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No. 104984-6

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHAYNE C. BAKER,

Petitioner.

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

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IDENTITY AND INTEREST OF AMICUS

The Innocence Project is a nonprofit organization that works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. Since its founding in 1992, the Innocence Project's work has led to the exoneration or release of 257 innocent people nationwide, who were wrongfully incarcerated for a total of 4,102 years.¹ In addition to litigating individual cases, it also works to prevent future wrongful convictions by advocating for the innocent and participating as amicus curiae in cases of broader significance.

As this Court has recognized, mistaken eyewitness identifications are “a leading cause of wrongful conviction.” *State v. Derri*, 199 Wn.2d 658, 662 (2022). Of the 455 cases where DNA proved that an innocent

¹ Innocence Project, *Our Impact: By the Numbers*, <https://innocenceproject.org/exonerations-data/> (last visited Sept. 8, 2026).

person had been convicted from 1989 to 2024, 297 (or 65 percent) involved eyewitness misidentifications.² And of the 56 exonerations in Washington since 1989, mistaken eyewitness identifications contributed to nine of the wrongful convictions.³

As a leading advocate for the wrongfully convicted, the Innocence Project has an interest in courts excluding the kind of unreliable evidence that can contribute to convicting innocent people—like the two first-time-in-court identifications here.

² Convicting the Innocent, *DNA Exonerations Database*, <https://convictingtheinnocent.com/> (advanced search by “trial info”) (last visited Sept. 8, 2026).

³ Nat’l Registry of Exonerations, *Explore Exonerations*, <https://exonerationregistry.org/cases> (filter by state and “contributing factors”) (last visited Sept. 8, 2026).

INTRODUCTION

This case involves first-time-in-court identifications in which two eyewitnesses were allowed to identify Petitioner Shayne Baker at trial after not identifying him when they were first shown photo arrays. When reviewing the pretrial photo array, one eyewitness stated unequivocally “No. I don’t see him,” repeatedly commenting “definitely not” and that the perpetrator’s photo was “not here.” The second eyewitness stated that he was “not sure” whether the culprit was depicted in the pretrial photo array and did not identify Mr. Baker.

But rather than heeding the results of these initial identification procedures, when memory was at its freshest and least likely to be contaminated by information learned after the event, the prosecution decided to re-test the eyewitnesses’ memory. The prosecution did so by conducting a highly suggestive in-court identification procedure, in which Shayne Baker was the only person

matching the suspect description at the defense table. And the trial court allowed them to do it.

Such first-time-in-court identifications fly in the face of this Court's insistence in *Derri* that Washington courts are to apply the "relevant, widely accepted modern science on eyewitness identification" when determining whether to exclude an identification from evidence as unduly suggestive and unreliable. *See* 199 Wn.2d at 675. The science is clear: First-time-in-court identifications are both suggestive and unreliable, especially when they follow an out-of-court identification procedure where the eyewitness did not identify the suspect (as happened here). There are two principal reasons why.

First, in-court identifications are inherently suggestive—and first-time-in-court identifications are unduly so. Researchers understand in-court identifications to be "closely analogous" to single-suspect showups in their suggestiveness. Gary L. Wells et al., *Policy and*

Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence, 44 L. & Hum. Behav. 3, 27 (2020) (“2020 White Paper”), available at <https://ap-ls.org/publications/>.⁴ Just like showups, in-court identifications involve situational pressures to identify the suspect, lack critical safeguards for the innocent, and are prone to mistaken identifications. There is a crucial distinction between police showups and those arranged by prosecutors in court, however. There is rarely a good reason why the police and prosecution cannot test an eyewitness’s memory in a fair identification procedure, conducted according to scientific guidelines for best practices, before asking that witness to make an in-court identification. Police showups, on the other hand,

⁴ This scientific review paper was co-authored by six leading researchers and represents the “official position” of the American Psychology-Law Society, a division of the American Psychological Association that includes the leading psychologists studying eyewitness identifications and memory. *Id.* at 4.

typically occur in close temporal and spatial proximity to a crime or involve other exigent circumstances.

Second, only the first identification procedure with the same eyewitness and suspect potentially provides reliable evidence—and even then, only if “pristine procedures” are used. In the words of a scientific review paper by leading researchers studying eyewitness identifications and memory, “there is only one *uncontaminated* opportunity for a given eyewitness to make an identification of a particular suspect. Any subsequent identification test with that same eyewitness and that same suspect is contaminated by the eyewitness’s experience on the initial test.” 2020 White Paper at 25 (emphasis in original). For this reason, scientists have adopted a consensus recommendation to “avoid repeated identification procedures with the same witness and suspect.” *Id.*

This Court should continue to follow the science on eyewitness identifications by joining its sister courts in New Jersey, Connecticut, and Massachusetts in categorically barring first-time-in-court identifications—absent a “good reason” for their use. *See State v. Watson*, 298 A.3d 1049, 1055 (N.J. 2023); *State v. Dickson*, 141 A.3d 810, 835–37 (Conn. 2016); *Commonwealth v. Crayton*, 21 N.E.3d 157, 169 (Mass. 2014).

STATEMENT OF THE CASE

Amicus relies on Mr. Baker's briefs for all relevant facts.

ARGUMENT

I. First-time-in-court identifications should be barred because they are unduly suggestive and unreliable—yet hold great sway over jurors.

A. First-time-in-court identifications are not only highly suggestive, but unnecessarily so.

There are few, if any, identification procedures more suggestive than an in-court identification. “Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant.” *United States v. Archibald*, 734 F.2d 938, 941 (2d Cir. 1984). This is especially true when the accused is the only person at defense table matching the suspect description, as was the case here.⁵ As the Connecticut Supreme Court put it, it is hard “to imagine how there could be a *more* suggestive

⁵ In the words of Mr. Baker’s supplemental brief: “The only tall, thin, man at the defense table was Mr. Baker, as his two attorneys were women. He was the only possible choice given [the witnesses’] previous descriptions.” Defense Supp. Br. 16.

identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime. If this procedure is not suggestive, then *no* procedure is suggestive.” *Dickson*, 141 A.3d at 822–23 (emphasis in original).

Scientists agree that “[a]n in-court identification is inherently suggestive, tantamount to a high-pressure showup.” Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. Applied Res. in Memory & Cognition 284, 287 (2016). Indeed, an “in-court identification is arguably even more suggestive than a typical showup because it [is] clear to the witness that the defendant has already been indicted.” 2020 White Paper at 27.

And recent “field-simulation” research shows that showups are even more suggestive and prone to mistaken

identification than previously understood from laboratory studies. Psychologists studied college students who witnessed a simulated theft and then were asked to take part in a showup or lineup by uniformed officers for what they believed to be a real police investigation, comparing them against a control group who were told before the lineup or showup that they were participating in an experiment. Mitchell L. Eisen et al., *Comparing Witness Performance in the Field Versus the Lab: How Real-World Conditions Affect Eyewitness Decision-Making*, 46 L. & Hum. Behav. 175, 177–180 (2022). The researchers found that witnesses were far more likely to identify the suspect in a showup that they believed to be real than in a showup that they knew to be staged—*regardless of the suspect’s guilt or innocence. Id.* at 185. Moreover, witnesses who thought they were participating in a real police showup were also “overconfident in their [identification] decisions” even when they were mistaken:

they were highly confident in half of their false positive identifications. *Id.* at 185, 187.

The researchers posited that the increased rate of false identifications and inflated witness confidence in simulated showups “was the result of situational pressures associated with witnesses’ participation in what they were led to believe was an actual police investigation—specifically, witnesses feeling increased pressure[] to make an identification.” *Id.* at 186. Similar (if not more intense) situational pressures are associated with an in-court identification, where a witness is asked in open court to identify the person that they know the prosecution believes to have committed the charged crime.

There is a crucial distinction between police showups and first-time-in-court identifications, however: There is always time to conduct a fair lineup or photo array before trial. While showups typically occur close in time to the crime, when memory is fresh, first-time-in-court

identifications often occur years later. Showups may sometimes be warranted “if there is no time to conduct a nonsuggestive identification procedure,” but first-time-in-court identifications have no such justification. *People v. Posey*, 1 N.W.3d 101, 115 n.6 (Mich. 2023).

B. First-time-in-court identifications are inherently unreliable.

In addition to being unnecessarily suggestive and highly conducive to mistaken identification, first-time-in-court identifications cannot benefit from any of the safeguards that are necessary to protect against the risk of misidentification.

An in-court identification involves only a single suspect, presented to the witness under highly suggestive circumstances. This deprives the accused of the benefit of a lineup or photo array, which siphons off guesses and provides a fair test of memory rather than guiding the witness to choose the suspect. In real police lineups with

real eyewitnesses, more than a third of witnesses who pick someone identify a known-innocent “filler” instead of the suspect, indicating that they are guessing or the filler is a better match to their memory than the suspect. 2020 White Paper at 5. But in-court identifications have no such protection against misidentification. And that is not the only protection lacking.

Derri instructs that “identification procedures should be administered in a double-blind fashion, meaning the administrator does not know who the suspect is.” 199 Wn.2d at 677. This is because lineup administrators can “influence the witnesses’ behavior” by “communicat[ing] the identity of the suspect to the witness through intentional or unintentional verbal or nonverbal behaviors.” 2020 White Paper at 14. Researchers have consistently found that “the single-blind administration of lineups increases the likelihood that witnesses will identify the suspect,” regardless of whether the suspect is the true

perpetrator or instead innocent. *Id.* With a first-time-in-court identification, however, everyone in the courtroom knows that the suspect is sitting at the defense table and the prosecution believes them to be guilty.

Derri further recognized that the “[p]olice should give preidentification admonitions informing the witness that the perpetrator may or may not be in the montage and the witness should not feel compelled to make a selection.” 199 Wn.2d at 677. The reason for this is simple: Witnesses tend to presume that the perpetrator is present, and their job is to find them. 2020 White Paper at 20. But an in-court identification can never be preceded by this kind of cautionary instruction. The suspect is always sitting at the defense table, and the witness is always going to feel pressure to select them. A non-identification under these circumstances is virtually unheard of, even when, as here, the witness did not identify the suspect out of court.

Derri also made clear that the police “should avoid giving feedback to witnesses that might inflate confidence levels.” 199 Wn.2d at 677. But in-court identifications implicate the same kind of problems presented by confirmatory police feedback. Studies have consistently found that simply telling witnesses “good, you identified the suspect” dramatically increases witness confidence in their identification decisions, even when they identify an innocent person. 2020 White Paper at 22. Similarly, telling witnesses before viewing a photo array “surely you are going to be able to pick the person out” makes them both three times more likely to identify an innocent suspect and more confident in that false identification. *Id.* at 20–21. That the accused is sitting at the defense table effectively communicates that the prosecution is so sure that the person on trial is guilty that they have indicted and are trying him, making the witness more likely to identify the accused regardless of guilt or innocence—and more

confident in that decision. *See* 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) (“Simply 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.”)

This is especially dangerous in cases like this one “[w]here eyewitnesses before trial were unable to make a positive identification of the defendant.” *Commonwealth v. Collins*, 21 N.E.3d 528, 534 (Mass. 2014). Witnesses “are likely to regard the defendant’s prosecution as confirmation that the defendant is the ‘right’ person and, as a result, may develop an artificially inflated level of confidence.” *Id.*

Because first-time-in-court identifications are suggestive, prone to mistaken identifications, and cannot include the safeguards this Court required in *Derri*, such

identifications are constitutionally unreliable. They are far too likely to result in “irreparable misidentification.” *Derri*, 199 Wn.2d at 685–86 (quoting *Manson v. Brathwaite*, 432 U.S 98, 116 (1977)).

C. Traditional trial tools are inadequate to counterbalance the effect of unreliable first-time-in-court identifications on jurors.

Yet, despite their suggestiveness and unreliability, jurors find in-court identifications highly persuasive. Jacqueline Katzman, Elaina Welch & Margaret Bull Kovera, *In-Court Identifications Affect Juror Decisions Despite Being Unreliable*, 49 L. & Hum. Behav. 376, 383 (2025). Forty-five years of scientific research have confirmed Justice Brennan’s famous remark that “there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original). Indeed, studies of juror decision-making have

consistently found that “[f]ew categories of evidence are as compelling to members of a jury as eyewitness evidence.” Carolyn B. Semmler et al., *Jurors Believe Eyewitnesses, in Conviction of the Innocent: Lessons from Psychological Research* 185, 185 (Brian L. Cutler ed., 2012). For example, in one study, 18 percent of mock jurors voted to convict when they were told there were no eyewitnesses. Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 *Jurimetrics J.* 188, 189 (1975). When a second group of mock jurors read a store clerk’s testimony identifying the accused, 72 percent voted to convict. *Id.* A third group of mock jurors read the same clerk’s testimony, as well as cross-examination that revealed the clerk was legally blind. *Id.* Shockingly, 68 percent of this group still voted to convict. *Id.*

This dismal figure is representative of cross-examination’s efficacy in countering mistaken eyewitness identifications. Although cross-examination “has been

extolled for its capacity to expose untruths,” it is “a tool to expose dishonesty, not mistaken identification.” Jules Epstein, *The Great Engine that Couldn’t: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 765–82 (2007). “Cross-examination will often expose a lie or half-truth, but may be far less effective when witnesses, although mistaken, believe that what they say is true.” *State v. Clopten*, 223 P.3d 1103, 1110 (Utah 2009). Moreover, “although cross-examination may expose the *existence* of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the *import* of these factors.” *State v. Guilbert*, 49 A.3d 705, 725–26 (Conn. 2012) (emphasis in original). This is a crucial gap since a “meta-analysis assessing lay knowledge concluded that 75% of 16 factors known to influence eyewitness identification accuracy are not common sense to jurors.” Angela M. Jones et. al,

Comparing the Effectiveness of Henderson Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence, 13 J. Experimental Criminology 29, 31 (2017).

Jury instructions, too, are insufficient to counterbalance the weight jurors place on unreliable eyewitness identifications. Empirical research reveals that even expanded, science-based identification instructions have “little impact on jurors’ decisions.” *Id.* at 48. Moreover, “[j]ury instructions are not given until the end of a trial, when most jurors have already made their decisions.” Samantha L. Oden, *Limiting First-Time In-Court Eyewitness Identifications: An Analysis of State v. Dickson*, 36 Quinnipiac L. Rev. 327, 353 (2018).

D. First-time-in-court identifications should be barred.

The only way to ensure that unreliable identification evidence does not affect the decisions of jurors—and

result in wrongful convictions—is to exclude it from evidence. Because “modern science on eyewitness identification” shows that first time-court identifications are unduly suggestive and inherently unreliable, yet highly persuasive to juries, Washington should join New Jersey, Connecticut, and Massachusetts in barring first-time-in-court identifications—unless the prosecution provides a good reason for not first conducting a fair out-of-court identification procedure. *See Watson*, 298 A.3d at 1055; *Dickson*, 141 A.3d at 835–37; *Crayton*, 21 N.E.3d at 169.⁶

II. First-time-in-court identifications pose a particular concern when they follow an initial non-identification.

There is another factor that makes the first-time-in-court identifications here particularly unreliable: They

⁶ Although there may be other good reasons for not first conducting a fair out-of-court identification procedure, one such good reason would be if the eyewitness has a close relationship to the accused, such as that of a family member or close friend, so that there is little danger of mistaken identification.

were not the first identification procedure. Instead, both eyewitnesses had previously been shown Shayne Baker's photograph in a six-suspect array but did not identify him.

Decades of scientific research provides at least two reasons why "[t]he first eyewitness identification attempt is the one that counts, whether the witness makes a positive identification or not." Steblay & Dysart, *supra*, at 288. First, memory only declines—or at best remains the same—over time. Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psych. 139, 147–48 (2008). It does not magically improve on the witness stand.

Second, testing a witness's memory can contaminate it. As noted above, "there is only one *uncontaminated* opportunity for a given eyewitness to make an identification of a particular suspect. Any subsequent identification test with that same eyewitness

and that same suspect is contaminated by the eyewitness's experience on the initial test." 2020 White Paper at 25 (2020) (emphasis in original). Seeing a suspect in a showup or lineup can cause witnesses to falsely identify the suspect during a later identification procedure, even if they did not initially identify that suspect, because the suspect *now* looks familiar. *Id.* Cognitive science research has found that identification procedures leave the eyewitness with a "memory trace" of the suspect's face, and an association of that face "with the context of the crime." John T. Wixted et al., *Test a Witness's Memory of a Suspect Only Once*, 22 Psych. Sci. in Pub. Int. 1S, 1S, 5S (2021). Accordingly, "[t]he importance of focusing on the first identification test cannot be emphasized strongly enough." 2020 White Paper at 25.

This is true even when an eyewitness says the culprit is not present or that they are not sure. When a witness does not identify the suspect in an initial

identification procedure, this is evidence of innocence because “witnesses are more likely to reject the lineup (make a non-ID decision) if it is a target-absent lineup than if it is a target-present lineup.” John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psych. Sci. in Pub. Int. 10, 44 (2017). Non-identifications “are not merely ‘failures’ to identify the suspect, but rather carry important information whose value should not be overlooked.” Steven E. Clark et al., *Regularities in Eyewitness Identification*, 32 L. & Hum. Behav. 187, 211 (2008). Furthermore, “lineup rejections carry a different meaning than don’t know responses. . . . In contrast to the witness who responds don’t know, the witness who rejects the lineup may be more clearly stating ‘I *do* know—that the culprit is *not* in the lineup.’” *Id.* (emphasis in original).

In short, initial non-identifications are not non-events. Instead, they provide the best evidence of an

eyewitness's memory: Either the suspect does not match the witness's memory of the perpetrator or the witness's memory is too poor to recognize anyone.

But when a witness identifies someone in court after not recognizing them in a pretrial photo array, as happened here, jurors are likely to focus on this in-court identification rather than the more probative evidence—the initial non-identification. Even when factfinders learn of an initial non-identification or equivocal identification, research has shown that they tend to disregard this evidence so long as some explanation is provided for why the witness can make a positive identification now. *See* 2020 White Paper 2020 at 21; *see also* Kylie N. Key et al., *High Eyewitness Confidence Is Always Compelling: That's a Problem*, 29 Psych., Crime & L. 120, 135 (2023) (finding that “jurors favored high confidence in cases where they should not—when the high confidence report

was only given in the courtroom, or when confidence inflated across time”).

In fact, allowing witnesses to identify the accused in court after a prior non-identification is a proven risk factor for misidentification and wrongful conviction. An archival study of the first 250 DNA exoneration cases 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 an innocent person 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.*

Derri recognized these issues, noting that “[s]uccessive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.” 199 Wn.2d at 682–83 (citations and internal quotation marks omitted). *Derri* continued: “This phenomenon is especially pronounced where, as here, the witness initially makes no identification from a photo array, but then selects someone whose picture was included in the photo array during a later identification procedure.” *Id.* (same). Accordingly, this Court concluded that the police “should never show the same suspect to the same witness over the course of multiple identification procedures.” *Id.* at 677.

The same principle applies when it is the prosecution, rather than the police, that conducts the subsequent identification procedure. The prosecution, like the police, should not be allowed to repeatedly re-test

witness memory until they get the desired result. Therefore, even if it does not categorically bar first-time-in-court identifications, this Court should follow Massachusetts in holding that (absent good reason) the prosecution should not be allowed to ask an eyewitness to make an in-court identification if that witness viewed the accused in a pre-trial identification procedure but did “not ma[k]e an unequivocal positive identification.” *Collins*, 21 N.E.3d at 537.

CONCLUSION

For the foregoing reasons, the Innocence Project respectfully urges this Court to hold that first-time-in-court identifications cannot be presented to a jury absent a good reason, especially when the eyewitness did not identify the suspect in an initial identification procedure.

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of RAP 18.17(c)(6) because, excluding the parts of the document exempted by RAP 18.17, it contains 3,926 words.

Respectfully submitted,

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