

SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	
Certiorari from the Colorado Court of Appeals Case No. 12CA2540	
Petitioner: JAMES JOSEPH GARNER, v. Respondent: THE PEOPLE OF THE STATE OF COLORADO	
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BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER	

CERTIFICATE OF COMPLIANCE

This brief complies with Colorado Appellate Rules 29 and 32, including all formatting requirements set forth in these rules. I acknowledge that the brief may be stricken if it does not so comply.

Specifically, the undersigned certifies that:

1. The amicus brief complies with the applicable word limit set forth in Rule 29(d) in that it contains 4,742 words.
2. The amicus brief complies with the content and form requirements set forth in Rule 29(c).

s/ Michael J.P. Hazel

MICHAEL J.P. HAZEL

May 30, 2017

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Psychological Association is the leading association of psychologists in the United States. A nonprofit scientific and professional organization, APA has approximately 115,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's purposes are to increase and disseminate knowledge regarding human behavior and to foster the application of psychological learning to important human concerns.

APA has filed more than 170 amicus briefs in courts around the country, briefs that have been cited frequently by courts. *See, e.g., Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017); *Hall v. Florida*, 134 S. Ct. 1986, 1994-1995, 2000-2001 (2014); *Commonwealth v. Wright*, 14 A.3d 798, 816 n.16 (Pa. 2011). These briefs have often addressed eyewitness-identification issues. *E.g., Perry v. New Hampshire*, 565 U.S. 228 (2012); *Payne v. Commonwealth*, 794 S.E.2d 577 (Va. 2016); *Commonwealth v. Gomes*, 22 N.E.3d 897 (Mass. 2015); *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014); *State v. Artis*, 101 A.3d 915 (Conn. 2014).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether the case is one in which there is sufficient scientific research relevant to a question before the court that APA can usefully

contribute to the court’s resolution of that question. APA regards this as one of those cases.¹

STATEMENT OF FACTS

As recounted in the court of appeals’ opinion, James Garner was convicted of various crimes arising from a shooting at a bar. Slip op. ¶¶1-3. At trial—which occurred three years after the shooting—three brothers each confidently identified Garner as the shooter. *Id.* ¶¶4, 18. Before trial, however, all three had not only failed to identify Garner from a photo array, but “also gave varying descriptions of the shooter and his clothing.” *Id.* ¶¶4, 16.

ARGUMENT

I. FOR REASONS EXPLAINED BY SOCIAL-SCIENCE RESEARCH, EYEWITNESS IDENTIFICATIONS ARE OFTEN INACCURATE AND LEAD TO WRONGFUL CONVICTIONS

A. Eyewitness testimony is critical to the criminal-justice system’s truth-seeking process. Accurate eyewitness identifications provide important evidence of guilt or innocence. “[B]oth archival studies and psychological research,” however, “suggest that eyewitnesses are frequently mistaken in their identifications.” Devenport et al., *Eyewitness Identification Evidence*, 3 Psychol. Pub. Pol’y & L. 338, 338 (1997). And because “there is almost *nothing more*

¹ APA gratefully acknowledges the assistance of Steven Penrod, J.D., Ph.D., and Jeffrey Neuschatz, Ph.D.

convincing [to a jury] than” an eyewitness’s identification of the defendant, “[m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country.” *State v. Henderson*, 27 A.3d 872, 885, 889 (N.J. 2011) (brackets in original) (quotation marks omitted).

These insights are not new. Five decades ago, the U.S. Supreme Court observed that “identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The ... annals of criminal law are rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967). And as this Court later explained, “[s]ubsequent experience and empirical evidence support the Supreme Court’s conclusions” regarding the dangers of eyewitness identification. *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002) (en banc). One study, for example, found that “of forty cases in which the convicted persons were later exonerated through DNA testing[,] ... 90%[] of the convictions were obtained, at least in part, by erroneous eyewitness identifications.” *Id.* (citing Wells et al., *Eyewitness Identification Procedures*, 22 Law & Hum. Behav. 603, 605 (1998)). “The study concluded that mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined.” *Id.* (quotation marks omitted).

More recent data confirms that erroneous identifications often produce wrongful convictions. According to the Innocence Project, more than 70 percent of DNA exonerations involve eyewitness misidentification. See Innocence Project, *Eyewitness Misidentification*, <https://www.innocenceproject.org/causes/eyewitness-misidentification> (visited May 30, 2017). “Of those, more than half (53 percent) were misidentified in court.” LaVarco & Newirth, *Connecticut Supreme Court Limits In-Court Identification in Light of the Danger of Misidentification* (Aug. 29, 2016), <https://www.innocenceproject.org/ct-supreme-court-limits-court-id>. Another study found that, of the first 200 cases of post-conviction DNA exonerations, nearly 80 percent included at least one eyewitness who mistakenly identified the innocent defendant. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76 tbl. 2 (2008). Overall, inaccurate eyewitness identifications are believed to account for more than half of wrongful convictions in the United States. E.g., Huff, *Wrongful Conviction*, 4 Res. in Soc. Probs. & Pub. Pol’y 99, 101-103 (1987); Cutler & Penrod, *Mistaken Identification* 8 (1995).

B. Decades of social-science research on human memory offer insights into the reasons for mistaken identifications. Cognitive psychologists have long “established that when we experience an important event, we do not simply record it in our memory as a videotape recorder would.” Loftus et al., *Eyewitness*

Testimony §2-2, at 14 (5th ed. 2013). Rather, it was discovered decades ago and is now widely accepted in the scientific community that the process of remembering “is an imaginative reconstruction or construction.... It is thus hardly ever really exact[.]” Bartlett, *Remembering* 213 (1932). Errors are common because “what is perceived and stored in memory is often incomplete or distorted as a result of the individual’s state of mind or the nature of the event observed.” Brigham et al., *Disputed Eyewitness Identification Evidence*, Ct. Rev., Summer 1999, at 12, 13.

In particular, research has documented that memory involves three discrete stages: (1) the acquisition or encoding stage, when a witness perceives an event and information is entered into the memory system; (2) the retention or storage stage, the period between acquisition and the witness’s attempt to recall the information; and (3) the retrieval stage, when the witness attempts to recall the stored information. Loftus et al., *Eyewitness Testimony* §2-2, at 14. Many factors may adversely affect memory at each stage. For example, the duration of an event or a witness’s age may affect acquisition; passage of time or post-event information may contaminate the witness’s memory during the retention stage; and the method of questioning may adversely affect or influence the memory when retrieved. *Id.* at 15.

Psychologists have conducted many empirical studies to ascertain the impact of specific variables on eyewitness identification accuracy. The variables studied fall into two categories: system and estimator. Wells et al., *Eyewitness Evidence*, 7 Psychol. Sci. Pub. Int. 45, 47 (2006) (citing Wells, *Applied Eyewitness Testimony Research*, 36 J. Personality & Soc. Psychol. 1546 (1978)). Estimator variables are those that police and prosecutors cannot change, such as the circumstances of a crime: dim lighting and the witness's distance from the perpetrator at the time of the crime, for example, or whether a weapon was present, or whether the witness and perpetrator are of the same race. *Id.* at 51-53. In contrast, system variables—such as the method of interviewing eyewitnesses—are within the control of law enforcement. *Id.* at 47, 54-55. And research shows that system variables “have a strong impact on the resulting probative value of eyewitness testimony.” *Id.* at 46; accord Kaplan & Purcal, *Who Could It Be Now? Challenging the Reliability of First Time In-Court Identifications After State v. Henderson and State v. Lawson*, 105 J. Crim. L. & Criminology 947, 964 (2015).

This case concerns a system variable: the use by law enforcement of first-time in-court identifications.

II. LIKE SHOWUPS, FIRST-TIME IN-COURT IDENTIFICATIONS ARE INHERENTLY SUGGESTIVE, AND MORE THAN TWICE AS LIKELY AS LINEUPS TO YIELD INACCURATE IDENTIFICATIONS

A first-time in-court identification is one in which an eyewitness who has *not* previously identified the defendant as the perpetrator does so in court. This procedure is starkly different from a photo array or a lineup. Each of those procedures involves the simultaneous presentation of both the person suspected by law enforcement and others whom law enforcement does not suspect (known as “fillers”). In-court identification, in contrast, is similar to a showup, where police present an eyewitness—outside the courtroom—with only a single person (their suspect) and ask the witness whether that person is the perpetrator. *See United States v. Greene*, 704 F.3d 298, 307 (4th Cir. 2013) (showups and in-court identification are “similar”); *United States v. Kaylor*, 491 F.2d 1127, 1131 (2d Cir. 1973) (in-court “identification ... amounted to a ‘show-up’”); Mandery, *Due Process Considerations of In-Court Identifications*, 60 Alb. L. Rev. 389, 390 (1996) (“overwhelming majority of in-court identifications are nothing more than show-ups”); Lipton, *Legal Aspects of Eyewitness Testimony*, in *Psychological Issues in Eyewitness Identification* 7, 17 (Sporer et al. eds., 1996) (“[A]ny in-court identification ... at trial is essentially a show-up.”).

The close similarity between showups and in-court identifications is relevant here because showups have been roundly and justly criticized as both suggestive and conducive to false identifications (although in-court identifications are actually worse in this regard, for reasons explained in Part III). Indeed, decades ago the U.S. Supreme Court observed that “[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned.” *Stovall v. Denno*, 388 U.S. 293, 302 (1967). In another case decided the same day, the Court explained why showups are so problematic: “It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police.” *Wade*, 388 U.S. at 234 (citing Frankfurter, *The Case of Sacco and Vanzetti* 31-32 (1927)); accord *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997) (“[I]t is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant.”). Consistent with these cases, courts have shown great skepticism toward showups, limiting their admissibility due to the high risk of misidentification. See, e.g., *Commonwealth v. Crayton*, 21 N.E.3d 157, 165 (Mass. 2014); *State v. Dubose*, 699 N.W.2d 582, 593-594 (Wis. 2005); *People v. Duuvon*, 571 N.E.2d 654, 656 (N.Y. 1991).

Psychological research confirms this judicial skepticism, demonstrating empirically that showups are more likely than other procedures to produce misidentifications. In one meta-analysis of studies that collectively involved more than 3,000 eyewitnesses, researchers found that showups produced more than twice as many false identifications as lineups. See Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations*, 27 Law & Hum. Behav. 523, 532-533 (2003); accord Dysart & Lindsay, *Show-Up Identifications*, in 2 *Handbook of Eyewitness Psychology* 137, 141 (Lindsay et al. eds., 2007). A second, more recent meta-analysis echoes those findings, concluding that research “provide[s] a dismal portrayal of” showups, and that researchers “have yet to find a situation where it would be more appropriate to conduct a showup [than a lineup] if eyewitness accuracy is the primary goal.” Neuschatz et al., *A Comprehensive Evaluation of Showups*, in 1 *Advances in Psychology and Law* 43, 63 (Miller & Bornstein eds., 2016). Indeed, showups tend not only to be less reliable but also to inflate eyewitness confidence, which can be very persuasive to jurors—leading to “the most dangerous” combination of identifications that are both less accurate and overconfident. *Id.* at 65-66.

First-time in-court identifications are characterized by the same traits that research shows gravely undermine the reliability of showups. First, as with

showups—but unlike with properly conducted lineups and photo arrays—“the identity of the police suspect is [inherently] obvious” in the case of in-court identifications. Loftus et al., *Eyewitness Testimony* §4-7, at 91. The witness’s task is thus not to identify the perpetrator from a group of people matching a given description but simply to confirm law enforcement’s suspicion that the individual police have singled out is the culprit.

Second, with in-court identifications (again as with showups), there is no filter for “guess” identifications, i.e., identifications by eyewitnesses who do not truly recognize the perpetrator but who nonetheless make an identification in an effort to be helpful. With lineups and photo arrays, guesses frequently result, as a matter of simple probabilities, in the selection of a “filler” whom the police know is not the perpetrator. Loftus et al., *Eyewitness Testimony* §4-7, at 87. This safety valve disappears, however, if a witness is given just one option, as with an in-court identification (or a showup). The identification does not test an eyewitness’s memory, because it is impossible for the witness to fail the test by picking a “filler.” See Nat’l Research Council of the Nat’l Acads., *Identifying the Culprit* 36 n.28 (2014).

Recognizing the unreliability of first-time in-court identifications, the Supreme Judicial Court of Massachusetts recently barred their admission in

criminal cases except where “there is ‘good reason’ for its admission.” *Crayton*, 21 N.E.3d at 169. The Connecticut Supreme Court has similarly deemed the “extreme suggestiveness and unfairness” of first-time in-court identifications to be “obvious,” and required such identifications to be treated “just like other identifications that are the result of unduly suggestive identification procedures.” *State v. Dickson*, 141 A.3d 810, 822-823 (Conn. 2016); *see also id.* at 822 (“[W]e are 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.”).² For the reasons given above and in the next section, this Court should do likewise.

III. DIFFERENCES BETWEEN SHOWUPS AND FIRST-TIME IN-COURT IDENTIFICATIONS JUSTIFY A PER SE EXCLUSION OF THE LATTER EVEN IF THE FORMER ARE SOMETIMES PERMISSIBLE

In *People v. Walker*, 666 P.2d 113 (Colo. 1983), this Court took a different approach from the cases just cited, applying its prior rulings regarding *out-of-court* one-on-one identifications to uphold the admission of an *in-court* one-on-one identification, *see id.* at 119 (citing *People v. Smith*, 620 P.2d 232 (Colo. 1980),

² The Court in *Dickson* also addressed at length the prosecution’s various arguments for why in-court identifications should be deemed admissible. *See* 141 A.3d at 827-838.

and *People v. Williams*, 516 P.2d 114 (Colo. 1973)). In doing so, however, the Court did not confront critical differences, discussed below, between in-court and out-of-court identifications. Given these differences, as well as developments in both the law and social science in the decades since those cases were decided, *Walker* should not be regarded as governing the resolution of this case. Rather, this Court should hold that first-time in-court identifications are per se—or at a minimum presumptively—inadmissible.³

A. First, a showup typically takes place within minutes or at most a few hours of the crime, whereas an in-court identification typically occurs months or even (as here) years later. That difference is important. Memory “decays” over time, and hence as the length of time between the crime and the identification (known as the “retention interval”) grows, an identification becomes increasingly unreliable. *E.g.*, Deffenbacher et al., *Forgetting the Once-Seen Face*, 14 J. Experimental Psychol. 139, 147-148 (2008); *see also, e.g.*, Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol’y & Ethics J. 327, 336 (2006). Indeed, research demonstrates that a showup conducted only twenty-four hours

³ The Court’s decision in *People v. Monroe*, 925 P.2d 767 (Colo. 1996) (en banc), similarly did not address the social-science research and other arguments presented in this brief.

after a crime is almost four times as likely to produce a misidentification as one done immediately after the event. See Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 Law & Hum. Behav. 459, 465 (1996). Here, the gap between the crime and the in-court identifications was *three years*. As research shows, and as common sense and experience confirm, memories of events that distant are highly prone to inaccuracy.

Second, an in-court identification is much more suggestive than a showup. In a standard showup, “the eyewitness likely knows that the police suspect the individual, but ... is unlikely to know how confident the police are in their suspicion.” *Crayton*, 21 N.E.3d at 166. After all, a showup typically occurs within a few hours of the crime, when the investigation is in its earliest stages and police have not had time to confirm any preliminary suspicions. The witness may suppose she will be confronted with a series of suspects, and that the process has not settled on only one. In contrast, an in-court identification involves a witness who knows that the defendant is both the sole suspect and a person whose guilt the police and prosecutors have enough evidence of that formal charges have been brought. See Kaplan & Puracal, *supra*, at 984 (“The first time, in-court identification presents the ultimate ‘targeted suspect’ situation that courts have repeatedly condemned in the pretrial context.”). In fact, police sometimes try to

mitigate the inherent suggestiveness of a showup by, for example, instructing the witness that the perpetrator “may or may not be the person you will see” and that “[t]he investigation will continue regardless of whether or not you make an identification.” Colorado Best Practices Comm., *Model Policy and Forms for Eyewitness Identification* 24 (Apr. 2015), <http://www.louisvilleco.gov/home/showdocument?id=9125>. No such mitigation can possibly occur at trial.

“An in-court identification is” therefore “tantamount to a high-pressure show-up.” Steblay & Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. Applied Res. Memory & Cognition 284, 287 (2016). “The prosecutor, the witness, and everyone else in the courtroom are aware that the suspect is the individual seated at the defense table,” and “[t]here is no way to safeguard the witness from influence caused by subtle cues in the prosecutor’s questioning or not-so-subtle cues in the courtroom itself.” Kaplan & Puracal, *supra*, at 985. In other words, “*all* in-court identifications” “involve some element of suggestion.” *Perry v. New Hampshire*, 565 U.S. 228, 244 (2012) (emphasis added).

Faced with such suggestiveness, “eyewitnesses may identify the defendant out of reliance on the prosecutor and in conformity with what is expected of them rather than because their memory is reliable.” *Crayton*, 21 N.E.3d at 166-167.

“The pressure of being asked to make an identification in the formal courtroom setting and the lack of anonymity,” that is, “create conditions under which a witness is most likely to conform his or her recollection to expectations, either by identifying the [defendant] or by ... conformi[ng] with the behavior of others ... seen on television.” Mandery, *supra*, at 417-418. Here, for example, the three eyewitnesses—themselves victims of the crime—doubtless “felt pressured to help solve a crime and understandably wanted to be of assistance.” *Greene*, 704 F.3d at 307.

The heightened pressure to confirm guilt inherent in being asked to make an in-court identification is strongly linked to false confidence. As research shows, witnesses’ confidence—like their memories of faces and events—is highly malleable and may change based on new information received before or after an identification. See Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science*, 33 Law & Hum. Behav. 1, 11-12 (2009). In particular, suggestiveness “reliably inflates witnesses’ ratings of confidence.” Loftus et al., *Eyewitness Testimony* §3-12, at 70. And confidence “is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by its suggestiveness.” *Crayton*, 21 N.E.3d at 168. Indeed, “[t]he outcomes of empirical

studies, reviews, and meta-analyses have converged on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak, with average confidence-accuracy correlations generally estimated between little more than 0 and .29.” Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification*, 8 J. Experimental Psychol. Applied 44, 44-45 (2002) (citing studies).⁴

Furthermore, “[t]he confidence of an eyewitness may increase by the time of the trial as a result of learning more information about the case, participating in trial preparation, and experiencing the pressures of being placed on the stand.” Nat’l Research Council, *supra*, at 110. The trial process itself further amplifies eyewitness confidence for reasons unrelated to accuracy—namely, that “[o]nce the witness has identified the defendant as the perpetrator, the prosecution will continue to ask questions designed to elicit details confirming the witness’s

⁴ Very recent research suggests that eyewitness confidence in an identification can be highly correlated with accuracy—but only under “pristine testing conditions [such as] initial, uncontaminated memory tests using fair lineups, with no lineup administrator influence, and with an immediate confidence statement.” Wixted & Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy*, 18 Psychol. Sci. Pub. Int. 10, 10 (2017). Those conditions are not true of a typical showup, much less the in-court identifications here. And the recent research confirms that, absent such conditions, “the accuracy of even a high-confidence suspect ID is seriously compromised,” *id.*, as is the case with showups, which are less reliable yet induce eyewitness overconfidence, see Neuschatz et al., *supra*, at 65-66.

certitude. The witness's exclusive role is to ... prove how certain she is." Kaplan & Puracal, *supra*, at 987. By contrast, although a showup is inherently suggestive, the single suspect presented in that procedure has not (unlike a charged criminal defendant) been authoritatively identified by law enforcement as the culprit, and hence the witness's role is simply to say honestly whether the suspect is the perpetrator. A witness may well believe that charges would not be brought unless the prosecution has a solid case against the accused.

B. Despite these problematic differences between showups and first-time in-court identifications, the court of appeals here relied on another difference that it believed made the latter *more* reliable: An in-court identification is subject to immediate cross-examination. *See* slip op. ¶23. That reliance was misplaced.

Empirical research on cross-examination indicates that it is ineffective at countering unreliable eyewitness testimony or false confidence. *See* Lampinen et al., *The Psychology of Eyewitness Identification* 249 (2012) (citing Leippe, *The Case For Expert Testimony About Eyewitness Memory*, 1 Psychol. Pub. Policy & Law 909 (1995)); accord Boyce et al., *Belief of Eyewitness Identification Evidence*, in 2 *Handbook of Eyewitness Psychology* 501, 518 (Lindsay et al. eds., 2007) ("Once the case is in court, jurors can't tell if an eyewitness is correct."). That is in part because what most affects jurors' assessments of an identification is

the witness's confidence. Cutler et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 185 (1990); Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. Applied Psychol. 79, 83 (1981). And cross-examination can do little to combat a witness who, although honest and highly confident, is mistaken—a common phenomenon given the divergence, noted above, between confidence and accuracy, and given the role that witnesses at trial understand they are to play. *E.g.*, Lampinen, *supra*, at 250 (“[T]he goal of cross-examination is to attack the credibility of the witness[, which] leads to a focus on factors ... such as witness demeanor and trivial inconsistencies.”); Rahaim & Brodsky, *Empirical Evidence Versus Common Sense*, 7 Law & Psych. Rev. 1, 7 (1982).

As courts have recognized, this research demonstrates that jurors “may be better able to assess a witness’s ... *confidence* during an in-court identification than through evidence of a showup,” but are no “better able to evaluate the *accuracy* of an in-court identification.” *Crayton*, 21 N.E.3d at 168 (emphasis added); *accord State v. Lawson*, 291 P.3d 673, 695 (Or. 2012); *State v. Guilbert*, 49 A.3d 705, 725 (Conn. 2012); *State v. Clopten*, 223 P.3d 1103, 1110 (Utah 2009). An in-court identification is not conducted under “pristine” conditions. As a result, confidence will not be correlated with accuracy but *will* be inflated by a

host of factors, and this inflated confidence can mislead jurors. Contrary to the opinion below, an accurate assessment of confidence thus provides little or no safeguard against the substantial risk of a false identification and wrongful conviction.

C. Finally, although courts have given various reasons for allowing the admission of showup identifications—such as “concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the accuracy of investigatory information”—none of those applies to first-time in-court identifications. *Crayton*, 21 N.E.3d at 170 (quotation marks omitted); Kaplan & Puracal, *supra*, at 970. Trial therefore exacerbates all of the risks of pretrial showups, yet is not justified by any of the legitimate reasons law-enforcement officials may need to use showups during an investigation.

IV. EYEWITNESS-IDENTIFICATION RESEARCH IS RELIABLE

This Court should give substantial weight to the arguments above regarding the significant risk of inaccurate first-time in-court identifications, and the risk of resulting wrongful convictions, because the social-science research underlying those findings is highly reliable. This reliability derives principally from three factors.

First, the methods used reflect best practices in scientific psychological research. “[L]ike all scien[tists] ... , psychologists rely upon basic principles of scientific inquiry that ensure the reliability and validity of their findings.” Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 3, 11 (Cutler ed., 2009). In particular, psychologists form hypotheses based on prevailing theories and available data, and then test those hypotheses through experiments or review of archival sources. See *id.* at 11-14. The testing process typically involves experiments in which researchers expose a controlled set of subjects to different videotaped or staged crimes and then test the accuracy of the subjects’ identification skills. See, e.g., Wells et al., *Eyewitness Evidence*, *supra*, at 49-50. This approach is widely considered to yield “the most robust findings.” Malpass et al., *supra*, at 13; see also Wells et al., *Eyewitness Evidence*, *supra*, at 49. The next step—analysis of the results produced by the experiments—is equally sound: It normally involves inferential statistical methods, which have been “developed and accepted by researchers over a period of more than a century.” Malpass et al., *supra*, at 14.

Second, studies in this field are typically subject to two layers of peer review, first at the funding stage and then at the publication stage. See Cutler &

Penrod, *supra*, at 66-67. The high standards and low acceptance rates at both stages provide additional checks on the methodological soundness of the research. *See id.* at 66-67; Malpass et al., *supra*, at 14.

Third, the APA's Ethical Principles and Code of Conduct forbids psychologists from fabricating data or making false or deceptive statements. APA Standard 8.10(a). It also requires them to share the data they use with any competent professional seeking to validate their work. APA Standard 8.14(a). Nor is the code the only source of ethical constraints on research. Universities—where much psychological research is conducted—typically require prior review by internal ethics boards. *E.g.*, Meyer, *Regulating the Production of Knowledge*, 65 Admin. L. Rev. 237, 243-250 (2013). And journals that publish the research typically require statements of compliance with ethical standards. *See, e.g.*, APA Certification of Compliance with APA Ethical Principles (2003), *available at* <http://www.apa.org/pubs/authors/ethics02.pdf> (requirement applies to APA journals).

Further evidence regarding the reliability of psychological research on eyewitness identifications is the level of consensus in the field as to core findings of that research. In a 1989 study, for example, researchers surveyed psychologists who had published in the field. *See* Kassin et al., *The “General Acceptance” of*

Psychological Research on Eyewitness Testimony, A Survey of the Experts, 44 Am. Psychologist 1089, 1090 (1989). This survey showed general agreement among experts that at least nine variables had reliably been shown to influence eyewitness accuracy. *See id.* at 1093, 1094 & tbl. 4. A follow-up survey conducted in 2001 confirmed the 1989 results. *See* Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research, A New Survey of the Experts*, 56 Am. Psychologist 405, 410, 413 tbl. 5 (2001). Still more recent results reaffirm this consensus. *See* Hosch et al., *Expert Psychology Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 143, 152 (Cutler ed. 2009) (according to a 2008 study cited therein, “the level of general acceptance in the field is higher than it was in 2001”). Simply put, “relative to other scientific research that enters courtrooms, the lack of controversy in the field of eyewitness identification is remarkable.” Schmechel et al., *Beyond the Ken?: Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics 177, 179 (2006). Psychological research on eyewitness identifications is highly reliable. In addressing the questions here, this Court should therefore give substantial weight to the relevant findings of that research, as discussed in the preceding sections.

CONCLUSION

The judgment of the court of appeals should be reversed.

Dated: May 30, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

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