NO. 19-75

In the
Supreme Court of the United States

JAMES JOSEPH GARNER,
Petitioner,
v.

COLORADO,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a series of cases culminating in *Neil v. Biggers*, 409 U.S. 188 (1972), this Court set forth "the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement." *Perry v. New Hampshire*, 565 U.S. 228, 238 (2012). In *Biggers*, the Court adopted a two-part test requiring trial courts to ask (1) whether the pretrial identification procedure was unnecessarily suggestive and, if it was, (2) whether the procedure "gave rise to a substantial likelihood of irreparable misidentification"—*i.e.*, whether the identification was nonetheless reliable. *Biggers*, 409 U.S. at 198, 201. In *Perry*, this Court clarified that pretrial screening for reliability is "inapposite in cases … in which the police engaged in no improper conduct." 565 U.S. at 242. In those situations, "vigorous cross-examination, protective rules of evidence, and jury instructions" will "suffice to test reliability." *Id.* at 233.

Here, eyewitnesses had not been able to identify the defendant in pretrial photo lineups, but identified him while testifying at trial. Few jurisdictions have addressed that scenario since *Perry*, but of those that have, nearly all agree that *Biggers* does not apply to courtroom identifications, absent some improper conduct by law enforcement.

The question presented is:

Whether, where there is no claim that either police or prosecutors engaged in improper conduct, a first-time in-court eyewitness identification must be prescreened by the trial judge for reliability.

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INTRODUCTION

Concerned that improper police procedures could lead eyewitnesses to falsely identify criminal suspects, this Court announced a two-part reliability test to protect due process in *Neil v. Biggers*, 409 U.S. 188 (1972). Under that test, a court first determines whether the police procedure was impermissibly suggestive. If so, the court then considers, under the totality of the circumstances, whether the suggestive confrontation created a very substantial likelihood of misidentification. *See Simmons v. United States*, 390 U.S. 377, 384 (1968); *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977). Reliability is assessed by examining: (1) the witness's opportunity to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the witness's level of certainty at the confrontation, and (5) the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 199–200. A court then weighs "the corrupting effect of the suggestive identification." *Manson*, 432 U.S. at 114.

Recently, this Court clarified that this reliability test applies only if the identification resulted from improper police conduct. In *Perry v. New Hampshire*, 565 U.S. 228 (2012), an eyewitness spontaneously identified the defendant shortly after police arrived on the scene but was unable to identify him later in a photo array. Rejecting the defendant's challenge to using the identification at trial, this Court held that the due process check for reliability comes into play only if the defendant first establishes improper police conduct: the very purpose of the check is "to avoid

depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct." *Id.* at 241 (emphasis in original). That deterrence rationale is "inapposite in cases … in which the police engaged in no improper conduct," as the due process check is linked "not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identification." *Id.* at 242 (citing *Coleman v. Alabama*, 399 U.S. 1 (1970)).[1] This Court therefore concluded, in *Perry*, that absent improper police conduct eyewitness identifications are admissible, with reliability to be protected through a trial's traditional safeguards:

> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

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[1] In *Coleman*, the defendants argued that a witness's in-court identifications violated due process because a pretrial stationhouse lineup was "so unduly prejudicial and conducive to irreparable misidentification as fatally to taint [the later identifications.]" 399 U.S. at 4. However, there was no due process violation because nothing "the police said or did prompted [the witness's] virtually spontaneous identification of [the defendants]." *Id.* at 6

Id. at 233.

Perry's holding was not confined to pretrial identifications: this Court referred generally to "eyewitness identification[s]." *Id.* at 236, 244. Thus while *Perry* did not specifically address the issue raised here—whether *Biggers* applies to first-time in-court identifications—its rationale applies. And the Colorado Supreme Court's application of *Perry* is unremarkable. Three circuit courts and six other states have applied *Perry* in similar circumstances, making Colorado the latest in a growing majority to decide that *Biggers* does not apply to first-time in-court identifications. Nor are there any remarkable facts which compel further review of the Colorado Supreme Court's decision; indeed, there was other evidence in the record to show that Petitioner, and no one else, was the shooter. Further review by this Court is unjustified.

STATEMENT OF THE CASE

1. Factual Background. Three brothers sat at a table celebrating a birthday at their local bar. R. Tr. 108 (Aug. 14, 2012). Seated near them was another group of four men and three women; it is undisputed that Petitioner and his girlfriend were part of that group. Pet. 4; R. Tr. 30, 61–62, 116–17 (Aug. 14, 2012); R. Tr. 87, 158 (Aug. 15, 2012). R. Tr. 19–20 (Aug. 17, 2012). Near closing time, a fight broke out between the two groups and someone pulled a gun. R. Tr. 124 (Aug. 14, 2012). All three of the brothers were shot, but survived. R. Tr. 124 (Aug. 14, 2012); R. Tr. 92, 165 (Aug. 15, 2012). Petitioner and his group fled the bar. R. Tr. 26 (Aug. 15, 2012).

Police interviewed the brothers just after the shooting and each of them gave a general description of the shooter. R. Vol. I, pp. 4–10. The first brother said that a man in the shooter's group was wearing a pair of prescription glasses. R. Vol. I, p. 6. A friend of the brothers, G.R., said that the shooter was "wearing a pair of prescription glasses with black frames." R. Vol. I, p. 6. Several other witnesses confirmed that Petitioner wears glasses, and DNA samples taken from black frame eyeglasses found at the bar matched Petitioner. R. Vol. I, pp. 4, 8, 10. The second brother said that the shooter was wearing a dark colored shirt with a number on it. R. Vol. I, p. 9. Photos of Petitioner taken at the bar on the night of the shooting show that Petitioner was wearing a dark colored NFL jersey; while the photos do not depict his entire torso, football jerseys of this sort typically include a player's number. R. Env. 1, Def. Ex. C, D; R. Tr. 181 (Aug. 16, 2012). The third brother told police that the shooter "was wearing black clothing, and was shorter than him, about 5'05" tall." R. Vol. I, p. 8.

The brothers reviewed photographic arrays which included Petitioner but none of them identified the shooter at any point before trial. R. Vol. I, pp. 4–10; Pet. App. 5a. At trial, however, each of them spontaneously identified Petitioner as the shooter. R. Tr. 148–49 (Aug. 14, 2012); R. Tr. 81–83, 162–63 (Aug. 15, 2012); Pet. App. 5a–6a.

Petitioner was charged with attempted murder of each brother, first-degree assault of two of them, possession of a weapon by a previous offender, and crime of violence sentence enhancers. R. Vol. I, pp. 12–16. His theory of defense was general denial: he

admitted being at the bar, but shooting anyone. The jury acquitted Petitioner of attempted murder but found him guilty of two counts of attempted reckless manslaughter; first degree assault; and reckless second-degree assault. R. Vol. I, pp. 12–16. He was sentenced to thirty-two years in prison. R. Vol. I, pp. 148–49.

2. Proceedings in the Colorado Court of Appeals. Petitioner directly appealed his convictions. Pet. App. 48a. He argued that the trial court violated his right to due process by allowing the victims to identify him in court despite the fact that none of them could make a pretrial identification.

The Court of Appeals affirmed, holding that "[w]hile the inability of a witness to identify the defendant in a photographic lineup is relevant and certainly grist for cross-examination, it does not, as a matter of law, preclude him from making an identification upon seeing the defendant in court." Pet. App. 55a. "Instead, the previous inability to identify goes to the weight of his identification testimony rather than its admissibility." *Id.* In reaching this conclusion, the Court of Appeals noted that *Biggers* "deals with the exclusion of impermissible pretrial identifications and the in-court identifications that follow them" and that "[t]he majority of courts addressing this issue have determined that [*Biggers*] does not apply to in-court identifications." Pet. App. 51a.

Therefore, because "'[t]he exclusionary rule has not been extended to in-court identifications alleged to be suggestive simply because of the typical trial setting,'" the Court of Appeals held that Petitioner's

right to due process was not violated. Pet. App. 51a–52a (quoting *People v. Monroe*, 925 P.2d 767, 775 (Colo. 1996)).

3. Proceedings in the Colorado Supreme Court. The Colorado Supreme Court granted certiorari and affirmed the Court of Appeals. Pet. App. 1a. Applying *Perry v. New Hampshire*, the majority concluded that due process does not require judicial prescreening of first-time in-court identifications not preceded by suggestive out-of-court procedures. Pet. App. 32a.

The majority came to this conclusion after tracing this Court's development of the *Biggers* reliability test. Pet. App. 12a–17a. The *Biggers* test was designed not only to ensure the reliability of eyewitness identifications but also to deter law enforcement from using improper lineups, show-ups, and photo arrays. Pet. App. 23a.

Next, the majority examined *Perry*. Unlike the *Biggers* line of cases, the out-of-court identification in *Perry* did not result from improper police procedures and, therefore, the reliability of the testimony was for the jury to determine. Pet. App. 21a–22a (citing *Perry*, 565 U.S. at 234–35). The majority recognized that although "*Perry* did not directly answer whether *Biggers* applies to a first-time in-court identification," it nevertheless "made clear that *Biggers* prescreening is not required in the absence of *improper* state action." Pet. App. 21a, 31a (emphasis in original).

Applying the reasoning of *Perry*, the majority concluded that *Biggers* is inapposite in cases like Petitioner's, where the state did not engage in improper conduct. Pet. App. 30a–32a. Because

Petitioner alleged no impropriety regarding the pretrial photographic arrays, and because the record revealed nothing unusually suggestive about the circumstances of the in-court identifications, there was no due process violation. Pet. App. 32a. Rather, the "ordinary trial safeguards are the appropriate checks on identifications made under suggestive circumstances not attributable to improper law enforcement conduct." *Id.*

The dissent agreed with the majority that *Perry* foreclosed the conclusion that *all* in-court identifications should be screened, but argued that it did not foreclose judicial screening of *some* in-court identifications. Pet. App. 35a (Hart, J., dissenting). Relying primarily on social science publications cited by the amici, the dissent would have held that a first-time in-court identification would always require judicial prescreening applying the *Biggers* test. Pet. App. 37a–38a, 44a.

This Petition was then filed.

REASONS FOR DENYING THE PETITION

In the wake of *Perry*, few jurisdictions have had the opportunity to address whether the *Biggers* reliability test applies in the context of routine in-court identifications where law enforcement has engaged in no impropriety, and the only "suggestive" circumstances are those arising from the defendant's right to be present and confront testifying witnesses. *Perry* clarified that *Biggers* only applies where improper police conduct created suggestive circumstances, and if this Court ever addresses the question presented here, it should do so only after a

longer period of post-*Perry* percolation. Most jurisdictions to consider the issue after *Perry* support the analysis adopted by Colorado here—indeed, after *Perry* only one jurisdiction has followed Petitioner's favored approach.

And this case is a poor vehicle for considering the question presented. The Colorado Supreme Court's resolution of the case is correct under *Perry*. There is simply no indication that law enforcement improperly created suggestive circumstances: no one told the witnesses either before or during their testimony that the shooter would be in the courtroom. The only "suggestiveness" here stemmed from the routine circumstance of the defendant's right to be present while the witnesses were testifying. While Petitioner compares that circumstance to a one-on-one, pre-trial "show-up," the situations are very different, and likewise the social science research cited by Petitioner does not undermine the result reached here. It is undisputed that Petitioner was one of the small group of men who were involved in this shooting, and ample physical evidence corroborated Petitioner's guilt. The jury could weigh the strength of the courtroom identifications, along with the other testimony and evidence, consistent with the constitution.

I. Petitioner overstates the split: few courts have considered the issue since *Perry*.

To suggest the existence of a deep and mature jurisdictional split, Petitioner cites over a dozen cases that were decided before this Court's 2012 opinion in

Perry.[2] Those older cases are relatively uninstructive: because they were decided prior to *Perry*, they give little indication about whether the jurisdictions that followed Petitioner's favored approach would still do so today. The true nature of the current split can only be divined by focusing on the cases decided after *Perry*.

A. Most jurisdictions to consider the issue since *Perry* agree with Colorado.

Of the cases Petitioner relies on to suggest a split, only twelve were decided after *Perry*. And of those twelve, nine support Colorado's decision here.

In addition to Colorado, six other states have applied *Perry's* rationale and held that, under the Due Process Clause, in-court identifications do not require judicial prescreening. *Young v. State*, 374 P.3d 395, 411–12 (Alaska 2016) (but announcing a new, more protective test under state constitution for future cases); *State v. Goudeau*, 372 P.3d 945, 981 (Ariz. 2016); *Fairley v. Commonwealth*, 527 S.W.3d 792, 798–800 (Ky. 2017); *Galloway v. State*, 122 So.3d 614, 664 (Miss. 2013); *State v. Ramirez*, 409 P.3d 902, 911–13 (N.M. 2017); *State v. Hickman*, 330 P.3d 551, 571–72 (Or. 2014).

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[2] *See* Pet. 13, citing *Kennaugh v. Miller*, 289 F.3d 36 (2d Cir. 2002); *United States v. Archibald*, 734 F.2d 938 (2d Cir. 1984); *United States v. Rogers*, 126 F.3d 655 (5th Cir. 1997); *State v. Clausell*, 580 A.2d 221 (N.D. 2007); *Hogan v. State*, 908 P.2d 925 (Wyo. 1995); *see also* Pet 14, citing *United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986); *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); *State v. Green*, 250 S.E.2d 197 (N.C. 1978); *State v. King*, 934 A.2d 556 (N.H. 2007); *State v. Lewis*, 609 S.E.2d 515 (S.C. 2005).

Three federal circuits—the Sixth, Tenth, and Eleventh—have reached the same conclusion. Notably, those circuits had all applied *Biggers* to first-time in-court identifications before *Perry*, but changed course afterwards. The Sixth Circuit concluded that, in light of *Perry*, the "due process rights of defendants identified in the courtroom under suggestive circumstances are generally met through the ordinary protections in trial." *United States v. Hughes*, 562 Fed.Appx. 393, 398 (6th Cir. 2014). The Tenth Circuit recognized that "our prior precedent indicates that a judicial reliability assessment is necessary" but that "such a rule is no longer viable" in light of *Perry*. *United States v. Thomas*, 849 F.3d 906, 910–11 (10th Cir. 2017). And the Eleventh Circuit determined that *Perry* "removed the foundation upon which [its prior cases] rested" when it "expressly disapproved the idea that in-court identifications would be subject to prescreening." *United States v. Whatley,* 719 F.3d 1206, 1216 (11th Cir. 2013). [3]

B. Only one jurisdiction since *Perry* has followed Petitioner's approach.

Since *Perry* was announced, only five jurisdictions have continued to apply *Biggers* to in-court identifications. *See United States v. Greene*, 704 F.3d 298 (4th Cir. 2013); *Lee v. Foster*, 750 F.3d 687 (7th

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[3] Without deciding the issue, the Ninth Circuit has indicated that it would likely reach a similar result. *S*ee *Benjamin v. Gipson*, 640 Fed.Appx. 656, 659 (9th Cir. 2016) (rejecting ineffective assistance of counsel claim for failure to move to suppress first-time in-court identification because, given *Perry*, such a motion was likely to have been unsuccessful).

Cir. 2014); *United States v. Morgan*, 248 F.Supp.3d 208 (D.D.C. 2017); *State v. Dickson*, 141 A.3d 810, 827–28 (Conn. 2016); *City of Billings v. Nolan*, 383 P.3d 219 (Mont. 2016). But even those cases do not clearly support Petitioner's position. Neither *Greene* nor *Nolan* address *Perry* in their analysis; indeed, neither even cites *Perry*. And the cases from the remaining jurisdictions provide Petitioner little support.

The U.S. District Court for the District of Columbia decided that even if an in-court identification procedure constitutes state action under *Perry*, the application of *Biggers* should be limited to circumstances where "the government d[oes] not have a basis for believing that the witness could make a reliable identification," and the identification is "merely an attempt to circumvent the due process constraints on one-man showups." *Morgan*, 248 F.Supp.3d at 213 n.2. This is nothing more than a different way of saying, "improper law enforcement action" and adds little to the debate.

The Seventh Circuit determined that not all first-time in-court identifications are impermissibly suggestive and specifically held that a witness's inability to identify the defendant pretrial is not enough to trigger a *Biggers* analysis. *Lee*, 750 F.3d at 691-92. The court did not discuss or analyze *Perry* in any depth; it cited *Perry* once, and only for the general proposition that due process prohibits evidence when it is so extremely unfair that its admission violates fundamental concepts of justice. *Id.* at 691. The Seventh Circuit nonetheless recognized, as Colorado

did here, that the defendant's mere presence at the defense table is insufficient to establish a due process violation. *Id.*; *see also* Pet. App. 31a ("The inherent suggestiveness of an ordinary courtroom setting does not, without more, give rise to improper state action.").

Connecticut is the only jurisdiction that, since *Perry*, follows Petitioner's approach. The Connecticut Supreme Court observed that a prosecutor's conduct during trial may constitute improper state action; therefore, *Perry* did not completely foreclose the application of *Biggers* to first-time in-court identifications. The logical corollary to this rationale is that, absent prosecutorial misconduct, *Biggers* does not apply to in-court identifications. *Dickson*, 141 A.3d at 827–28. Connecticut, however, also held that in cases where identity is an issue, a first-time in-court identification would be so suggestive as to "implicate due process protections and must be prescreened by the trial court." *Id.* at 822–25.

So of the five jurisdictions that have continued to apply *Biggers,* only two have discussed *Perry* in any meaningful way, and only one clearly supports Petitioner's position. Those decisions do not create as deep a split as Petitioner claims. And only a small fraction of jurisdictions have addressed this issue in the wake of *Perry*. The remaining state and federal courts have either taken no position on *Perry's* applicability or have not yet had the opportunity to address it. *See, e.g., United States v. Correa-Osorio*, 784 F.3d 11, 19–22 (1st Cir. 2015) (declining to address the question because "[o]ne could argue either way" whether *Biggers* applies to in-court

identifications after *Perry*, and defendant's claim would fail under either analysis).

Given the paucity of decisions on this question coupled with the varied rationales of those jurisdictions that have rejected *Perry*, this Court should await further development of the law before granting review.

II. This case is a poor vehicle for addressing the question presented.

This case is a poor vehicle for the court's consideration because the Colorado Supreme Court's decision was correct under *Perry*, and there was ample evidence—apart from the courtroom identifications—from which the jury could decide Petitioner's guilt.

A. Under *Perry*, the Colorado Supreme Court's decision is correct.

Contrary to Petitioner's argument, *see* Pet. 18, the Colorado Supreme Court did not hold that due process is *never* implicated by a first-time in-court identification. Instead, it was careful to explain that due process is not implicated where: (1) there is no impermissibly suggestive pretrial identification procedure arranged by law enforcement; and (2) where nothing *beyond* the inherent suggestiveness of the ordinary courtroom setting made the in-court identification itself constitutionally suspect. Pet. App. 4a.

This holding recognizes the appropriateness of judicial prescreening of a first-time in-court identification under certain circumstances. For example, in *People v. Walker*, 666 P.2d 113, 119–20

(Colo. 1983), the prosecution specifically told the victim that the defendant on trial was "the shotgun-wielding robber." This constituted improper law enforcement action which went beyond the inherent suggestiveness of the ordinary courtroom setting. The Colorado Supreme Court determined that judicial prescreening was appropriate.[4] *Id.* Here, by contrast, the prosecutors did not tell the victims the shooter would be in the courtroom, or otherwise suggest that they should identify Petitioner as the culprit. Due process therefore was not implicated.

The circumstances here simply did not require pretrial screening. The last time this Court found a due process violation based on eyewitness identification testimony was fifty years ago, in *Foster v. California*, 394 U.S. 440 (1969). In *Foster*, police arranged two in-person lineups. *Id.* at 442–43. There were only three subjects in the first lineup and the defendant "stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber." *Id.* at 443 (citation omitted). When this lineup "did not lead to positive identification," police permitted an extended "one-to-one confrontation" between the victim and the defendant, which still yielded only a "tentative" identification. *Id.* Then, a second lineup was arranged in which the defendant "was the only person in this lineup who had also participated in the first lineup." *Id.* After this second lineup, the victim made a "definite identification." *Id.* This Court described the facts in *Foster* as

[4] The identification in *Walker* was ultimately deemed reliable under the *Biggers* test. *Id.*

presenting "a compelling example of unfair lineup procedures." *Id.* at 442.

By contrast, the circumstances differ from *Foster*, and do not rise to the level of a due process violation. Here, Petitioner sat at counsel table and wore a shirt and tie. *See* R. Tr. 163 (Aug. 15, 2012). The victims identified him as the shooter spontaneously, without any prompting from the prosecution. R. Tr. pp. 81, 162–63 (Aug. 15, 2012). There is nothing in the record to suggest that the prosecution engaged in any improper behavior, and Petitioner has not alleged any such misconduct. Because there was no improper law enforcement action, there was no need to prescreen the identifications. *See Perry*, 565 U.S. at 233; *cf. Walker*, 666 P.2d at 119–20.

B. There was ample evidence from which the jury could decide Petitioner's guilt.

It is undisputed that Petitioner was a member of a small group of men who were involved in the shooting. Petitioner alleges that his group contained four men (including Petitioner) and three women. Pet. 4. This is consistent with the testimony of the victims and other witnesses, all of whom said that the shooter's group contained four to five males and two to three females. R. Vol. I, pp. 5, 7, 9. It is undisputed that the shooter was a man and Petitioner was one of the men in that group. Accordingly, this was not a case where the shooter could have been any random member of the public; he was instead one of a discrete set of people who were at the bar.

These facts stand in sharp contrast to a case in which the shooter could have been anyone. For example, in *Dickson*, the defendant and two other men

made online arrangements to sell a vehicle. 141 A.3d at 817. The victims drove to a parking lot where the transaction was to take place and were robbed and assaulted when they arrived. *Id.* at 817–18. Two of the assailants ran off while the third shot one of the victims. The shooting victim was unable to select Dickson from a photo array but identified him for the first time at trial. *Id.* at 818. Given the anonymous nature of online transactions and the fact that the victims did not know who the sellers were, the shooter could have been anyone. By contrast, the shooter here was one of the four men in the bar.

And here, there was ample evidence to prove that Petitioner—and no one else—shot the victims. Contrary to Petitioner's assertions, the prosecution's case did not "hinge" on the in-court identifications. The prosecution presented significant additional evidence of identity. The descriptions provided to police just after the shooting match Petitioner and are corroborated by other evidence.

The first victim told police that he did not see the shooter; but he also said one of the men in the shooter's group was "wearing a pair of prescription glasses." R. Vol. I, p. 6. Several other witnesses confirmed that Petitioner wears "prescription glasses with D&G printed on the bow of the frames." R. Vol. I, pp. 5, 6, 8, 10. The glasses found at the bar matched that description, and DNA samples taken from those glasses matched Petitioner. *Id.*

The second victim said that the shooter was wearing a dark colored shirt with a number on it. R. Vol. I, p. 9. Defense Exhibits C and D are pictures of Petitioner taken at the bar on the night of the

shooting; both show that Petitioner was wearing a dark colored NFL jersey, which are customarily adorned with a number. R. Env. I, Def. Ex. C, D; R. Tr. 181 (Aug. 16, 2012).

The third victim told police that the shooter "was wearing black clothing, and was shorter than him, about 5'05" tall." R. Vol. I, p. 8. The arrest warrant states that Petitioner is 5'08" tall (*see id.*, p. 1); however, the Colorado Department of Corrections, which has custody of Petitioner, reports that he is 5'06" tall.[5]

G.R., the victims' friend, described the shooter as an "Hispanic male, 5'06" – 5'08" tall, thin build, dressed all in black, having a mustache and wearing a pair pf prescription glasses with black frames." R. Vol. I, p. 6. As previously noted, other witnesses confirmed that Petitioner wears glasses and DNA samples taken from the glasses found at the bar matched Petitioner. R. Vol. I, pp. 8, 10).

Taken as a whole, this evidence dispels any concern that Petitioner was misidentified. The

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[5] *See* http://www.doc.state.co.us/oss/ as accessed on August 20, 2019. This Court has discretion to take judicial notice of the Colorado Department of Corrections' records, which are public records capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* FRE 201; *see also Boone v. Menifee*, 387 F.Supp.2d 338, 343 n.4 (2005) (a court may take judicial notice of information of a "prisoner locator" website, such as those maintained by the Bureau of Prisons and the state Department of Corrections); *Cordrey v. Prisoner Review Bd.,* 21 N.E.3d 423, 426 n.3 (Ill. 2014) (a court may take judicial notice of Department of Corrections records because they are public documents).

constitutional standard for reliability is designed only to prevent a jury from being presented with a completely spurious identification:

> [T]he direction to suppression courts is not to conclude that an identification is actually reliable in terms of being correct, but that there is a basis by which a jury that heard that identification testimony could weigh it intelligently through the adversary trial process and conclude that it was in fact accurate.

Jules Epstein, *Irreparable Misidentifications and Reliability: Reassessing the Threshold for Admissibility of Eyewitness Identification*, 58 Vill. L. Rev. 69, 71 (2013). This description of the standard finds support in *Brathwaite*:

> [W]e cannot say that under all the circumstances of this case there is "a very substantial likelihood of irreparable misidentification." Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

432 U.S. at 116 (citation omitted). Similarly, in *Perry*, this Court held that the Due Process Clause restricts admissibility "[o]nly when evidence 'is so extremely unfair that its admission violates fundamental

conceptions of justice.'" 565 U.S. at 237 (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).

Here substantial evidence corroborates the courtroom identifications and under this Court's precedent the strength of the identifications was a question for the jury. This case is not a good candidate for further review.

III. Petitioner's arguments on the merits are flawed.

Petitioner's arguments on the merits of his theory are flawed. He both misapprehends this Court's precedent and misconstrues the degree of consensus among social scientists regarding identifications.

A. Petitioner's due process argument misapprehends *Perry*.

Despite *Perry's* holding that *Biggers* applies only to cases involving law enforcement misconduct, Petitioner contends that "due process scrutiny must be brought to bear *whenever* an in-court identification procedure impermissibly gives rise to a substantial likelihood of misidentification." Pet. 20. His efforts to distinguish *Perry*, however, are unavailing.

To begin, Petitioner's argument that courtroom identifications involve more "state action" than that present in *Perry* is inaccurate. True, for an in-court identification to occur, "[t]he prosecution must bring a particular defendant to trial and call the eyewitness to the stand for questioning." Pet. 25. But in *Perry*, police officers detained the defendant at the scene and were asking the witness to describe the assailant when the witness made the identification. 565 U.S. at 234. That

was not enough: none of the police conduct was *improper*. *Id.* at 231–45 (the word "improper" appears in *Perry* a total of seventeen times.) Likewise here, the prosecutors at trial did not use leading questions, point in Petitioner's direction, stand behind him while asking for an identification, or otherwise improperly suggest that the witnesses should proclaim Petitioner to be their assailant. To the extent Petitioner's presence in the courtroom was suggestive of his guilt, that presence arose not from "improper" law enforcement conduct, but rather from a criminal process that honored his right to be present and confront the witnesses as they testified against him.

And Petitioner cannot persuasively distinguish *Perry* by saying that it involved an out-of-court identification, and that jurors are particularly "ill-equipped" to properly weigh the strength of identifications that instead occur in court. Pet. 27. If anything, jurors are *better* positioned to weigh the likely accuracy of identifications when they occur in court than when they occur out of court.

First, the jury sees the in-court identification procedure. "[W]hen a first-time eyewitness identification occurs in court and no suggestive pretrial identification procedures were administered by the state, courts generally have concluded that the factfinder is better able to evaluate the reliability of the identification because he or she can observe the witness's demeanor and hear the witness's statements *during* the identification process." *Hickman*, 330 P.3d at 564 (emphasis in original); *see also Domina,* 784 F.2d at 1368 (stating that, when a witness identifies a defendant at trial, that "testimony

has generally been held admissible unless tainted by the prior suggestive identification process").

Second, an in-court identification "is subject to immediate challenge through cross-examination."[6] *Hickman*, 330 P.3d at 564. Defense counsel is able to contemporaneously test the witness's perceptions, memory, and bias, thereby exposing any weaknesses in the identification. This adds perspective, gives the jury a full picture of what the witness did (or did not) see, and allows the jury to make a fair determination of the witness's credibility.

Third, as a safeguard, defense counsel may seek an identification procedure that is less suggestive than the typical trial setting. Here, Petitioner could have availed himself of Colo. R. Crim. P. 41.1, which allows defendants to seek court-ordered identification procedures, including live line-ups, either prior to trial or during trial. *See* Colo. R. Crim. P. 41.1(b), (g), (h)(2); *see also People v. Monroe*, 925 P.2d 767, 774 (Colo. 1996) (explaining that Colorado procedure allows defendants to also seek to use any of the procedures that were suggested by this Court in *Moore v. Illinois*,

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[6] While the Constitution "guarantees a fair trial through the Due Process Clauses," it "defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 684—85 (1984). The Sixth Amendment provides defendants with the rights to confrontation and an opportunity for effective cross-examination of witnesses. *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985). By providing defendants with this mechanism to test prosecution witnesses, the Constitution guarantees "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

434 U.S. 220, 230 n. 5 (1977), including, for example, asking that the defendant be seated in the audience among others while eyewitnesses are testifying). Petitioner acknowledges that such procedures wholly alleviate his due process concerns, describing them as "an easy solution." Pet. 24. His attorney's decision not to request such procedures here was presumably a tactical choice based on trial strategy.

B. Petitioner overstates the degree of consensus among social scientists.

Petitioner suggests that social scientists all agree that eyewitness identifications are unreliable, *see* Pet. 16–17, but this claim overstates the alleged research consensus.[7] Courts have treated the reliability of such identifications as an open question. *See, e.g., Hickman,* 330 P.3d at 566 n.9 (declining to take judicial notice of social science findings, given the fallibility and biases of researchers and judges, and the central role of citizen jurors in the adjudicative process); *United States v. Libby*, 461 F. Supp.2d 3, 10–18 (D.C. Cir. 2006) (deconstructing studies purporting to show that juries place too much reliance on identification evidence); *Watkins v. Sowder*, 449 U.S. 341, 350 (1981) (holding that identification evidence, though significant, "is still only evidence" and "counsel

[7] *See* E.J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 Alb. L. Rev. 389, 417 n. 203 (1996) (conceding that "no scientific data exists" to explain the results in situations where the defendant plants a look-alike in court); *see also* C.A. Carlson & M.A. Carlson, *A Distinctiveness-Driven Reversal of the Weapon-Focus Effect*, 8 Applied Psychol. Crim. Just. 36, 49 (2012); J.M. Fawcett, et al., *Of Guns and Geese: A Meta-Analytic Review of the 'Weapon Focus' Literature*, 19 Psychol., Crime & L. 35, 56 (2013).

can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification").

Colorado has long allowed this battle of experts to unfold before the finder of fact. *See Campbell v. People*, 814 P.2d 1, 7 (Colo. 1991), *abrogated on other grounds by People v. Shreck*, 22 P.3d 68 (Colo. 2001). So too do other jurisdictions: nearly every state and federal circuit has held that trial courts may admit expert testimony on the topic of eyewitness identification, so that jurors can weigh the experts' competing claims. *See Com. v. Walker*, 92 A.3d 766, 782–84 (Pa. 2014) (collecting cases). Allowing such competing expert testimony to be presented to the jury underscores the reality that jurors can and should intelligently weigh the strength of eyewitness identifications.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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