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**SCWC-23-0000412
IN THE SUPREME COURT OF THE STATE OF HAWAI‘I**

STATE OF HAWAI‘I,
Respondent/Plaintiff-Appellee,

v.

IKAIKA PUA AREN AHINA,
also known as AREN AHINA,
Petitioner/Defendant-Appellant.

**CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS
(CAAP-23-0000412; CASE NO. 2CPC-22-0000398(3))**

**AMICUS CURIAE BRIEF BY THE HAWAI‘I INNOCENCE PROJECT AND THE
INNOCENCE PROJECT**

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

The Innocence Project and the Hawai‘i Innocence Project are nonprofit organizations dedicated to freeing and exonerating factually innocent people. *Amici* have helped to free or exonerate more than 250 wrongfully convicted people nationwide, who served a total of more than 4,100 years in prison. *Amici* are also dedicated to preventing future wrongful convictions. Through their experience exonerating innocent individuals and examining the root causes of wrongful convictions, *amici* have developed unique insight into the role played by mistaken identifications. Eyewitness misidentification has played a part in more than 60 percent of the wrongful convictions exposed by the work of the Innocence Project, and more than two thirds of all exonerations nationwide where DNA evidence has proven a convicted person to be innocent.¹

This case involves a new and different category of identification evidence arising from the increasingly widespread use of surveillance cameras, body cameras, smartphones, and video doorbells: “non-eyewitness identifications.” In a non-eyewitness identification, a person who was not present at the crime scene and did not observe the offense identifies a suspect from photographs or videos. Kathy Pezdek & Tamar Lerer, *Let’s Go to the Tape: Science-Based Standards for Non-Eyewitness Identifications in a Surveillance World*, 59 Crim. L. Bull. 1 (2023). Such identifications rely on similar mechanisms of memory and perception as traditional eyewitness identifications, yet most jurisdictions have not yet instituted the same protections against their potential fallibility—such as preliminary admissibility hearings and jury instructions. *See id.* at 3–5. Non-percipient witnesses routinely identify “people from surveillance footage in court with little procedural or substantive protections to ensure the accuracy of their identifications.” *Id.* at 1.

Amici have an interest in ensuring that the robust safeguards that this Court has established to protect against mistaken identifications keep pace with the science and the increasingly prevalent category of non-eyewitness identification evidence. *Amici* therefore urge this Court to maintain its leading role in protecting against wrongful convictions by recognizing that non-eyewitness identifications share many of the same scientifically proven issues with reliability as traditional eyewitness identifications and, accordingly, providing guidance to trial courts and jurors about how to assess the risk of unreliability with non-eyewitness identifications.

¹ See Innocence Project, *Explore the Numbers: Innocence Project’s Impact*, (2026) <https://innocenceproject.org/exonerations-data/> [https://perma.cc/DQP3-76ZQ]; Innocence Project, *DNA Exonerations in the United States (1989 to 2020)*, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> [https://perma.cc/YC7N-YHVS].

INTRODUCTION AND SUMMARY OF ARGUMENT

The Hawai‘i Supreme Court has long been a national leader in protecting against eyewitness misidentifications—and ensuing wrongful convictions. In *State v. Cabagbag*, this Court recognized that “it cannot be assumed that juries will necessarily know how to assess the trustworthiness of eyewitness identification evidence.” 127 Haw. 302, 313, 277 P.3d 1027, 1038 (2012). After examining the empirical scientific research, this Court identified thirteen factors that are relevant to assessing the reliability and accuracy of eyewitness identifications and, invoking its supervisory power to correct and prevent errors in the trial courts, created a model jury instruction for eyewitness identifications (now Hawai‘i Pattern Jury Instruction 3.19). *Id.* at 310–11, 277 P.3d at 1035–36.

Continuing its leadership in safeguarding against unreliable eyewitness evidence, this Court held in *State v. Kaneaiakala* that when addressing the “admissibility of a suggestive eyewitness or show-up identification, trial courts must also consider the effect of any suggestiveness on the reliability of the identification in determining whether it should be admitted into evidence.” 145 Haw. 231, 236, 450 P.3d 761, 766 (2019). In addition to incorporating the thirteen-factor framework established under *Cabagbag* when assessing the reliability of eyewitness identification, this Court held that “when an identification has been procured through a suggestive eyewitness or show-up identification procedure or when the eyewitness or show-up identification is central to the case, the jury must also be instructed to consider the impact of . . . any suggestive procedures on the reliability of the eyewitness or show-up identification.” *Id.* at 248, 450 P.3d 761, 778–79. Then, in its most recent decision on eyewitness identifications, *State v. Jercy*, this Court reaffirmed that “misidentifications are one of the leading causes of wrongful convictions,” emphasized how suggestive identification procedures can undermine the reliability of eyewitness identifications, and acknowledged that a general jury instruction cannot negate the prejudicial effects of a misidentification. SCWC-23-0000743, 2026 WL 1745317, at *10 (Haw. June 17, 2026).

This case presents this Court with the opportunity to play a leading role in adopting robust, scientifically-based safeguards against the potential unreliability of a new kind of identification evidence. Surveillance cameras, video doorbells, and smartphones now record an ever-growing percentage of everyday life. In addition to cell phones and police body-worn cameras, there are now an estimated 85 million surveillance cameras in the United States. Pezdek & Lerer, *Let’s Go*

to the Tape, supra, at 11. Consequently, prosecutors and law enforcement are increasingly relying upon such footage in criminal cases—along with lay opinion testimony from non-percipient witnesses to establish that the suspect in a case is the person depicted in the recording.

Courts nationwide must now contend with evidentiary issues regarding the admission of such non-eyewitness identifications at trial. As a result, leading courts across the country have begun to recognize that non-eyewitness identifications pose similar concerns about reliability as traditional eyewitness identifications. *See People v. Mosley*, 239 N.E.3d 928, 935 (N.Y. 2024) (holding that the trial court abused its discretion in admitting a police officer’s testimony identifying the defendant from surveillance video footage); *State v. Gore*, 269 A.3d 1, 4 (Conn. 2022) (affirming conviction but adopting a science-informed framework for when non-eyewitness identifications are admissible as lay opinion testimony). In most jurisdictions, however, non-eyewitness identifications are not yet subject to any of the legal safeguards that protect against unreliable eyewitness identifications. *See Pezdek & Lerer, Let’s Go to the Tape, supra*, at 3–4, 39 n.237. Instead, “[t]he case law governing these identifications has proceeded on a separate track from that of eyewitness identifications, resisting the adoption of scientific knowledge about how memory works, despite the relevance of that knowledge to these non-eyewitness identifications.” *Id.* at 4.

In Hawai‘i, for instance, a person accused of a crime can request a science-based jury instruction when there is eyewitness testimony or a show up identification, but there is no existing pattern jury instruction for non-eyewitness identifications. Accordingly, in the present case, the trial court denied the accused’s request for a jury instruction because “there were no eyewitnesses in this case.” *State v. Ahina*, CAAP-23-0000412, 2025 WL 3654413, at *3 (Haw. Ct. App. Dec. 17, 2025 (SDO)). The Intermediate Court of Appeals then affirmed because the police officer who identified Ahina from surveillance video “was not at the scene of the offense” and thus “was not an eyewitness.” *Id.* The reasoning of both courts rested on a categorical premise: because the identification was not made by a percipient witness, it fell outside the eyewitness framework altogether and therefore warranted none of that framework’s safeguards. The ICA did not reach Ahina’s separate contention that the trial court should have held a hearing under Hawai‘i Rules of Evidence Rule 104 before the identification was placed before the jury; it resolved that point on briefing and preservation grounds under Hawai‘i Rules of Appellate Procedure Rule 28. *Id.* at *2.

The record here illustrates the stakes. The only identification at trial came from a police officer who was present at none of the three charged incidents and who instead viewed surveillance footage of one of them the following day. *Id.* at *2–3. His claimed familiarity with the accused rested on having known him years earlier as a substitute teacher at his high school, together with two brief, casual off-duty encounters after the officer graduated. *Id.* at *2. The distinguishing feature the officer recalled from high school—a lower back tattoo—was not visible in the footage, and the video of the first charged incident contained no clear image of the individual’s face at all. *Id.* at *1. Nothing in Hawai‘i law required the trial court to examine any of this before the jury heard the officer name the accused as the person in the videos, and nothing in Hawai‘i law gave the jury any framework for evaluating that opinion once it was admitted.

Amici urge this Court to fill this gap and provide guidance to courts statewide by recognizing that non-eyewitness identifications can be unreliable in many of the same ways as eyewitness identifications—and extending similar protections to non-eyewitness identifications. *Amici* advance three points below. First, non-eyewitness identifications from photographs or surveillance videos carry many of the same scientifically proven risks of unreliability that have animated this Court’s eyewitness identification jurisprudence (as well as the risk of usurping the jury’s role as the factfinder). Second, because of these risks, the trial court should conduct a preliminary hearing to determine the admissibility of lay opinion testimony identifying the accused from a video or photograph. Third, this Court should exercise its supervisory authority to adopt a model jury instruction for non-eyewitness identifications when such identification is central to the case and the accused requests a jury instruction—much like it did for eyewitness identifications in *Cabagbag*. *Amici* have also included a proposed model jury instruction, adapted from Hawai‘i Pattern Jury Instruction – Criminal (“HAWJIC”) 3.19, in the appendix.

ARGUMENT

I. Non-Eyewitness Identifications Can Pose Substantial Risks of Misidentification.

A. Non-eyewitness identifications involve similar cognitive processes as eyewitness identifications and thus are vulnerable to the same kinds of errors.

The psychological literature studying facial recognition ability and episodic memory, which this Court has already incorporated into its jurisprudence, is also relevant to non-eyewitness identifications. Even though non-eyewitnesses are not basing their identifications on their memory of a crime, the underlying cognitive process for non-eyewitness identifications are similar to that

of eyewitness identifications. In both instances, “[t]he witness is comparing their memory of a face to an image of a face and deciding if these are the same person. In the case of the eyewitness, the ‘face in memory’ is from having actually witnessed a person commit a crime and, sometimes, from some prior exposure to that person in the course of their life. In the case of the non-witness, the face in memory is always from some prior exposure.” Pezdek & Lerer, *Let’s Go to the Tape*, *supra*, at 5. And, just like eyewitness identifications, non-eyewitness identifications can be unreliable. Indeed, empirical research demonstrates that “identifications by non-witnesses, especially unfamiliar non-eyewitnesses, are far from accurate and highly prone to errors.” *Id.* at 19.

Psychologists who study eyewitness perception and memory divide the risk factors for mistaken identifications into two basic categories: “estimator variables” and “system variables.” Nat’l Rsch. Council, *Identifying the Culprit: Assessing Eyewitness Identification* 1, 16 (2014), available at <https://www.nationalacademies.org/projects/PGA-STL-13-02/publication/18891> [<https://perma.cc/XXL5-YQYC>]. Estimator variables are characteristics of the witness, the culprit, or the event that “affect the accuracy of eyewitness identifications,” but “are beyond the control of the criminal justice system.” *Id.* at 17. These include factors such as lighting, distance, and whether the culprit and witness are of the same or different races. *See id.* at 92–99 (surveying research on various estimator variables and how it can affect eyewitness identification). By contrast, system variables are factors under the control of the legal system that relate to the reliability of eyewitness identifications. *Id.* at 16. Examples include whether an identification procedure was double-blind, what instructions (if any) a witness was given before an identification procedure, and what feedback a witness was given after making an identification. *Id.* at 35.

Many of these risk factors do not apply to non-eyewitness identifications. For example, viewing a video of a crime or photograph does not involve the same degree of stress or “weapon focus” as being the victim of or witness to a crime. And even if a crime is over in seconds, a witness viewing a video or photograph can take the time to study the perpetrator’s face. *Cf. Cabagbag*, 127 Haw. at 310–11, 277 P.3d at 1035–36 (discussing how factors such as witness stress, weapon focus, and exposure duration “tend to affect the reliability of an eyewitness’s identification”).

But, as further discussed below, many of the same scientifically validated risk factors apply equally to non-eyewitness identifications. If the lighting is dark, or the video is shot from far away, or the perpetrator is wearing a mask or hat, for example, this will affect a non-eyewitness’s ability

to recognize a person depicted on video just like it would affect an eyewitness's ability to accurately encode the details of a perpetrator's face and later recognize that person in a show up or lineup. Similarly, many of the factors that can result in unreliable identification evidence, from the decay of memory over time and the "cross-race effect" to the effect of suggestive viewing circumstances on identification decisions and the inflation of witness confidence due to post-identification feedback, apply also to non-eyewitness identifications.

B. Many of the factors that affect the reliability of traditional eyewitness identifications also affect the reliability of non-eyewitness identifications.

The scientific literature has organized the reliability risks for non-eyewitness identifications into a two-prong framework: (1) video image quality, followed by (2) the situational and cognitive factors that bear on accuracy when the image clears that threshold. *See* Pezdek & Lerer, *Let's Go to the Tape*, *supra*, at 2. Not coincidentally, the factors discussed below track many of the factors already established by this Court in HAWJIC 3.19 for eyewitness testimony.

1. Image quality

Image quality is "the most important factor" affecting non-eyewitness accuracy and reliability. Pezdek & Lerer, *Let's Go to the Tape*, *supra*, at 22. "Matching a poor-quality video to a suspect would make as much sense as using a smudged fingerprint to determine whether there is a match to a suspect." Kathy Pezdek & Tamar Lerer, *The New Reality: Non-Eyewitness Identifications in a Surveillance World*, 32 *Current Directions in Psych. Sci.* 439, 440 (2023). Indeed, research into facial recognition from videos has found the "accuracy rates in assessing whether a person is familiar or accurately identifying familiar faces is reduced when the image is blurred, the number of pixels is decreased, or the distance of the face image from the camera is increased." Tamar Lerer & Kathy Pezdek, *The Witness Who Was Not There: Challenging the Reliability of Identifications Made from Images*, *The Champion*, at 13 (May 2024); *see also* Karen Lander, Vicki Bruce, & Harry Hill, *Evaluating the Effectiveness of Pixelation and Blurring on Masking the Identity of Familiar Faces*, 15 *Appl. Cognit. Psychol.* 101, 102, 107 (2001).

The distance of a camera from the events captured and lighting conditions can affect the ability of non-eyewitnesses to make a reliable identification. Essentially, the problem is the same as with any eyewitness who views the perpetrator of a crime from a great distance or at night. When there are poor lighting conditions and significant distance between the witness and a suspect, a witness's "visual acuity" and "ability to discern details" is negatively affected. Thomas J. Nyman

et al., *A Stab in the Dark: The Distance Threshold of Target Identification in Low Light*, 6 Cogent Psych. 1, 2 (2019). Scientific research has consistently found that the ability of witnesses to make accurate identifications declines quickly with distance—as the likelihood of mistaken identification increases. Robert F. Lockamy et al., *The Effect of Viewing Distance on Empirical Discriminability and the Confidence-Accuracy Relationship for Eyewitness Identification*, 34 Appl. Cognit. Psychol. 5, 2 (2020). Simply standing a little more than thirty feet away from the culprit results in a “significantly greater risk of mistaken identification.” *Id.* at 10. One explanation for this finding applies equally to identifications from low-resolution video: “the effect of distance on face perception can be construed as the visual system’s inability to perceive and encode progressively coarser grained facial details as the face moves farther away.” Geoffrey R. Loftus & Erin M. Harley, *Why Is it Easier to Identify Someone Close than Far Away?*, 12 Psychonomic Bull. & Rev. 43, 44 (2005). In other words, mistaken identification is more likely when witnesses see a person from far away because the details of that person’s face appear blurry.

Viewing angle can play a role, too. The view from “a downward camera angle is likely to impair subsequent recognition accuracy of a person seen in full frontal view, especially if the target person was initially viewed from above wearing a head covering . . . thereby blocking the target person’s face.” Pezdek & Lerer, *Let’s Go to the Tape*, *supra*, at 26. As well, “[m]any surveillance videos also record the suspect in profile rather than in a full-frontal view, another factor associated with poor identification rates.” Pezdek & Lerer, *The New Reality*, *supra*, at 441.

Moreover, in addition to increasing the likelihood of mistaken identification, blurry video can increase the sway that non-eyewitness identification testimony has over the jury, making such testimony even more likely to usurp the jury’s role as factfinder. Basic research into human perception has found that what we expect to see shapes what we do see, especially when images are blurry or low-resolution and thus the “sensory input is . . . ambiguous.” Floris P. de Lange, Micha Heilbron, & Peter Kok, *How Do Expectations Shape Perception?*, 22 Trends Cognitive Sci. 764, 764 (2018). As one jurist put it: “When videos are of poor quality, non-percipient witness identification ‘surreptitiously tends to bolster the video itself. A grainy, pixelated, or otherwise poor video might be of little help at all to a jury, but adding the lay witness may have the effect of encouraging jurors to see more in the video than they really can.’” *Mosley*, 239 N.E.3d at 939 (Rivera, J., concurring) (quoting George Bach, *Moderating the Use of Lay Opinion Identification Testimony Related to Surveillance Video*, 47 Fla. St. U. L. Rev. 445, 459 (2020)).

A recent case out of the United Kingdom illustrates how blurry video and the tendency of jurors to credit law enforcement testimony can combine to result in wrongful convictions. A 21-year-old, Ademola Adedeji, spent more than two years wrongfully incarcerated after a police officer misidentified him in a “dark, grainy video showing a teenager taunting rivals.” Selam Gebrekidan, *British Man Freed From Prison Over Video Misidentification*, N.Y. Times, Jan. 15, 2025, <https://www.nytimes.com/2025/01/15/world/europe/uk-conspiracy-gang-video-misidentification-trial-overturned.html> [<https://perma.cc/BF99-JKQ2>]. Even though “[t]he more times that prosecutors played the footage in court, the clearer it became that the man in the video was not Mr. Adedeji,” the jury still credited the white officer’s cross-racial identification and voted to convict. *Id.* It was only after a hearing where “another teenager confirmed that he, and not Mr. Adedeji, was featured in the video” that the appeals court vacated the conviction and ordered his release. *Id.*

2. *Situational and cognitive factors*

Familiarity

Like eyewitness identifications, non-eyewitness identifications are a test of memory. Instead of comparing a memory of the crime to a suspect seen in a show-up or lineup, the non-eyewitness is reviewing an image or video and comparing it against a memory of a person from a prior interaction or prior interactions. The non-eyewitness’s ability to do so is necessarily “grounded on the witness’s general familiarity with the defendant’s appearance or the witness’s familiarity with the defendant’s appearance at the time that the incident occurred.” *Gore*, 269 A.3d at 13–14. A witness’s testimony is helpful to the jury only if the witness possesses a degree of familiarity with the accused that the jury lacks—familiarity acquired over time and across a variety of circumstances. *See Mosley*, 239 N.E.3d at 934 n.6 (“Unless a proffered witness is sufficiently familiar with the defendant, then their testimony could have no probative value.”).

The degree of familiarity is crucial because familiarity is a continuum ranging “from strangers to those ‘who have been seen a few times . . . to those who have been seen fairly regularly . . . to those who have been extensively encountered and/or well known.’” Pezdek & Lerer, *Let’s Go to the Tape*, *supra*, at 29–30 (quoting Jonathan P. Vallano et al., *Familiar Eyewitness Identifications: The Current State of Affairs*, 25 Psych. Pub. Pol’y & L. 128, 134 (2019)). Somewhat counterintuitively, research has shown that when a witness has a limited familiarity with the suspect, this passing acquaintance can actually be a risk factor for mistaken identification.

While common sense might suggest that a witness who recognizes a perpetrator as someone they have seen before would be more reliable, “research studies have consistently shown that prior familiarity can adversely affect the reliability of an eyewitness identification.” James E. Coleman, Jr., et al., *Don’t I Know You? The Effect of Prior Acquaintance/Familiarity on Witness Identification*, *The Champion*, 52, 53 (Apr. 2012). Witnesses are more likely to mistakenly identify someone they have seen once or twice before as the culprit than a stranger precisely because that person looks “familiar” to them. Empirical research has shown, for instance, that “an innocent suspect is at great risk of misidentification if seen as a bystander in close temporal proximity with a perpetrator” and that “an innocent bystander is much more likely to be identified than a different innocent suspect never seen before, even when the latter resembles the perpetrator.” Curt A. Carlson, Alex R. Wooten, & Maria A. Carlson, *Was He the Perpetrator or a Bystander? Testing Theories of Unconscious Transference for Eyewitness Identification*, 13 *J. Appl. Res. Mem. Cogn.* 543, 552 (2024). Studies have also shown that when an eyewitness is only casually familiar with someone, the witness’s ability to discern whether they have seen them before is “typical of recognition memory for strangers.” Kathy Pezdek & Stacia Stolzenberg, *Are Individuals’ Familiarity Judgments Diagnostic of Prior Contact?*, 20 *Psych. Crime & L.* 302, 311 (2014).

Notably, even a familial relationship with the suspect does not guarantee accurate non-eyewitness identifications when the image quality is low or the culprit is wearing a disguise. For example, in the case of the recent exoneration of Ronnell Johnson, Mr. Johnson was wrongfully identified by both his estranged father and his aunt as the masked man depicted on surveillance video footage, with his father stating, “I mean, this is clear as day.” Nat’l Reg. of Exonerations, *Ronnell Johnson*, <https://exonerationregistry.org/cases/13324> [<https://perma.cc/MJ28-KRFC>].

Time delay

An additional factor bearing on the reliability of a non-eyewitness identification is the amount of time that has passed since the witness last observed the person identified on video. “The time delay between when the person was ‘recognized’ and when he was last observed has a significant impact on the accuracy of identifications.” Lerer & Pezdek, *The Witness Who Was Not There, supra*, at 14. One reason for this is that memory fades and can be altered with the passage of time. “Laboratory studies have demonstrated that stored memories are more likely to be forgotten with the increasing passage of time and can easily become ‘enhanced’ or distorted by

events that take place during this retention interval.” Nat’l Rsch. Council, *Identifying the Culprit*, *supra*, at 98.

Another reason is that a person’s appearance can change dramatically over time. Research into the effects of changing hairstyles and facial hair, as well as the aging of facial features, has found that when natural appearance change occurs over time, “correct ID rates plummet.” Curt A. Carlson et al., *Natural Appearance Change Dramatically Harms Eyewitness Identification Accuracy and Reduces the Value of Confidence and Response Time as Reflectors of Accuracy*, 40 *Applied Cognitive Psych.* 3, at 18 (2026). Thus, a non-percipient witness whose familiarity with the person identified was formed years earlier and never renewed by more than passing contact—as the record here reflects—is far more likely to make a mistaken identification.

The interval that matters is not the one the courts below emphasized. That the officer viewed the footage “shortly after” the charged incident, *Ahina*, 2025 WL 3654413, at *3, says nothing about the reliability of his identification. For a non-eyewitness, the image is the stimulus, not the memory; what affects accuracy is the time elapsed between the witness’s last contact with the person and the viewing, because it is that memory against which the witness is comparing the image.

Cross-race effect

This Court has already recognized that “cross-race identification raises significant reliability issues.” *Kaneaiakala*, 450 P.3d at 772 n.8. A classic meta-analysis of cross-racial identifications found that eyewitnesses are 1.56 times more likely to falsely identify a suspect when the suspect is of a different race or ethnicity than them. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 *Psych. Pub. Pol’y & L.* 3, 15 (2001). The finding that people are better at identifying individuals of the same race or ethnicity as them has been repeatedly replicated. *See* Jungwon Lee & Steven D. Penrod, *Three-level Meta-Analysis of the Other-Race Bias in Facial Recognition*, 36 *Applied Cognitive Psych.* 5, 18 (2022) (reviewing 159 journal articles from 1969 to 2021).

This same “own-race bias” applies even to face matching tasks involving no prior memory—and to non-eyewitness identifications as well. *See* Pezdek & Lerer, *Let’s Go to the Tape*, *supra*, at 31. For example, in one study Egyptian and Caucasian participants simultaneously viewed a photograph of a target person and a ten-person photographic array, which either did or did not include the target, and asked to select the person in the photographic lineup who matched

the target person in the photograph. Ahmed M. Megreya et al., *The Other-Race Effect Does Not Rely on Memory: Evidence from a Matching Task*, 64 Q. J. Exp. Psych. 1473, 1476 (2011). Even with both images simultaneously displayed, participants were more likely to make a false identification and less likely to make a correct identification when the target was of a different race. *Id.* at 1478. This indicates that not only a non-eyewitness who purports to be matching a previously seen face to a video, but also jurors comparing the accused to a video they view in court are less likely to be accurate when making cross-racial identifications. See Pezdek & Lerer, *Let's Go to the Tape*, *supra*, at 30; see also *Mosley*, 239 N.E.3d at 940 (Rivera, J., concurring).

Priming and suggestiveness

Even in non-eyewitness identifications, priming the witness—*i.e.*, introducing a stimulus that subconsciously influences how a witness construes later information—can bias an identification, diminishing its reliability. Pezdek & Lerer, *Let's Go to the Tape*, *supra*, at 31–32. For example, if non-eyewitnesses are shown a still image or video circulated with a narrative summary of the crime and suspect, or simply asked whether they recognize the person in a video or image, it may unconsciously bias them. Even if a police officer is not provided the name of the suspect, they may assume that they are being asked to identify someone they previously arrested or someone they associate with a particular area. Thus “it is critically important to determine that the identification from the video is based solely on the visual information presented and not other potentially biasing factors.” Pezdek & Lerer, *The New Reality*, *supra*, at 4.

Indeed, “[t]here is a wealth of research showing that human perceptions are shaped by our expectations. As one example, in a grainy photograph, a red circle is likely to be perceived as a ball in a photograph of a playground and is likely to be perceived as a tomato in a photograph of a vegetable garden.” Pezdek & Lerer, *Let's Go to the Tape*, *supra*, at 32. Compounding this issue, “once expectations have been formed, confirmation bias leads people to perceive and interpret new evidence to verify their preexisting beliefs.” Pezdek & Lerer, *The New Reality*, *supra*, at 4. In one illustrative study, participants were shown photographs of an adult and child, half of whom were related and half were not, and given either truthful or deceitful information about their relationship. Paola Bressan & Maria F. Dal Martello, *Talis Pater, Talis Filius: Perceived Resemblance and the Belief in Genetic Relatedness*, 13 Psych. Sci. 213, 213 (2002). Researchers found that by far the most important predictor of whether the two people were judged to be related was not their actual

genetic relationship but instead whether the study participants were told they were parent and child or unrelated. *Id.*

Witness confidence

Empirical research has consistently found that factfinders tend to rely upon the confidence expressed by a witness in their identification decision more than any other factor when assessing whether the identification is correct. *See, e.g.,* Brian L. Cutler, Steven D. Penrod, & Hedy Red Dexter, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 L. & Hum. Behav. 185, 190 (1990). The effect of witness confidence is so powerful that it “may overwhelm the effect of other factors on jury assessments of eyewitness reliability.” Brandon L. Garrett et al., *Factoring the Role of Eyewitness Evidence in the Courtroom*, 17 J. Empirical Legal Stud. 556, 558 (2020). The problem is that, despite being compelling to judges and juries, an eyewitness’s “self-reported confidence at the time of trial is not a reliable predictor of . . . accuracy.” Nat’l Rsch. Council, *Identifying the Culprit*, *supra*, at 108; *see also Cabagbag*, 277 P.3d at 1036 (“Empirical research has also undermined the common sense notion that the confidence of the witness is a valid indicator of the accuracy of the identification.”).

One of the best-established effects in the eyewitness identification literature is “confidence inflation,” meaning that eyewitness confidence changes and tends to go up over time. *See* Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, 44 L. & Hum. Behav. 1, 21–23 (2020). Witnesses who are initially uncertain or who did not even identify the suspect when they first saw the suspect in a show up or lineup often become highly confident in their identification by the time of trial. *Id.* at 22. An archival study of the first 250 DNA exonerations found that in 57 percent of the eyewitness misidentification cases where trial transcripts were available, “the witnesses reported [at trial] that they had *not* been certain at the time of the earlier identifications,” despite confidently identifying the defendant in court. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 49 (2011) (emphasis in original). “Witnesses said that they had been unsure when they first identified the defendant, or they had identified other people, or they had trouble making an identification because they had not seen the culprit’s face.” *Id.*

Such confidence inflation is explained, at least in part, by the “post-identification feedback effect,” which refers to the effect of “information given to eyewitnesses about their identification *after* they have made an identification decision.” Gary L. Wells & Laura Smalarz, *Lives Destroyed*

by *Distorted Reflections of Fluency, Attention, View, and Confidence: A Sin of Bias in Eyewitness Identification* 11 J. of Applied Rsch. in Memory & Cognition 461, 461 (2022) (emphasis in original). Studies have consistently found that when lineup administrators simply tell witnesses “good, you identified the suspect” after they identify the wrong person, they become far more confident. *Id.* And, importantly, this effect is *retrospective*: it affects not just how confident the witnesses are now but also how confident they say they were when they made the initial identification decision. *Id.* A meta-analysis of many studies found that “[c]onfirming feedback significantly inflates eyewitness reports on an array of testimony-relevant measures, including . . . certainty of the identification decision.” Nancy K. Steblay, Gary L. Wells, & Amy Bradfield Douglass, *The Eyewitness Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 Psych. Pub. Pol’y & L. 1, 11 (2014). Researchers have concluded that, due to its distorting effect, post-identification feedback “likely accounts for more wrongful convictions than any other single memory phenomenon.” Wells & Smalarz, *Lives Destroyed*, *supra*, at 461.

All the same psychological factors and pressures apply to non-eyewitness identifications as traditional eyewitness identifications. As witnesses learn more about the other evidence in the case, participate in trial preparation, and receive positive feedback and coaching from the police and prosecution—even inadvertently—they tend to become more and more confident in their identification decisions. Indeed, “[s]imply asking a witness to testify in court can function as a form of confirming feedback, as it confirms that the witness correctly identified the police’s suspect.” Margaret Bull Kovera et al., *Science-Based Recommendations for the Collection of Eyewitness Identification Evidence*, 58 Ct. Rev.: J. Am. Judges Ass’n 130, 137 (2022). And a confident in-court identification by a non-eyewitness from a video or photograph, just like a confident in-court identification by a traditional eyewitness, is likely to have great sway over the jury. *See* Jacqueline Katzman, Elaina Welch, & Margaret Bull Kovera, *In-Court Identifications Affect Juror Decisions Despite Being Unreliable*, 49 L. & Hum. Behav. 376, 383 (2025) (finding that, despite their inherent suggestiveness, jurors find in-court identifications persuasive).

Identification by law enforcement

Finally, when the non-eyewitness is a police officer, as is often the case, the risks of unfounded reliance on a non-eyewitness identification multiply. Identifications by law enforcement raise a particular concern of usurping the role of the jury as factfinder because jurors

may be more likely to credit non-eyewitness identifications made by officers—and to allow such non-eyewitness identifications to shape what they see on ambiguous or low-quality video footage.

Surveys have found “that judges, jurors, and many others believe that law enforcement personnel are more credible than other witnesses when they testify in court . . . and, moreover, that officers are more accurate eyewitnesses than civilians.” Kathy Pezdek & Daniel Reisberg, *Psychological Myths About Evidence in the Legal System: How Should Researchers Respond?*, 11 J. of Applied Rsch. in Memory & Cognition 143, 144 (2022) (citations omitted). But even though jurors may tend to assume police officers are more accurate identifiers than civilians (such as themselves) by dint of their training and experience, the empirical record refutes that assumption. *Id.* at 145. Indeed, the “suggestion of a police officer identification advantage is best regarded as a myth.” Daniel Reisberg & Kathy Pezdek, *Police Officers Have No Advantage Over Civilians When Making Identifications*, 38 Applied Cognitive Psych. 1, 5 (2024). Moreover, though the police are no more accurate than anyone else at facial recognition, some studies have found that their self-reported confidence “in their identifications tended to be inflated and was not actually predictive of recognition accuracy.” Pezdek & Lerer, *The New Reality*, *supra*, at 5.

II. This Court Should Adopt a Science-Based Framework to Determine the Admissibility of Non-Eyewitness Identifications at a Preliminary Hearing.

Because non-eyewitness identifications can be unreliable in many of the same ways as traditional eyewitness identifications, this Court should require trial courts to conduct a preliminary hearing under Hawai‘i Rules of Evidence 104 and 701 before allowing a witness to make a non-eyewitness identification in court. The reliability risks discussed above should be screened by the trial court, outside the presence of the jury, because the bell cannot be unrung.

The Hawai‘i Rules of Evidence commit “[p]reliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence” to the trial court. Haw. Rev. Stat. § 626-1, Rule 104. It also limits lay opinion testimony to opinions that are “(1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.” *Id.*, Rule 701.

The scientific research discussed above is all relevant to the questions of whether the proposed non-eyewitness identification is “rationally based on the perception of the witness” and “helpful to . . . the determination of a fact in issue”—namely, identity. If the image quality is too low or the person on video is masked, then the witness cannot rationally make an identification

based on their perception of the video. Similarly, if the non-percipient witness has only had very limited interactions with the suspect or has not seen them for many years, such that the jury is in just as good a position as the witness to determine if the accused is the person depicted on the video, then the non-eyewitness's lay opinion testimony would not be helpful to the jury. Moreover, in both scenarios, given the risk that non-eyewitnesses will usurp the role of jury as factfinder and influence their perception of ambiguous video evidence, such lay opinion testimony would have little or no probative value but pose a substantial "danger of unfair prejudice, confusion of the issues, or misleading the jury," and thus should be excluded under Rule 403. *See id.*, Rule 403.

Amici therefore propose a three-step test for admissibility, drawn from the scientific literature and caselaw from other jurisdictions dealing with non-eyewitness identifications. At the first step, courts should assess image quality. "This factor takes priority because it is critical to determine that any identification from the video is based solely on the visual information presented in the video and not other potentially biasing factors, and a face that cannot be clearly seen in a video is not likely to be accurately identified." Pezdek & Lerer, *The New Reality*, *supra*, at 5. While image quality will vary from case to case, the crucial question here is "the minimal threshold above which an identification is possible." *Id.* If a photograph or video does not clear this low bar, a witness should not be allowed to make a non-eyewitness identification in front of the jury.

Next, trial courts should consider a proposed non-eyewitness's familiarity with the accused, including the number and type of contacts and the time elapsed since the last interaction. The threshold question is "whether the witness has had sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful If the witness lacks such familiarity, it is the province of the jury to draw [its] own conclusions regarding the identity of the person depicted without the witness's assistance . . . , and that is the end of the inquiry." *Mosley*, 239 N.E.3d at 933 (internal citations and quotation marks omitted; brackets in original); *see also Gore*, 269 A.3d at 18 (requiring that "the proponent of the testimony demonstrate the [non-percipient] witness possesses more than a minimal degree of familiarity with the defendant").

Finally, at the third step, courts should consider the totality of the circumstances. The quality of the image and the non-eyewitness's familiarity with the accused remain factors here: there may be cases where the image clears the minimum threshold required for identification, or the witness has sufficient contacts with the accused, yet these factors still weigh against admission. But the other factors identified in the scientific literature and discussed above should also be

considered here, as they may weigh against admission of the evidence even when the video is clear or a non-percipient eyewitness has had substantial contact with the accused. As the Connecticut Supreme Court aptly summarized, “although familiarity increases the accuracy of identifications, these identifications are not immune from detracting factors such as expectations (the belief that one will come across a familiar face), the presence of a disguise, cross-racial identifications, and an increased distance between the witness and the target individual.” *Gore*, 269 A.3d at 21.

A preliminary hearing is the natural vehicle for the reliability screening that *amici* propose. Once a jury hears a non-eyewitness identification, they cannot unhear it, even if the court later strikes it from evidence or gives a cautionary jury instruction. *See Jerce*, 2026 WL 1745317, at *11 (noting that it is unlikely that a general jury instruction “negated the prejudicial effect” of an unreliable identification being admitted into evidence); *Mosley*, 239 N.E.3d at 934–35 (“[B]efore admitting lay non-eyewitness identification testimony, a court should inquire as to the basis of the witness’s familiarity outside the presence of the jury in a separate hearing or voir dire.”).

Conducting the inquiry outside the presence of the jury also avoids the dilemma that can arise when the purported basis for a non-percipient witness’s familiarity with the accused is itself prejudicial, which can unfairly curtail cross-examination. In cases involving non-eyewitness identifications by law enforcement, “[c]ross-examination that attempts to test the officer’s testimony may be ineffective or, worse, harmful, to the extent that it attempts to explore the officer’s familiarity with a criminal defendant. Consider this question on cross: ‘You claim that you can recognize the defendant in that grainy video?’ with this hypothetical answer: ‘Yes, I have arrested him a dozen times and know him when I see him.’” *Bach, Moderating the Use of Lay Opinion Testimony, supra*, at 447.

That the ICA resolved *Ahina*’s Rule 104 claim on preservation and briefing grounds rather than on the merits, *see Ahina*, 2025 WL 3654413 at *2, is no obstacle to the guidance *amici* urge. This Court exercises supervisory authority over the trial courts to announce prospective, science-based identification rules, and it did precisely that in *Cabagbag*—adopting a model jury instruction and directing its use going forward. 277 P.3d at 1040. Indeed, the thinness of the record on the reliability of this identification is itself a product of the gap that *amici* identify: Because Hawai‘i law supplies no framework for screening non-eyewitness identifications, there was no settled procedure for counsel to invoke and no set of findings for the trial court to make.

Accordingly, *amici* urge this court to require preliminary screenings of non-eyewitness identifications for reliability by trial courts, using a science-based admissibility framework. Such reliability screenings would help prevent future misidentifications and wrongful convictions.²

III. This Court Should Exercise Its Supervisory Authority to Adopt a Science-Based Model Jury Instruction for Non-Eyewitness Identifications.

Finally, when non-eyewitness identification evidence is admitted at trial and identity is a central issue, trial courts should be required to give a jury instruction upon the request of the accused that provides the jury with science-based factors to assess the reliability of such evidence. In *Cabagbag*, this Court exercised its supervisory powers to hold that, “upon request of the defendant when identification is a central issue, the jury will be specifically instructed as to the potential factors which can affect the reliability of eyewitness testimony.” 277 P.3d at 1040. *Cabagbag*’s logic and reasoning apply to this case and compels a specific jury instruction here.

Currently, the Hawai‘i pattern criminal jury instructions do not address any of the reliability problems highlighted above. HAWJIC 3.19 and 3.19A govern, respectively, eyewitness testimony and show-up identifications. Neither, however, pertain to a non-percipient witness who identifies someone from a video recording or photograph. In this case, for instance, the trial court denied the accused’s request for a jury instruction because “there were no eyewitnesses in this case.” *Ahina*, 2025 WL 3654413 at *3. And the Intermediate Court of Appeals affirmed on this issue because the police officer who identified Ahina from a surveillance video of the offense “was not at the scene of the offense” and thus “was not an eyewitness.” *Id.*

But the lower courts’ conclusion that non-eyewitness identifications fall outside the scope of the existing eyewitness jury instruction does not mean that the jury should be left entirely without guidance on what is often the crucial issue in a criminal trial—identity. Instead, it demonstrates that a different, tailored jury instruction is required. The means for closing this gap are readily available as HAWJIC 3.19 already supplies the basic structure for a science-based model jury instruction on how to assess the reliability of identification evidence. Although some of its factors presuppose a percipient witness and thus do not fit the non-eyewitness setting, many of the factors in HAWJIC 3.19 directly translate to the context of non-eyewitness identifications.

² To be clear, *amici* are not proposing any new restrictions on when videos or photographs can be shown to the jury, only on when non-eyewitnesses are allowed to offer lay opinion testimony.

The proposed model jury instruction in the Appendix would close the gap left unaddressed by this Court's eyewitness identification jurisprudence, extend *Cabagbag*'s protections to the types of identifications the surveillance age now produces, and keep Hawai'i at the forefront of guarding against misidentifications and wrongful convictions. *Amici* proposes that this jury instruction be given twice: first in abbreviated form at the time the identification testimony is presented, and then as a full instruction as part of the final charge. *See Mosley*, 239 N.E.3d at 935 ("Additionally, as a best practice, it would be appropriate for the trial court to provide cautionary jury instructions, both at the time of the testimony and during the final charge.").

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to (1) require trial courts to conduct a preliminary admissibility hearing outside the presence of the jury before allowing non-eyewitness identification evidence; (2) exercise its supervisory power to require trial courts to give a specific jury instruction on non-eyewitness identifications when such an identification is central to the case and the accused so requests; and (3) adopt the proposed model jury instruction set out in the Appendix.

Honolulu, Hawai'i, July 27, 2026

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APPENDIX
PROPOSED MODEL JURY INSTRUCTION
HAWJIC 3.19B—NON-EYEWITNESS IDENTIFICATION

After non-eyewitness identification witness testifies:

You have just heard testimony from <insert name of witness> in which [he/she/they] stated [his/her/their] opinion that the person appearing in <describe video or photographic evidence> is the defendant. That witness was not present at the events shown and is not testifying from a memory of having observed them. The witness is offering an opinion about who is shown in the [video/image], and you are not required to accept that opinion. I will instruct you later about the factors you may consider in deciding whether the opinion is accurate. It is your role as jurors to determine whether it is in fact the defendant who is depicted in that [video/image].

At conclusion of evidence:

The burden of proof is on the prosecution with reference to every element of a crime charged, and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the person responsible for the crime charged.

In this case you have seen [a surveillance video] [a still image] [photograph(s)] of the events in question. You have also heard testimony from <insert name of witness> in which [he/she/they] stated [his/her/their] opinion that the person appearing in <describe video or photographic evidence> is the defendant. This witness is not testifying from a memory of having observed the events. Instead, the witness is testifying to an opinion about who is shown in the [video/image], based on the witness's claimed prior familiarity with the defendant.

As I explained earlier, this type of identification testimony is opinion testimony that you as jurors may choose to accept or reject. It ultimately is your responsibility, in your role as jurors, to determine whether the person depicted in the [video] [image] is the defendant.

In evaluating whether this identification testimony is accurate, you may consider the following factors:

The quality of the [video] [image], including its resolution or clarity, lighting, distance, angle, and the extent to which the person's face or other distinguishing features are visible;

The nature, frequency, duration, and recency of the witness's prior contacts with the defendant, and whether those contacts gave the witness a familiarity with the defendant's appearance that you do not have from observing the defendant in court;

The cross-racial or ethnic nature of the identification;

The period of time between the witness's prior contact(s) with the defendant and the identification;

The circumstances under which the witness came to view the [video] [image] and to make the identification, including what, if anything, the witness was told about the [video] [image] or about any suspect before viewing it, and whether anything about those circumstances may have suggested a particular identification;

The extent to which the witness is either certain or uncertain of the identification and whether the witness's assertions concerning certainty or uncertainty are well-founded, including whether the witness learned anything after making the identification that may have affected the witness's level of certainty;

Whether the witness's identification is in fact the product of [his/her/their] own recollection; and

Any other evidence relating to the witness's ability to make an identification.

[Optional—if identification is made by law enforcement] You have heard this identification from a law enforcement officer. You must evaluate that witness's testimony and identification using the same standards and the same care you would apply to any other witness. You should not give the testimony either greater or lesser weight merely because the witness is a police officer.

CERTIFICATE OF PROOF OF SERVICE

The undersigned hereby certifies that on this date, July 27, 2026, one copy of the foregoing documents and this certification of proof of service were duly served upon the following via JEFS addressed to:

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