No. 19-75

IN THE
Supreme Court of the United States

JAMES JOSEPH GARNER,
Petitioner,
v.
COLORADO,
Respondent.

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

BRIEF OF SCHOLARS OF LAW, PSYCHOLOGY, NEUROSCIENCE, AND OTHER FIELDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

This brief is signed by scholars representing a variety of disciplines, including law, psychology, neuroscience, and statistics.[2] The scholars have an interest in the quality of eyewitness evidence and in improvements to law enforcement use of such evidence. *Amici* believe that law enforcement procedures and courtroom testimony relating to eyewitness evidence should be founded on scientific research. *Amici* are also interested in improving the administration of justice in general, and in maintaining the accuracy of evidence in particular. *Amici* are concerned that unreliable eyewitness identification procedures and evidence can cause wrongful convictions.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that petitioner and respondent have consented to the filing of this brief and that *amici curiae* timely notified counsel of record of their intent to file this brief.

[2] The signatories are listed in the Appendix to this brief. The views expressed herein reflect those of Professor Brandon L. Garrett and the other signatories, but not those of any academic or other institution to which they belong, such as Duke University.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Defendant-Petitioner James Joseph Garner was identified in court by eyewitnesses while he sat at counsel's table with his two female defense attorneys, readily identifiable as the defendant in the relevant proceedings. The evidence against Garner consisted entirely of testimony by the three eyewitnesses, each of whom had earlier failed to identify Garner from a photo array, and instead identified Garner for the first time in court.

The Colorado Supreme Court ruled that the Due Process Clause did not require the trial court to assess the reliability of those in-court identifications in the absence of an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where "nothing beyond the inherent suggestiveness of the ordinary courtroom setting" made the identification constitutionally suspect. As the petition elaborates, this ruling was incorrect in its interpretation of relevant due process caselaw.

Our focus here, however, is not on that legal error, but rather the court's failure to take account of the substantial body of scientific research concerning reliability of eyewitness memory. The Colorado Supreme Court's ruling neglected the central rationale for carefully scrutinizing suspect identification procedures—their manifest unreliability. In-court identifications must be viewed with the greatest suspicion because, like so-called "showups," they present the eyewitness with a single suspect for identification and are

considered highly suggestive. In-court identifications, and still more troubling, in-court identifications made for the first time in court, raise still greater reliability concerns than show-ups conducted in the field. The central concern in such circumstances is that the suggestive nature of any identification made pursuant to such a procedure raises serious doubts regarding its accuracy.

Identifications made for the first time in court have been shown by research to be unreliable—and raise still greater concerns than showups that police conduct in the field soon after a reported crime—due to the fact that many months or years may have elapsed since the subject event transpired, because memory fades, and because the courtroom setting is highly suggestive. The in-court testimony of eyewitnesses also inherently suggests to the jury greater confidence in the identification of defendants than the testimony warrants—and, frequently, greater confidence than the witnesses themselves expressed pre-trial. Jurors are not aware of the potential for inaccuracy in courtroom identifications, and instead place great weight on the confidence of an eyewitness in court. In-court identifications therefore pose great risks of misidentification, due to the combination of suggestiveness and the impact on jurors. These reliability concerns are heightened where, as here, in-court identification follows earlier non-identification by each of the three eyewitnesses at police photo array procedures held three years before the criminal trial.

The Colorado Supreme Court's ruling, particularly in circumstances in which no positive pretrial identification has occurred, ignores a large body of scientific research on eyewitness memory and, as a result, poses great risks of inaccuracy and wrongful convictions.

ARGUMENT

I. THE DANGERS OF FIRST-TIME IN-COURT EYEWITNESS IDENTIFICATIONS SIGNIFICANTLY OUTWEIGH THEIR UTILITY.

The problem of erroneous eyewitness identifications in the courtroom is a highly pressing one. Dr. Thomas Albright has explained the "profound and multifaceted" "consequences of erroneous convictions based on flawed eyewitness accounts." Thomas D. Albright, *Why Eyewitnesses Fail*, 114 Proc. Nat'l Acad. Sci. 7758, 7758 (2017). Erroneous eyewitness identification has led to wrongful convictions, as a result of which "innocent people have spent many years of their lives behind bars while the perpetrators remain at large, the latter often committing additional crimes." *Id.*

DNA has exonerated more than 350 wrongfully convicted defendants. Information about those cases offers insights into where criminal procedure results in a wrongful conviction. One key place where criminal procedure goes wrong: eyewitness identification. Over two-thirds of the wrongfully convicted defendants exonerated by DNA evidence

had been convicted in cases involving eyewitness misidentification.[3]

Of particular relevance here, in-court identifications by witnesses who had earlier been unable to make a positive identification played a role in those troubling cases. Many wrongful convictions are attributable to false identifications, and particularly to first-time in-court identifications. In at least 40 percent of the first 190 DNA exonerations involving misidentification, witnesses did not initially identify the innocent suspect.[4] Almost without exception, however, those eyewitnesses were completely certain in their identification at the time of trial.[5] Innocent people

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[3] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011) ("Eyewitnesses misidentified 76% of the exonerees (190 of 250 cases)."); Innocence Project, *Eyewitness Identification Reform*, https://www.innocenceproject.org/eyewitness-identification-reform/ (last visited Aug. 5, 2019) ("Mistaken eyewitness identifications contributed to approximately 71% of the more than 360 wrongful convictions in the United States overturned by post-conviction DNA evidence").

[4] Garrett, *supra* note 3, at 64.

[5] *Id.* at 68; *see also* Nancy K. Steblay, Gary L. Wells & Amy B. Douglass, *The Eyewitness Post-Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 Psychol., Pub. Pol'y, & L. 1, 2 (2014) (explaining why a witness's confidence in his or her identifications, including his or her retrospective report of confidence at time of initial identification, grows across time from initial identification to trial).

were misidentified by more than one eyewitness in 36 percent of those DNA exoneration cases.[6]

Due to the severity of the problem, the National Academy of Sciences, in a committee co-chaired by Dr. Albright, released a 2014 report providing authoritative guidance on the state of eyewitness memory research and its implications for the legal system. *See generally* Nat'l Acad. of Sci., *Identifying the Culprit: Assessing Eyewitness Identification* 108 (2014) [hereinafter National Academy Report].

The National Academy Report represented perhaps the most comprehensive effort to date to survey both the state of current law-enforcement procedures and the scientific literature relevant to visual memory, in order to summarize their lessons for law enforcement and courts.[7] The National

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[6] Garrett, *supra* note 3, at 50.

[7] The National Academy Report cited, *e.g.*, Carl Martin Allwood, Jens Knutsson & Pär Anders Granhag, *Eyewitnesses Under Influence: How Feedback Affects the Realism in Confidence Judgements*, 12 Psychol., Crime, & L. 25-38 (2006); Brian H. Bornstein & Douglas J. Zickafoose, *"I Know I Know It, I Know I Saw It": The Stability of the Confidence-Accuracy Relationship Across Domain*, 5 J. of Experimental Psychol.: Applied 76-88 (1999); Pär Anders Granhag, Leif A. Stromwall & Carl Martin Allwood, *Effects of Reiteration, Hindsight Bias, and Memory on Realism in Eyewitness Confidence*, 14 Applied Cognitive Psychol. 397-420 (2000); Henry L. Roediger, III, John H. Wixted & K. Andrew DeSoto, *The Curious Complexity between Confidence and Accuracy in Reports from Memory*, *in* Oxford Series in Neuroscience, Law & Philosophy: Memory & Law (Lynn Nadel & Walter P. Sinnott-Armstrong eds., Oxford University Press 2012).

Academy report recommended (and explained the science supporting), among other improvements, implementing pre-trial judicial inquiry regarding eyewitness identification procedures, exercising caution regarding in-court identifications in general and limiting first-time in-court identifications, specifically.

II. FIRST-TIME IN-COURT IDENTIFICATIONS ARE UNRELIABLE AND INHERENTLY CONVEY AN INFLATED SENSE OF CONFIDENCE IN THE IDENTIFICATION TO JURIES.

Eyewitness identification testimony is often wrong, due to, among other issues, the time elapsed from observation, and the format of the identification process. The more time elapses, the less accurate eyewitness testimony becomes. And identification processes such as showups result in particularly unreliable identification.

Both of these problems are of particular relevance to in-court eyewitness identification testimony. The time that elapses between when someone witnesses a crime and when he or she identifies a defendant in court is substantial—often a period of several years—posing significant risk of misidentification. Memory is not a perfect record. Rather, memory is fragile and malleable. National Academy Report at 108. And the risk of

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National Academy Report, *supra*, at 108 n.4; *see also* Gary L. Wells et al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, L. & Hum. Behav. (forthcoming 2020).

suggestiveness inherent in the courtroom—with the defendant already effectively identified by his or her position next to counsel at the defense table—is self-evident.[8]

These problems are exacerbated by the confidence almost always expressed by eyewitnesses in such settings. As to in-court identifications, "self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy." *Id.*[9] A witness's in-court "[e]xpression[] of confidence . . . often deviate[s] substantially from [the witness's] initial confidence judgment, and confidence levels reported long after the initial identification can be inflated by factors other than the memory of the suspect." National Academy Report at 108. Research shows that an eyewitness's degree of certitude is probative only when expressed "at the moment of initial

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[8] Research has demonstrated that the presence of suggestion during an in-person identification procedure increases false identifications and witness confidence that a false identification is correct, but does not increase arruate identifications. *See* Mitchell L. Eisen et al., *Pre-Admonition Suggestion in Live Showups: When Witnesses Learn that the Cops Caught "the" Guy*, 31 Applied Psychol. 520, 520-29 (2017). Of course, the circumstances of an in-court identification such as the one to which Garner was subjected are highly suggestive and thus constitute a great threat to eyewitness reliability.

[9] *See also* Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & Hum. Behav. 1 (2009).

identification," before other confounding variables—such as law enforcement feedback and implicit cues—are introduced. *See id.* In contrast, "[i]n-court confidence statements may also be less reliable than confidence judgments made at the time of an initial out-of-court identification; as memory fails and/or confidence grows disproportionately." *Id.* at 110.

The case of Ronald Cotton serves as an example—and a warning. In 1984, a victim of a sexual assault was shown a photo array and then a lineup, where she only with difficulty, and after several minutes, identified Cotton as the person who "looks the most like" the culprit. *Id.* at 110. After the detective asked if she was certain, the victim responded "[y]es." *Id.* The detective reinforced that decision by telling her that Cotton was the same person that she had identified from the photos. *Id.* In court, none of this uncertainty was apparent; she told the jury that she was "absolutely sure" that Cotton was the culprit. Cotton was sentenced to life in prison plus fifty-four years, and only years later did DNA testing exonerate him and implicate another man. *Id.* This was a witness who was "initially quite unsure," but "became certain it was Cotton only after the police made confirmatory remarks and had her participate in two identification procedures where Cotton was the only person shown both times." *Id.* at 11.

DNA exoneree Neil Miller was similarly wrongly convicted of sexual assault in

Massachusetts in 1990. About a month after the attack, the detective brought an array of nine photos to the victim, who selected two photos, but was not sure if she could pick out either individual as the attacker. The detective recalled instructing her, "[I]f she had a first impression, that the best thing to do was go with her first impression." Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 473 (2012) (alteration in original) (citation omitted). The victim then identified Miller's photo, and Miller was arrested. A second array was conducted two months later, with a more recent photo of Miller, and the victim picked his photo. Miller's defense lawyer then made a motion to request a new photo array at the upcoming pretrial hearing. Just before the hearing was to take place, the prosecutor and a detective walked the victim past Miller in the hallway outside the courtroom, where she was unable to identify him. In the courtroom at the hearing, she was able to say "[t]his is him," once it was obvious who he was. *Id.* (citation omitted). The judge ruled that this pretrial courtroom identification was highly suggestive and suppressed it. However, the judge allowed the victim to again identify Miller at trial, where she now said she was "positive" he was the culprit. *Id.* at 474 (citation omitted). The judge ruled that the witness's original view of the perpetrator was an "independent basis" for the courtroom identification. *Id.* (citation omitted). Miller was exonerated by post-conviction DNA testing in 2000, after serving almost ten years in prison. *Id.*

In-court identifications—like in Cotton's and Miller's cases—have extreme power over jurors. As Justice Brennan observed, "there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant," and identifies him as the perpetrator. *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting Elizabeth F. Loftus, *Eyewitness Testimony* 19 (1979)). Research supports Justice Brennan's observation. A large body of jury studies has shown that eyewitness confidence in the courtroom can affect jurors powerfully and cause them to disregard other important aspects of the testimony that bear on its reliability.[10]

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[10] Elizabeth F. Loftus, James M. Doyle & Jennifer E. Dysart, *Eyewitness Testimony: Civil and Criminal* 120, 121 n.4 (5th ed. 2013) (citing Brian L. Cutler et al., *Juror Decision-Making in Eyewitness Identification Cases*, 12 L. & Hum. Behav. 41 (1988)); Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria* 24 L. & Hum. Behav. 581 (2000); Neil Brewer & Anne Burke, *Effects of Testimonial Inconsistencies and Eyewitness Confidence on Mock-Juror Judgments*, 26 L. & Hum. Behav. 353 (2002); Brian L. Cutler, Steven D. Penrod & Hedy Red Dexter, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 L. & Hum. Behav. 185 (1990). In essentially the same manner, eyewitness confidence might impair accurate judicial fact-finding, as some studies by Judge Andrew Wistrich and others have shown judicial susceptibility to cognitive bias. *See, e.g.*, Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law of Their Feelings?*, 93 Tex. L. Rev. 855 (2015); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001) (reporting experimental

Although jurors regard it as particularly meaningful, a witness's confidence at the time of trial is meaningless with respect to its accuracy.[11] The only confidence statement known reliably to indicate accurate identification is the eyewitness's confidence statement at the time he or she makes the initial identification. Subsequent statements of confidence are a function of later events and cannot substitute for a confidence statement at the time of initial identification.[12] An eyewitness who makes a confident identification at the time of a police lineup may be more reliable than a witness who has low confidence at the police lineup yet expresses great confidence in the courtroom. That is why the National Academy Report emphasizes carefully documenting initial lineups and any confidence expressed if an identification is made.[13] By contrast, earlier lack of confidence is a troubling red flag. Most DNA exonerations involving eyewitness misidentifications involved an eyewitness who either did not identify the defendant before the trial or who had not been

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evidence showing that judges are susceptible to misleading heuristics and biases when making judgments).

[11] Wells, *supra* note 9.

[12] John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. in Pub. Int. 10, 17, 19 (2017).

[13] *See also* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Hum. Behav. 603, 635-36 (1998).

certain of that identification.[14] Yet, by the time of trial, all but a handful testified that they were completely certain of their identifications.[15]

This confidence-inflation by the time of trial is not surprising. The "implicit task of an eyewitness" testifying at trial is to tell a coherent story. Witnesses commonly do so by knitting together multiple pieces of information, including their own sensory experiences during the crime, the lineup identification experience, and reports of others." Thus, "[w]itnesses talk to other witnesses, listen to media reports of their own actions, and tell their stories to others who appear to believe them, all of which is reinforcing of the original identification and gives the illusion of confirmation by independent sources." Witnesses will have seen the suspect's image in prior identification procedures, and perhaps also in pretrial hearings and of course, the trial itself. Repeated exposure can lead to a "familiarity effect" in which witnesses "are more likely to recognize previously viewed targets, even if they did not pick them out in the original procedure." Dan Simon, *In Doubt: The Psychology of the Criminal Process* 155 (2012); *see generally id.* at 154-57. Further, witnesses will know about the other evidence in the case, including testimony by

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[14] *See* Garrett, *supra* note 3, at 64 ("In 57% of the trials with eyewitness testimony (91 of 161 trials), the witnesses had earlier not been certain at all, a glaring sign that the identification was not reliable.").

[15] *Id.* at 68 ("In only four cases were the eyewitnesses *not* sure at trial that they had identified the right person.").

other eyewitnesses, if there are multiple eyewitnesses. Scientists would expect this "to markedly increase the confidence of each witness because it gives the appearance of independent confirmation, even though the correlated misidentifications have the same root causes in uncertainty and bias." Albright, *supra* at 7762. Dr. Daniel Simon has also described how "the social environment surrounding in-court identifications produces an immensely strong commitment effect." Simon, *supra*, at 155. An eyewitness may feel that failing to identify the defendant "will make him appear incompetent, unreliable, or unhelpful to law enforcement." *Id*. at 155-56.

For the above reasons, first-time in-court identifications run the risk of substantially misleading jurors. The National Academy Report highlights that first-time identifications should not occur in court:

> An identification of the kind dealt with in this report typically should not occur for the first time in the courtroom. If no identification procedure was conducted during the investigation, a judge should consider ordering that an identification procedure be conducted before trial.

National Academy Report at 110.

The risk of misleading jurors is greater where law enforcement *did* conduct an identification procedure during the investigation of the crime and

the result was no identification—as here. In such a case, the "results" of in-court testimony contradicts the results of the more-reliable during-investigation procedure—but jurors are virtually certain to credit the in-court testimony anyway, for the reasons explained above. In other words, "a first time in-court identification procedure amounts to a form of improper vouching." *State v. Dickson*, 141 A.3d 810, 823 (Conn. 2016). Nor are in-court identifications necessary to promptly rule out possible suspects at a crime scene; an eyewitness can describe what transpired at properly-conducted police identification procedures without the added, and highly suggestive, theater of making an in-court identification.

III. IN-COURT IDENTIFICATION, AS OF DEFENDANT-PETITIONER GARNER, RAISES SERIOUS RELIABILITY CONCERNS AND REQUIRES DUE PROCESS REVIEW.

A. The Non-Identifications at Photo Arrays and the In-Court Identifications Below Raise Reliability Concerns.

James Joseph Garner was convicted based solely on the testimony of three eyewitnesses in court, none of whom had identified him in a police photo identification procedure conducted three years earlier. Garner was at a bar in Denver at 2:00 am when a gunman fired during an altercation, injuring brothers Arturo, Christian, and Roberto Adam-Diaz. All three brothers had

been drinking. Immediately after the shooting, Roberto told police that he had not clearly seen the shooter. Arturo described the shooter to police as a man who was 27 years old and 5 feet, 2 inches. (Garner was nine years older and half a foot taller.) In a second interview, Arturo told police, "I don't remember [the shooter]. I don't remember." Rep. Tr. 117-118 (Aug. 15, 2012). Christian thought the shooter was bald, wearing no glasses, with no facial hair, and with a tattoo on his head. Garner had short black hair, glasses, facial hair, and no such tattoos.

During the investigation, police presented a photo array with six photos to each of the three brothers. All of the five "filler" photos were selected to resemble Garner; i.e. none had tattoos, none were bald, and all had facial hair. None of the three brothers selected Garner. Christian selected one of the fillers as the shooter. In response, the detective interviewed the brothers again, and now they all added a new detail that the shooter had facial hair. No other witnesses were shown photo arrays, and none of these three witnesses identified Garner.

Three years after the shooting, Garner's trial occurred. Garner was seated at the defense table, readily identifiable between his two female attorneys. For the first time, all three brothers now identified Garner. The prosecutor asked Roberto whether he saw anybody in the courtroom "who shot at [him] on that particular evening." *Garner v. People*, 436 P.3d 1107, 1109 (Colo. 2019)

(alteration in original). Roberto pointed at Garner and told the jury that he would "never forget" Garner's face. *Id.* Christian did the same. *Id.* Arturo declared that he was "a hundred percent sure that it was him." *Id.*

In closing statements, the prosecution emphasized that: "We have not one, not two, but three eyewitnesses who tell you they're 100 percent sure this man is the shooter. That's beyond a reasonable doubt." Rep. Tr. 227 (Aug. 17, 2012).

B. Judicial Review of the In-Court Identifications in this Case Would Address Serious Due Process Concerns Regarding Suggestion and Unreliability.

The eyewitness testimony in-court at Garner's trial raises a series of grave concerns regarding suggestion and unreliability.

As Justice Brennan once observed, "the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967) (Brennan, J.). In particular, so-called "showup" identifications, in which law enforcement present a witness with only a single suspect for identification, have been "widely condemned" as unreliable and unnecessarily suggestive. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). Field showups are conducted shortly after a criminal report, typically within a few hours of a report.

Showups pose special risks of inaccuracy. For one thing, there are no fillers in a showup, and therefore it is a "yes" or "no" test. A. Daniel Yarmey, Meagan J. Yarmey & A. Linda Yarmey, *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 L. & Hum. Behav. 459, 464-65 (1996); Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A MetaAnalytic Comparison*, 27 L. & Hum. Behav. 523, 538-39 (2003).

Another reason that showups are particularly likely to be inaccurate is that they are inherently suggestive. Courts have also regulated showups for this reason.[16] For the same reason, this Court should regulate in-court first-time identifications. In-court first-time identifications are even more suggestive than a field showup.

In practice, in-court identifications are showups: only a single defendant may be present in the courtroom. In-court identifications are conducted under even more inherently suggestive circumstances than showups, because the defendant is charged and sitting at counsel's table. In-court identifications may also follow prior identification procedures, which can themselves, even in the absence of an identification,

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[16] For example, the Wisconsin Supreme Court has "conclude[d] that evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary." *State v. Dubose*, 699 N.W.2d 582, 593-94 (Wis. 2005).

contaminate the memories of the witnesses.[17] In-court identifications are also even less accurate than field showups, because they may be conducted months or years after the criminal incident is reported. Memory erodes over time. Because of "the passage of time," along with "the inherent suggestiveness of in-court identifications," an "in-court identification" subsequent to an "earlier out-of-court identification" "cannot be more reliable" than the earlier identification. *Commonwealth v. Johnson*, 45 N.E.3d 83, 92 (Mass. 2016); *see also State v. Henderson*, 27 A.3d 872, 907 (N.J. 2011). Here, the in-court "identifications" of Garner occurred three years after the crime.

In-court identifications also raise a series of reliability concerns.[18] The State has argued "that in-court identifications *not preceded by improper pretrial identification procedures* do not implicate a defendant's right to due process." *Garner v. People*, 436 P.3d at 1111 (emphasis added). Picking up on this argument, the Colorado Supreme Court found "[i]mportan[t]" the fact that Garner "d[id] not allege that the pretrial identification procedures were improper." *Id.* at 1110. In the Colorado Supreme Court's view, "requir[ing] prescreening of in-court

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[17] *See, e.g.*, Brian L. Cutler, *Sources of Contamination in Lineup Identifications*, The Champion, May 2017, at 16-17.

[18] Dan Simon, *In Doubt*: *The Psychology of the Criminal Process* 154-157 (2012) (explaining that in-court identifications are "patently suggestive" "susceptible to both decay and contamination," and occur in an environment producing "an immensely strong commitment effect").

identifications . . . where, as here, the witness failed to identify the defendant in a pretrial procedure. . . . could disincentivize the use of properly conducted lineups and encourage the prosecution to try their luck in the (typically) suggestive trial setting." *Id.* at 1119. The implication is that the proper conduct of law enforcement officers in conducting the original photo lineup removes concerns about the in-court identification. That argument is logically backwards. The testifying witnesses here failed to identify Defendant-Petitioner Garner during pretrial identification procedures. In fact, the very controls that make a properly conducted photo lineup non-suggestive at the time it is conducted create a strong source of suggestion for any subsequent identification. The facts of this case show why that is so.

The facts of this case further show why a review of the in-court identifications would raise serious concerns. We set out a series of such concerns:

(a) **Initial Viewing Conditions**. The initial viewing occurred late at night, with all three witnesses intoxicated, in a chaotic situation, in which witnesses were injured and may have been focusing on a weapon. These suggest quite poor viewing conditions.

(b) **Initial Non-Identifications**. None of the three witnesses could identify Garner at the original photo arrays. One had in fact identified another person, a "filler" photo.

(c) **Suggestion from the Original Photo Array**. At the original photo array, each witness paid attention to Garner's face while thinking about the shooter, thus linking Garner with their memory of the shooter. At the photo array lineup, all of the images the witnesses saw shared features similar to Garner's (including the facial hair), thus implanting the idea that the shooter shared those features.

(d) **Change in Description**. The witnesses had initially described a shooter with a markedly different appearance than Garner's.

(e) **Substantial Passage of Time**. Eyewitness memories fade and become less clear over time.

(i) **Memory Decay**. The passage of time leads to memory decay. Three years elapsed from the time of the photo arrays to trial: a substantial amount of time.

(ii) **Contamination**. The passage of time also leads to greater potential for contamination. It makes it easier and more likely that a witness will conflate what he actually saw with intervening images, especially intervening images closely linked to his memories of the shooting. It also makes it more likely that other influences, such as from the

State during trial preparation, will impact memory.

(f) **In-court Showup**. In court, Garner was the only person in the courtroom whose face corresponded to the image of the shooter implanted by the previous lineup. Indeed, Garner was the only male sitting at counsel's table. Thus, this was a showup identification. Showups are extremely unreliable, and, as set forth above, an in-court showup is particularly unreliable, given the passage of time and other factors discussed herein, as well as the social setting and the pressure to conform to expectations of the prosecutor, judge, and jury.

(g) **First-Time In-Court Identification**. An in-court identification is particularly problematic when it constitutes the first time that a witness has identified a suspect. Since memory does not improve over time, and given the suggestion and contamination inherent in such procedures, a first-time in-court identification raises dramatic potential for error.

For these reasons, not only do *amici* believe that in-court identifications should be carefully reviewed in general, but they also believe that these particular in-court identifications raise grave concerns with suggestion and unreliability.

CONCLUSION

In-court identifications raise particular dangers regarding error and prejudice, while providing little probative value, since an eyewitness may testify regarding prior, properly conducted procedures without making an in-court identification. First-time in-court identifications raise particular due process concerns for several reasons. Inherent in the courtroom setting is the suggestion that the defendant is guilty. Pretrial processes inflate the witness's degree of confidence, which inflated sense of confidence the witness conveys to the jury. Jurors, in turn, are overly influenced by that confidence. Further, there is no scientifically supportable reason, nor is there any constitutional reason, to distinguish between suggestive identification procedures conducted in-court versus out of court. For the reasons set forth herein, *amici curiae* suggest that the ruling by the Colorado Supreme Court is erroneous and that the Due Process Clause does apply to in-court identification procedures, and therefore that this Court should grant review and reverse the ruling below.

Respectfully submitted,

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APPENDIX

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