ORIGINAL

No. 18-7825

IN THE

SUPREME COURT OF THE UNITED STATES

TREVONTE JENKINS — PETITIONER, *pro se*

vs.

STATE OF OHIO — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

TREVONTE JENKINS, #A694-869
TRUMBULL CORRECTIONAL INSTITUTION
P.O. BOX 901
LEAVITTSBURG, OHIO 44430
PHONE. NO. N/A

DAVID YOST, ESQUIRE
OHIO ATTORNEY GENERAL
150 E. GAY STREET, 16TH FL.
COLUMBUS, OHIO 43215
PHONE NO. (614) 466-4986

QUESTIONS PRESENTED

FIRST QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WHEN IDENTIFICATION WAS AT ISSUE AT TRIAL AND THERE WAS A FLAWED PROCESS RELATED TO A FIRST-TIME IN-COURT IDENTIFICATION AT TRIAL BY THE STATE'S ONLY WITNESS?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Unites States district court appears at Appendix ____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion from the last state court to review the merits, the Eighth District Court of Appeals, appears at Appendix A to the petition and is

[X] reported at *State v. Jenkins*, 2018-Ohio-2397; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Ohio Supreme Court appears at Appendix B to the petition and is

[X] reported at *State v. Jenkins*, 153 Ohio St. 3d 1504, 2018-Ohio-4285; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States court of appeals decided my case was _____

[ ] No petition for rehearing was timely filed in my case.
[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears a Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was Granted to and including _____ (date) on _____ (date) in Application No. ___ A _____ .

The jurisdiction of this Court is invoked under U.S.C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was October 24, 2018. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____ .
[ ] An extension of time to file the petition for a writ of certiorari was Granted to and including _____ (date) on _____ (date) in Application No. ___ A _____ .

The jurisdiction of this Court is invoked under U.S.C. § 1257(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved herein is the Fourteenth Amendment to the United States Constitution:

Amendment XIV
"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 7, 2016, the Beautiful Soulz festival, featuring local hip-hop artists, took place at the Phantasy club on Detroit Avenue in Lakewood, Ohio. There was a drive-by shooting at the entrance of the nightclub after midnight that evening.

The Petitioner attended the festival with his girlfriend, Sarah Super. He wore a black T-shirt and a pair of blue jeans to the festival. The pair arrived at the festival in a rented Hyundai Accent. That night, according to security at the club, there were "a bunch of Ford Fusions" outside of Phantasy.

At some point in the evening, Ms. Super and Petitioner had a disagreement that turned into a physical altercation. Gregory Cunningham, a security guard at the festival, observed Ms. Super and Petitioner fighting. So did his colleague, John Eanes, Jr. The fight was broken up by a group of men, who physically continued to physically assault Petitioner. The security guards eventually broke up the fight and Petitioner left the club.

Later that evening, Ms. Super borrowed Cunningham's phone to call her boyfriend for a ride home. Ms. Super then walked to the nearby parking lot of Value City to be picked up. After Ms. Super left the club, a white sedan drove by the front entrance and the driver of the car fired multiple shots. Two patrons—George Trouche and Jonathan Bobak—were struck by bullets.

In the ensuing investigation, law enforcement spoke to Trouche, Bobak ,and Cunningham and administered photo array identification procedure. Trouche

admitted that he did not see where the shots were coming from or who the shooter was. Bobak also testified that law enforcement visited him later that day to look at a photo array. Bobak identified Petitioner in the photo array as the man involved in the altercation with the woman that occurred earlier on the night of October 7 outside of Phantasy. At trial, Bobak stated that although he did not see the shooter, he assumed that Petitioner was the shooter.

Cunningham—who was not outside during the shooting—was presented with a photo array and identified the face of one of the line-up fillers, not Petitioner. During the pre-indictment investigation, Eanes was not interviewed or asked to identify the shooter. According to Detective Miller, who led the investigation into the shooting, officers "weren't aware that [Eanes] existed as far as someone who had actually been a witness to events." *State v. Jenkins*, 2018-Ohio-2397 at ¶ 28.

Despite he paucity of evidence after this initial investigation, Petitioner was identified as a suspect and arrested. On October 14, 2016, Petitioner was indicted for two counts of attempted murder in violation of R.C. 2903.02 and 2923.02, two counts of felonious assault in violation R.C. 2903.11(A)(2), two counts of discharging a firearm on or near prohibited premises in violation of R.C. 2923.162(A)(3), two counts of improperly handling firearms in a motor vehicle in violation of R.C. 2923.16(A) and (B), one count of having weapons while under disability in violation of R.C. 2923.13(A)(2), one count of criminal damaging or endangering in violation of R.C. 2909.06(A)(1), and one count of domestic violence in violation of R.C. 2919.25(A). Except for the counts for criminal damaging or endangering and

domestic violence, all of the counts carried one-, three-, and five-year firearm specifications. Additionally, the counts for attempted murder and felonious assault carried a notice of prior conviction and a repeat violent offender specification.

On April 3, 2017, the case was set for an initial trial date. *State v. Jenkins*, Case no. CR-16-610627. Despite the fact that Eanes had never provided the police with a statement or a pre-trial identification, he was subpoenaed to testify. Eanes testified that he figured out a suspect had been caught "when Prosecutor Lawson" called him prior to the subpoena. The case was continued, and Eanes spoke further with law enforcement on April 10, 2017, six months after the evening of the crimes. Eanes testified that he agreed to finally talk to Lakewood Police and cooperate as an identifying witness "[b]ecause they told me they had the guy and I wanted justice to be served." TrT., pg. 703. Despite Eanes's contention that he could positively identify the person who sot at the Phantasy on October 7, 2016, and his demonstrated interest in cooperating with law enforcement, he was never asked to make an out-of-court identification when police were well-aware of his identity prior to trial.

Petitioner filed a motion in limine to prohibit Eanes from making an in-court identification on the grounds that such identification would be unreliable and unduly suggestive as Petitioner was the only suspect at the defense table during trial. *Jenkins*, 2018-Ohio-2397 at ¶ 4. The trial court, applying the factors in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972), denied Petitioner's motion and overruled his objection to Eanes's identification testimony at trial. Id. Eanes, the

only witness who was not subject to a pre-trial identification procedure, was also the only witness who was able to identify Petitioner as the shooter.

Petitioner raised the issue of the error of the trial court in permitting the improper in-court identification on direct appeal, which was denied by the state reviewing court. The reviewing court found that Eanes's identification was reliable, and further found that Petitioner was protected from a bad identification because "Eanes's testimony was under oath and subject to cross-examination." Id. This was inadequate to protect Petitioner from an unfair trial.

Petitioner sought further review of his issue through appeal to The Supreme Court of Ohio, which was not accepted for review under Ohio S. Ct. Prac. R 7.08(B)(4), with the dissent of Justice French. The Ohio Supreme Court generically claimed lack of jurisdiction under any of the following: (a) The appeal does not involve a substantial constitutional question and should be dismissed; or, (b) The appeal does not involve a question of great general or public interest; or, (c) The appeal does not involve a felony; or, (d) The appeal does involve a felony, but leave to appeal is not warranted. It is from the aforementioned denials that Petitioner now seeks a Writ of Certiorari from this Honorable Court.

REASONS FOR GRANTING PETITION

Honest, but mistaken, eyewitness identifications lead to the wrongful conviction of innocent people. Scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and "[b]ecause the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness." See Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 772 (2007). In fact, "at least one mistaken eyewitness identification was present in almost three-quarters of DNA exonerations" in the United States. National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* at 12 (2014) (hereinafter "NAS Report").

To understand the roots of this prejudicial phenomenon, a robust body of peer-reviewed scientific literature has developed over the last four decades since this Honorable Court's decision in *Neil v. Biggers*, supra., was set forth in 1972 and further supported in *Manson v. Brathwaite*, 432 U.S. at 114, 97 S. Ct. at 2253 (1977). NAS Report; see also Sandra Guerra Thompson, "*Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*," 4 U.C. Davis L. R. 1487 (2008); Nancy Steblay et al., "*Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*," 27 Law and Human Behavior 523 (2003). This research investigated the variables that impact the reliability of eyewitness identifications. See e.g., *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011) (cataloging and detailing "[t]he body of eyewitness

identification research [that] reveals an array of variables that can affect memory and lead to misidentifications."). This research is similar in value and application to that used by this Court to determine constitutional and fundamentally fair sentences for juvenile offenders in *Graham v. Florida*, 560 U.S. 48, and *Miller v. Alabama*, 132 S.Ct. 2455.

The research based evidence has driven policy reform efforts: implementing eyewitness identification procedures that are responsive to the research can significantly reduce the risk of misidentification. NAS Report at 105-109. In fact, responding to the wrongful conviction caused by eyewitness misidentifications and the science explaining how suggestive identification procedures contribute to such misidentifications, the Ohio General Assembly codified a number of research-based practices for non-suggestive identification procedures in Ohio Revised Code (R.C.) §2933.83, which governs the administration of photo or live lineups. The purpose of mentioning the state statute is not to argue a state law issue, but to show that Ohio has adopted some of the research-based evidence in law, which was still not followed by the state nor the state reviewing court(s) in determining the outcome of Petitioner's case.

In this case, these important reforms were actively circumvented. A claimed eyewitness, John Eanes, Jr., was asked to make a first-time, in-court identification of Petitioner, who stood accused of a drive-by shooting six months prior to the trial. In marked contrast to the unspoiled out-of-court identification procedures in the Ohio statute, a first-time, in-court identification is inherently suggestive. *United*

States v. Rogers, 126 F.3d 655, 658 (5th Cir. 1997) ("[I]t is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant."). It is more so suggestive to ask a witness to make an identification of a lone defendant after the police had told him "they had the guy." TrT., pg. 703.

Applicably, The Supreme Court of Connecticut has reasonably determined:

> We 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. If this procedure is not suggestive, then no procedure is suggestive.
> *State v. Dickson*, 322 Conn. 410, 423, 141 A.3d 810 (2016)

While federal case law has addressed in-court identification, the vast majority is related to improper pre-trial identification procedures and the legality of the in-court identification related to the same. State case law is cited herein due to the extreme paucity of federal case law regarding the specific issue of *first-time* in-court identification. At least one U.S. District Court has held that a state court's holding that *Biggers* did not apply to a first-time, in-court identification was "not an unreasonable application of Supreme Court precedent or based on an unreasonable determination of the facts in light of the evidence presented at trial." *Rice v. Warden, Leath Corr. Inst.*, 2017 U.S. Dist. LEXIS 157170 (U.S. Dist. S.C.). If it is true that *Biggers* is inapplicable in a first-time, in-court identification, then there is no current standard to address the constitutionality of the process when it occurs. A different U.S. District Court refused to find the *Biggers* standard inapplicable

under the same circumstances. *Holland v. Horn,* 150 F. Supp. 2d 706 (U.S. Dist. PA).

Given that first-time, in-court identifications regularly occur months—six months herein—or years after the witness has observed a potential crime, the reliability of the identification is negatively impacted by the erosion of memory which is compounded by the suggestiveness of the procedure. See Kenneth A Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation,* 14 L. Experimental Psychology: Applied 139, 142 (2008). Other variables including the lack of a blinded identification procedure, the absence of a test of the witness's memory using filler suspects, and the pressure to make an identification in court all contribute to the low reliability of a first-time, in-court identification. See id., at 9-11.

The state reviewing court's opinion in this case permits the admission of a first-time, in-court identification—even when it is not preceded by an out-of-court identification procedure—as the sole means of identifying a suspect in a crime. It is fundamentally unfair to permit the Sate of Ohio to admit unreliable and prejudicial evidence to convict a defendant instead of obtaining more reliable—but sometimes less favorable—evidence through an easily administered, science-supported, out-of-court identification procedure. Beyond simply allowing for the errant outcome in the instant case, the state reviewing court's opinion regarding the unfair practice of the State creates strong incentives for the Government to avoid the scientifically sound out-of-court procedures contemplated by the research presented above and

incorporated into Ohio law that are designed to preserve reliable eyewitness identification evidence, and instead opt to wait for trial, when an eyewitness can make an inherently suggestive and prejudicial first-time in-court identification.

To reduce the risk of wrongful convictions based on unreliable and prejudicial identifications, this Court should accept review of this issue and update the scientifically unsound and inadequate identification standards in use today to prevent the injustice and lack of fundamental fairness when any court permits a witness to make a first-time identification while testifying in court.

Further reasoning for hearing the issue is presented as follows:

FIRST QUESTION PRESENTED FOR REVIEW:

IS A PETITIONER DENIED DUE PROCESS OF LAW AND A FAIR TRIAL WHEN IDENTIFICATION WAS AT ISSUE AT TRIAL AND THERE WAS A FLAWED PROCESS RELATED TO A FIRST-TIME IN-COURT IDENTIFICATION AT TRIAL BY THE STATE'S ONLY WITNESS?

The state reviewing court considered the identification of the witness in this case within the framework of 409 U.S. 188, 93 S. Ct. 375 (1972). The admission of an unreliable identification that results from a suggestive procedure violates due process. Id., at 196. *Biggers* identified five non-exhaustive factors that guide courts in determining whether an identification is sufficiently reliable:

(1) The opportunity of the witness to view the criminal at the time of the crime,

(2) The degree of attention of the witness,

(3) The accuracy of the witness's prior description'

(4) The witness's level of certainty at the time of the identification, and,

(5) The length of time elapsed between the crime and the identification.

Id., at 199-200.

While the state reviewing court acknowledged the inherently suggestive nature of a first-time, in-court identification, the way in which it applied this Court's ruling in *Biggers* failed to accurately assess whether Eanes's identification was reliable despite the suggestive procedure. Indeed, as courts in other states have found, where no properly-administered out-of-court procedure has been administered, due process principles severely limit the circumstances under which an in-court identification is permissible. *Commonwealth v. Crayton*, 470 Mass. 228, 236, 21 N.E.3d 157 (2014); *Dickson*, 322 Conn. At 410.

1. Due process requires prohibiting the admission of in-court identification testimony that is not predicated upon an out-of-court identification procedure.

"All of the evidence points rather strikingly to the conclusion that there is almost noting 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, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting).

Despite creating the illusion of a persuasive and objective witness-driven identification, an in-court identification results from suggestive state action. See infra., at 9-10. The choice to make an in-court identification the initial procedure instead of first conducting an identification based on more procedurally and scientifically sound identification, as exampled in Ohio Revised Code 2933.83, is

also one made by State actors. Because such an identification procedure is a litigation strategy that is compelled by the State, due process concerns are implicated. See *Perry v. New Hampshire*, 565 U.S. 228, 228, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012) (holding that due process is implicated when an identification is "procured under unnecessarily suggestive circumstances arranged by law enforcement.").

Despite their dramatic power, in-court identifications have minimal to no reliability. See infra., at 10-12. The Due Process Clause prohibits the State from exercising such a powerful tool when there is not sufficient indicia of reliability to support then identification. See *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. at 2253 (1977). A properly conducted out-of court identification procedure is an indispensable tool for determining the reliability of an in-court identification. See infra., at 13-14. The state reviewing court's ruling permits the State to avoid conducting a line-up or administering a blind photo array and simply elicit an inherently suggestive and prejudicial first-time in-court identification at trial. This is fundamentally unfair. See *Dickson*, 322 Conn. at 410; *Crayton v. Mass.* at 228; see also *More v. State*, 880 N.W.2d 487, 492, n. 1 (Iowa 2016) ("the validity of Elmore's in-court identification is not at issue in this case. We have noted, however, that such identifications may be so suggestive as to be impermissible.")

A. A first-time in-court identification procedure is an inherently suggestive state action.

An in-court identification is, like a show-up where a witness is presented with one suspect and asked to make an identification, "inherently suggestive."

Nancy K. Steblay and Jennifer E. Dyasart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. of Applied Research on Memory and Cognition, 287, 287-288 (2016) (hereinafter "Steblay and Dysart"); Dickson, 322 Conn. at 423. The suggestiveness of a show-up is well-established. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *Stovall v. Denno* (1967), 388 U.S. 293, 302. In *State v. Henderson*, the New Jersey Supreme Court reviewed scientific literature on show-ups and concluded that "the main problem with showups is that—compared to lineups—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*, 208 N.J. at 260. In *Commonwealth v Crayton*, the Massachusetts Supreme Court explicitly compared an in-court identification to a showup that was in accord with federal law:

> Where, as here, a prosecutor asks a witness at trial whether he or she can identify the perpetrator of the crime in the court room, and the defendant is sitting at counsel's table, the in-court identification is comparable in its suggestiveness to a showup identification. See *Commonwealth v. Carr*, 464 Mass. 855, 877, 986 N.E.2d 380 (2013), quoting *Commonwealth v. Bol Choeurn*, 446 Mass. 510, 519-520, 845 N.E.2d 310 (2006) ("We have long recognized that 'a degree of suggestiveness inheres in any identification of a suspect who is isolated in a court room'"). See also *Perry v. New Hampshire*, 132 S. Ct. at 727 (all in-court identifications "involve some element of suggestion"). Although the defendant is not alone in the court room, even a witness who had never seen the defendant will infer that the defendant is sitting with counsel at the defense table, and can easily infer who is the defendant and who is the attorney. *See United States v. Archibald*, 734 F.2d 938, 941, modified, 756 F.2d 223 (2d Cir. 1984) ("Any witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant ... ").

Crayton, 470 Mass. at 236. Indeed, given the circumstances herein, a first-time, in-court identification may be more suggestive than a garden-variety showup. As the *Crayton* court further explained:

> In fact, in-court identifications may be more suggestive than showups. See Mandery, Due Process Considerations of In-Court Identifications, 60 Alb. L. Rev. 389, 415 (1996) ("If anything, the evidence suggests that in-court identifications merit greater protection" than pretrial identifications). At a showup that occurs within hours of a crime, the eyewitness likely knows that the police suspect the individual, but unless the police say more than they should, the eyewitness is unlikely to know how confident the police are in their suspicion. However, where the prosecutor asks the eyewitness if the person who committed the crime is in the court room, the eyewitness knows that the defendant has been charged and is being tried for that crime. The presence of the defendant in the court room is likely to be understood by the eyewitness as confirmation that the prosecutor, as a result of the criminal investigation, believes that the defendant is the person whom the eyewitness saw commit the crime. Under such circumstances, eyewitnesses may identify the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is reliable. See id. at 417-418 ("The pressure of being asked to make an identification in the formal courtroom setting and the lack of anonymity ... create conditions under which a witness is most likely to conform his or her recollection to expectations, either by identifying the particular person whom he or she knows the authorities desire identified, or by acting in conformity with the behavior of others they may have seen on television ... ").
> Id., at 237.

B. An identification made in a first-time, in-court procedure is inherently unreliable.

"Reliability id the linchpin in determining the admissibility of identification testimony." Manson, 42 U.S. at 114. The reliability of a first-time, in-court identification is shaky, at best, while "[i]t is true that a witness could identify the defendant in court from original memory," any attempt by an eyewitness to identify the perpetrator in court based on memory of the crime should be viewed with skepticism." Stebley and Dysart at 287-88. Courts, as the state reviewing court in

this case, have traditionally exercised skepticism through application of the totality-of-the-circumstances reliability tests articulated in *Biggers* and *Manson*. *Jenkins*, 2018 Ohio 2397 at ¶ 39. A mechanical application of the *Biggers* factors obscures the reality that first-time, in-court identifications are inherently unreliable.

The confluence of a number of different factors render the first-time, in-court identifications unworthy of probative value:

- **Length of time elapsed:** Trial often occurs months or years after a crime. By the time that an eyewitness makes a first-time, in-court identification, the memory that serves as the basis of identification has significantly eroded. This is because memory decays at an "exponential" rate, with "the greatest proportion of memory loss occurring shortly after an initial observation." *State v. Lawson*, 352 Ore. 724, 746, 291 P.3d 673 (2012); see also *Henderson*, 208 N.J. at 267; Forgetting the Once-Seen Face at 148. Non-suggestive and pristine out-of court procedures are most reliable when they are conducted immediately. Id. Given the timing of trial, the length of time between a crime and an identification at trial weighs strongly against the reliability of the identification.

- **Pressure to identify:** Witnesses making in-court identifications routinely face intense pressure to choose the defendant. NAS Report at 110; *Crayton*, 470 Mass., at 237. Whether it is intentionally created or not, this pressure is applied by an administrator—the prosecutor—who is not blinded to the identity of the suspect. *Henderson*, 208 N.J. at 248. Because an in-court identification is tantamount to a showup, the pressure a witness faces to pick the right person is not balanced by the possibility of witness error inherent in a genuine test of memory such as a line-up or blind photo array.

- **Confidence inflation:** The "[e]vidence indicates that self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy." NAS Report at 108. This is because "confidence can be influenced by factors unrelated to a witness's actual memory of a relevant event." Henderson, 208 N.J. at 236. Among these factors is confidence-inflating feedback offered by an identification procedure administrator. See Nancy K. Steblay and Gary L. Wells, *The Eyewitness Post Identification Feedback Effect 15 years Later: Theoretical and Policy Implications*, 20 Psychology, Public Policy, and

Law, No. 1, 1-18 (2014). Witness confidence is only correlated with identification accuracy when it is measured immediately after an identification is made in an initial, non-suggestive procedure. See John T. Wixted and Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. in the Pub. Int. 10, 14, 19-20, 51, 52 (2017). Because first-time, in-court identifications occur long after the witnessed event and are often preceded by confidence-inflating feedback, self-reported confidence has no probative value.

The above-mentioned variables, all of which point toward the conclusion that first-time, in-court identifications are unreliable, are not counter-balanced by any of the remaining enumerated *Biggers* factors.

- **Opportunity to observe and degree of attention:** These two *Biggers* factors are self-reported by the eyewitness and can be distorted by circumstances and influences of which the witness is unaware. These influences are called "estimator variables" because they relate to the perception of the witness and "are factors beyond the control of the criminal justice system." *Henderson*, 208 N.J. at 261. Two such variables are the witness's (1) level of stress during the encounter and (2) exposure to a weapon during the encounter. NAS Report at 93-94. In the absence of other indicia of reliability, the impact of these estimator variables cannot be taken into full account while assessing the reliability of an identification. Thus, these two *Biggers* variables are of little probative value in assessing the reliability of a first-time, in-court identification.

- **Accuracy of the witness's prior description:** In a first-time, in-court identification such as the one in this case, law enforcement agents did not elicit a prior description from the witness making the identification. Without proper identification or description to which an in-court identification may be compared, the logic of the *Biggers* test breaks down. A totality-of-the-circumstances test is nearly impossible to administer without a comparison point, leading to unreliable identification.

Prior to the trial, Eanes had never made an identification. Prior to his testimony, he was supplied with the knowledge that the State had already "gotten" its suspect. Then, by the time he testified, and via false self-assurance, he

confidently identified Petitioner as the shooter. This chronology demonstrates why first-time, in-court identifications are inherently unreliable. There was never an opportunity to assess Eanes's confidence in his identification at or near the time of the crime when his confidence was actually probative of accuracy. But, over time, as his memory of the night eroded, his confidence was inflated by external feedback.

C. The admission of a first-time, in-court identification violates due process.

When an identification is "infected by" improper State action, due process requires suppression "if there is a very substantial likelihood of irreparable misidentification." *Perry*, 565 U.S. at 232, quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967 (1968). Because first-time, in-court identifications always create a substantial risk of misidentification, due process requires that they be suppressed.

II. Cross examination is an insufficient tool to challenge the credibility of an unreliable in-court identification.

Traditionally, courts have located the remedy for an unreliable in-court identification in the accused's Sixth Amendment right to confront and cross-examine witnesses in front of a jury. *Perry*, supra., syllabus; *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); see *State v. Lewis*, 363 S.C. 37, 41-42, 609 S.E.2d 515 (2005). This Court has recognized the shortcomings of this process. *United States v. Wade*, 388 U.S. 218 at 235, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) ("even though cross-examination is a precious safeguard to a fair trial,

it cannot be viewed as an absolute assurance of accuracy and reliability [of an in-court identification].")

However, because eyewitness error may not arise from malice or dishonesty, but rather sincerely-held but erroneous belief, courts have become increasingly aware of the limitations of neutralizing an unreliable in-court identification through cross-examination. Id., *Dickson*, 322 Conn. at 440 (recognizing that "cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs."); *Crayton*, 470 Mass. at 240-241 ("We are not persuaded that the immediacy of cross-examination materially lessens the 'hazards of undue weight or mistake' arising from a suggestive identification.").

Cross-examination is nearly always an ineffective tool for challenging a bad identification. See Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identification, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727 (2007). This is true even in situations where a witness is subject to impeachment after making an in-court identification that differs from a prior out-of-court identification. Id. In cases with first-time, in-court identifications, cross-examination is an even less effective tool because defense counsel lacks prior inconsistent statements for impeachment.

III. Allowing first-time, in-court identifications incentivizes law enforcement to avoid administering reliable identification procedures in compliance with science-supported procedures as exemplified in O.R.C. 2933.83.

While referring to the substance of Ohio law as an example to support his claim, Petitioner asserts that his is not one of a state law issue. Requiring a state to

conduct an out-of-court procedure prior to the introduction of an in-court identification deters law enforcement from intentionally foregoing a reliable line-up or blinded photo array procedure in favor of a suggestive in-court identification. This is consistent with *Perry*, which reasoned the "[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances is to deter law enforcement's use of improper procedures in the first place." Perry, 565 U.S. at 229. The law should require, minimally, that eyewitness identification procedures be conducted: (1) with the use of non-suggestive fillers in order to test a witness's memory; (2) the use of blind administrators to limit the possibility of inadvertent feedback; and (3) with the pre-trial identification being performed as soon as possible following the crime to avoid memory decay; (4) with limiting instructions to the witness in order to alleviate pressure to pick. An in-court identification lacks all of these basic protections.

Requiring a state to conduct an out-of-court identification procedure is a minimal burden on law enforcement resources; in the use of a blinded photo array, such an array "can be assembled quickly and does not require the physical presence of the suspect or any other individuals." Memorandum of Sally Q. Yates, Deputy Attorney General, Department of Justice, Eyewitness Identification: Procedures for Conducting Photo Arrays (January 6, 2017). And a properly-conducted photo array procedure, conducted as close in time to the witnessed event as practicable, promotes the reliability of eyewitness evidence and minimizes the serious risk of misidentification triggered by suggestive procedures and unnecessary delays.

This case illustrates the strategic reason why law enforcement, if not deterred from relying upon first-time, in-court identifications, may forego an out-of-court procedure. Prior to subpoenaing Eanes on April 3, 2017, law enforcement conducted a photo array identification with Eane's boss, Cunningham. *Jenkins*, 2018 Ohio 2397 at ¶ 13. Cunningham did not identify Petitioner; he instead circled the face of a filler in the photo line-up. Id. Faced with the testimony of Eanes, claiming to be a news eyewitness, the State had a choice to conduct an immediate, properly administered out-of-court identification procedure to test Eanes's reliability or wait until Eanes was before the jury and allow him to make a highly suggestive, unreliable and prejudicial identification of the only defendant in the courtroom. After providing Eanes with pre-identification feedback that they had already caught the shooter, the State chose the latter option. The state reviewing court's decision to allow the State to present Eanes's identification testimony in this manner violated Petitioner's right to due process.

CONCLUSION

The issue before the Court is one of great importance, as it involves the clear violation of due process, the continued application of standards that have not been updated by modern science, with resultant wrongful convictions resulting in manifest injustices. Therefore, petition for a writ of certiorari should be granted.

Respectfully submitted,

Trevonte Jenkins, #A694-869

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