No. _____

In The
Supreme Court Of The United States

STATE OF CONNECTICUT,
Petitioner,

v.

QUAVON TORRES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF THE
STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI WITH ATTACHED APPENDIX

KEVIN T. KANE
Chief State's Attorney

LAURIE N. FELDMAN*
Special Deputy Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau
300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5807
Fax (860) 258-5828
Email: Laurie.Feldman@ct.gov

COUNSEL OF RECORD

QUESTION PRESENTED

This Court has held that, "when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime," the trial judge must prescreen that identification for reliability. *Perry v. New Hampshire*, 565 U.S. 232 (2012). This Court's prescreening decisions have given rise to a nationwide division over whether prescreening is likewise required for "first time in-court identifications," *i.e.*, in-court identifications by eyewitnesses who had not previously identified the defendant outside of the trial. The question presented is:

Does the Due Process Clause require judicial prescreening of first time in-court identifications in criminal trials, and, if it does, what is the proper test for determining their admissibility?

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INTRODUCTION

Applying a federal due process rule recently announced by the Connecticut Supreme Court, the Appellate Court of Connecticut reversed a murder conviction on the ground that an eyewitness who had failed to identify the defendant from a police photo array later identified him at trial. This decision deepens a pervasive conflict over whether the Due Process Clause requires that trial courts prescreen such first time in-court identifications to ensure they are reliable.

Few criminal procedures are more common or longstanding than calling an eyewitness at trial and asking that person whether he or she can identify the perpetrator. Under oath, in front of the jury, the witness "retrieve[s a] mnemonic representation" of the culprit and, if it matches the defendant, "positively identifie[s]" the defendant in front of the jury. *United States v. Crews*, 445 U.S. 463, 472 (1980). Until recent times, these encounters by and large occurred for the first and only time at trial. *United States v. Wade*, 388 U.S. 218, 224 (1967). For centuries, juries have been trusted to determine the weight of these identifications.

With the advent of police-conducted identification procedures and concerns about their potential for contaminating identifications and misleading juries, this Court concluded that due process prescreening

is necessary for identifications that are the product of police procedures and for any ensuing in-court identification by the same witness. In a series of cases culminating in *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), this Court set forth "the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement." *Perry v. New Hampshire*, 565 U.S. at 238. Rejecting a rule of per se exclusion, this Court adopted a two-part test (the "*Biggers* test"). The *Biggers* test asks, case-by-case, (1) whether the identification procedure was "unnecessarily" suggestive and, if it was, (2) whether the identification and any subsequent in-court identification are nonetheless reliable. *Brathwaite*, 432 U.S. at 107; *Biggers*, 409 U.S. at 198-200.

This Court has never addressed a related question that has divided lower federal and state courts: whether due process prescreening is likewise required for identifications at trial from eyewitnesses who have *not* made a prior out-of-court identification. Some courts have held that due process requires prescreening because of the inherent suggestiveness of the courtroom, state action by prosecutors eliciting the evidence, and the lack of a prior identification by the witness in a non-suggestive procedure. Other courts have reached the opposite conclusion, that the due process concerns about police-conducted procedures are inapplicable because in-court identifications occur within the judicial process and its safeguards.

In August 2016, in what it claimed was a necessary extension of this Court's precedents, the Connecticut Supreme Court held that "first time in-court identifications are inherently suggestive and implicate a defendant's due process rights no less than unnecessarily suggestive out-of-court identifications." *State v. Dickson*, 141 A.3d 810, 822 (Conn. 2016). It determined that this traditional practice has become an antiquated and "unfair procedure" that it could not constitutionally condone. *Id.* at 822-25 & n.11, 830, 832-33. Accordingly, the court adopted a concededly "prophylactic" rule prospectively barring Connecticut trial courts from admitting any and all first time in-court identifications unless the identity of the perpetrator or the ability of the eyewitness to identify the defendant is uncontested. *Id.* at 825 n.11, 835-37. For cases like this one pending on appeal, in which the first time in-court identification occurred prior to the release of *Dickson*, the court mandated due process evaluation under the *Biggers* test. *Id.* at 838-40 & nn.35 & 36.[1]

In this case, pursuant to the *Dickson* ruling, the Appellate Court of Connecticut reversed a murder conviction solely on the ground that an eyewitness made a first time in-court identification of the killer.

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[1] The State of Connecticut sought this Court's review of *Dickson*'s new constitutional rule, but did so as the prevailing party because the *Dickson* court deemed the violation in *Dickson* itself to be harmless and thus affirmed the judgment of conviction. *Dickson*, 141 A.3d at 840-44. This Court denied the state's petition for certiorari. *Connecticut v. Dickson*, 137 S. Ct. 2263 (2017).

The Appellate Court purported to apply the *Biggers* test, but its analysis was predetermined by *Dickson*'s rejection of the legitimacy of first time in-court identifications. Relying on *Dickson*'s views that a courtroom identification is the most suggestive procedure imaginable and that a witness's inability to make an identification in a non-suggestive pretrial procedure demonstrates his or her unreliability, the Appellate Court held that due process was violated. Pet. App. A10-A20.

This case presents an ideal occasion for this Court to resolve the division among the lower courts as to whether to extend due process constraints on the admissibility of evidence from police identification procedures to first time in-court identifications and, if so, by what test. This Court should grant review and hold that first time in-court identifications do not require prescreening or that, even if they do, courts should employ a form of prescreening that—in contrast to Connecticut's—does not treat such identifications as per se impermissible.

OPINION AND ORDERS BELOW

The opinion of the Appellate Court of Connecticut is reported as *State v. Torres*, 175 Conn. App. 138, 167 A.3d 365 (2017), and is in the appendix, Pet. App. A1-A20, *infra*. On November 8, 2017, the Supreme Court of Connecticut denied the state's petition for certification. *State v. Torres*, 172 A.3d 204 (Conn. 2017), Pet. App. A21-A22, *infra*. On November 28, 2017, the Appellate Court of

Connecticut granted the state's motion for a stay of execution of the judgment pending a decision by this Court. Pet. App. A23-A24, *infra*.

JURISDICTION

The Appellate Court of Connecticut entered judgment on August 1, 2017, reversing the judgment of convictions and remanding the case for a new trial. On November 8, 2017, the Supreme Court of Connecticut denied the state's timely petition for certification. Pet. App. A21-A22, *infra*. The jurisdiction of this Court to review the judgment of the Appellate Court of Connecticut is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, amendment XIV, section 1, provides:

> No State shall … deprive any person of … life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Torres's criminal trial

The State of Connecticut charged respondent Quavon Torres with murder and carrying a pistol without a permit. The evidence showed that the victim, Donald Bradley, drove three men—Torres, Marcus Lloyd, and Freddie Pickette—to a Burger King drive-thru in New Haven, where one of them

fatally shot him. Each man sat in a distinct seat in the car and wore a different colored shirt. The sole question at trial was the identity of the shooter. The state presented an eyewitness, Theresa Jones, who had been unable to identify Torres on the night of the crimes from a police photo array, but said she could identify the culprit if she saw him in person. Jones identified Torres in the courtroom.

The evidence can be summarized as follows.

On July 23, 2012, the day of the murder, Torres, Lloyd, and Pickette phoned the victim from Tasia Milton's house, where they had been socializing, and asked him to drive them to another location. The victim first parked in a CVS parking lot across from Milton's house. While he went inside the store, the other three men seated themselves in his car. Torres, in a blue shirt, sat in the rear driver's-side seat; Lloyd, in a red shirt, sat in the rear passenger seat; and Pickette, in a black shirt with a white emblem, sat in the front passenger seat. Pet. App. A2, State's Exhibits 100-103, 115, 142-55.

When the victim returned to his car, he drove to a nearby Burger King drive-thru. There, for the first time, he noticed that Torres was in the car and repeatedly ordered him to get out, without effect. Threatening to remove Torres, the victim exited the car, walked to the rear passenger-side door, and reached inside to retrieve a baseball bat. As he did so, Torres emerged from his rear driver's-side door, approached the victim, and shot him. The victim died from multiple bullet wounds. Pet. App. A2-A3.

Pickette ran to a McDonald's, but Torres and Lloyd ran back to Milton's house, where a SWAT team gathered. After Torres and Lloyd emerged, the police searched the house and discovered the murder weapon in Milton's bedroom. Pet. App. A3-A4, A18.

That night, Lloyd and Pickette identified Torres from police photo arrays as the gunman. State's Exhibits 96-97, 115, 124-25. Lloyd told police that, after the shootings, in Milton's bedroom, Torres gave a revolver to his sister, who was present with them. Transcripts ("Tr.") 8/14/14 at 76-84; 8/18/14 at 56. Milton too testified that, after hearing gunshots, she saw Torres and Lloyd run upstairs to her bedroom where Torres handed a gun to his sister and told her, "[J]ust do something with it." Pet. App. A6.

A witness to the murder, Lachelle Hall, saw a car at the drive-thru with four people in it, including her nephew Pickette in the front seat. Hall saw the driver walk to the rear of the car, the rear driver's-side passenger get out and walk around the car, and "next thing you know" there were gunshots. She testified that the other passengers were still in the car, and no one else was in the immediate vicinity. The shooter had his back to Hall, so she could not see his face or gun, but she was sure that he was the man who had emerged from the rear driver's side seat. Pet. App. A4-A5, Tr. 8/15/14 at 59-89.

Theresa Jones, who made the in-court identification at issue, testified that, as she was standing across the street and considering taking her children to Burger King, she witnessed a young

man at the drive-thru shoot several times toward the rear passenger side of a car. Jones saw that this gunman wore a blue shirt. Jones got a good look at his face. The gunman ran off, and two other people got out of the car and ran off: Pickette, whom Jones knew, and a man in a red shirt. In a police interview that night, Jones described the shooter as a young, brown-skinned adult, 5'7" or 5'8", with a thin build, wearing a "Canadian blue" shirt. At trial, Jones acknowledged on direct examination that on the night of the murder she had been unable to make an identification from a police photo array. She believed at the time, and when she testified at trial, that she could identify the shooter if she saw him in person, but she found it difficult to identify a person based on a picture, and did not recognize Torres "on the paper." Pet. App. A4; Tr. 8/18/14 at 14-44. Without objection, Jones identified Torres in the courtroom. Tr. 8/18/14 at 29. Defense counsel cross-examined her about her failure to choose Torres from a photo array and the fact that in the courtroom Torres was sitting at the defense table. *Id*. at 30.

In summation, defense counsel stressed that Jones could not identify Torres from a photograph on the night of the crime, "[b]ut in court two years later, she comes in, she sits down, and goes hey, the young black man sitting at the defense table, that's the shooter, now I recognize him." Tr. 8/21/14 at 17-18. The state argued in rebuttal that Jones described the shooter for police and told them from the start that if she saw him in person she could identify him, but, due to the impracticability of assembling live

lineups, the police employed a photo array, a harder format for making an identification. *Id*. at 40-42.

The jury convicted Torres as charged of murder and carrying a pistol without a permit. Pet. App. A1.

B. The *Dickson* Decision

The Connecticut Supreme Court issued its decision in *Dickson* while Torres's case was pending on direct appeal. In *Dickson*, the Connecticut Supreme Court joined those courts that hold that first time in-court identifications implicate federal due process. *Dickson*, 141 A.3d at 825-26. It went further than those courts, however, by holding that *Biggers*'s case-by-case assessment is appropriate only for suggestive procedures that have already occurred, outside the trial court's control. *Id*. at 836 n.29. The court maintained that it follows inevitably from *Biggers* that federal due process bars trial courts from admitting first time in-court identifications, except where they are inconsequential because identity or the witness's ability to identify the defendant is undisputed. *Id*. at 822-25 & n.11, 834-37.

The court asserted in support that (1) there is no more suggestive identification procedure than a prosecutor "placing a witness on the stand in open court, confronting the witness with the person who[m] the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime"; (2) jurors are likely to give undue weight to first time in-court identifications; (3) mistaken identifications are a

significant cause of wrongful convictions; (4) prosecutors' conduct at trial is state action that implicates due process; and (5) the deterrence rationale for suppression of eyewitness identifications tainted by extrajudicial police procedures applies equally to prosecutors' in-court behavior. 141 A.3d at 822-24. For cases pending on direct review, in which the first time in-court identification already had occurred prior to its ruling, the *Dickson* court prescribed use of the *Biggers* test. *Id*. at 839-40 & n.35.

C. The Connecticut Appellate Court's reversal of Torres's convictions

Because Jones's first time in-court identification occurred prior to *Dickson*, the Appellate Court purported to assess its admissibility under the *Biggers* test. Its treatment of each prong of that test, however, incorporated *Dickson*'s view that first time in-court identifications are inherently unfair. Specifically, based on *Dickson*'s holding that every in-court identification is highly and unnecessarily suggestive, it found the unnecessarily-suggestive prong to be met per se, without assessing the degree of courtroom suggestiveness or its effect on this witness. Pet. App. A12-A13. On the reliability prong, citing *Dickson*'s view that the failure to make an identification in a non-suggestive procedure demonstrates a witness's unreliability, the Appellate Court summarily held that Jones's identification lacked sufficient evidence of an independent origin. It based that conclusion solely on her inability to make an identification from the photo array shortly after the crime and her "vague" description to police

consisting of the shooter's "clothing, approximate age, height, and build, and race." Pet. App. A14-A15. The Appellate Court held that admission of the identification was not harmless beyond a reasonable doubt and, consequently, reversed the convictions. Pet. App. A15-A20.

D. Denial of certification by the Connecticut Supreme Court

The state petitioned the Connecticut Supreme Court for certification to review. In so doing, the state asked for reconsideration of the *Dickson* rule and review of the Appellate Court's application of the *Biggers* test. The Connecticut Supreme Court denied the state's petition. Pet. App. A21-A22.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an excellent vehicle through which to resolve a pervasive and persistent split among the lower federal and state courts on whether the Due Process Clause requires prescreening of first time in-court identifications. At least three federal courts of appeal and eight state high courts hold that prescreening is not required because such identifications do not implicate the concerns that arise from *ex parte* police procedures; rather, ordinary trial safeguards provide all the process that is due. At least eight other federal courts of appeal and three state high courts—including the Connecticut Supreme Court—hold just the opposite, concluding that the inherent suggestiveness of in-court identifications necessitates prescreening for reliability.

The issue is of substantial legal and practical importance. With the burden of proving identity beyond a reasonable doubt in every criminal trial, prosecutors routinely elicit in-court identifications from eyewitnesses to the crime. And many witnesses who make such identifications have not—for a variety of reasons—previously identified the defendant. Trial judges, prosecutors, and defense counsel need to know when these often-critical witnesses may testify. This Court should grant certiorari and hold that prescreening is not required before witnesses may make first time in-court identifications. Absent this Court's review, reliable and probative evidence will continue to be excluded in courts around the nation, judicial resources will be wasted on unnecessary pretrial hearings and appellate review, the division of responsibility between judges and juries will continue to be upset, and convictions will needlessly be overturned.

The Connecticut Supreme Court's *Dickson* decision, as applied here, warrants review for an additional reason. Whereas other courts that require prescreening apply *Biggers*'s two prongs and sometimes permit first time in-court identifications as sufficiently reliable, the Connecticut Supreme Court has effectively banned such identifications in the name of "prescreening." That rule is irreconcilable with this Court's emphatic rejection of per se rules of exclusion even for out-of-court identifications tainted by police.

The *Dickson* ban on first time in-court identifications in Connecticut criminal trials is likely

to preclude the emergence of a vehicle other than this case for bringing the rule before this Court. There can be no new first time in-court identifications under *Dickson*, the state cannot appeal the suppression of an in-court identification,[2] and, to the state's knowledge, there are no other cases in the appellate pipeline in which admission of a first time in-court identification will not likely be found harmless, making the state the prevailing party, as in *Dickson*. Only if this Court grants certiorari here and overturns the exclusionary rule can the state avoid the ongoing impairment of its ability to enforce its criminal laws.

I. THIS COURT'S GUIDANCE IS NEEDED TO RESOLVE AN ACTIVE AND GROWING CONFLICT AMONG THE FEDERAL COURTS OF APPEALS AND STATE HIGH COURTS

1. The conflict among the courts on the question presented is an outgrowth of a series of decisions addressing out-of-court identifications influenced by police conduct. As a general rule, the "Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy

[2] Connecticut law does not permit the state during a prosecution to obtain interlocutory review of trial court rulings suppressing evidence. *State v. Southard*, 467 A.2d 920, 921-23 (Conn. 1983).

of credit." *Perry*, 565 U.S. at 237. An exception to this general rule applies, however, when "the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law." *Foster v. California*, 394 U.S. 440, 442-43 n.2 (1969).

To date, the only type of identifications this Court has placed within that exception are those that are (1) arranged by law enforcement officers, *Perry*, 565 U.S. at 232, and (2) occur outside of court, *Wade*, 388 U.S. at 235. Such identifications pose a danger that trial safeguards will be inadequate because the procedures may "crystallize the witnesses' identification of the defendant," thus tainting a subsequent in-court identification. *Id.* at 240. And because they occur outside the courtroom, "the defense can seldom reconstruct [their] manner and mode . . . for judge or jury at trial." *Id.* at 230; *see Perry*, 565 U.S. at 242-43.

Even as to police-conducted identification procedures, the due process protection this Court devised is a carefully limited one, requiring suppression only if the procedure was unnecessarily suggestive and the witness lacked an independent basis for identifying the perpetrator. *Biggers*, 409 U.S. at 198-200. Thus, witnesses who have made an out-of-court identification under unnecessarily suggestive circumstances arranged by law enforcement may make an in-court identification, consistent with due process, provided the trial court determines that there are adequate indicia of reliability for the evidence to reach the jury. *Perry*,

565 U.S. at 238; *Brathwaite*, 432 U.S. at 106 n.9; s*ee Wade*, 388 U.S. at 240-42.

Most recently, in *Perry* the Court held that due process does not require prescreening of an out-of-court identification that occurred in suggestive circumstances stemming from private conduct rather than police arrangement. 565 U.S. at 233. The Court explained that trial judges need not "prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances" because that would inappropriately "open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications." *Id.* at 240, 243. Rather, the Court has "linked the due process check, not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identification." *Id.* at 242. *Perry* did not, however, specifically address the validity of a first time in-court identification that was not prescreened.

2. Lacking a ruling by this Court on the issue, the lower courts have divided over whether first time in-court identifications require judicial prescreening. At least three federal courts of appeals and eight state high courts have held—in direct conflict with the Connecticut Supreme Court—that the Due Process Clause does not require prescreening. In contrast, at least eight federal courts of appeals and two state high courts agree with the Connecticut Supreme Court that judicial prescreening of first time in-court identifications is constitutionally compelled. The

division has grown even sharper since this Court decided *Perry* six years ago.

a. The Ninth, Tenth, and Eleventh Circuits and the highest courts of Alaska, Arizona, Delaware, the District of Columbia, Georgia, New Hampshire, Oregon, and South Carolina have held that "the inherent suggestiveness of in-court identifications does not rise to a constitutional concern." *State v. King*, 156 N.H. 371, 376 (2007).

The leading federal case is *United States v. Whatley*, 719 F.3d 1206 (11th Cir.), *cert. denied*, 134 S. Ct. 453 (2013), in which the Eleventh Circuit abrogated its own precedents that had required prescreening of first time in-court identifications, on the ground that *Perry* indirectly but unmistakably establishes that judicial prescreening is required only when the police create suggestive circumstances—which is not what occurs when witnesses make in-court identifications. "*Perry* makes clear that, for those defendants who are identified under suggestive circumstances not arranged by police, the requirements of due process are satisfied in the ordinary protections of trial[.]" *Id*. at 1208. Defendants who are identified by a witness for the first time in the courtroom are protected by "the right to confront witnesses, the right to effective assistance of an attorney who can expose the flaws in identification testimony on cross-examination, the right to eyewitness-specific jury instructions . . ., and the right to be presumed innocent until found guilty beyond a reasonable doubt by a jury of [their] peers." *Id*. at 1216. In short,

the court held that "[d]ue process imposes no requirement of a preliminary examination for an in-court identification." *Id.*

The Tenth Circuit found the Eleventh Circuit's reasoning in *Whatley* "persuasive" and held that due process does not "require[] the district court to make a reliability assessment to determine the admissibility of an in-court identification." *United States v. Thomas*, 849 F.3d 906, 910-11 (10th Cir. 2017). Rather, the court held, "evidentiary reliability is traditionally a question for the jury, not the judge, and [ ] other due-process protections are in place that limit the weight the jury attributes to evidence that may be unreliable." *Id.* at 911.

The Alaska, Arizona, New Hampshire, and Oregon Supreme Courts likewise have held that *Perry* confirms that courts need not prescreen first time in-court identifications. *See Young v. State*, 374 P.3d 395, 411-12 (Alaska 2016) (the "circumstances under which the identification is made are apparent"); *State v. Goudeau*, 372 P.3d 945, 981 (Ariz. 2016) ("*Perry* controls here"), *cert. denied*, 137 S. Ct. 223 (2016); *State v. Perry*, 166 N.H. 716, 721 (2014) ("We read *Perry* as confirming" that the inherent suggestiveness in "normal trial procedure" "does not rise to the level of constitutional concern'"); *State v. Hickman*, 330 P.3d 551, 571-72 (Oregon 2014) (*Perry* indicates that due process rights involved in in-court identifications "are generally met through the ordinary protections in trial"), *cert. denied*, 136 S. Ct. 230 (2015).

Even before *Perry*, numerous courts had ruled that prescreening is not required for first time in-court identifications. In *United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986), the Ninth Circuit, after discussing the *Biggers* line of cases, stated that "[w]hen the initial identification is in court, there are different considerations" because the "jury can observe the witness during the identification process and is able to evaluate the reliability of the initial identification." *Id*. at 1368. The court held that "[t]here is no constitutional entitlement to an in-court line-up or other particular methods of lessening the suggestiveness of in-court identification, such as seating the defendant elsewhere in the room." *Id*. at 1369.

Several state high courts reached the same conclusion. In *Byrd v. State*, 25 A.3d 761 (Del. 2011), the Delaware Supreme Court held that the "inherent suggestiveness in the normal trial setting does not rise to the level of constitutional concern." *Id*. at 767. The court relied in part on the reasoning in *State v. Lewis*, 609 S.E.2d 515 (S. Car. 2005). There, the South Carolina Supreme Court held that "*Biggers* does not apply to a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations." *Id*. at 518. *See also Ivey v. State*, 596 S.E.2d 612, 615 (Ga. 2004) ("*Biggers* applies to extra-judicial pretrial identification procedures such as

lineups, showups and photographic displays, not to the in-court procedures used in this case."); *Middleton v. United States*, 401 A.2d 109, 133 n.47 (D.C. App. 1979) ("without more, the mere exposure of the accused to a witness in the suggestive setting of a criminal trial does not amount to the sort of impermissible confrontation with which the due process clause is concerned").

b. Another group of courts, including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, and the highest courts of North Dakota and Pennsylvania, have, like the Connecticut Supreme Court, reached the opposite conclusion and held that first time in-court identifications implicate due process. The Sixth Circuit expressly concluded that "all of the concerns that underlie the *Biggers* analysis, including the degree of suggestiveness, the chance of mistake, and the threat to due process are no less applicable when the identification takes place for the first time at trial." *United States v. Hill*, 967 F.2d 226, 232 (6th Cir. 1992). The court therefore applied the *Biggers* test, and assumed for purposes of decision that the first prong (impermissible suggestiveness) was met, but concluded on the second prong (reliability) that the identification "was sufficiently reliable to allow its admission into evidence." *Id*. at 232-33.

More recently, the Fourth Circuit applied the *Biggers* test, even after *Perry*, and held that the admission of a first time in-court identification violated due process. *United States v. Greene*, 704 F.3d 298, 305-11 (4th Cir.), *cert. denied*, 134 S. Ct.

419 (2013). The Seventh Circuit cited *Perry* but still applied the *Biggers* test. *Lee v. Foster*, 750 F.3d 687, 690–92 (7th Cir. 2014). The First, Second, Third, Fifth, and Eighth Circuits, and the North Dakota and Pennsylvania Supreme Courts, have also applied *Biggers* to first time in-court identifications. *See United States v. De Leon-Quinones*, 588 F.3d 748, 755 (1st Cir. 2009) (applying *Biggers* test after rejecting the government's contention that "this confrontation cannot be deemed unnecessarily suggestive because it was not orchestrated or staged by the government"); *Kennaugh v. Miller*, 289 F.3d 36, 41-48 (2d Cir. 2002) (courts must employ *Biggers* or some form of due process screening); *United States v. Emanuele*, 51 F.3d 1123, 1129-31 (3d Cir. 1995) (determining under *Biggers* test that admission of first time in-court identification violated due process); *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997) (requiring evaluation under *Biggers* test); *United States v. Rundell*, 858 F.2d 425, 426-27 (8th Cir. 1988) (applying *Biggers*); *In re R.W.S.*, 728 N.W.2d 326, 335-36 (N. Dak. 2007) (same); *Com. v. Silver,* 452 A.2d 1328 (Penn. 1982) (same).[3]

[3] *See also United States v. Morgan*, 248 F. Supp. 3d 208, 213 (D.D.C. 2017) ("this Court disagrees with the Tenth and Eleventh Circuits' conclusion that initial in-court identifications are automatically permissible under *Perry*, without any reliability screening"); *United States v. Thomas*, No. 15-20487, 2015 WL 8478463, at *3 (E.D. Mich. Dec. 10, 2015) ("*Perry*'s holding does not apply to a situation where, as here, no pre-trial identification procedure took place").

c. The First Circuit recently noted the conflict between the Eleventh Circuit, which "read *Perry* as holding that the *Biggers* test applies only if the complained-of suggestion arose from improper police conduct," and the Seventh Circuit, which "after citing *Perry*[,] more recently used the *Biggers* test to reject a due-process attack on an in-court identification of a black male seated at defense table." *United States v. Correa–Osorio*, 784 F.3d 11, 19-20 (1st Cir.) (citing *Whatley*, 719 F.3d at 2015-17, and *Lee*, 750 F.3d at 691-92), *cert. denied*, 135 S. Ct. 2909 (2015). The First Circuit declined to pick a side, holding that the first time in-court identification in the case was properly admitted under either test. *Id.* at 20.

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Only this Court can resolve the longstanding and growing conflict over whether first time in-court identifications must be subjected to judicial prescreening.

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE JUDICIAL PRESCREENING OF FIRST TIME IN-COURT IDENTIFICATIONS

The Connecticut Supreme Court and other courts that require due process prescreening of first time in-court identification err in equating them to police identification procedures. Requiring due process prescreening of first time in-court identifications (1) inverts the rationale of this Court's decisions, which treat in-court identifications as unobjectionable; (2) runs counter to longstanding tradition; and (3) wrongly presumes that the absence of an out-of-court

identification triggers due process concerns about the reliability of a witness's in-court identification.

1. This Court's decisions treat in-court identifications as relevant, probative evidence subject to ordinary trial protections, and aim to ensure that this evidence is not unduly influenced by *out of court* police conduct that might have irrevocably tainted the witness's memory of the culprit. In its seminal decision in this area, this Court ruled that an accused has a Sixth Amendment right to counsel at post-arrest police identification procedures because the "risks of suggestion," the setting of "[p]rivacy" and "secrecy," and the tendency for the out-of-court lineup to be "used … to crystallize the witnesses' identification of the defendant for future reference" at trial "may deprive [a defendant] of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Wade*, 388 U.S. at 229-32, 235, 240. The Court took for granted that the state has a right to conduct an in-court identification with the court, counsel, and the jury present. And while, in later Due Process Clause cases, this Court considered the impact of suggestiveness on an out-of-court identification and ensuing in-court identification, it expressed no separate due process concern with the courtroom setting itself. *See Stovall v. Denno*, 388 U.S. 293, 295 (1967); *Simmons v. United States*, 390 U.S. 377, 382-86 (1968); *Foster*, 394 U.S. at 442; *Coleman v. Alabama*, 399 U.S. 1, 3 (1970); *Biggers*, 409 U.S. at 198 & n.5; *Brathwaite*, 432 U.S. at 102 and 106 n.9.

To the contrary, this entire line of jurisprudence presupposes that, absent taint from out-of-court procedures, in-court identifications are admissible without judicial prescreening. First time in-court identifications simply do not entail the concerns that arise from *ex parte* police procedures. The prosecutor elicits an in-court identification in the bright light of trial, with the judge, defense counsel, and jury present, subject to the full range of trial protections. The witness is under oath. The jury is physically on hand rather than merely hearing a description of the identification. Defense counsel can immediately cross-examine the witness in the setting where the identification occurred and in summation can marshal reasons for the jury to discredit it. Through jury instructions the judge can caution about risks associated with eyewitness identifications, and in many jurisdictions, expert witnesses are permitted to educate the jury about infirmities of identification evidence. *E.g.*, *State v. Guilbert*, 49 A.3d 705 (Conn. 2012).[4]

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[4] Even assuming, *arguendo*, that a demonstrable risk of jury error in assessing courtroom evidence were enough to activate due process constraints on the admissibility of evidence, courts that employ a due process check offer *no* evidence that first time in-court identifications tend to be inaccurate or that juries routinely over-weigh them. Exoneration data and putative social scientific knowledge are far too inconclusive to support these speculations. According to an analysis of the first 250 DNA exoneration cases, only six, or 2.4 percent, involved first time in-court identifications, whereas half of the cases involved the type of suggestive police conduct to which the *Biggers* test

(continued...)

Moreover, as this Court held in *Perry*, "the due process check for reliability … comes into play only after the defendant establishes improper police conduct." 565 U.S. at 232. Concerns about "police rigging," *id.* at 241, do not apply to prosecutors eliciting identifications in open court before a judge, jury, and defense counsel. Unlike police composing an identification procedure, the prosecutor has no authority to manipulate the configuration of the courtroom or the chance composition of the jury, courtroom personnel, and spectators. Non-suggestive in-court alternatives are not feasible on a widespread basis, as even the Connecticut Supreme Court acknowledged. *Dickson*, 141 A.3d at 830-31. For these reasons, first time in-court eyewitness-identifications cannot be characterized as "procured under unnecessarily suggestive circumstances arranged by law enforcement[,]" *Perry*, 565 U.S. at 248, and thus do not trigger due process prescreening.

(...continued)
is directed. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48, 49, 56 (Harvard University Press 2012). Notably, in the only two DNA exoneration cases in Connecticut involving eyewitness evidence, the witness in each case made pretrial identifications in nonsuggestive procedures, meaning a rule requiring prescreening would not have applied or changed the outcome. *State v. Tillman*, 600 A.2d 738, 745 (Conn. 1991), *State v. Thompson*, 983 A.2d 20, 24 (Conn. 2009) (trial transcripts CR95-0470531 10/1/98 at 22-23, 10/2/98 at 34).

2. Imposing a due process check on first time in-court identifications also runs counter to our legal tradition. *Perry* emphasized that due process restricts the use of probative evidence "[o]nly when [it] 'is so extremely unfair that its admission violates fundamental conceptions of justice'" or "'any concept of ordered liberty.'" *Perry*, 565 U.S. at 237 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990), and *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). Those descriptions cannot be applied to first time in-court identifications. This Court treats the traditional use of a practice as a presumptive indication that it accords with due process. *Medina v. California*, 505 U.S. 437, 445-46 (1992). First time in-court identifications have been admissible without prescreening since the origins of our common law tradition. The first detailed account of an ordinary criminal trial at English common law featured an in-court identification. Sir Thomas Smith, *De Republica Angoram*, bk.2, ch. 23, at 111-115 (c. 1565) (Mary Dewar ed. 1982), reprinted in J.H. Langbein, et al., *History of the Common Law: The Development of Anglo-American Legal Institutions* 591 (Aspen Publishers 2009).[5]

What is more, the practice of eliciting in-court identifications originally developed *as a critical component of a fair trial*. It is a natural corollary of

[5] At common law, a defendant could not waive his presence at trial, *People v. Epps*, 37 N.Y.2d 3d 343, 348-49 (1975). And, even with modern allowance for waiver, a defendant can be compelled to appear at trial for an in-court identification. *Schmerber v. California*, 384 U.S. 757, 764 (1966); *United States v. Lumitap*, 111 F.3d 81, 84 (9th Cir. 1997).

the Confrontation Clause right to have accusers testify against the accused "face-to-face," so as to enhance the truth-finding process, *Coy v. Iowa*, 487 U.S. 1012, 1015-20 (1988), and promote fair trials, *Crawford v. Washington*, 541 U.S. 36, 44-46 (2004). In-court identifications entail the very situation the Confrontation Clause is intended to ensure—the act of direct confrontation between the witness and the defendant.[6]

Police investigations and identification procedures, by contrast, postdate the Bill of Rights. Historically, the in-court identification was the *uncontroversial* evidence, while courts debated whether out-of-court identifications were inadmissible hearsay. Only over time did courts develop evidentiary hearsay exceptions permitting admission of evidence of out-of-court identifications on the theory that the witness is available for cross-examination. *Gilbert v. California*, 388 U.S. 263, 272 n.3 (1967). No decision of this Court has ever suggested that, because out-of-court identification evidence is frequently obtainable and admissible in

[6] It comes as no surprise, therefore, that courts must permit witnesses to testify that the defendant is *not* the person they saw at the crime scene. *State v. Witham*, 72 Me. 531, 536-39 (1881) (trial court erred in excluding testimony that defendant was not person seen in adulterous encounter). It is not uncommon for witnesses to fail to identify the defendant in court. *See*, *e.g.*, *State v. Chism*, 591 So. 2d 383, 385 (La. Ct. App. 1991) (witness who had identified defendant in investigative lineup testified that man on trial was not the assailant); *State v. Jenkins*, 53 Wash. App. 228, 230 (1989) (witness "pointed to a man who was in the courtroom, but who was not the defendant").

modern times, it is now improper or unfair, unless the witness has made an out-of-court identification, to elicit sworn identification testimony in full view of the court and the ultimate factfinder.

3. That tradition of admitting first time in-court identifications is founded on the recognition that they are often highly probative, despite the absence of an out-of-court identification by the witness in a non-suggestive procedure. Those courts that impose due process prescreening constitutionalize an ordinary evidentiary matter that should instead be explored at trial for the jury's assessment. There is no reason to assume that a witness who was unwilling or unable to make an out-of-court identification would offer an unreliable in-court identification.

For a number of reasons, some witnesses never participate in a pretrial procedure. *See People v. Blevins*, 886 N.W.2d 456, 462 (Mich. App. 2016) (witnesses refused to cooperate); *Lewis*, 609 S.E.2d at 517 n.8 (victim unable to return to jurisdiction prior to trial). Similarly, in cases in which the witness participated in a pretrial procedure but did not make an identification, "[a] variety of reasons might exist …, none of which would cast serious doubt on the reliability of a later identification." *De Leon-Quinones*, 588 F.3d at 755. For example, whereas trial witnesses can be subpoenaed to testify under oath, many witnesses do not cooperate with police, *e.g.*, *People v. Smith*, 841 N.E.2d 489, 503 (Ill. App. Ct. 2005), or are unwilling to name their assailants, *e.g.*, *Fairley v. Commonwealth*, 527

S.W.3d 792, 796 (Ky. 2017) (fear of blame and retaliation). Many witnesses who could not identify a defendant from an array of mugshots—the standard vehicle for police identification procedures today—nevertheless can make an identification in court, once given the opportunity to observe the defendant in all dimensions in person. *See People v. Simmons*, 485 N.E.2d 1135, 1141 (Ill. App. Ct. 1985) ("in-court identification was based partially upon [defendant's] mannerisms which [victim] remembered from the attack"); *Amador v. State*, 376 S.W.3d 339, 345 (Tex. App. 2012) (witness "explained at trial that she was better able to recognize appellant in person than she had been in the photo spread").

Some witnesses, like Ms. Jones in this case, know from the start that they need to see the culprit in person to be able to make an identification, and that opportunity occurs at trial. *E.g.*, *Lee*, 750 F.3d at 691-92; *People v. Hoiland*, 22 Cal. App. 3d 530, 542 (1971) (witness's "failure to identify the photo … and his insistence on an in-person view are evidence of the conscientious and serious way in which he shouldered his responsibility"). And, sometimes, the photos available to police can impair the ability to make an identification. *See*, *e.g.*, *United States v. Morgan*, 248 F. Supp. 3d 208, 211, 214 (D.D.C. 2017) (police photo "fuzzy"); *State v. Miller*, 522 A.2d 249, 255 (Conn. 1987) (small old black-and-white photograph in possession of police dissimilar to recent photos).

Indeed, this Court itself has recognized that a witness's inability to identify the defendant in a

photo array is not dispositive of whether that witness may reliably identify the defendant in person. In *Perry*, the Court ruled that a witness's identification of a defendant standing at the crime scene with a police officer was constitutionally admissible—even though the setting was suggestive *and the same witness subsequently failed to identify the defendant from a photo array*. 565 U.S. at 234.

The Connecticut Supreme Court, and the other federal and state courts on its side of the conflict, are therefore wrong in imposing mandatory due process screening whenever the witness had not made a pretrial identification. These courts give to judges what, under our Constitution, is the province of the jury.

III. EVEN IF DUE PROCESS REQUIRES PRESCREENING, CONNECTICUT'S EXCLUSIONARY RULE CONFLICTS WITH THE PRESCREENING PROCESS REQUIRED BY OTHER COURTS AND WITH THIS COURT'S PRESCREENING CASES

Although the Connecticut Supreme Court purportedly requires use of the *Biggers* test to assess first time in-court identifications that occurred prior to the issuance of its prospective ban, as this case shows, an unprecedented due process exclusionary rule is in fact at work. By dint of *Dickson*'s rulings that first time in-court identifications are the most suggestive and unnecessary procedure possible, and that a witness's inability to make an identification from a photo array demonstrates that the witness is

unreliable, the outcome of the *Biggers* test in Connecticut will always be, as it was here, that a first time in-court identification is unreliable and should have been excluded. That categorical rule conflicts with how other courts apply *Biggers* and with this Court's rejection of per se exclusionary rules for identification evidence. Even if this Court determines that due process prescreening is necessary, the Connecticut regime must be rejected.

A. The Connecticut Appellate Court's application of the *Biggers* test conflicts with the approach of other courts that require prescreening

Most courts that apply due process prescreening to first time in-court identifications recognize that "[t]o allow a failed [pretrial] identification to always bar a later identification would make little sense." *De Leon-Quinones*, 588 F.3d at 755. If a witness had an adequate opportunity to observe the assailant, the failure to make an out-of-court identification "goes to the weight to be accorded [an in-court identification] rather than its admissibility." *Silver*, 452 A.2d at 1332. Indeed, in many cases, the *Biggers* test leads courts to find that trial safeguards and a witness's independent basis for making an identification suffice to counteract the suggestiveness of the courtroom. *See*, *e.g. United States v. Davis*, 103 F.3d 660, 670 (8th Cir. 1996) (although defendant was seated at defense table and one of only two black men in courtroom, "the witness's in-court identification was vigorously attacked on cross-examination, and more importantly, other circumstances indicate that the

witness's testimony was reliable enough to be presented to the jury"). With one exception, the courts that hold that the *Biggers* test applies to first time in-court identifications faithfully apply both prongs of that test, which first asks whether the procedure was unnecessarily suggestive, and then asks whether the identification was sufficiently reliable despite the suggestive context.[7] *See Brathwaite*, 432 U.S. at 114 (describing the two prongs).

Connecticut is the exception. The Appellate Court—in compliance with the state Supreme Court's determinations—used the *Biggers* test as a per se rule of exclusion. Purporting to apply the first prong of the test, the Appellate Court, with no evidence in the record about the circumstances in which the in-court identification was made, followed *Dickson*'s monolithic view that *every* first time in-court identification is equally, unnecessarily, and highly suggestive. Other courts have recognized, however, that not all courtroom settings are equally suggestive. *Compare United States v. Bush*, 749 F.2d 1227, 1232 (7th Cir. 1984) (where the "only suggestive circumstance identified by defendant is

[7] The second-prong reliability assessment looks to the totality of the circumstances, including five specified factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Brathwaite*, 432 U.S. at 114.

that he sat at counsel table," "[t]his circumstance alone is not enough to establish a violation of due process"), *with In re R.W.S.*, 728 N.W.2d at 335-36 (defendant was only Native American and handcuffed person in courtroom and sat alone with counsel at defense table). Indeed, in-court identification *procedures* are not all the same, and many courts outside Connecticut appropriately consider the particular degree of suggestiveness. *Compare Bush*, 749 F.2d at 1231-32 (finding no evidence of misconduct in prosecutor asking witness, "Do you see anybody here in the courtroom today that resembles one of the two men who robbed you on that day ...?"), *with Greene*, 704 F.3d at 311 (holding that it is unnecessarily suggestive for prosecutor to "verbally or physically point to a defendant and ask a witness if the defendant is the person who committed the crime"), *and Emanuele*, 51 F.3d at 1128–32 (finding due process violation where marshals walked shackled defendant in front of identification witnesses waiting outside courtroom).

The Appellate Court also applied a distorted and perfunctory analysis on the second prong of the *Biggers* test. Citing *Dickson*, the Appellate Court treated Jones's failure to make the out-of-court identification as *de facto* proof that "her in-court identification of the defendant, two years later, was unreliable." Pet. App. A15.[8] Other courts, by

[8] The Appellate Court put its weight on this one factor, while finding in passing that Jones's description of the killer to the police was "vague" because it consisted of "clothing, (continued...)

contrast, treat that factor as one in a totality of relevant circumstances. *See*, *e.g.*, *Howard v. Bouchard*, 405 F.3d 459, 484 (6th Cir. 2005) (inability to identify defendant in photo array shortly after crime "somewhat undermines the reliability" of later lineup identification after seeing defendant in court, but is not fatal). The Appellate Court gave no consideration to relevant factors that courts evaluate in a *Biggers* assessment, such as Jones's clear view of the gunman's face from directly across the street, attentiveness, description of the gunman's "Canadian blue" shirt, and confidence that she could identify the gunman if she saw him in person. *Compare*, *e.g.*, *Silver*, 452 A.2d at 1332 (examining lighting, distance, duration, number of views, lack of obstruction, description to police, level of certainty, ability to differentiate perpetrators, length of time between crime and trial).

(...continued)
approximate age, height, and build, and race." Pet. App. A15. *But see Biggers*, 409 U.S. at 200 (victim's "description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough" and, in combination with other reliability factors, supported admission of evidence of a show-up identification and subsequent in-court identification).

B. The Connecticut Courts' treatment of first time in-court identifications conflicts with this Court's jurisprudence

The Appellate Court's application of the *Biggers* test, like *Dickson*'s categorical ban on first time in-court identifications from which it stems, directly conflicts with this Court's decisions, which establish that a per se rule excluding identifications that are made under suggestive circumstances would disserve justice. In *Brathwaite*, this Court, after balancing the importance of eyewitness identifications against the potential for undue police influence, unequivocally rejected a per se exclusionary rule for identifications tainted by suggestive police procedures. 432 U.S. at 109-13; *see id.* at 112 (a "per se rule … goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant"). Instead, *Brathwaite* held that such identifications, and *any in-court identification* by the same witness, should be excluded under due process only if they failed both prongs of the *Biggers* test. *Id.* at 102, 114, 117. The Connecticut decisions impose the very regime that *Brathwaite* rejected.

As a prophylactic rule, *Dickson* extends to *all* witnesses who did not participate in a non-suggestive identification procedure, even those whose in-court identifications in fact would be reliable. The *Dickson* court adopted that rule so as to "eliminate the *risk*" that an in-court identification would be unreliable. *Dickson*, 141 A.3d at 825 n.11

(emphasis in original). The *Dickson* rule likewise treats a witness's prior failure to make a pretrial identification when participating in a police procedure as conclusive proof of constitutional unreliability, rather than evaluating the totality of the circumstances per *Biggers*. As the Solicitor General has written, the *Dickson* "holding cannot be squared with this Court's rejection of a *per se* rule of exclusion." U.S. Br. in Opp. at 19, *Thomas v. United States*, No. 16-9389 (2017). Unless and until this Court intervenes, however, that ruling will, as a matter of federal due process, prohibit all first time in-court identifications in Connecticut.

CONCLUSION

For the foregoing reasons, the State of Connecticut respectfully requests that this Court grant the petition for a writ of certiorari.

Respectfully submitted,
STATE OF CONNECTICUT

KEVIN T. KANE
Chief State's Attorney

Counsel of Record:
LAURIE N. FELDMAN
Special Deputy Assistant State's Attorney
Office of the Chief State's Attorney
Appellate Bureau, 300 Corporate Place
Rocky Hill, CT 06067
Tel. (860) 258-5807 / Fax. (860) 258-5828
Laurie.Feldman@ct.gov
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