

No. 18A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES JOSEPH GARNER,

Applicant,

v.

COLORADO,

Respondent.

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

**APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR WRIT OF CERTIORARI**

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TO: Justice Sotomayor, Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

Applicant James Joseph Garner respectfully requests an extension of thirty (30) days in which to file his petition for writ of certiorari, challenging the Colorado Supreme Court's decision in *Garner v. People*, 436 P.3d 1107 (2019), a copy of which is attached herewith. In support of this application, Applicant provides the following information:

1. The Colorado Supreme Court issued its decision on March 18, 2019. App. 1. Accordingly, the petition for certiorari is currently due on June 17, 2019. Granting this extension would make it due on July 17, 2019.

2. This case is a serious candidate for certiorari review. It raises a federal constitutional question over which state courts of last resort and the federal courts of appeals are divided: whether identifications of criminal defendants in ordinary courtroom settings as the perpetrator of a crime are categorically exempt from screening for reliability under the Due Process Clause so long as the police did not arrange an unduly suggestive identification before trial. A bare majority of the Colorado Supreme Court held in this case that the Due Process Clause is categorically inapplicable under these circumstances. App. 29. The majority acknowledged, however, that, some state and federal courts have held to the contrary. *See id.* at 17-20,

27-28 (citing, *e.g.*, *State v. Dickson*, 141 A.3d 810, 822-28 (Conn. 2016); *United States v. Greene*, 704 F.3d 298, 305-06 (4th Cir. 2013)). And the dissenting Justices would have followed the lead of those other courts. *See* App. 39-43 (Hart, J., dissenting).

The importance of this issue is manifest. In-court identifications are a regular occurrence in criminal trials. They also are “extremely powerful evidence.” App. 3. Indeed, there is “almost nothing more convincing than a live human being who takes the stand” and identifies the perpetrator. *Watkins v. Sowders*, 449 U.S. 341, 352 (1982) (Brennan, J., dissenting). At the same time, it is difficult to imagine “a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime.” *Dickson*, 141 A.2d at 822; *see also 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.”). This suggestive setting can lead to misidentifications—and to wrongful convictions.

This case, moreover, is an excellent vehicle to decide whether due process ever has anything to say about the risk of such wrongful convictions. The potential for misidentification was extremely high here. Three eyewitnesses identified applicant as the perpetrator at the stand at trial. Yet

all three were shown photo arrays including applicant shortly after the crime, and *none* identified applicant as the perpetrator. Furthermore, all three gave physical descriptions of the perpetrator to the police that varied wildly from applicant—for example, describing the perpetrator as a bald man, whereas applicant had hair. Finally, none of the eyewitnesses knew the perpetrator, and their sole exposure to him (at least before trial) was a brief chaotic scrum late at night in a bar. For all of these reasons and others, the dissenting Justice below observed—without dispute from the majority—that if due process requires a reliability screen in this setting, it is likely the identifications would have been impermissible. *See* App. 43-46 (Hart, J., dissenting).

3. This application is not filed for purposes of delay. Given the importance of this case, Applicant has recently retained Jeffrey L. Fisher of the Stanford Supreme Court Litigation Clinic to be lead counsel in this Court. The time requested is necessary for Mr. Fisher and the other members of the Clinic to fully familiarize themselves with the record, decisions below, and the relevant case law across the country on this issue. In light of other obligations of the Clinic, Mr. Fisher would not be able adequately to complete these tasks by June 17, 2019.

RESPECTFULLY SUBMITTED this 29th day of May, 2019.

By: Jeffrey L. Fisher

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