NO. 19-75

IN THE

Supreme Court of the United States

JAMES JOSEPH GARNER,

Petitioner,

v.

COLORADO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause imposes any check on an eyewitness's identification of a criminal defendant in the typically suggestive setting of trial where there was no police misconduct but there is nonetheless substantial reason to doubt the witness would identify the defendant in a nonsuggestive setting.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers, Inc. submits the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to FRAP 26.1. The National Association of Criminal Defense Lawyers, Inc. is a not-for-profit corporation headquartered in Washington, DC. It has no parent corporation and no stock.

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct, in both state and federal court. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It is dedicated to advancing the proper, efficient, and just administration of justice. NACDL submits this brief in support of certiorari because the question presented here is of great importance to criminal defendants throughout all fifty states, many of whom are being subjected to unreliable, first-time in-court identifications without any due process check in violation of their federal constitutional rights.[1]

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[1] A*mici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici* and their counsel—contributed money intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief and have been timely notified of the filing of this brief. *See* Sup. Ct. R. 37.6.

INTRODUCTION AND SUMMARY OF ARGUMENT

Imagine you have been charged with a crime. Before your trial, an eyewitness who had an obstructed and fleeting glance at the perpetrator described someone to the police who bears virtually no resemblance to you. Shortly after the crime, the witness failed to identify you as the perpetrator when he was shown a picture of you in a photo array. In fact, he picked someone else.

Two years after the police arrested you, your trial begins. The judge and the court officers seat you at a table next to your lawyer. The eyewitness who failed to identify you before trial takes the stand and starts testifying about the events that he claims to have seen. The prosecutor asks him: "Do you see the person who committed that crime in the courtroom today?" To your surprise, the witness says "Yes." The prosecutor asks: "Are you certain?" Again, the witness says, "Yes." The prosecutor directs the witness to point the perpetrator out for the jury. The witness turns toward your table, raises his hand, and points to you. You see the jurors shake their heads in collective disapproval.

You are certain the witness would not have identified you as the perpetrator if the government had not placed you in the proverbial hot seat—the most suggestive circumstance imaginable for a witness with a deeply flawed recollection of a fleeting, hectic event that occurred years ago. Yet you also know that nothing you or your lawyer say will likely change the jury's mind. The sheer power of an eyewitness identification is too great for ordinary adversarial process to overcome it.

Would you think you had received a fair trial?

No, you wouldn't. And that intuition would be firmly grounded in this Court's cases, which make clear that a defendant's right to due process is implicated when the government orchestrates an unreliable identification procedure. Most recently, the Court held in *Perry v. New Hampshire*, 565 U.S. 228 (2012), that no due process check is required where there isn't any state action. But *Perry* made clear that a due process check *does* apply where there is state action and also strong reason to doubt the reliability of an identification. Both of those circumstances are present in cases like this one, where government agents control and manipulate every step of the identification procedure. This Court should grant certiorari to resolve a clear post-*Perry* split on the question presented and reverse the decision below.

I. As Judge Ellen Huvelle recently recognized, "[c]ircuit courts have split as to whether it is impermissibly suggestive for a witness to make an in-court identification when it is obvious which person is the defendant." *United States v. Morgan*, 248 F. Supp. 3d 208, 212–13 (D.D.C. 2017) (collecting cases). This split on *Perry*'s implications for the question presented here is mature, well-established, and intractable. Courts of appeals and state high courts have recognized the split and taken positions on it. Eleven courts understand *Perry* to eliminate the need for any due process checks on in-court identifications. Four courts, in contrast, view *Perry* as supporting the need for such checks.

Where this question is implicated, it is often outcome determinative. Across the nation, defendants experience different rules of federal constitutional law and different

outcomes depending on the happenstance of which jurisdiction they are prosecuted in. This split creates an intolerable state of affairs and cries out for intervention.

II. Recognizing that in-court identifications involve extensive state action, the question arises whether due process checks are necessary. The answer to that question is undoubtedly yes. Overwhelming and unrebutted empirical evidence—which includes studies published since *Perry* was decided—demonstrate both serious reliability concerns and the inability of ordinary adversarial process to adequately resolve them.

REASONS FOR GRANTING THE WRIT

I. THERE IS A POST-*PERRY* SPLIT ON THE QUESTION PRESENTED.

Following this Court's decision in *Perry*, "[t]he courts are divided whether a reliability analysis is required to admit an in-court identification." *United States v. Shumpert*, 889 F.3d 488, 491 (8th Cir. 2018) (collecting cases). This split has been recognized by federal courts of appeals, state high courts, federal district courts, and expert commentators. The split has only deepened in recent years. And it has grave real-world consequences.

Some courts believe that *Perry* eliminated the need for any due process checks on in-court identifications, no matter how strong the reasons to doubt the reliability of the identification. Other courts believe *Perry* directly or by implication requires due process checks. This split reflects a deep difference of opinion about the meaning of *Perry* for identifications like the one at issue here.

Courts on one side of the split maintain that *Perry* entirely limited due process checks to police-arranged suggestive eye-witness identifications—and that *Perry* thus precludes any check on in-court identifications, even if there is substantial reason to doubt reliability. This reading imposes a limitation on *Perry* that appears nowhere in the opinion (due process requirements apply only to police), while disregarding the decision's clear emphasis on state action (which certainly occurs when prosecutors and court officials manufacture an in-court identification calculated to produce a single result).

In contrast, courts on the other side of the split correctly understand that *Perry*'s central logic demands due process checks for identifications like the one that occurred below. These courts reason that *Perry* was about state action—and state action is at its peak when a prosecutor arranges a first-time in-court identification.

Many judges faced with the question presented here have acknowledged that courts are split on the answer. At the federal level, "circuits have debated whether or not the Court's decision [in *Perry*] overruled circuit-level precedent requiring inquiries into the suggestiveness and reliability of in-court identifications." *United States v. Thomas*, 849 F.3d 906, 910–11 (10th Cir. 2017); *see also United States v. Evans*, 908 F.3d 346, 352 (8th Cir. 2018) (observing that "the law is unsettled on whether an in-court identification can violate due process without a showing of misconduct by the government").

State high courts have similarly remarked upon the disarray that followed *Perry*. As the Supreme Court of Kansas stated, "jurisdictions are split on" the question of "whether a first time, in-court identification following an

out-of-court failure to identify needs to be tested against the reliability factors applicable in the traditional second prong of the out-of-court eyewitness identification analysis." *State v. Thurber*, 420 P.3d 389, 432 (Kan. 2018); *see also Fairley v. Commonwealth*, 527 S.W.3d 792, 799 (Ky. 2017) (noting post-*Perry* split on the question).

Remarking upon this split, scholars agree that courts have "taken different approaches as to how such claims should be analyzed." Aliza B. Kaplan & Janis C. Puracal, *Who Could It Be Now? Challenging the Reliability of First Time in-Court Identifications After State v. Henderson and State v. Lawson*, 105 J. CRIM. L. & CRIMINOLOGY 947, 978 (2015); *see also* Samantha L. Oden, *Limiting First-Time in-Court Eyewitness Identifications: An Analysis of State v. Dickson*, 36 QUINNIPIAC L. REV. 327, 334 (2018); Dakota Kann, *Admissibility of First Time in-Court Eyewitness Identifications: An Argument for Additional Due Process Protections in New York*, 39 CARDOZO L. REV. 1457, 1459–60 (2018).

A. Four courts have correctly held that a due process check applies in cases like this one.

Courts that require due process checks for unreliable, first-time in-court identifications have the better reading of *Perry*, which was fundamentally about the importance of finding state action before applying due process checks to unreliable identifications. There is no sound basis for excluding prosecutors and court officials from that rule. Four courts have properly reached this conclusion.

Consistent with *Perry*, the Fourth Circuit reviews the admissibility of first-time in-court identifications under a

due process rubric. This is confirmed by *United States v. Greene*, 704 F.3d 298 (4th Cir. 2013), which was decided two years after *Perry* and which analyzed the admissibility of an in-court identification under the test established in *Neil v. Biggers*, 409 U.S. 189, 199–200 (1972). *See* 704 F.3d at 309–10. Of course, that test applies only where a due process check is required. Applying it in *Greene*, the Fourth Circuit held that the disputed identification was "unnecessarily suggestive" and unreliable. *Id.* at 307, 310.

The Seventh Circuit similarly applied *Biggers* to an in-court identification in *Lee v. Foster*, 750 F.3d 687 (7th Cir. 2014). *Lee* considered whether a particular in-court identification procedure was unduly suggestive and whether the resulting identification was reliable. *See id.* at 691–92 (citation omitted). The State argued at length in its brief that *Perry* foreclosed any application of the *Biggers* test—but, like the Fourth Circuit, the Seventh Circuit did not treat *Perry* as eliminating the need for due process checks on in-court identifications. Nor did it signal any support for a post-*Perry* distinction between police and prosecutors when it comes to action by state officials that generates suggestive identifications.

Writing separately in *United States v. Correa-Osorio*, Judge Barron emphasized that this view of the law is correct: "I must first explain why [*Perry*] does not shield from *Biggers* review any in-court identification that is untainted by a prior suggestive out-of-court prompt—the seemingly categorical position the Eleventh Circuit takes. *See United States v. Whatley*, 719 F.3d 1206, 1216 (11th Cir. 2013). But the explanation is not hard to give. Simply put, *Perry* did not involve an in-court identification at all. *Perry* thus cannot set the standard

for how we should treat one." 784 F.3d 11, 31 (1st Cir. 2015) (Barron, J., concurring in part and dissenting in part). Elaborating on this straightforward point, Judge Barron reasoned as follows: "*Perry* is instead best read to affirm what the Court had said before about when the *Biggers* test must be applied . . . when the government is responsible for the suggestiveness . . . due process requires an inquiry into the reliability of the identification." *Id.*

In addition to the Fourth and Seventh Circuits, two state high courts have held—since *Perry*—that first-time in-court identifications implicate a defendant's federal due process rights. The leading case comes from the Supreme Court of Connecticut, which properly sees *Perry* as "turn[ing] on the presence of state action." *State v. Dickson*, 141 A.3d 810, 828 (Conn. 2016) (emphasis omitted) (quoting *Perry*, 565 U.S. at 233). The *Dickson* Court concluded that "the arc of logic" requires that "inherently suggestive in-court identifications" pass the same due process scrutiny as "inherently suggestive out-of-court identifications." *Id.* at 827. *Dickson* saw no principled reason "why, if an in-court identification following an unduly suggestive pretrial police procedure implicates the defendant's due process rights because it is the result of state action, the same would not be true when a prosecutor elicits a firsttime in-court identification." *Id.* at 825.

The Supreme Court of Montana reads *Perry* the same way. In *City of Billings v. Nolan*, the Montana high court applied *Biggers* to the admissibility of a first-time in-court identification. *See* 383 P.3d 219, 225 (Mont. 2016). *Nolan* likened the identification to a pretrial "show-up," which is disfavored because of its suggestiveness and

unreliability. *Id.* at 224. Under the particular facts at issue—where Nolan "was the only black man in the courtroom; he was the defendant; he was seated next to defense counsel; he was seated at the defense table; and the suspect of the crime was a black male"—the first-time in-court identification was impermissibly suggestive. *Id.* at 225.

In sum, the Fourth and Seventh Circuits, as well as the high courts of Connecticut and Montana, read this Court's precedents as requiring due process checks for highly suggestive first-time in-court identifications. Many of these decisions also emphasize that such suggestive procedures are unnecessary. This very case proves the point. Colorado had three years between Petitioner's arrest and trial to use a less suggestive procedure. *See People v. Garner*, 439 P.3d 4, 15 (Colo. 2015). The prosecution could have arranged for an out-of-court identification procedure (*e.g.*, a photo array or a line-up), or it could have made the in-court procedure less suggestive by seeking an in-court lineup or arranging for Petitioner to sit in the audience instead of at the defense table. *See Dickson*, 141 A.3d at 830. Instead, after getting an unfavorable result from a photo array, the prosecution waited until trial to employ an "inherently suggestive" identification procedure that was more likely to give them a favorable outcome. *See Morgan*, 248 F. Supp. 3d at 213 n.2. As a result, the State unfairly won a trial that it otherwise would likely have lost.

As *Lee* confirms, due process checks do not always result in exclusion of a suggestive in-court identification. But a due process check in circumstances like those here is the absolute minimum required to protect a criminal defendant's constitutional right to a fair trial.

B. Eleven courts have wrongly held that a due process check does not apply in cases like this one.

Although four courts have reached the question presented and decided it correctly, more courts have gotten it wrong. Three federal courts of appeals and eight state high courts—including the court below—have reasoned that *Perry* precludes a due process check for suggestive and unreliable in-court eyewitness identifications.

These courts have committed three recurring errors. *First*, they mistakenly read *Perry* as restricting due process checks to identifications arranged by the police, rather than by prosecutors. *Second*, and relatedly, they read *Perry* as holding that due process rights can be offended *only* by law enforcement misconduct, rather than by state action more generally. *Finally*, they assert that *Perry* blesses ordinary trial safeguards as always sufficient to protect a defendant's due process rights in connection with suggestive in-court identifications.

1. *Perry* was about more than police.

Numerous state and federal courts have interpreted *Perry* as stating that criminal defendants are entitled to federal due process protection *only* from police-arranged pre-trial identifications. This approach is exemplified by *United States v. Whatley*: "*Perry* makes clear that, for those defendants who are identified under suggestive circumstances not arranged by police," due process checks are unnecessary. 719 F.3d at 1216. On the basis of that interpretation, the Eleventh Circuit held that *Perry*

overruled cases leaving open the possibility that in-court identifications could offend due process. *See id.*

Two state high courts—in Kentucky and Nebraska—agree with this reading of *Perry*. *See Fairley*, 527 S.W.3d at 798 (holding that *Perry* "give[s] strong support for the limitation of *Biggers,* as well as its predecessors and progeny, to out-of-court identifications resulting from suggestive circumstances arranged by the police"); *State v. Stevens*, 860 N.W.2d 717, 728 (Neb. 2015) (declining to apply *Biggers* to in-court identification because of absence of police involvement).

Other state high courts have followed this path, treating *Perry* as insulating all identifications from due process scrutiny unless they are arranged by police. For example, the high courts of Arizona and New Mexico have rejected constitutional challenges to suggestive in-court identifications on the theory that they are not the result of improper law enforcement (*i.e.* police) conduct. *See State v. Ramirez*, 409 P.3d 902, 912 (N.M. 2017) (denying objection to a suggestive in-court identification because it does "nothing to establish that the alleged taint, if there was any, arose as a consequence of improper law enforcement influence"); *State v. Goudeau*, 372 P.3d 945, 980–81 (Ariz. 2016) (holding that due process checks do not apply to in-court identifications that occur "as part of formal court proceedings" which are "not influenced by improper law enforcement activity").

These decisions are all mistaken. *Perry*, like its predecessors, "turn[ed] on the presence of state action." 565 U.S. at 233. *Perry* addressed the admissibility of an out-of-court police-arranged identification and therefore

used the terms "police" and "law enforcement" interchangeably. But nothing about *Perry*'s holding, or its logic, suggests that identifications arranged by prosecutors should be shielded from the due process scrutiny accorded to identifications arranged by police.

2. *Perry* is not limited to identifications that result from official misconduct.

Several courts have refused to apply *Perry* to in-court identifications on the theory that due process concerns arise only when state actors misbehave.

In *United States v. Thomas*, for instance, the Tenth Circuit rejected a challenge to a suggestive in-court identification because the identification was "not the product of improper conduct by law enforcement—be it by police officers or the prosecution." 849 F.3d at 910–11. Likewise, in *Young v. State*, the Supreme Court of Alaska held that a first-time in-court identification "could be unnecessarily suggestive," but *only* where there is improper law enforcement conduct. 374 P.3d 395, 412 (Alaska 2016). And here, the Colorado Supreme Court made a similar mistake when it held that first-time identifications, without more, are never "improper state action" that triggers a due process check. *See Garner v. People*, 436 P.3d 1107, 1119 (2019) (noting "*Perry* made clear that *Biggers* prescreening is not required in the absence of *improper* state action").

These decisions misinterpret *Perry*'s references to "improper state conduct." 565 U.S. at 245. *Perry* used that phrase as a shorthand for its clunkier cousin: "unnecessarily suggestive circumstances arranged by law enforcement." *Id.* at 248. That the two phrases are

synonymous is obvious from the context in which they are used. *Perry* did not involve "any manipulation or intentional orchestration by the police." *Id.* at 240. Nor did it address intentional misconduct on the part of law enforcement in arranging suggestive identifications. Instead, the evil that *Perry* aimed to avoid was the unnecessary use of suggestive identification procedures, which is what it meant by "improper state conduct." Courts that read this phrase as requiring wrongdoing, or bad faith, have misunderstood *Perry*'s logic.

3. Trial safeguards do not adequately address suggestive, state-arranged identifications.

A final set of state and federal courts have concluded that *Perry* obliterates due process protections for in-court identifications because it recognizes the important role played by ordinary trial safeguards. *See, e.g.*, *United States v. Hughes*, 562 F. App'x 393, 398 (6th Cir. 2014) (reasoning that the "due process rights of defendants identified in the courtroom under suggestive circumstances are generally met through the ordinary protections in trial" (citing *Perry*, 565 U.S. at 244–48)).

This approach is most common in state courts. The Mississippi Supreme Court, for example, has held that "[t]he trial itself affords the defendant adequate protection from the general inherent suggestiveness present at any trial." *Galloway v. State*, 122 So. 3d 614, 664 (Miss. 2013). New Mexico, Oregon, Kentucky, and Colorado courts have also anchored relevant decisions in a similarly mistaken reading of *Perry*. *See Ramirez*, 409 P.3d at 913 ("[O]ther constitutional safeguards provide a criminal defendant sufficient protection against any fundamental unfairness resulting from eyewitness

identifications." (citations omitted)); *State v. Hickman*, 330 P.3d 551, 571 (Or. 2014) (en banc) (same); *Fairley*, 527 S.W.3d at 799–800 (same); *Garner*, 436 P.3d at 1119 (same).

These decisions miss *Perry's* point. *Perry* held that without state action, there are no due process concerns to address and thus no basis for requiring a due process check. Its discussion of trial procedures was meant only to demonstrate that even absent such checks, there are *some* safeguards against the dangers posed by unreliable identifications that did not result from state action. But nowhere does *Perry* hold that those safeguards are sufficient to alleviate any need for due process checks in the first place. If so, that would bring *Perry* directly into conflict with the entire line of precedent that precedes it. Those cases *expressly* start from the premise that trial safeguards will sometimes fall short in achieving fairness when state actors have orchestrated eye witness identifications under suggestive circumstances. Applied here, that understanding confirms the need for a due process check, rather than judicial abdication.

* * * * *

A review of state and federal decisions decided since *Perry* confirms the existence of a mature, self-conscious, and outcome-determinative circuit split on the question presented. The majority view within that split, moreover, rests on a clear misreading of *Perry*. This Court should grant certiorari to ensure the uniformity of federal law and protect the due process rights of criminal defendants facing state-orchestrated, suggestive identifications.

II. THE IDENTIFICATIONS HERE AT ISSUE POSE UNIQUE DUE PROCESS RISKS.

There is no room for doubt that first-time in-court identifications are inherently suggestive procedures arranged by state actors. So the question is whether these identifications are dangerous enough to require due process checks. A developing body of scientific and empirical research makes the answer a resounding "yes."

Although researchers have written extensively about the reliability concerns raised by first-time in-court identifications, courts seldom engage with their studies. And the lower courts that have addressed this issue have "not discuss[ed] in detail the additional scientific bases for finding a first time, in-court identification unreliable." Kaplan & Puracal, *supra*, at 978. We will therefore summarize the scientific evidence and explain the unique, irreparable due process harms that stem from first-time in-court identifications.

A. First-time in-court identifications are highly suggestive and error prone.

Not ten years ago, this Court reminded us that "the annals of criminal law are rife with instances of mistaken identification." *Perry*, 565 U.S. at 245 (quoting *United States v. Wade*, 388 U.S. 218, 228 (1967)). The experiences of wrongly convicted criminal defendants bear out this tragic reality. Mistaken eyewitness testimony "contributed to approximately 71% of more than 360 wrongful convictions in the United States" discovered through DNA evidence. *Eyewitness Identification*, INNOCENCE PROJECT.[2] "More than half

[2] https://www.innocenceproject.org/eyewitness-identification-reform/ (last visited July 31, 2019).

[of those] were misidentified in court." Shirley LaVarco & Karen Newirth, *Connecticut Supreme Court Limits In-Court Identification in Light of the Danger of Misidentification*, INNOCENCE PROJECT (Aug. 29, 2016).[3] In other words, as far as we can measure, eyewitness testimony of *all* forms is the single largest source of error in the criminal justice system. And among identification procedures, the type at issue here—first-time in-court identification—is the most unreliable.

There are two major sources of unreliability in eyewitness identifications, both of which apply with more force to first-time in-court identifications than to any other kind of identification procedure. First, as a particular eyewitness procedure becomes more suggestive, with fewer opportunities for the witness to identify an individual other than the defendant, its reliability decreases. Second, because human memory decays with time, a witness's ability to accurately make an identification diminishes over time as well. First-time in-court identifications like the one here are uniquely unreliable because they squarely present both concerns.

Starting with the first issue—suggestiveness—this Court has already recognized that "all in-court identifications" must "raise some element of suggestion." *Perry*, 565 U.S. at 244. That is true for largely the same reasons that police show-ups are seen as impermissibly suggestive. *See, e.g., Wade*, 388 U.S. at 234 ("It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed to be guilty by the police."). It really does not take a scientist to ask the obvious question under such

[3] https://www.innocenceproject.org/ct-supreme-court-limits-court-id/

circumstances: "Who else will the witness point to, other than the defendant?" Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. APPLIED RES. MEMORY & COGNITION 284, 287 (2016). In 2016, the Connecticut Supreme Court put the point plainly when it observed:

> [W]e are hard-pressed to imagine how there could be a *more* suggestive 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.

Dickson, 141 A.3d at 822.

Empirical research proves, and common-sense dictates, that in-court identifications are the most suggestive and least reliable identification procedures. Not only does the witness know exactly whom they are being asked to identify; there is virtually no way for the witness to "guess" incorrectly, even if the witness has no independent recollection of the suspect. Making matters worse, in a courtroom the witness feels the pressure of making the identification for the first time in public, in front of a judge and jury. In fact, psychologists have compared an in-court identification to a "high-pressure show-up." Steblay & Dysart, *supra*, at 287. The data confirm what these intuitions suggest: show-ups result in far less accurate identification rates than do line-ups. *See generally, e.g.*, Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAVIOR 523 (2003) (meta-analysis with over 3,000 participants).

Apart from suggestiveness, the second major source of unreliability in first-time eyewitness identifications is decayed memory. Human memory deteriorates with time, and thus a witness's ability to accurately make an identification decreases over time as well. Unlike line-ups or a typical show-up at the crime scene, which often happen shortly after an incident occurs, first-time in-court identifications necessarily take place months, and often years after the fact (as in Petitioner's case).

Slightly less obvious is the fact that "emotional and traumatic 'flashbulb memories' are also susceptible to . . . automatic distortions." Joyce W. Lacy & Craig E.L. Stark, *The Neuroscience of Memory: Implications for the Courtroom*, 14 NATURE REVS. NEUROSCIENCE 649, 651 (2013). When a memory of a traumatic event is first imprinted, like the face of one's attacker, that memory may be inaccurate from the start, making victims' recollections of assailants' appearances still less reliable.

B. Ordinary trial safeguards cannot remedy the risks inherent to these identifications.

First-time in-court identifications are not only uniquely unreliable; they are uniquely persuasive to juries. As Elizabeth Loftus famously put it: "All the evidence points rather strikingly to the conclusion 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!'" Elizabeth Loftus, EYEWITNESS TESTIMONY 19 (1979); *see also* NAT'L INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 161258, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE

TO ESTABLISH INNOCENCE AFTER TRIAL 24 (1996) (noting that in one survey, "eyewitness testimony was the most compelling evidence" presented at trial).

Research proves that jurors over-believe eyewitness testimony and are not adequately trained in detecting when it is false. The "belief that suggestion can be 'cured'"—whether "through cross examination . . . [or] a jury's presence"—"is misplaced based on what we have learned from the more than 500 wrongful convictions around the country involving mistaken eyewitness identifications and the 30 years of science that has dramatically changed our understanding of human memory." Kaplan & Puracal, *supra*, at 954–55.

Nonetheless, several courts have misread *Perry* as declaring trial procedures a panacea for suggestive identifications. In their view, the safeguards built into our adversary system are *always* sufficient to remedy the risk of eyewitness misidentification, no matter how substantial the reasons to doubt the reliability of a particular identification. *See, e.g.*, *Garner*, 436 P.3d at 1119 ("*Perry* made clear that ordinary trial safeguards are the appropriate checks on identifications made under suggestive circumstances not attributable to improper law enforcement conduct."); *id.* at 1117 (collecting cases where courts have "place[d] their trust in the ordinary safeguards of trial that are at their height when an identification procedure takes place in open court").

This view is wrong as a reading of *Perry* and it is wrong as a description of reality. The assumption that ordinary safeguards suffice to protect defendants from mistaken first-time in-court identifications lacks factual support. Studies show that faulty in-court identifications

are immune to all of the usual trial protections touted by *Perry*—which is why a judicial check is so important.

For example, psychologists have concluded that voir dire is an ineffective remedy for eyewitness error because defense attorneys often lack either the opportunity or the means of assessing jurors' attitudes and beliefs about such testimony. *See* Richard A. Wise et al., *An Examination of the Causes and Solutions to Eyewitness Error*, FRONTIERS PSYCHIATRY, Aug. 13, 2014, at 4. And overwhelming scientific and historical consensus indicates that cross-examination is fundamentally a tool to expose deliberate deception rather than misremembering or false confidence, two hallmarks of eyewitness misidentification. *See* Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 766 (2007) ("A tool designed from its inception to root out *liars* is ill-suited for the task of exposing the risk or reality of *mistaken* identification.").

Moreover, the highly suggestive circumstances of an in-court identification—outlined above—tend to inflate a witness's confidence in the identification, further insulating these identifications from cross-examination. The "confirming feedback in the courtroom" from the prosecutor has the effect of "allowing [the witness] to respond to cross-examination and other scrutiny with greater confidence borne out of the approbation of the figures of authority in the courtroom," a confidence which, although "distorted" or "false," is defined by its "apparent credibility." Kaplan & Puracal, *supra*, at 987. Indeed, a witness has no reason to doubt his recollection, however faint, where he also knows that the person he is

going to identify is the person that the state believes committed the crime beyond a reasonable doubt.

Jury instructions are likewise an ineffective safeguard against mistaken eyewitness identifications. "Studies of the *Telfaire* instructions"—"the most widely used eyewitness jury instructions in the U.S."—"uniformly show that they do not sensitize jurors to eyewitness testimony." *See* Wise et al., *supra*, at 4.

More fundamentally, studies have shown that "differences in lawyer performance have no impact on juror decisions"—and that lawyers are often "incapable of arguing coherently why eyewitness testimony is erroneous." Jens Omdal, *Believing Without Seeing: The Problem of Eyewitness Misidentification*, 20 LOY. J. PUB. INT. L. 29, 44–45 (2018) (citing Thomas Dillickrath, *Expert Testimony on Eyewitness Identification: Admissibility and Alternatives*, 55 U. MIAMI L. REV. 1059, 1096 (2001)).

The psychological and persuasive power of inaccurate in-court eyewitness identifications cannot be remedied by "good lawyering" or any other mechanism that exists in our adversarial system. Nor should we expect that it would be. We know that a well-choreographed first-time in-court identification carries nuclear-grade strength with juries. Where the prosecution creates and deploys this weapon, and there are strong reasons to doubt its accuracy, we cannot expect that ordinary trial safeguards will meaningfully protect a defendant's right to due process. Just as the Court has required a judicial check for sketchy identifications orchestrated by one set of state actors (the police), so should the Court require a similar judicial check for doubtful, government-arranged identifications that occur in courtrooms nationwide.

CONCLUSION

For the foregoing reasons, NACDL respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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