary screenings for in-court identifications.

defendant was sitting next to defense counsel in court and was one of only two African-American males in the room." 141 A.3d at 823. The court stressed that due process does not allow the State to conduct a highly suggestive identification procedure after "a fair procedure failed to produce the desired result." *Id.* at 830. *Dickson* established, consistent with due process, that in a case where the perpetrator's identity is at issue, in order to seek an in-court identification, the State must show that (i) the witness knew the defendant before witnessing the crime or (ii) the witness "identif[ied] the defendant in a nonsuggestive out-of-court procedure." *Id.* at 836.

The Massachusetts Supreme Judicial Court also recently overhauled its approach to in-court identifications based on state principles of fundamental fairness. In *Crayton* and *Collins*, the court barred in-court identifications where no out-of-court identification occurred or where the eyewitness "made something less than an unequivocal positive identification of the defendant during a nonsuggestive identification procedure." *Collins*, 21 N.E.3d at 536; *see also Crayton*, 21 N.E.3d at 169-70. Massachusetts courts now treat such in-court identifications as in-court

show-ups and admit them in evidence only with "good reason."[8] *Collins*, 21 N.E.3d at 534; *Crayton*, 21 N.E.3d at 169-70.

C. Due process and evidentiary principles require limiting in-court identifications in cases where identity is a contested issue.

This Court has long held that while in-court identifications may violate due process, they do not necessarily do so. *Walker*, 666 P.2d at 119. In so holding, the Court has considered on a case-by-case basis whether in-court identifications following unnecessarily suggestive out-of-court identifications have an "independent source," as determined by an analysis of the *Biggers* reliability factors. *See*, *e.g.*, *Huguley v. People*, 577 P.2d 746, 747 (Colo. 1978). Like the United States Supreme Court, this Court "has not yet addressed the question of whether first time in-court identifications are in the category of unnecessarily suggestive procedures that trigger due process protections." *Dickson*, 141 A.3d at 821 (citing cases).

The time has come to address this question. There is no principled reason for distinguishing between unnecessarily suggestive procedures based on where they occur. "[D]ue process concerns are identical in both cases and any attempt to

[8] The Massachusetts Supreme Judicial Court is now considering in-court identifications preceded by suggestive identification procedures. *Commonwealth v. Dew*, No. SJC-12225. *See* http://www.ma-appellatecourts.org/display_docket.php?dno=SJC-12225.

draw a line based on the time the allegedly suggestive identification technique takes place seems arbitrary." *United States v. Hill*, 967 F.2d 226, 232 (6th Cir. 1992); *see also Collins*, 21 N.E.3d at 536 ("[W]e shall not admit such an identification in evidence simply because it occurred in the court room rather than out of court.").

Due process concerns arise in every case where identity is disputed and the prosecution seeks to introduce an in-court identification. This is so because in-court identifications are inherently suggestive and, as research and DNA exonerations make clear, unnecessarily so. Additionally, they pose a grave risk of irreparable misidentification.

In-court identifications by a witness who has never participated in an out-of-court identification procedure are unnecessary because lawful out-of-court identification procedures are a readily available, more reliable, and more timely test of a witness's memory. Such in-court identifications also present an issue of unfair surprise and serious policy concerns. A defendant has no reason to assume that a witness who has not previously been subjected to an out-of-court identification procedure or who previously failed to identify the defendant would be asked to make an in-court identification. Unless the prosecution provides notice that it will seek an in-court identification, the defendant will not have taken steps

such as obtaining an expert to explain the meaninglessness of the identification to the jury. As the *Dickson* court held, the prosecution—which has control of the witness, as well as knowledge of prior procedures and its own trial strategy—should be required to seek the court's permission for any in-court identification procedure. 141 A.3d at 835. Additionally, without a rule requiring the court's permission prior to attempting a first-time, in-court identification of a stranger, such procedures may be used as low-risk opportunities to obtain positive identifications from witnesses with weak or unreliable memories.

In-court identifications preceded by non-suggestive out-of-court identifications are unnecessary because the witness has already been subject to the best test of his or her memory, resulting in the most reliable evidence. Further, in-court identifications preceded by suggestive out-of-court identifications (whether or not those procedures are deemed "unnecessarily suggestive") are unnecessary because the state could have conducted (and indeed, is required to conduct) lawful, non-suggestive identification procedures. See § 16-1-109.

As explained, in-court identifications pose an enhanced risk of irreparable misidentification. Due process thus requires that the Court now adopt a legal framework that protects defendants from the risk of wrongful conviction based on these unnecessarily suggestive identification procedures. Indeed, the risk of due

process violation presented by in-court identifications is so great that a prophylactic constitutional rule is required: "it is well established that courts have the duty not only to craft remedies for actual constitutional violations, but also to craft prophylactic constitutional rules to prevent the significant risk of a constitutional violation." *Dickson*, 141 A.3d at 824 n.11. Such a rule will be "more effective at preventing such violations, less costly and more in keeping with the legislative will than any other alternative." *Id*.

Amicus curiae now proposes that the Court adopt, as a matter of due process, the following rule: where identity is a contested issue, the State may seek an in-court identification only where it can show that the witness was well-acquainted with the defendant or that the witness made an unequivocal positive identification of the defendant in a non-suggestive out-of-court procedure, and that there is good reason[9] for the in-court identification procedure.

In the alternative, evidentiary principles also require limiting the availability of in-court identifications. CRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

[9] For examples of "good reason," *see supra* n.4.

cumulative evidence." For the reasons described *supra*, in-court identifications are precisely the type of evidence Rule 403 is designed to limit.

As discussed, the probative value of in-court identifications is minimal. On the other hand, the danger of unfair prejudice, confusion of the issues, misleading the jury, and the needless presentation of cumulative evidence are all unacceptably high with in-court identifications. This is because juries overvalue identification evidence, particularly when it is delivered with great confidence. Juries are also ill-equipped to distinguish between accurate and inaccurate identifications when suggestive procedures have been implemented. In-court identifications tend to mask deficiencies in out-of-court procedures, as an identification witnessed by the jury is more powerful than one described in testimony. Finally, in-court identifications—though less reliable than non-suggestive out-of-court procedures—are cumulative and unnecessarily so. Jurors should be presented only with evidence resulting from the best test of the witness's memory: that from a non-suggestive out-of-court procedure conducted close in time to the crime.

CONCLUSION

For the reasons set forth herein, amicus curiae the Innocence Project urges this Court to consider the weight of the relevant social science research, the data derived from known wrongful conviction cases, and the contemporary decisions of

sister states in formulating a new rule of law regarding the admissibility of in-court identifications. In-court identifications should be permitted only where identity is not a contested issue or where the state can establish that the witness previously identified the defendant in a non-suggestive out-of-court procedure, and where there is good reason to admit this highly persuasive and often unreliable evidence. Such a rule is dictated both by due process and by evidentiary concerns, and is particularly necessary in cases such as this where the witnesses previously were unable to identify the defendant in a non-suggestive out-of-court identification procedure.

Respectfully submitted this 30th day of May 2017.

s/ Eric K. Klein
Karen A. Newirth, NY Bar No. 4115903
Lawrence S. Bader, NY Bar No. 1561257
Eric K. Klein, CO Bar No. 42185
Amy D. Trenary CO Bar No. 46148

Attorneys for Amicus Curiae
The Innocence Project

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2017, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT** using the Colorado Courts E-Filing system, which will send notification of such filing to the parties of record.

s/ Amy D. Trenary