No. 19-75

IN THE

Supreme Court of the United States

JAMES JOSEPH GARNER,

Petitioner,

v.

COLORADO,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The State does not—and cannot—dispute the importance of the question presented: whether due process imposes any check at all on eyewitnesses' in-court identifications where there is a substantial likelihood of misidentification. Nor does the State dispute that there is a split of authority on this issue. The State nonetheless contends that "this Court should await further development of the law [in other lower courts] before granting review" to address whether the Due Process Clause requires judicial prescreening under the circumstances here. BIO 13. The State also maintains this case is an unsuitable vehicle for addressing this issue and that the Colorado Supreme Court's decision is correct.

None of these arguments withstands scrutiny. The conflict over the question presented is substantial, and nothing would be gained by further percolation. This case is an excellent vehicle for resolving the split; indeed, it vividly illustrates the reality that eyewitnesses will sometimes make identifications in the suggestive setting of the courtroom that they would not make in nonsuggestive settings. And the Colorado Supreme Court's decision is wrong. Where there is substantial reason to doubt that a testifying witness would identify the defendant but for the suggestiveness of the ordinary courtroom setting, due process demands a judicial check on the identification.

I. The conflict over the question presented is substantial and ripe for resolution.

1. The State acknowledges that "five jurisdictions" since *Perry v. New Hampshire*, 565 U.S. 228 (2012), have held that the Due Process Clause imposes a check

on in-court identifications under the circumstances here, while nine courts have held to the contrary. BIO 9-12. This conflict alone is more than enough to warrant certiorari.

The State protests that "only two" of the post-*Perry* decisions on petitioner's side of the split "discuss[] *Perry* in any meaningful way." BIO 12. But the State's quibble merely reinforces the need for this Court's intervention. Some courts, like the three dissenters in the Colorado Supreme Court, believe that *Perry* "did not consider, and does not resolve, the question" in this case. Pet. App. 40a (Hart, J., dissenting); *see also* Pet. 12-14. Courts with this view have no reason to discuss *Perry* in depth; they think other decisions from this Court provide more significant guidance regarding the question presented. Other courts have held that certain broad language in *Perry* insulates in-court identifications under the circumstances here from constitutional scrutiny. *See* Pet. 15 (citing cases). Only this Court can resolve which group of courts is correctly interpreting this Court's precedent.

2. Contrary to the State's suggestion (BIO 9), cases decided before *Perry* make the conflict over the question presented run even deeper. *Perry* dealt with an eyewitness's out-of-court identification in the absence of any state action: "[L]aw enforcement officials did not arrange the suggestive circumstances," and the police "did not ask" the eyewitness to identify the perpetrator. 565 U.S. at 235, 240. This case, by contrast, involves an in-court identification where a prosecutor calls the witness to the stand and asks whether he can "point to" the perpetrator in the courtroom. Pet. App. 54a.

Accordingly, courts that held before *Perry* that the Due Process Clause requires prescreening in the circumstances here would have no reason to reconsider those holdings. *See* Pet. 13, 25; NACDL Br. 10-14.

II. This case is an excellent vehicle for resolving the split.

The State's contentions notwithstanding, it is hard to imagine a more compelling vehicle than this one to address whether the Due Process Clause imposes any check under the circumstances here on eyewitness identifications.

1. The State first asserts that "the Colorado Supreme Court's decision is correct" because there was no "improper law enforcement action which went beyond the inherent suggestiveness of the ordinary courtroom setting." BIO 13-14. For example, the prosecutors did not outright tell the victims that "they should identify Petitioner as the culprit." *Id.* 14.

This is really a merits argument, not a vehicle argument. But insofar as the State suggests the facts here do not implicate the question presented, the State is exactly wrong. The question presented is whether due process requires prescreening where "there was no police misconduct," but there is nevertheless a substantial likelihood of misidentification due to the typically suggestive setting of trial. Pet. i. The absence of any "improper law enforcement action which went beyond the inherent suggestiveness of the ordinary courtroom setting," BIO 14, thus makes this a perfect vehicle for resolving the question presented.

2. The State's attempts to downplay the significance of the identifications in this particular case have no merit either.

a. There plainly was substantial reason to doubt the eyewitnesses would have identified petitioner as the perpetrator in a nonsuggestive setting. After all, all three eyewitnesses failed to identify petitioner in properly constructed photo arrays. Pet. App. 5a. Furthermore, in the days immediately after the crime, the eyewitnesses offered physical descriptions of the perpetrator that bore scant resemblance to petitioner. *See* Pet. 4-5, 28.

The State highlights the few things about the eyewitnesses' physical descriptions of the shooter that aligned with petitioner's general appearance. BIO 16-17. But these select details are relatively meaningless in light of the eyewitnesses' inability to identify petitioner in the photo array—a fact that, by itself, establishes a substantial likelihood they would not have identified him in the courtroom but for the suggestive setting. At any rate, the State ignores the many details that the eyewitnesses gave near the time of the shooting that did *not* match petitioner—for example, describing the shooter as a half foot taller than petitioner, being bald (petitioner has hair), having tattoos (petitioner does not), wearing a bandana (petitioner was not), not wearing glasses (petitioner was), and not having facial hair (petitioner did). *See* Pet. 4-5.

In sum, if petitioner's conception of due process is correct, the court unquestionably should have prescreened the identifications here. And, as the dissenters below maintained without dispute from the majority, if the trial court had prescreened the 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); *see also* Pet. 28-29.

b. The State's suggestion that there was "ample evidence" establishing petitioner's guilt beyond the eyewitnesses' identifications, BIO 16, is doubly misguided. To start, the standard for determining whether a constitutional error entitles a defendant to a new trial is not whether "ample evidence" supported the verdict; it is whether the erroneously admitted evidence was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The State does not even try to satisfy the proper standard here. Nor could it. As the Colorado Supreme Court explained, the prosecution here "hinged" on the in-court identifications. Pet. App. 3a.

Even on its own terms, the State's argument is sorely mistaken. The discovery of petitioner's glasses established nothing more than he was a patron in the bar that night. The glasses do not indicate he was the shooter (recall Christian said the shooter was *not* wearing glasses, Pet. 5). And the general physical description that G.R., the victims' friend, gave of the perpetrator probably fit any number of men present during the altercation. Not to worry, the State says: The shooter here had to be "one of the four men" in petitioner's group that night. BIO 16. Even if this assertion were accurate (and evidence in the record indicates it is not, *see* Rep. Tr. 76-77 (Aug. 14, 2012); *id.* 179-80 (Aug. 16, 2012)), it speaks volumes about this prosecution. Petitioner was the only one of the four men in his group whose identity the State ever ascertained, and the State offers no evidence that the eyewitnesses' vague and shifting descriptions of the shooter matched petitioner any more closely than any

of the other three. Pet. 5-6. Twenty-five percent odds might be good for a carnival game, but the criminal justice system requires considerably more.

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

In light of the direct conflict over the question presented, the State's arguments on the merits provide no reason to deny review. Regardless, the State's arguments are unconvincing.

1. Like the Colorado Supreme Court, the State concedes that the Due Process Clause requires courts to scrutinize in-court identifications where prosecutors explicitly suggest a testifying witness should identify the defendant as the perpetrator. BIO 14. But the State argues that, so long as the prosecution does not "improperly suggest that the witness[] should proclaim [the defendant] to be [the] assailant," features of the adversarial process other than judicial prescreening are always enough to guard against misidentification. BIO 20-22. In other words, the State maintains that the *implicit* suggestiveness of the typical courtroom setting can never give rise to due process concerns—even where there is substantial reason to believe a testifying witness would not identify the defendant as the perpetrator in a nonsuggestive setting.

Petitioner has already largely answered this argument. *See* Pet. 26-28. In short, this Court has long held that the default adversarial process is not necessarily enough to guard against misidentification in the courtroom. *See id.* 26 (citing cases). This is because "due process requires an inquiry into the reliability of the procedure" whenever there is a substantial likelihood of misidentification and "the

government is responsible for the suggestiveness" of the identification procedure. *United States v. Correa-Osorio*, 784 F.3d 11, 31 (1st Cir. 2015) (Barron, J., concurring in part and dissenting in part). It does not matter whether the identification procedure takes place inside or outside of the courtroom. If anything, a "one-on-one" identification, wherever it takes place, "generally is thought to present greater risks of mistaken identification than a [pretrial] lineup." *Moore v. Illinois*, 434 U.S. 220, 229 (1977).

The State's related suggestion that the identifications here occurred "spontaneously, without any prompting from the prosecution," BIO 15, is also off-base. As with any in-court identification, the prosecution charged petitioner with a criminal offense, brought him to trial in a courtroom, and called the eyewitnesses to the stand with the defendant sitting next to his lawyers at counsel table. The prosecution also asked the eyewitnesses questions such as whether they could "point to" anyone in the courtroom "who shot at [them] on th[e] particular evening" at issue. Pet. App. 54a. These prosecutorial actions differentiate the situation here from *Perry* (where the suggestive circumstances were "not arranged by the police" and the police "did not ask" the eyewitness to identify the perpetrator, 565 U.S. at 235-36), and trigger the Due Process Clause's protections against procedurally unreliable state action. *See* Pet. 25-26.

That leaves the State's contention that, in situations such as this, "defense counsel may seek an [in-court] identification procedure that is less suggestive than the typical trial setting." BIO 21. This assertion misapprehends petitioner's due process claim. Petitioner's claim is that the Due Process

Clause requires judicial prescreening where there is substantial reason to doubt a testifying witness would identify the defendant as the perpetrator absent the suggestiveness of the ordinary courtroom setting. Once a defendant makes such a showing, it becomes the State's burden—not the defendant's—to alleviate the problem. Put another way, the prosecution must refrain from orchestrating an identification procedure that creates a substantial risk of misidentification. To satisfy this constitutional obligation, the prosecution (or the court) can invoke rules such as Colo. R. Crim. P. 41.1, but the defendant need not do so.

2. Citing three articles, the State suggests that social science does not necessarily support bringing due process scrutiny to bear on in-court identifications under the circumstances here. BIO 22-23 & n.7. Two of the articles, however, deal solely with a single, narrow aspect of memory: the so-called "weapon focus" effect—that is, the degree to which an assailant's holding a weapon undermines an eyewitness's ability to remember and identify the perpetrator. The articles do not question the broader proposition that the inherent suggestiveness of the courtroom can create a substantial likelihood of misidentification.

The third article is directly adverse to the State. It is a clarion call—based on "the best available psychological evidence" at the time—for giving defendants "[i]f anything, . . . greater" due process protection against unreliable in-court identifications. E.J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 Alb. L. Rev. 389, 391, 415 (1996). The National Academy of Sciences and scores of experts across numerous disciplines have since echoed that view. *See, e.g.*, Nat'l Academy of Sciences,

Identifying the Culprit: Assessing Eyewitness Identification 110 (2014); Br. of Scholars of Law, Psychology, Neuroscience, and Other Fields 15-23. The State cites not a single scholar who disagrees; the "battle of experts" it imagines, BIO 23, is completely illusory.

The question, therefore, is whether defendants should be required to put on expert testimony to educate the jury regarding the fallibility of in-court identifications even in cases where there is indisputably substantial reason to doubt an eyewitness would identify them but for the suggestiveness of the courtroom. The answer is no. This Court has long held that out-of-court identifications can be so unreliable that judges cannot allow them to be presented to juries without creating an unacceptable risk of convicting the innocent. *See, e.g.*, *Neil v. Biggers*, 409 U.S. 188, 196-98 (1972); *Foster v. California*, 394 U.S. 440, 443 (1969). The same reasoning applies to in-court identifications where there is a substantial likelihood of misidentification. *See* Pet. 27-28. And all the more so in a case such as this, where the genuine possibility of a wrongful conviction is so palpable.

CONCLUSION

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

Respectfully submitted,

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