No.

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES O. KEENE, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In criminal cases, where a defendant's conviction is based on eyewitness identification, this Court has found that it was the *likelihood of misidentification* that violates a criminal defendant's right to due process and that the central question was whether the identification procedure utilized was *reliable* even though the confrontation procedure was suggestive. Since this Court established the five-factor test in *Neil v. Biggers*, 409 U.S. 188 (1972), for determining the reliability of eyewitness identifications, which was reaffirmed in *Manson v. Brathwaite*, 432 U.S. 98 (1977), scientific research has demonstrated that a few of those factors have very little correlation with the accuracy of that identification. Specifically, the level of certainty or confidence a witness demonstrates in his identification can be a poor gauge of accuracy. In light of the scientific findings, the numerous cases of DNA exonerations of individuals wrongly convicted due to eyewitness evidence, and the trend in the state courts of last resort addressing the due process concerns stemming from the defects in the *Biggers* test, this case presents an opportunity for this Court to resolve the split in the federal and state courts regarding the test courts are to use in determining whether an identification made during an unnecessarily suggestive procedure is nonetheless sufficiently reliable to satisfy the requirements of due process and the integrity of our judicial system.

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The petitioner, Charles O. Keene, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at *People v. Keene*, 2018 IL App (5th) 140553-U, and is not published. A copy of order denying rehearing (Appendix B) is not reported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported at *People v. Keene*, 98 N.E.3d 53 (Table).

JURISDICTION

On February 14, 2018, the Appellate Court of Illinois issued its decision. *People v. Keene*, 2018 IL App (5th) 140553-U. A petition for rehearing was timely filed and denied on March 7, 2018 (Appendix B). The Illinois Supreme Court denied a timely filed petition for leave to appeal on May 30, 2018. *People v. Keene*, 98 N.E.3d 53 (Table). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *** nor be deprived of life, liberty, or property, without due process of law; ***." U.S. Const., amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part that: "No State shall *** deprive any person of life, liberty, or property without due process of law ***." U.S. Const., amend. XIV.

STATEMENT OF THE CASE

On October 7, 2013, Jesse Warden and four others resided at the "Yoga House" in Carbondale, Illinois. (T.191-94) The Yoga House was split into a yoga and meditation area to the left and a residents' area to the right. (T.193-94) The meditation side was open to the public for meditation and yoga and contained a fish bowl used to gather donations. (T.194, 211-13) The residents' side included a living room, a kitchen, a staircase that led up to four bedrooms and a bathroom, and a fifth bedroom in the basement. (T.193) One resident owned a PlayStation 3 (PS3) that was kept in his bedroom. (T.203-11)

At approximately 5:30 pm, Warden was home alone and on his bed in his bedroom wearing underwear and a t-shirt. (T.196-97, 217-18) He noticed a stranger open his bedroom door slightly. (T.196-97) Initially, Warden could only discern that the stranger was black. (T.218) When the stranger opened his bedroom door and looked inside, Warden was shocked and alarmed. (T.197, 201, 219) He raised his voice and became confrontational. (T.197, 201, 219) He then got out of bed and chased the intruder out of his room, down the stairs, and out the front door. (T.201, 220-22) While chasing the man down the stairs, he initially saw the back of the man's head for the first set of stairs, but when the intruder went down the second set of stairs, he looked up at Warden the entire way down. (T.221) Warden believed the entire interaction on the stairs lasted 30 seconds. (T.221)

After chasing the man outside, Warden realized that he did not have his cell phone and was not wearing any pants or shoes. (T.201, 221-22) Warden ran back home and grabbed his phone, shoes, and pants from his bedroom. (T.201-02, 221-22) He was

in his bedroom for 30 to 45 seconds. (T.222) Before resuming chase, Warden checked the house for anyone else by checking his roommates' rooms, the meditation area, and the basement. (T.202) He called the police as he ran outside to continue pursuing the intruder. (T.202)

Warden did not immediately see the man outside but had to round the corner from the house to see him. (T.202) Once Warden resumed chasing the man, he followed the man for, at most, three minutes. (T.223) But when Warden lost sight of the man, dispatch told him to return home because officers had been dispatched to his area. (T.203, 223) Warden was unable to describe any of the intruder's facial features, eye color, hair color, style of facial hair, or skin complexion. (T.224) When Warden returned home, he found his roommate's PS3 lying on a chair in the living room and coins missing from the fish bowl. (T.203-12) But Warden never witnessed the intruder take money out of the fish bowl or move the PS3. (T.224-25)

At approximately 6:45 pm, Carbondale police officer Nathan Biggs was dispatched to the area of the Yoga House. (T.231-34) Dispatch stated that a residential burglary had just occurred, and the suspect was a "black male in black pants, a white shirt[,] and [black] hat." (T.234) There were no facial features, no eye color, no age, and nothing more specific described. (T.233-34, 249) Biggs started driving near the area where the suspect was last seen and saw Mr. Keene, a 49-year-old black male, with a light-skinned complexion and a goatee, wearing black pants, a white zip-up hoodie, and a black beret. (T.6,12, 199-200, 224, 234-36, 249) Biggs and Sergeant Kevin Banks approached Mr. Keene, who did not run or hide. (T.237, 249) Mr. Keene willingly talked to Biggs and answered his questions. (T.249-50) Biggs searched Mr. Keene and

found $5.30 in change in his pocket. (T.250-51)

When Biggs first questioned Mr. Keene, he initially stated that he was coming from the Amtrak station, heading to his brother's house. (T.236) Mr. Keene's brothers, Reginald and John Keene, lived on opposite sides of town, so it was routine for Mr. Keene to go between their homes daily. (T.318-22) Mr. Keene later told Biggs that he was coming from meeting up with some friends at a store, but then later stated that he was coming from his other brother's house. (T.237) When Biggs confronted him with those inconsistencies, Mr. Keene got confused. (T.237) Still, Mr. Keene was clear and consistent that he did not enter anyone's residence or steal anything. (T.251-52) Furthermore, earlier that day, Mr. Keene's uncle, Donald Snowden, had dropped Mr. Keene off in Carbondale after day-drinking. (T.325)

As Biggs made contact with Mr. Keene, another Carbondale police officer, Cloee Frank, went to the Yoga House. (T.216, 254-55) Frank drove Warden to where Biggs and Banks were surrounding Mr. Keene to do a one-man showup. (T.216, 264-56) Before driving Warden to the showup location, Frank told Warden that "they had a suspect [and] that she needed [Warden] to get in the back of the squad car to drive by and identify the suspect." (T.216, 263) It was fairly dark outside at this time. (T225-26, 264) At the showup, Warden was approximately ten feet away and sitting in the back of Frank's squad car, and the lighting outside was "dark" or "fairly dark." (T.225-26, 263-64) Warden witnessed Biggs conducting a search of Mr. Keene's pants. (T227, 237) Warden made a positive identification. (T216, 256-57, 263) Frank was not certain as to whether Mr. Keene was already in handcuffs during the showup. (T.264)

Frank retrieved the PS3 from the Yoga House and transported it to the police

station. (T.241, 248) Biggs then lifted a latent fingerprint from the bottom of the PS3. (T.239-41) Frank also took Mr. Keene's fingerprints and elimination prints from Warden and two of his roommates. (T.257-62) No elimination prints were taken from the owner of the PS3. (T.257-62) A latent fingerprint expert examined the original latent lift from the PS3, the way it came to her from Frank and Biggs. (T.279) Prior to her evaluation, she was informed that a burglary had occurred and that Mr. Keene was a suspect. (T.300) The latent lift showed excessive force, meaning that the partial print was smeared and the friction ridges were distorted, and contained artifacts, possibly from environmental causes or due to the officers handling the lift. (T.290, 295) She made a comparison between the latent lift and Mr. Keene's prints in AFIS and made an identification. (T.283-84)

On October 8, 2013, the State charged Mr. Keene with residential burglary. (C.12) At his jury trial, defense counsel informed the court that Mr. Keene's defense at trial was that he was misidentified because he did not enter the Yoga House on October 7, 2013. (T.332-33) During jury deliberations, the jury sent a note to the trial court, asking what happened to the fish bowl, and whether any fingerprints were lifted off of it.[1] (T.357-58) Subsequently, the jury found Mr. Keene guilty, and the trial court sentenced him to 20 years in prison. (T.358-60, 363, 374; C.137)

On appeal, Mr. Keene argued, *inter alia*, that the unnecessary and suggestive one-man showup violated his due process right to fair identification procedures and that defense counsel's failure to file a motion to suppress constituted ineffective

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[1]The record does not contain any evidence as to whether a latent fingerprint was ever recovered from the fish bowl.

assistance of counsel where the main defense at trial was that Mr. Keene was misidentified. (Appendix A); *People v. Keene*, 2018 IL App (5th) 140553-U, ¶¶2, 37-52. The Illinois Appellate Court, Fifth District, disagreed that the unnecessary and suggestive one-man showup violated his due process right to fair identification procedures after considering: "Warden's opportunity to view defendant, Warden's degree of attention, the accuracy of Warden's preliminary description, Warden's level of certainty, and the brief timeframe between the crime and the confrontation." *Keene*, 2018 IL App (5th) 140553-U, ¶¶39-52.

The appellate court affirmed Mr. Keene's conviction and sentence (Appendix A), and subsequently denied his petition for rehearing (Appendix B). The Illinois Supreme Court denied Mr. Keene's petition for leave to appeal on May 30, 2018 (Appendix C).

REASON FOR GRANTING CERTIORARI

Review should be granted because scientific evidence has evolved since this Court established the five-factor test in *Biggers* and *Manson* as to what makes an eyewitness' identification accurate, which has led to several state courts of last resort questioning the continued validity of the five *Biggers* factors—especially the witness' level of certainty at the point of identification.

Eyewitness identification is "one of the least reliable forms of evidence." *Commonwealth. v. Walker*, 92 A.3d 766, 779 (Pa. 2014); *State v. Henderson*, 27 A.3d 872, 885 (N.J. 2011), *holding modified by State v. Chen*, 27 A.3d 930, 942-43 (N.J. 2011). As Justice William Brennan once noted, "there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!' " *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original). Everyday, courts across the country are asked to assess the reliability and admissibility of eyewitness testimony.[2] And in the more than four decades since this Court's decisions in *Neil v. Biggers*, 409 U.S. 188

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[2]This Court has also reviewed numerous cases other than *Biggers* and *Manson* involving eyewitness identifications in different circumstances, such as: *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967) (one-man showup), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987); *Simmons v. United States*, 390 U.S. 377, 383-84 (1968) (showing a single photograph); *Foster v. California*, 394 U.S. 440, 442-43 (1969) (police arranging a lineup, then a one-on-one showup, and finally another lineup); *Perry v. New Hampshire*, 565 U.S. 228, 231-33 (2012) (pretrial screening for reliability of eyewitness identifications not extended to suggestive circumstances not arranged by law enforcement officers); *Sexton v. Beaudreaux*, 585 U.S. _ ,138 S. Ct. 2555, 2559-60 (2018) (whether counsel's failure to file a motion to suppress the eyewitness' identification amounted to deficient performance).

(1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), empirical research continues to call into question the correlation of this Court's five-factor test with the accuracy and reliability of eyewitness identifications.

Further, the likelihood of a misidentification increases when the eyewitness' identification is based on an "inherently suggestive" showup because the eyewitness assumes police officers only present suspects they believe to be the perpetrator. *State v. Oliver*, 274 S.E.2d 183, 194 (N.C. 1981); *State v. Harvell*, 762 S.E.2d 659, 663 (N.C. Ct. App. 2014). Stated differently, the "main problem" with showups "is that *** they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect. In essence, showups make it easier to make mistakes." *Henderson*, 27 A.3d at 903; see *State v. Dubose*, 699 N.W.2d 582, 588-95 (Wis. 2005).

Due process requires trial courts to examine all identifications for suggestiveness and accuracy. *Perry v. New Hampshire*, 565 U.S. 228, 237-40 (2012). A trial court must exclude an identification procured by suggestive procedures, *Biggers*, 409 U.S. at 197, when the "totality of the circumstances" demonstrate there is a "substantial likelihood" the eyewitness misidentified the defendant. *Manson*, 432 U.S. at 113-16; *Harvell*, 762 S.E.2d at 663. To assess reliability, this Court established that courts across the country must consider five factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the time of the confrontation; and (5) the time between the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. But where the advances in science

render the continued application of *Biggers* untenable, and where the state courts of last resort are increasingly questioning the test's measures of reliability, the time has come for this Court to reconsider its five factors.

Courts have widely recognized and condemned the suggestiveness of one-man "showup" identifications. *Stovall v. Denno*, 388 U.S. 293, 302 (1967), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314, 321 (1987); *People v. McKinley*, 370 N.E.2d 1040, 1042-43 (Ill. 1977). That is because such procedures—involving only a single defendant without any other suspects—carry "a dangerous degree of improper suggestion." *People v. Blumenshine*, 250 N.E.2d 152, 154 (Ill. 1969); see also *Henderson*, 27 A.3d at 903. The one-man showup has been called "the most grossly suggestive identification procedure now or ever used by the police." Michael D. Cicchini & Joseph G. Easton, *Reforming The Law On Show-up Identifications*, 100 J. Crim. L. & Criminology 381, 389 (2010).

The New Jersey Supreme Court accepted the importance of the findings in modern social science relating to eyewitness identifications in *Henderson*. See, *e.g.*, *Henderson*, 27 A.3d at 919 (laying new framework for admissibility test which would "consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory"). According to *Henderson*, the *Biggers* and *Manson* reliability factors may have a counterintuitive impact on reliability because the factors focus on confidence, degree of attention, and opportunity to view the crime. Instead, new

scientifically-supported reliability factors should be integrated into its new eyewitness identification admissibility test. *Id.* at 885-923. The *Henderson* Court's decision included a discussion about a report produced by the Special Master, which reviewed over 360 exhibits, including over 200 scientific studies of the influence of human memory on eyewitness identifications. *Id.* at 884. The Report also considered testimony from seven experts in the fields of psychology, criminal defense, and wrongful convictions during a ten-day remand hearing. *Id.* at 884-85. The *Biggers* and *Manson* test rested on three assumptions in order to protect due process: "(1) that it would adequately measure the reliability of eyewitness testimony; (2) that the test's focus on suggestive police procedure would deter improper practices; and (3) that jurors would recognize and discount untrustworthy eyewitness testimony." *Id.* at 918-28 (citing *Manson*, 432 U.S. at 112-16). In *Henderson*, however, the court noted that experience in the intervening decades had proven these assumptions to be untrue and recognized the significant harm caused by misidentifications. *Id.* The *Henderson* Court relied on the alarming data presented on the connection between such flawed evidence and wrongful conviction rates. *Id.*; see also Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 9, 48, 279 (2011) (finding eyewitnesses misidentified 76% of the exonerees in a 250-case study of wrongful convictions overturned by DNA evidence).

The *Henderson* test departs from the scientifically-fallible assumptions incorporated in *Manson* and forces the State to prove a much higher degree of independent reliability from eyewitness identifications before it can be submitted to the trier of fact. *Henderson*, 27 A.3d at 919-26. It also inverts the burden of production

in a peculiar way: it shifts the responsibility to the defendant to show evidence of variables which detract from the eyewitness identification's reliability, rather than focusing on the five *Biggers* factors, evidence of which the State would carry the burden of providing under *Manson*. *Id.* at 919-22. As the range of admissible variables is much broader (possessing no definitive limit), it serves to defeat the identification's reliability instead of only focusing on the availability of State evidence to support it.[3] *Id.*

Oregon has also held that a similar test is necessary in *State v. Lawson,* 291 P.3d 673 (Or. 2012) (en banc). *Lawson* adopted many of the same scientific rationales as *Henderson*, and closely mirrored its discussion of system (circumstances surrounding the identification procedure itself that are within the law enforcement's control) and estimator (characteristics of the eyewitness, the alleged perpetrator, and the environmental conditions of the event that cannot be manipulated by state actors) variables. *Lawson,* 291 P.3d 685-88. The *Lawson* test was developed because the court found that the evidence of a suggestive variable can "give rise to an inference of unreliability that is sufficient to undermine the perceived accuracy and truthfulness of an eyewitness identification—[and] only then may a trial court exclude [it] ***." *Id.* at 697.

Subsequently, Massachusetts, in *Commonwealth v. Gomes,* 22 N.E.3d 897 (Mass.

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[3]See *People v. LeGrand*, 867 N.E.2d 374, 377 (N.Y. 2007) (citing 1 McCormick, Evidence § 206, at 880 (6th ed. 2006), for the premise that degree of confidence can be influenced by, for example, misleading questions asked after a witness' viewing of a suspect); see also *People v. Santiago*, 958 N.E.2d 874, 879 (N.Y. 2011) (eyewitness recognition studies state an eyewitness' confidence level is not a good predictor of eyewitness accuracy and eyewitnesses' confidence levels can be influenced by factors unrelated to identification accuracy).

2015), took yet another route in its rejection of this Court's established framework. The *Gomes* Court reformed its prior jury instructions on the reliability of eyewitness identifications to include additional generally accepted principles. *Gomes,* 22 N.E. 3d at 906-11 (applying the scientific findings cumulated in Robert J. Kane *et al.*, *Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to theJustices*(2013),http://mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf). In *Gomes*, the Massachusetts Supreme Court reasoned that five scientific principles had reached "near consensus in the relevant scientific community" sufficient to mandate inclusion in jury instructions, not as a replacement for but as a more robust counterpart to expert testimony on reliability. *Id.* at 909-12. These factors included: (1) that memory consists of three complex processing stages, (2) that certainty alone does not indicate accuracy, (3) that high levels of stress may reduce ability to make an accurate identification, (4) that information unrelated to the actual viewing of the event but received before or after making an identification can affect later recollection of the memory or the identification, and (5) that viewing of a suspect in an identification procedure may negatively affect the reliability of a subsequent identification showing the same suspect. *Gomes*, 22 N.E. 3d at 911-16.

In 2016, Alaska also announced an eyewitness identification admissibility test in *Young v. State*, 374 P.3d 395, 427 (Alaska 2016). In *Young*, the Alaska Supreme Court broke step with nearly forty years of established criminal procedure to allow pre-trial hearings on the reliability of eyewitness identifications to present evidence in order to address the systematic and circumstantial flaws that may affect eyewitness identifications. *Young*, 374 P.3d at 410-27. *Young* accounted for modern scientific

insights about the malleability of eyewitness identification in an effort to shift the focus from a myopic procedural view of the benefits of eyewitness identifications to a broader appreciation of the positive and negative impacts of such evidence in criminal trials. *Id.* at 406, 411-27. Even in light of this Court's reinforcement of its prior precedent and the focus on police suggestiveness in *Perry*, 565 U.S. at 241, courts like *Henderson, Gomes*, and *Young*, have departed from this Court's rulings in light of the advancements in social sciences on the suggestiveness and circumstantial reliability factors which often result in flawed eyewitness identifications and wrongful convictions.

Although state courts of review are considering *Henderson*, not all courts are adopting it. See, *e.g.*, *State v. Watlington*, 759 S.E.2d 116, 125-30 (N.C. Ct. App. 2014) ("Defendant has not argued, much less established, that we are entitled to take judicial notice of the information upon which the *Henderson* Court relied"); *Smiley v. State*, 111 A.3d 43, 49-52 (Md. 2015) ("We shall also decline to adopt the theories and methodologies promulgated by the New Jersey Supreme Court in [*Henderson*] to review whether extrajudicial identifications are suggestive, ***); *People v. Blevins*, 886 N.W.2d 456, 461-63 (Mich. Ct. App. 2016); *Jeter v. Commonwealth*, 531 S.W.3d 488, 492-94 (Ky. 2017). Further, while courts may recognize the scientific findings of the fallibility of eyewitness identifications, the research and results are being utilized in an inconsistent manner in light of this Court's *Manson* and *Biggers* test. See, *e.g.*, *United States v. Greene*, 704 F.3d 298, 305-09, fn.3-4 (4th Cir. 2013) (utilizing the five *Biggers* factors but also incorporating the scientific research, such as recognizing that the fourth factor of witness certainty has been under "withering attack as not relevant

to the reliability analysis"); *Young v. Conway*, 698 F.3d 69, 77-85 (2d Cir. 2012); *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 320-44 (3d Cir. 2016). Further, while this Court has recognized the scientific developments, even as recently as June of this year, in *Sexton v. Beaudreaux*, 585 U.S. _ ,138 S. Ct. 2555, 2559 (2018), this Court has continued to exclusively apply the *Biggers* and *Manson* test. "The factors affecting reliability include '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.'" *Beaudreaux*, 585 U.S. _, 138 S. Ct. at 2559-60. However, not only does the scientific research involving eyewitness identifications support this Court's reassessment of its reliability test, but so do the many DNA exoneration cases.

In 1967, long before the era of exculpatory DNA evidence, this Court recognized that "the annals of criminal law" were "rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Since then, DNA exonerations have only proven what many courts have long recognized—that unreliable eyewitness testimony can pose significant and unique dangers in the criminal justice system.[4] In

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[4]Take for example, Mr. Keene's case, where the fingerprint expert was informed, prior to her examination, that Mr. Keene was a suspect, based on an eyewitness identification. (T.300) Equipped with that information, the expert conducted one comparison between Mr. Keene's fingerprints and the latent lift from the PS3, which showed excessive force, meaning that the partial print was smeared and the friction ridges were distorted, and contained artifacts, possibly from environmental causes or due to the officers handling the lift. (T.290, 295) While the police took elimination prints from Warden and two of his roommates, no elimination prints were taken from the owner of the PS3, and no other comparison was conducted. (T.257-62)

Perry, Justice Sotomayor's dissent highlighted the dangers of suggestive identifications by stating:

> The empirical evidence demonstrates that eyewitness misidentification is 'the single greatest cause of wrongful convictions in this country.' Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures. *Perry*, 565 U.S. at 262-65 (Sotomayor, J., dissenting) (internal quotation marks and footnotes omitted).

The continuing number of DNA exonerations where the conviction was based on eyewitness misidentifications lend support to the argument that this Court's established *Biggers* factors from 1972 are inadequate to determine the reliability of identification evidence once a court has determined the evidence was derived from suggestive identification procedures. See, *e.g.*, Innocence Project, *DNA Evidence Prevents the Wrongful Conviction of a Suspect Based on Misidentification* (July 23, 2018), https://www.innocenceproject.org/dna-evidence-prevents-the-wrongful-conviction-of-a-suspect-based-on-misidentification/(lastvisitedAugust13,2018); Innocence Project, *FeaturedCases*,https://www.innocenceproject.org/all-cases/#eyewitness-misidentification, exonerated-by-dna (last visited August 13, 2018) (a list of individuals exonerated by DNA where a contributing cause of conviction was eyewitness misidentification). The sheer number of DNA exonerations where the conviction was based on eyewitness misidentification demonstrates the inadequacy of the *Biggers* test to determine the reliability of identification evidence, and the need for this Court's review.

In Mr. Keene's case, defense counsel indicated for the record that the main

contention at trial (and also a significant matter of contention on appeal) was the identification of the stranger who entered the Yoga House. But counsel did not file a motion to suppress Warden's eyewitness identification of Mr. Keene in the unnecessarily suggestive showup, where Mr. Keene was surrounded by two police officers and being searched while Warden sat in the back of a third police officer's squad car at a distance from where Mr. Keene was being detained in the evening hours in October. Because his case presents an excellent opportunity for this Court to consider eyewitness identifications in light of the advancements in science—social, psychological, and forensic—and its effect in the legal field, Mr. Keene respectfully requests this Court's review in his case.

CONCLUSION

For the foregoing reasons, petitioner, Charles O. Keene, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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