No. 19 -___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause imposes any check on an eyewitness's identification of a criminal defendant in the typically suggestive setting of trial where there was no police misconduct but there is nonetheless substantial reason to doubt the witness would identify the defendant in a nonsuggestive setting.

RELATED CASES

James Joseph Garner v. People of the State of Colorado, No. 16SC75, Supreme Court of Colorado (March 18, 2018).

People of the State of Colorado v. James Joseph Garner, No. No. 12CA2540 (December 15, 2015).

People of the State of Colorado v. James Joseph Garner, No. 10CR1565 Adams County (Colorado) District Court (August 20, 2012).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Joseph Garner respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at 436 P.3d 1107 and reprinted in the appendix to the petition ("Pet. App.") at 1a-47a. The decision of the Colorado Court of Appeals is reported at 439 P.3d 4 and reprinted at Pet. App. 48a-74a.

JURISDICTION

The Colorado Supreme Court issued its decision on March 18, 2019. Pet. App. 1a. On May 31, 2019, Justice Sotomayor extended the time to file this petition until July 17, 2019. No. 18A1244. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

The prosecution's case against petitioner James Joseph Garner "hinged" on testimony from three witnesses identifying him, while he sat at defense counsel table, as the perpetrator of the crime. Pet. App. 3a. The question presented is whether the Due Process Clause permitted these in-court identifications to occur in the suggestive setting of the courtroom without any judicial screening at all—no matter how strong the reasons to doubt their accuracy.

And there were *extremely* compelling reasons to doubt the reliability of the identifications. The identifications were made by three brothers who, after a night of drinking in a crowded bar, were struck by a flurry of gunshots. Later that night and in the months after, each of the brothers gave wildly varying descriptions of the shooter. Pet. App. 46a. Almost nothing about those descriptions fit Mr. Garner. *Id.* What is more, when presented with a photo array containing Mr. Garner's image, *none* identified him as the shooter. *Id.* 5a.

Nonetheless, each brother told a very different story when put on the witness stand at trial three years later and presented in the courtroom with Mr. Garner, seated between his two female attorneys. One brother proclaimed he was "a hundred percent sure" Mr. Garner was the shooter; another said he was "positive" Mr. Garner was the gunman; and the last one said "the shooter's face was something he would never forget." Pet. App. 5a-6a. The prosecution then argued to the jury: "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).

On appeal, the Colorado Supreme Court recognized that this Court's precedent "d[oes] not directly answer" the question whether due process imposes any limitations on in-court identifications under the circumstances here—namely, when no pretrial police misconduct has occurred but there is substantial reason to doubt the witness would identify the defendant in a nonsuggestive setting. Pet. App. 21a. The court also acknowledged that state and federal courts have long been split over the issue. *Id.*

17a-30a. A bare majority of the court then held that so long as the police did not arrange a suggestive pretrial identification, due process imposes no check on an ordinary in-court identification. *Id.* 32a-33a.

This split of authority needs resolution. And the Colorado Supreme Court's holding is mistaken. The Due Process Clause's framework designed to prevent undue risk of misidentifications applies *whenever* the state has arranged an impermissibly suggestive identification procedure. The suggestiveness inherent in a typical courtroom identification becomes impermissible where, as here, there is substantial reason to doubt that the witness would identify the defendant in a nonsuggestive setting.

Contrary to the Colorado Supreme Court's belief, *Perry v. New Hampshire*, 565 U.S. 228 (2012), does not signal otherwise. *Perry* held that a totally different sort of identification is exempt from due process scrutiny: an out-of-court identification not prompted by any state actor. *Id.* at 245-48. But in the end, only this Court can resolve whether *Perry* reaches far beyond its facts and insulates *in-court* identifications under the circumstances here from any constitutional oversight whatsoever. This Court should use this occasion to do so—and to confirm that the Due Process Clause does not recede into nothingness at the precise moment of a trial where procedural fairness and accuracy are most urgently required.

STATEMENT OF THE CASE

A. Factual Background

1. One night several years ago, three brothers—Arturo, Roberto, and Christian Adame-Diaz—were drinking at a Denver-area bar with a friend. Petitioner

James Joseph Garner and some friends—three men and three women—were also at the bar. Pet. App. 4a. Mr. Garner is 5'8", has dark hair, and was 36 years old at the time. Rep. Tr. 26-28, 70-72 (Aug. 13, 2012); Aff. for Arrest Warrant 8 (June 4, 2010). That night, he had some facial hair and was wearing glasses and a dark long-sleeved shirt. Rep. Tr. 26-28, 39, 49-50 (Aug. 14, 2012). None of the brothers knew Mr. Garner.

At about 2:00 a.m., something sparked an altercation among several of the patrons. Pet. App. 4a. Amidst the scrum, someone pulled out a gun and fired several shots, injuring each of the brothers. *Id.*

After the shooting, people were shoving each other and began running away. In the chaos, Mr. Garner fell and lost his glasses. Pet. App. 4a. A friend of his also dropped her cell phone as she was leaving. *Id.* The phone contained pictures of her, Mr. Garner, and the other people in their party. *Id.* 4a, 49a.

None of the workers in the bar saw who fired the shots. An employee at the bar later said she saw Mr. Garner depart via the back door and that he was *not* carrying a gun. Rep. Tr. 65, 102-05 (Aug. 14, 2012).

2. During the investigation, the brothers offered varying descriptions of the shooter. Almost none of the details they gave matched Mr. Garner.

Immediately after the shooting, Roberto conceded he had not clearly seen the shooter. Rep. Tr. 186 (Aug. 16, 2012). But he said he thought the shooter was a man wearing a bandana (Mr. Garner was not). *Id.*

Arturo told the police he had exchanged words with the shooter during the altercation. Rep. Tr. 16-17 (Aug. 16, 2012). Arturo described the shooter as a 27-year-old man (Mr. Garner was 36) who was 5'2" (Mr.

Garner is a half-foot taller, 5'8"), with short black hair. *Id.* 11-12, 16. In a second interview, Arturo was asked if the shooter had facial hair or tattoos. He responded, "I don't remember this guy. I don't remember." Rep. Tr. 117-18 (Aug. 15, 2012). But Arturo, who is 5'5" tall, repeated that the shooter was *shorter* than him. *Id.* 121. Arturo added that the shooter was wearing black clothes. *Id.*

Christian, who was the most seriously injured of the three, also described the shooter twice in the months following the shooting. The night of the altercation, he told a deputy while in the hospital that he thought the shooter was bald (Mr. Garner had hair). Rep. Tr. 15-16 (Aug. 17, 2012). More than three months after the shooting, he repeated his belief that the shooter was a bald man with a tattoo on the side of his head (Mr. Garner had no visible tattoos). Rep. Tr. 188-90 (Aug. 15, 2012). He said the shooter was nineteen or twenty years old (again, Mr. Garner was 36), did not have facial hair (Mr. Garner did), was wearing a hat (Mr. Garner was not) and a dark shirt, and was not wearing glasses (Mr. Garner was). *Id.* 189-93, 207. He described another man with glasses that stood out to him, but he indicated that this man was *not* the shooter. *See id.* 190, 200-02.

3. A few months after the incident, the police disseminated a bulletin to the community with photos pulled from the cell phone that Mr. Garner's friend had dropped at the bar. Pet. App. 53a. Someone responded to the bulletin and identified Mr. Garner as one of the men pictured in the photos. Rep. Tr. 93-94, 150 (Aug. 16, 2012). No other men in the bar that night could be identified.

Lacking any other leads, the police decided to present a "photo array" containing Mr. Garner and photos of five similar-looking "fillers" to the brothers to see whether they might identify him as the perpetrator. Pet. App. 5a; *see also* Ex. 23. The array was properly constructed and non-suggestive.[1] All six of the men in the array had short dark hair and facial hair—specifically, mustaches and hair on their chins. Ex. 23. None had any visible tattoos. *Id.*

Not one of the brothers identified Mr. Garner as the shooter. Pet. App. 5a. Only one brother, Christian, marked Mr. Garner as even "possibly" there. Rep. Tr. 195-97 (Aug. 15, 2012); Ex. 26. But he also indicated that two of the fillers were "definitely" there, and he said one of the fillers was the shooter. Rep. Tr. 195-97 (Aug. 15, 2012); Ex. 26.

4. Still lacking any other leads, the State proceeded to file attempted murder and assault charges against Mr. Garner.

At that point, the detective re-interviewed Arturo and Christian about the shooting. In line with the photo array, but not their initial statements, their

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[1] Properly conducted pretrial identification procedures "play an important role in our criminal justice system," enabling officers to test in a comparative setting whether witnesses identify suspects as perpetrators. U.S. Dep't of Just., Memorandum for Heads of Department Law Enforcement Components All Department Prosecutors from Sally Q. Yates, Deputy Attorney General (Jan. 6, 2017), https://www.justice.gov/file/923201/download. Such procedures are much more reliable than one-on-one "show-ups," particularly when conducted closer in time to the crime. Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 Mo. L. Rev. 377, 398-400 (2016).

descriptions of the shooter now both included the detail that he had facial hair. Pet. App. 46a. Arturo described the shooter as having a mustache and a soul patch on his chin. Rep. Tr. 119-20 (Aug. 15, 2012). Like Arturo, Christian now described the shooter as having a mustache and a soul patch, and he said the shooter was wearing a black shirt. *Id.* 207-10. At the same time, both brothers continued to insist the shooter had tattoos (an attribute that did not match Mr. Garner). *Id.* at 119-20, 207-10.

B. Procedural History

1. Three years after the shooting, the State brought Mr. Garner to trial.

During trial, Mr. Garner was seated at the defense table between his two female attorneys. Rep. Tr. 148-49, 152-53 (Aug. 14, 2012). Although none of the brothers had identified him before trial, all three proclaimed from the witness stand that they were positive Mr. Garner was the shooter. The prosecutor asked Roberto, the first witness, whether he saw anybody in the courtroom "who shot at [him] on that particular evening." Pet. App. 5a. In response, Roberto pointed at Mr. Garner. *Id.* He stated that he would "never forget" Mr. Garner's face. *Id.* Christian said the same thing. *Id.* 6a. And Arturo declared that he was "a hundred percent sure that it was him." *Id.* 5a.

Mr. Garner objected to all three identifications on the basis that the courtroom setting was "unduly suggestive." Pet. App. 5a. As defense counsel put it, the identifications amounted to one-on-one show-ups, *id.*—a practice that has long been "widely condemned" as unreliable, *Stovall v. Denno*, 388 U.S. 293, 302 (1967). The trial court overruled the objections. Pet. App. 5a-6a.

Unable to preclude the admission of the identifications, Mr. Garner's attorneys did their best to cross-examine the brothers regarding their prior inability to identify Mr. Garner. Roberto claimed that he was very confused the night of the shooting both because he had been drinking and because he believed Christian was on the verge of death. Rep. Tr. 7-11, 14-17, 19, 32, 41, 46 (Aug. 15, 2012). Arturo likewise asserted that his mind was not clear when he gave his initial statements to police. *Id.* 116-17. He told the jury that at the trial, three years later, it was. *Id.* 124, 134.

The brothers' in-court identifications were the only evidence implicating Mr. Garner as the shooter. Stressing this evidence at closing, the prosecutor asserted: "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).

The jury convicted Mr. Garner of first-degree assault of Christian; second-degree assault of Arturo; and attempted reckless manslaughter of the two. Pet. App. 7a. The trial court sentenced Mr. Garner to thirty-two years in prison. *Id.* 50a.

2. Mr. Garner appealed, arguing as relevant here that the trial court violated the Fourteenth Amendment's Due Process Clause by permitting the brothers to identify him under impermissibly suggestive circumstances. Pet. App. 50a. The Colorado Court of Appeals rejected the argument and affirmed. *Id.* 49a.

The appellate court recognized that when in-court identifications follow impermissibly suggestive pretrial identification procedures, the Due Process Clause requires trial courts to ensure that the in-court

identifications are sufficiently reliable to be put before juries. Pet. App. 50a-51a. But the Colorado Court of Appeals held that absent improper pretrial identification procedures, due process imposes no check on in-court identifications. *Id.* 56a-57a.

3. A closely divided Colorado Supreme Court affirmed. The four-justice majority observed that state and federal courts have reached divergent conclusions about whether this Court's due process precedents require judicial oversight of in-court identifications "not preceded by an improper out-of-court identification procedure." Pet. App. 11a, 17a-21a, 24a-30a. The majority then chose its side in the conflict, ruling that due process is not violated "where an in-court identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where nothing beyond the inherent suggestiveness of the ordinary courtroom setting made the in-court identification itself constitutionally suspect." *Id.* 33a.

The majority did not deny—in fact, it openly acknowledged—that eyewitness identifications are "fallible." Pet. App. 2a. It also recognized the particular "power[]" and "suggestiveness that inheres in identifying a defendant for the first time in court." *Id.* 2a, 30a. Indeed, "precisely because identification testimony is so persuasive, a mistaken identification can lead to a wrongful conviction." *Id.* 2a.

Yet the majority read *Perry v. New Hampshire*, 565 U.S. 228 (2012), to signal that, absent an improperly suggestive pretrial identification procedure, the Due Process Clause is never violated by "ordinary" in-court identifications. Pet. App. 31a. Even where a witness's inability before trial to identify the

defendant gives rise to serious questions about the reliability of an in-court identification, the Colorado Supreme Court concluded that due process has nothing to say about the issue. *Id.* 31a-32a.

The three dissenting justices would have sided with other courts holding due process requires judicial prescreening of in-court identifications under the circumstances here. Pet. App. 44a-45a (Hart, J., dissenting). The dissent began by noting that in-court identifications are essentially show-ups, where "the witness is confronted with a single potential suspect and asked if he or she is the right one." *Id.* 43a. Indeed, an ordinary in-court identification is even more suggestive than the typical show-up, because it "presents a witness with the single person who the police and the prosecutor believe committed the crime and typically does so long after the commission of the crime." *Id.* Finally, the dissent stressed that the risk of "irreparable misidentification" is accentuated where, as here, a witness has "failed [before trial] to identify the defendant" in a properly administered photo array or line-up. *Id.* 35a.

The dissenters then turned to *Perry*. That case, they observed, "did not consider, and does not resolve, the question" in this case. Pet. App. 40a. Instead, it involved an *out-of-court* identification that occurred without any state action at all. The majority's reliance on *Perry*, the dissenters maintained, thus "unmoors that case from its factual setting and ignores the parallels between an unnecessarily suggestive pretrial identification procedure arranged by one branch of law enforcement—the police—and an unnecessarily suggestive in-court identification arranged by another branch of law enforcement—the prosecution." *Id.*

Turning to the facts, the dissent concluded not only that the trial court should have prescreened the brothers' in-court identifications, but that applying due process scrutiny probably would have precluded the identifications altogether. The shooting was quick and chaotic; the brothers "offered wildly varying descriptions of the shooter;" and all failed to identify petitioner in the photo array. Pet. App. 45a-46a. Conducting a pretrial reliability analysis, therefore, "quite likely would have led the court to conclude that the brothers' first-time in-court identifications lacked any likelihood of reliability." *Id.* 47a.

REASONS FOR GRANTING THE WRIT

I. State and federal courts are divided over the Due Process Clause's application to in-court identifications.

1. This Court has long held that due process requires judicial screening of identification evidence when law enforcement arranges an "impermissibly suggestive" identification procedure. *Simmons v. United States*, 390 U.S. 377, 384 (1968). An identification procedure is "impermissibly suggestive" when it unnecessarily creates (or increases) a danger that the witness will misidentify the defendant. *Id.* If a defendant makes such a showing, courts then consider the "totality of the circumstances" regarding the witness's observation of the crime and quality of memory to determine whether there is, in fact, a "substantial likelihood of misidentification." *Neil v. Biggers*, 409 U.S. 188, 199-201 (1972); *see also Manson v. Brathwaite*, 432 U.S. 98, 113-16 (1977). Where this reliability analysis shows that such a likelihood exists, the identification evidence cannot be presented to the

jury. *Biggers*, 409 U.S. at 201; *see also Foster v. California*, 394 U.S. 440, 443 (1969).

In *Perry v. New Hampshire*, 565 U.S. 228 (2012), the Court held that this due process framework does not apply to out-of-court identifications in the absence of "improper" police influence on the eyewitness. *Id.* at 233. Yet neither *Perry* nor any other case addresses whether pretrial police misconduct is a necessary prerequisite to raise a due process challenge to an *in-court* identification. Lower courts were divided before *Perry* over this question, *see In re R.W.S.*, 728 N.W.2d 326, 332-33 (N.D. 2007), and they have continued after *Perry* to be "divided," *United States v. Shumpert*, 889 F.3d 488, 491 (8th Cir. 2018); *see also United States v. Morgan*, 248 F. Supp. 3d 208, 212 (D.D.C. 2017) (recognizing that "courts have split" on the issue); *State v. Thurber*, 420 P.3d 389, 432 (Kan. 2018) (same).

2. Five federal courts of appeals and five state supreme courts have applied the Due Process Clause to screen the reliability of in-court identifications in the absence of pretrial improper police influence on the witness. The Connecticut Supreme Court has issued the most comprehensive decision on the issue. *See State v. Dickson*, 141 A.3d 810 (Conn. 2016), *cert. denied*, 137 S. Ct. 2263 (2017). Likening in-court identifications to highly suggestive show-ups, the court saw "no reason to distinguish inherently suggestive in-court identifications from inherently suggestive out-of-court identifications." *Id.* at 827. "[I]f an in-court identification following an unduly suggestive pretrial police procedure implicates the defendant's due process rights," so should such an identification orchestrated by a prosecutor where

there are equally compelling reasons to doubt "the witness would be able to identify the defendant in a nonsuggestive setting." *Id.* at 823-24.

Other courts also have employed a due process check on the reliability of in-court identifications. *See Kennaugh v. Miller*, 289 F.3d 36 (2d Cir. 2002); *United States v. Archibald*, 734 F.2d 938 (2d Cir. 1984); *United States v. Jones*, 126 Fed. Appx. 560 (3d Cir. 2005); *United States v. Greene*, 704 F.3d 298 (4th Cir. 2013); *United States v. Rogers*, 126 F.3d 655 (5th Cir. 1997); *Lee v. Foster*, 750 F.3d 687 (7th Cir. 2014); *City of Billings v. Nolan*, 383 P.3d 219 (Mont. 2016); *State v. Clausell*, 580 A.2d 221 (N.J. 1990); *In re R.W.S.*, 728 N.W.2d 326 (N.D. 2007); *Hogan v. State*, 908 P.2d 925 (Wyo. 1995). And the U.S. District Court for the District of Columbia also recently issued a detailed decision holding that due process requires prescreening in the circumstances here. *See United States v. Morgan*, 248 F. Supp. 3d 208 (D.D.C. 2017).

Like the Connecticut Supreme Court, these courts understand this Court's precedent to establish a "general due process standard, mandating that identification testimony must not lead to the likelihood of irreparable identification as a result of impermissibly suggestive procedures." *Kennaugh*, 289 F.3d at 44. Accordingly, they have screened in-court identifications for reliability when necessary to "avoid the 'very substantial likelihood of irreparable misidentification.'" *Id.* at 46 (quoting *Manson*, 432 U.S. at 116). And when the totality of the circumstances establishes a likelihood of misidentification, courts have held that due process forbade the in-court identifications. *See, e.g.*, *Greene*, 704 F.3d at 308-10; *Rogers*, 126 F.3d at 658-59. In the

alternative, some courts have suggested that due process may be satisfied by modifying the ordinary courtroom setting—such as by rearranging "the seating" and placing "some people of the defendant's approximate age and skin color" near him—to alleviate the undue suggestiveness of a typical in-court identification. *Archibald*, 734 F.2d at 942.

The First Circuit has not taken a definitive position on the issue. But in *United States v. Correa-Osorio*, 784 F.3d 11 (1st Cir. 2015), Judge Barron concluded in a separate opinion that a district court committed plain error by failing to subject an in-court identification to a due process screen. *Id.* at 29 (Barron, J., concurring in part and dissenting in part). He distinguished *Perry* as a case where the government was not responsible for the suggestiveness of an identification procedure. *Id.* at 31. And he took the remainder of this Court's case law to hold that where the "government *is* responsible for the suggestiveness"—whether outside the courtroom or inside—"due process requires an inquiry into the reliability of the identification." *Id.* (emphasis added).

3. The Colorado Supreme Court in this case joined three federal courts of appeals and thirteen other state courts of last resort in holding that, in the absence of suggestive pretrial procedures arranged by police, ordinary in-court identifications are categorically exempt from due process scrutiny. *See United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986); *United States v. Thomas*, 849 F.3d 906 (10th Cir. 2017); *United States v. Whatley*, 719 F.3d 1206 (11th Cir. 2013); *Young v. State*, 374 P.3d 395 (Alaska 2016); *State v. Goudeau*, 372 P.3d 945 (Ariz. 2016); *Byrd v. State*, 25 A.3d 761 (Del. 2011); *In re W.K.*, 323 A.2d

442 (D.C. 1974); *White v. State*, 403 So. 2d 331 (Fla. 1981); *Ralston v. State*, 309 S.E.2d 135 (Ga. 1983); *Fairley v. Commonwealth*, 527 S.W.3d 792 (Ky. 2017); *Galloway v. State*, 122 So. 3d 614 (Miss. 2013); *State v. Green*, 250 S.E.2d 197 (N.C. 1978); *State v. King*, 934 A.2d 556 (N.H. 2007); *State v. Ramirez*, 409 P.3d 902 (N.M. 2017); *State v. Hickman*, 330 P.3d 551 (Or. 2014); *State v. Lewis*, 609 S.E.2d 515 (S.C. 2005).

These courts offer different rationales for their decisions. Some think the jury's ability to observe identifications in the courtroom necessarily provides sufficient safeguards against the suggestiveness of that setting. *See, e.g.*, *Domina*, 784 F.2d at 1368; *Lewis*, 609 S.E.2d at 518. Other courts, like the Colorado Supreme Court in this case, read *Perry*'s focus on pretrial police misconduct to establish a categorical rule that ordinary in-court identifications are totally exempt from due process scrutiny absent such improper influence. *See, e.g.*, Pet. App. 30a-31a; *Thomas*, 849 F.3d at 910-11; *Whatley*, 719 F.3d at 1216-17; *Goudeau*, 372 P.3d at 981.

Furthermore, several of these court have enforced their categorical bars on screening ordinary in-court identifications even where, as here, the witness failed to identify the defendant in a reliable pretrial procedure, such as a properly administered lineup or photo array. *See, e.g.*, *Benjamin v. Gipson*, 640 Fed. Appx. 656, 658-59 (9th Cir. 2016); *Young*, 374 P.3d at 401, 411-12; *Goudeau*, 372 P.3d at 980-81; *Ralston*, 309 S.E.2d at 683; *Fairley*, 527 S.W.3d at 797; *Galloway*, 122 So. 3d at 664; *King*, 934 A.2d at 377. In these jurisdictions, a witness's previous inability to identify the defendant goes merely to the "credibility of the in-court identification, not to its admissibility."

King, 934 A.2d at 377 (citation omitted). The same is true where, also as here, a witness's pretrial descriptions of the perpetrator did not resemble the defendant. *See Whatley*, 719 F.3d at 1217.

II. The question presented is important and recurring.

1. In-court identifications are a regular and pivotal part of criminal trials. Consequently, as the numerous cases in the split show, the question presented arises frequently in state and federal courts.

2. The question presented also matters a great deal for the accuracy of criminal convictions. In its decision below, the Colorado Supreme Court recognized that an eyewitness identification in the courtroom is "extremely powerful evidence." Pet. App. 2a. Indeed, there is "almost *nothing more convincing* than a live human being who takes the stand," points 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)). But eyewitness identifications are "peculiarly riddled with innumerable dangers." *United States v. Wade*, 388 U.S. 218, 228 (1967). Consequently, "the annals of criminal law are rife with instances of mistaken identification." *Id.*

The power and fallibility of in-court identifications combine to establish a simple truth: Mistaken identifications from the witness stand "can lead to a wrongful conviction." Pet. App. 2a. Indeed, more than seventy percent of wrongful convictions exposed by DNA evidence have involved mistaken identifications, and more than half of those misidentifications occurred in the courtroom. *See* Innocence Project,

Courtroom Identifications: Unreliable and Suggestive, https://www.innocenceproject.org/courtroom-identifications-unreliable-suggestive/. This is because jurors are generally "unaware of the sources of error in eyewitness testimony and place undue faith in its veracity." John C. Bingham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 19 (1983). In particular, jurors "seem to believe that perceptions of particular events are stored on something akin to memory 'tapes.'" *Id.* at 20. But in reality, intervening knowledge and contemporaneous perceptions shape recall, resulting in "distortions." *Id.*

3. State law enforcement officials themselves have recognized the importance of the question presented. Two years ago, Connecticut and twelve other states urged this Court to grant certiorari to decide whether the Due Process Clause requires judicial prescreening in the circumstances here. Br. for State of Michigan et al., as Amici Curiae, *Connecticut v. Dickson*, 137 S. Ct. 2263 (2017) (No. 16-866). Several attorneys general explained that the issue was one of "exceptional importance to the States." *Id.* at 14.[2]

To be sure, these states argued that the Due Process Clause imposes no limitations on ordinary in-

[2] While this Court denied certiorari in that case, it was a singularly poor vehicle for considering the question presented. The Connecticut Supreme Court had ultimately decided the case in the state's favor, holding that it was "clear beyond a reasonable doubt that the jury would have returned a guilty verdict even without [the eyewitness's] in-court identification of the defendant." *State v. Dickson*, 141 A.3d 810, 843 (Conn. 2016). This Court's resolution of the constitutional question in that case therefore would not have affected the judgment of conviction.

court identifications. But the relevant point for present purposes is that those who prosecute criminal cases also recognize the importance of the question presented and the need for this Court to resolve it.

III. The Colorado Supreme Court's decision is incorrect.

The Colorado Supreme Court was mistaken in concluding that due process is never implicated by ordinary in-court identifications not preceded by pretrial police misconduct. The Due Process Clause's protections against unfair procedures are triggered whenever a state actor is responsible for impermissibly suggestive identification procedures. And an identification under the circumstances here—namely, where the prosecution generates it through a suggestive procedure at trial despite substantial reason to doubt the witness would identify the defendant in a nonsuggestive setting—fits that bill.

A. Due process requires judicial scrutiny of in-court identifications under the circumstances here.

1. A criminal trial, above all, is a "search for truth." *Nix v. Whiteside*, 475 U.S. 157, 166 (1986). The Due Process Clause accordingly requires the procedures at criminal trials to comport with "fundamental conceptions of justice," *Dowling v. United States*, 493 U.S. 342, 352 (1990) (citation omitted), and regulates the "fairness of the factfinding process," *Deck v. Missouri*, 544 U.S. 622, 630 (2005).

Applying these general due-process principles, this Court has established a two-step test to ensure that "the jury not hear eyewitness [identification] testimony unless that evidence has aspects of reliability." *Manson v. Brathwaite*, 432 U.S. 98, 112

(1977). First, courts must inquire whether law enforcement arranged an identification procedure that is "impermissibly suggestive." *Simmons v. United States*, 390 U.S. 377, 384 (1968). An identification procedure is impermissibly suggestive when it is "both suggestive and unnecessary." *Perry v. New Hampshire*, 565 U.S. 228, 238-39 (2012). When a defendant makes this threshold showing, a court must assess whether the "totality of the circumstances" reveals a "substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972) (quoting *Simmons*, 390 U.S. at 384).

This Court has applied this two-step framework not only to testimony regarding out-of-court pretrial identifications but to *in-court* identifications as well. In *Foster v. California*, 394 U.S. 440 (1969), for instance, the Court held that a witness's in-court identification of the defendant as the perpetrator of the crime violated due process. *Id.* at 443. The Court explained that the "suggestive elements" of the lineups and show-up that the police orchestrated made it "all but inevitable" that the witness would identify the defendant as the perpetrator at trial, "whether or not he was in fact 'the man.'" *Id.*

The Court similarly analyzed the admissibility of an in-court identification in *Simmons*. 390 U.S. at 382-86. The Court recognized that when an eyewitness was shown a photo array before trial that included an image of the defendant, that prior exposure can inform the likelihood that the witness will render an accurate identification in the courtroom. *See id.* at 383-84. But because neither the photo array in that case nor the witness's response to it gave rise to a serious risk of misidentification, due process allowed the in-court

identification. *Id.* at 384-86; *see also Coleman v. Alabama*, 399 U.S. 1, 5-6 (1970) (conducting due process analysis of in-court identifications but finding no violation because the pretrial lineups did not provide reason to question witness's ability to identify the perpetrator).

To be sure, these cases involving in-court identifications all included allegations that the police arranged pretrial identification procedures that tainted the reliability of the subsequent in-court identifications. But there is no reason that the reach of the Due Process Clause should be confined only to that scenario. To the contrary, *Simmons* explained that the question whether an in-court identification presents a "very substantial likelihood of irreparable misidentification" turns on "the totality of the circumstances." 390 U.S. at 383-84; *see also Foster*, 394 U.S. at 442. This means due process scrutiny must be brought to bear *whenever* an in-court identification procedure impermissibly gives rise to a substantial likelihood of misidentification.

2. Applying that principle yields a straightforward rule that governs here: Due process requires judicial prescreening of an in-court identification where pretrial events (such as a previous failure to identify the defendant) give substantial reason to doubt the witness would identify the defendant but for the suggestiveness of the courtroom.

a. As the Colorado Supreme Court and others have recognized, the "ordinary" courtroom setting—in which the defendant sits next to his attorney, having been singled out and charged by law enforcement—is "inherently suggestive." *United States v. Morgan*, 248 F. Supp. 3d 208, 213 n.2 (D.D.C. 2017); *see also, e.g.*,

United States v. Archibald, 734 F.2d 938, 941 (2d Cir. 1984); Pet. App. 4a. Indeed, one is "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." *State v. Dickson*, 141 A.3d 810, 822 (Conn. 2016); *see also Simmons*, 390 U.S. at 383 ("chance of mis-identification" is "heightened" when law enforcement indicates who it believes committed the crime).

Put another way, in-court identifications are essentially show-ups, where law enforcement presents the witness with only a single suspect. *See, e.g.*, *United States v. Greene*, 704 F.3d 298, 307 (4th Cir. 2013). Over fifty years ago, this Court acknowledged that show-ups are "widely condemned" for their extreme suggestiveness. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). And in-court identifications are particularly suggestive show-ups. The witness knows that law enforcement not only suspects the defendant committed the crime; he knows it has evidence it believes establishes guilt beyond a reasonable doubt. *See Dickson*, 141 A.3d at 822-23.[3]

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[3] Worse yet, the reliability of identifications resulting from show-ups rapidly declines as time passes between the crime and the show-up. *See State v. Henderson*, 27 A.3d 872, 903 (N.J. 2011) (citing A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 *Law & Hum. Behav.* 459, 464 (1996)). Thus, in-court show-ups taking place years after the crime—as in this case—are apt to be even less reliable than already untrustworthy pretrial show-ups.

b. The suggestiveness of the ordinary courtroom setting does not dictate that "*all* in-court identifications" elicited by the prosecution require due process scrutiny. *Perry*, 565 U.S. at 244 (emphasis added). But a prosecutor's generation of an in-court identification in an ordinary courtroom setting becomes *impermissibly* suggestive—and thus triggers a court's duty to screen for reliability—when pretrial events give substantial reason to doubt that the witness would identify the defendant in a nonsuggestive setting. In that circumstance, the state action of facilitating an in-court identification creates an unacceptable risk that a witness's naming the defendant as the perpetrator will be the product of the courtroom setting, rather than the witness's observation of "the criminal at the time of the crime," *Biggers*, 409 U.S. at 199.

The Connecticut Supreme Court has applied this reasoning to hold that due process imposes a check on the subset of in-court identifications where the witness is asked on the stand to identify the defendant for the first time and does not know the defendant. *Dickson*, 141 A.3d at 817. But at the very least, this Court should hold that an in-court identification is subject to due process scrutiny where, as here, the witness makes a first-time identification and was previously shown a photo array or lineup including the defendant and did *not* identify him as the perpetrator. *See Kennaugh v. Miller*, 289 F.3d 36, 46 (2d Cir. 2002) (Calabresi, J.) (stressing relevance of this factor).

The Colorado Supreme Court resisted this rule on the ground that it could penalize law enforcement for the use of "properly conducted" lineups or photo arrays. Pet. App. 31a. But this reasoning turns due

process on its head. It is one thing to honor proper police tactics when the witness positively identified the defendant in a pretrial procedure. But when the witness *failed* to identify the defendant in a pretrial procedure, the legitimacy of that procedure supports, rather than undercuts, the defendant's claim that it is constitutionally problematic to allow a subsequent identification in the inherently suggestive setting of the courtroom. In that circumstance, eliciting an in-court identification during trial looks much more like "an attempt to circumvent the due process constraints on one-man showups" than the routine use of a traditional courtroom procedure. *Morgan*, 248 F. Supp. 3d at 213 n.2. Put another way, if the prosecution would not have been allowed to conduct a suggestive show-up the day before trial, it should not be able to do so during it.

c. To be clear: Due process does not automatically bar an in-court identification where a pretrial photo array or the like gives substantial reason to doubt the witness would identify the defendant in a nonsuggestive setting. An in-court identification under those circumstances is still admissible if the totality of the circumstances demonstrates sufficient reliability to present the identification to the jury. For example, if the witness had a prolonged opportunity to view the perpetrator, *see Biggers*, 409 U.S. at 200-01, or if the witness had a prior relationship with the defendant, an in-court identification may comport with due process regardless of any pretrial hiccups. But "[t]he state is not entitled to conduct an unfair procedure merely because a fair procedure failed to produce the desired result." *Dickson*, 141 A.3d at 830. All the more so where, as here, the witnesses also gave pretrial descriptions of the perpetrator to the police,

and those descriptions did not match the defendant—thus compounding the doubt created by the witness's response to the photo array.

Alternatively, a court might alleviate due process concerns under the circumstances here simply by mitigating the suggestiveness of trial procedures. The Colorado Supreme Court speculated that sometimes a witness "might be better able" to identify a defendant in the flesh in the courtroom than in a photo array. Pet. App. 31a. But if that is all that is driving the desire for an in-court identification, there is an easy solution. A court can conduct an "in-court lineup" or seat the defendant in the gallery, near others with similar appearances. *See United States v. Correa-Osorio*, 784 F.3d 11, 33 (1st Cir. 2015) (Barron, J., concurring in part and dissenting in part). After all, the operative framework here is one of *procedural*, not substantive, due process. So long as the trial court finds some way to guarantee a fundamentally fair identification procedure, due process is satisfied.

B. *Perry v. New Hampshire* does not hold to the contrary.

While expressing sympathy at various points for Mr. Garner's argument, the Colorado Supreme Court believed that *Perry* forecloses any due process check under the circumstances here. Pet. App. 30a-31a. But the dissent was correct: "*Perry* did not even consider th[e] question" here, much less mandate that the Due Process Clause is inapplicable. *Id.* 36a (Hart, J., dissenting).

1. *Perry*'s holding that due process requires prescreening of *out-of-court* identifications only when they resulted from "improper police conduct," 565 U.S. at 241, does not apply to in-court identifications.

a. In *Perry*, an eyewitness identified the defendant at the crime scene "without any inducement from the police." 565 U.S. at 235 (citation omitted). In the absence of any "state action" related to the identification, the Court held that due process did not regulate the admission of the evidence. *Id.* at 233; *see also Colorado v. Connelly*, 479 U.S. 157 (1986) (Due Process Clause does not regulate admissibility of confessions obtained in the absence of state action).

This concern about extending due process beyond its proper bounds does not apply to in-court identifications. For an in-court identification to occur, state action must be brought to bear. The prosecution must bring a particular defendant to trial and call the eyewitness to the stand for questioning. Furthermore, prosecutors are generally free to structure in-court identifications as they wish, yet they typically allow the witness to identify the perpetrator while the defendant is seated at defense counsel table next to his attorney. When such law enforcement action is present—that is, when "the government is responsible for the suggestiveness" of an identification procedure—there is nothing untoward about bringing due process principles to bear on the reliability of the identification. *Correa-Osorio*, 784 F.3d at 31 (Barron, J., concurring in part and dissenting in part).

b. Nor does *Perry*'s focus on whether improper conduct generated the identification create an obstacle here. The "improper police conduct" that *Perry* required, 565 U.S. at 241, was simply a shorthand in the setting of an out-of-court identification for "unnecessarily suggestive circumstances arranged by law enforcement." *Id.* at 248. Applying that more general test here, the prosecution's decision to pursue

a suggestive in-court identification where substantial reason exists to doubt that the witness would identify the defendant in a nonsuggestive setting readily meets the Court's criterion. Simply put, it is improper to orchestrate an identification in a highly suggestive setting where there is substantial reason to doubt its reliability—particularly where less suggestive in-court procedures are available. *See Morgan*, 248 F. Supp. 3d at 213 n.2.

2. The Colorado Supreme Court also misread *Perry* to dictate that cross-examination and related trial safeguards are always enough to protect against misidentification in the ordinary courtroom setting. Pet. App. 32a. But this Court had previously made clear that the availability of cross-examination does not categorically suffice to protect defendants from the risks attendant to in-court identifications tainted by government-created suggestiveness. In *Foster*, the defendant had every opportunity to cross-examine the witness who identified him, yet the Court nonetheless held that the in-court identification was so unreliable that its occurrence violated the defendant's due process rights. 394 U.S. at 443. Similarly, the defendants in *Simmons* and *Coleman* were able to conduct cross-examinations, yet the Court conducted reliability analyses of the identifications.

Perry did not question those holdings—and for good reason. The Due Process Clause sometimes requires trial courts to craft protections beyond conventional trial safeguards. For example, due process prohibits the prosecution from introducing false evidence, even when the defendant could expose its falsity through cross-examination and other tools inherent in the adversarial process. *Napue v. Illinois*,

360 U.S. 264, 269-70 (1959). The Court also has indicated that other testimony implicates due process when jurors alone "will not be competent to uncover, recognize, and take due account" of its shortcomings. *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983); *see also Stein v. New York*, 346 U.S. 156, 192 (1953) (due process requires courts to regulate juries' exposure to evidence that "combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive").

Such is the situation here. Jurors are unusually ill-equipped to "take due account," *Barefoot*, 463 U.S. at 899, of the deficiencies of in-court identifications. Research demonstrates that suggestiveness "inflates witnesses' ratings of confidence." Elizabeth F. Loftus et al., *Eyewitness Testimony* § 3-12, at 70 (5th ed. 2013). And jurors are understandably swayed by witnesses who express great confidence in their testimony. Yet confidence "is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by its suggestiveness." *Commonwealth v. Crayton*, 21 N.E.3d 157, 168 (Mass. 2014); *see also* Neil Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. Experimental Psychol. Applied 44, 44-45 (2002).

Cross-examination is no panacea for this problem. Adversarial questioning may be effective at revealing when witnesses are lying, but it is unlikely to expose as false what a witness is convinced is true. *See* James Michael Lampinen et al., *The Psychology of Eyewitness Identification* 250 (2012). This phenomenon is often present with in-court

identifications. *See United States v. Wade*, 388 U.S. 218, 235 (1967) (recognizing that cross-examination can be inadequate to test the "accuracy and reliability" of an identification). Therefore, where there is substantial reason to doubt that the witness would correctly identify the defendant outside the suggestive setting of the courtroom, the trial judge must ensure the identification meets a minimum threshold of reliability before the jury can be exposed to it.

IV. The facts of this case provide an ideal platform for addressing the question presented.

The facts of this case vividly illustrate the stakes involved in whether the Due Process Clause ever imposes a check, in the absence of pretrial police misconduct, on in-court identifications.

1. If due process requires courts to prescreen in-court identifications where there is substantial reason to doubt that the witness would identify the defendant in a nonsuggestive setting, then such prescreening was unquestionably required here. Shortly after the crime, when their memories were freshest, the brothers offered "wildly varying descriptions" of the shooter. Pet. App. 46a. None matched Mr. Garner. *See supra* at 4-5. Even more important, each brother was presented before trial with a properly-constructed pretrial photo array, and all three failed to identify Mr. Garner as the shooter. Pet. App. 5a.

2. In addition, if the trial court had conducted a due process analysis of the in-court identifications, "it is unlikely that the three brothers would have been permitted to identify Mr. Garner for the first time from the witness stand." Pet. App. 45a (Hart, J., dissenting).

The shooting at the center of this case unfolded rapidly and created a great deal of chaos, making it

hard for the brothers who were shot to pay close attention to the shooter. Pet. App. 45a. Furthermore, the brothers had been drinking. Rep. Tr. 27-28, 111-16 (Aug. 14, 2012). And the in-court identifications at Mr. Garner's trial took place three years after the event. Pet. App. 46a; *see United States v. Rogers*, 126 F.3d 655, 658-59 (5th Cir. 1997) (lapse of ten months weighed against a finding of reliability). There is every indication, in short, that factors besides the brothers' observation and memory of the crime drove them to identify Mr. Garner as the perpetrator.

To be sure, the brothers were emphatic at trial that Mr. Garner was the man who fired the shots in the bar. But "self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy." Nat'l Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* 108 (2014). Rather, an eyewitness's degree of certitude is probative only when expressed "at the moment of initial identification," before other confounding variables—such as law enforcement feedback and implicit cues—are introduced. *See id.* And here, the brothers said immediately after the shooting that they did *not* remember the shooter—and almost all of the details they offered diverged from Mr. Garner. *See supra* at 4-5. It seems clear, therefore, that there was a substantial likelihood here of misidentification.

3. In fact, this case raises the unmistakable specter of a wrongful conviction. The prosecution offered no evidence other than the brothers' testimony establishing anything besides Mr. Garner's presence in the bar. The prosecution's allegation that Mr. Garner was the shooter "hinged on" the brothers' in-court identifications of him as the perpetrator. Pet.

App. 3a. Especially under these circumstances, the question whether the Due Process Clause has anything to say about the procedures governing such a pivotal moment of a criminal prosecution cries out for this Court's attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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