STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

ELISAH KYLE THOMAS

Defendant-Appellant
_____/

Supreme Court No. 155245

Court of Appeals No. 326311

Lower Court No. 14-9512-FC

Wayne County Prosecutor
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_____

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_____

AMICUS CURIAE BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN and THE INNOCENCE PROJECT

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STATEMENT OF APPELLATE JURISDICTION

Amici agree with the parties statement of jurisdiction.

INTEREST OF AMICUS CURIAE

Since its founding in 1976, Criminal Defense Attorneys of Michigan (CDAM) has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members.

As reflected in its bylaws, CDAM exists in part to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against the erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws."

The Innocence Project, Inc. (the "Innocence Project") is a non-profit organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration, by post-conviction DNA testing, of 351 individuals.

Eyewitness misidentification is the leading contributing cause of wrongful convictions, playing a role in 242 of the 351 wrongful convictions identified through post-conviction DNA testing. Identifications that follow suggestive procedures, and in-court identifications, pose a particularly significant risk of error. Accordingly, both the Innocence Project and CDAM have a compelling interest in ensuring that courts employ an appropriate framework for determining the admissibility of these types of identifications.

STATEMENT OF QUESTIONS PRESENTED

I. IS EYEWITNESS MISIDENTIFICATION A LEADING CONTRIBUTING CAUSE OF WRONGFUL CONVICTIONS NATIONWIDE, INCLUDING IN MICHIGAN?

Amici answers: Yes

II. CAN SOCIAL SCIENCE RESEARCH EXPLAIN THE CAUSE OF EYEWITNESS MISIDENTIFICATION AND WHAT CAN BE DONE TO MINIMIZE THE RISK OF MISTAKEN IDENTIFICATIONS?

Amici answers: Yes

III. SHOULD THE MICHIGAN SUPREME COURT TAKE THIS OPPORTUNITY TO IMPROVE THE RELIABILITY OF IDENTIFICATION EVIDENCE AND REDUCE THE RISK OF WRONGFUL CONVICTIONS BASED ON UNRELIABLE IDENTIFICATION EVIDENCE?

Amici answers: Yes

INTRODUCTION

Over the past four decades, the scientific community has acknowledged and addressed the chasm between how reliable eyewitness identifications are and how reliable juries *think* they are. To address this pressing justice issue, courts, prosecutors, police, defense attorneys, and legislatures have worked together to implement safeguards against misidentifications. In the pretrial context, states have instituted best practices for eyewitness identification procedures, including:

- Using "blind" administrators of police lineups and photo arrays;
- Providing appropriate pre-identification instructions that discourage witnesses from guessing or feeling undue pressure to identify someone;
- Recording the confidence of an eyewitness at the time of the identification is made; and
- Minimizing any factors that might influence a witness.

In the trial context, some courts have:

- Addressed flaws in the existing legal framework for evaluating challenged identification evidence;
- Issued robust and particular jury instructions designed to improve the ability of jurors to evaluate eyewitness identification evidence, including by mitigating against the juror's natural (and unjustified) impulse to trust an eyewitness identification without examining its context; and
- Expanded the use of expert testimony about the factors that influence the identification and limited the use of in-court identifications.

Michigan's jurisprudence, however, has not evolved with the science. While the State Bar worked with police and prosecutors to reform eyewitness identification processes, the courts have not similarly taken steps to remedy longstanding issues with eyewitness identification evidence. This case presents the Court with the opportunity to adopt significant safeguards that will protect the integrity of the criminal justice process.

I. EYEWITNESS MISIDENTIFICATION IS A LEADING CONTRIBUTING CAUSE OF WRONGFUL CONVICTIONS NATIONWIDE, INCLUDING IN MICHIGAN.

Eyewitness misidentification is a leading contributing cause of wrongful convictions. Indeed, seventy-one percent of exonerations based on DNA evidence involved at least one mistaken eyewitness.[1] In a study of the first 250 DNA-based exonerations, Professor Brandon Garrett found that 78 percent (125 of 161) of cases involving eyewitness misidentification involved procedures that were unduly suggestive or had other indicia of unreliability.[2] These identifications were nevertheless admitted in evidence, often over the defense's objection on due process grounds at trial, and led to the wrongful convictions of the innocent.

A. Eyewitness misidentification has led to wrongful convictions in Michigan.

Michigan is not immune from the miscarriages of justice that result from of eyewitness misidentification. No fewer than *nineteen innocent people* have been wrongfully convicted in Michigan on the bases of faulty eyewitness identification testimony. Walter Swift, of Wayne County, to pick one example, served over a quarter century in prison for a rape he did not commit before he was exonerated in 2008.[3] Eight days after the rape was committed, police showed the victim hundreds of photographs of men who matched the victim's general description of her attacker: African-American male between 15 and 18 years old, about 5'10,"

[1] Innocence Project, *DNA Exonerations in the United States* <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (accessed September 5, 2017).

[2] B. L. Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong* 49 (2011).

[3] The Innocence Project, *Walter Swift* <https://www.innocenceproject.org/cases/walter-swift/> (accessed September 5, 2017).

with small braids in his hair.[4] The victim tentatively identified eight men from the photographs, but only Mr. Swift was put in an in-person lineup.

The officer told the victim *before* the in-person lineup that one of the men whose photographs she had previously selected would be in the lineup.[5] The victim still only made a tentative identification of Swift in the lineup. Nonetheless, Swift was charged and then convicted at trial largely on the identification evidence.[6] He was exonerated by post-conviction DNA testing.

In another case, Nathaniel Hatchett of Macomb County was sentenced to 25 to 40 years in prison for rape and carjacking after he was arrested driving the stolen car. The victim identified him for the first time in court and stated that she was certain he was her assailant.[7] Hatchett served ten years in prison before DNA evidence exonerated him.[8]

In yet another case, Kenneth Wyniemko of Macomb County was wrongfully convicted in 1994 of criminal sexual misconduct, breaking and entering, and robbery based on an eyewitness misidentification.[9] Although the victim stated that she did not get a good look at her attacker, the police worked with her to create a composite sketch that met her general description: white male, *over* 6'0" tall, and between 20 and 25 years of age.[10] Despite the fact that Wyniemko was 5'11" and 43 years of age at the time of his arrest, the police brought him in for a lineup based on his alleged resemblance to the composite sketch – a sketch that the victim herself said was only

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] The Innocence Project, *Nathaniel Hatchett* <https://www.innocenceproject.org/cases/nathaniel-hatchett/> (accessed September 5, 2017).

[8] *Id.*

[9] The Innocence Project, *Kenneth Wyniemko* <https://www.innocenceproject.org/cases/kenneth-wyniemko>

[10] *Id.*

60 percent accurate.[11] The victim nevertheless identified Wyniemko, and he was sentenced to 40 to 60 years in prison, of which he served nine years before he was exonerated based on DNA evidence.[12]

Messrs. Swift, Hatchett and Wyniemko are among the identified nineteen Michigan citizens who were wrongly convicted based, at least in part, on mistaken eyewitness identification.[13] In total, these nineteen individuals served 213 years for crimes they did not commit.[14] In at least three of these cases, the person who actually committed the crimes was later identified.[15] Wrongful convictions destroy lives, waste judicial resources, and imperil public safety. This Court should now take the opportunity to comprehensively address the causes of eyewitness misidentification.

[11] *Id.*

[12] *Id.*

[13] The National Registry of Exonerations <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (accessed September 8, 2017).

[14] *Id.*

[15] *Id.*

II. A VAST BODY OF SOCIAL SCIENCE RESEARCH EXPLAINS THE CAUSES OF EYEWITNESS MISIDENTIFICATION, HOW EYEWITNESS MISIDENTIFICATION LEADS TO WRONGFUL CONVICTIONS, AND WHAT CAN BE DONE TO MINIMIZE THE RISK OF MISTAKEN IDENTIFICATIONS.

A. It Is Time for Michigan Courts to Fully Incorporate the Social Science Research into our Criminal Justice System.

More than four decades of robust and generally-accepted social science research identifies factors that can undermine the reliability of eyewitness identifications, explains why misidentifications occur so frequently, and describes the consequences of mistaken identifications.

The findings concerning human memory are straightforward. Contrary to most people's common-sense understanding, human memory is not like a videotape. Rather, it is a creative, constructive, malleable process, subject to factors that can decrease its reliability.[16] Many of those very factors are present during crimes. Scientists have identified two categories of variables that affect the reliability of an eyewitness identification: estimator variables—factors that inhere in the witness, the event, or the perpetrator and are thus out of the control of the criminal justice system; and system variables—factors that are under the control of the criminal justice system.[17]

Estimator variables include elements such as the violence of the crime, the level of stress experienced by the witness, the presence of a weapon, the use of a disguise, whether the witness

[16] National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification 59-60 (2014) ("NAS Report").

[17] See G. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables,* 36 J Personality & Soc Psychol 1546, 1548 (1978).

and the perpetrator were of different races, lighting and visibility conditions, and the length of time the witness was exposed to the perpetrator.[18]

System variables include the type and number of identification procedures used, whether the administrator knew the identity of the suspect, the construction of the identification procedure (writings on certain photos for example), and the recording of the identification procedure.

Research shows that the presence of estimator and system variables can affect the accuracy of a witness's memory. Furthermore, research shows that eyewitness memory can be distorted in a number of ways by suggestive identification procedures, after-acquired information and, even, biases held by the witness him or herself. Despite this understanding of memory and its limitations, factfinders tend to overvalue eyewitness memory, particularly when it is offered with confidence in the courtroom.

Courts have long recognized the shortcomings of eyewitness identification evidence.[19] In 1973, this Court recognized "that there are serious limitations on the reliability of eyewitness identification of defendants."[20] In recent years, courts have begun to ground these long-recognized limitations in the large and reliable body of scientific literature on the subject. Michigan courts, however, have not yet brought its jurisprudence in line with the science as other states have done.

[18] *Id.* at 1552.

[19] *US v Wade*, 388 US 218, 229-237; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[20] *People v Anderson*, 389 Mich 155, 172; 205 NW2d 461 (1973), overruled on other grounds by *People v Hickman*, 470 Mich 602, 684 NW2d 267 (2004).

The most complete judicial examinations of the scientific research can be found in *State v Henderson*,[21] *State v Lawson*,[22] and *Young v State*.[23] In these cases, the state supreme courts of New Jersey, Oregon, and Alaska, respectively, reviewed the scientific literature concerning eyewitness memory and perception, with each court finding the research reliable, widely accepted in the scientific community and therefore applicable to questions of law relating to eyewitness identification evidence.

The New Jersey Supreme Court declared in *Henderson* that the social science research was the "gold standard in terms of the applicability of social science research to the law," explaining that "[e]xperimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings."[24] Both the Oregon and Alaska supreme courts conducted similar broad reviews of the scientific research and came to similar conclusions about the reliability of the research and its applicability in the courtroom.[25]

The Supreme Judicial Court of Massachusetts (SJC) convened a study group in 2011 "to consider how [the court could] best deter unnecessarily suggestive procedures and whether existing model jury instructions provide adequate guidance to juries in evaluating eyewitness

[21] *State v Henderson*, 208 NJ 208; 27 A3d 872 (2011), holding mod. by *State v Chen*, 208 NJ 307; 27 A3d 930 (2011).

[22] *State v Lawson*, 352 Or 724; 291 P3d 673 (2012).

[23] *Young v State*, 374 P3d 395 (Alas, 2016).

[24] *Henderson*, 208 NJ at 283. The *Henderson* court appointed a Special Master "to evaluate scientific and other evidence about eyewitness identifications. The Special Master presided over a hearing that probed testimony by seven experts and produced more than 2,000 pages of transcripts along with hundreds of scientific studies." *Henderson*, 208 NJ at 877. The New Jersey Supreme court adopted much of the report issued by the Special Master. *Id.*

[25] *Lawson*, 352 Or at 739-40; *Young*, 374 P3d at 414.

testimony."[26] This report included and relied upon an exhaustive review of the research, which the Study Group found to be reliable.[27]

In its recent decision setting forth enhanced, eyewitness identification specific jury instructions, the SJC adopted many of the scientific findings set forth in the study group's report.[28] The supreme courts of Connecticut,[29] Hawaii,[30] Utah,[31] and Wisconsin[32] have also referenced and relied on scientific research to support modification of their respective standards for ensuring the reliability of eyewitness identification evidence.

The research has also been reviewed and endorsed by other system participants. Perhaps most critically, the National Academy of Sciences (NAS) created a committee made up of scientists, judges, prosecutors, defense lawyers and members of law enforcement to assess the

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[26] *Commonwealth v Walker*, 460 Mass 590, 605 n 16; 953 NE2d 195 (2011).

[27] Massachusetts Supreme Judicial Court Study Group on Eyewitness Identification, *Report and Recommendations to the Justices*, <http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf> (accessed September 5, 2017).

[28] *Commonwealth v Gomes* 470 Mass 352, 354; 22 NE3d 897, 900 (2015), *holding modified by Commonwealth v Bastaldo*, 472 Mass 16; 32 NE3d 873 (2015) (We "conclude that there are scientific principles regarding eyewitness identification that are 'so generally accepted' that it is appropriate in the future to instruct juries regarding these principles so that they may apply the principles in their evaluation of eyewitness identification evidence.").

[29] *State v Guilbert*, 306 Conn 218, 235-36; 49 A3d 705 (2012)("The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification.").

[30] *State v Cabagbag*, 127 Haw 302, 313; 277 P3d 1027 (2012) ("Most significantly, the impetus for a change in our approach lies in the empirical research that reveals that people generally do not understand all of the factors that affect the reliability of an eyewitness identification.").

[31] *State v Clopten*, 2009 UT 84, ¶ 15; 22 P3d 1103 (2009)("[T]he vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification." citing *State v Long*, 721 P2d 483, 491 (Utah 1986) (quoting *United States v Wade*, 388 U.S. 218, 228; 87 S. Ct. 1926; 18 L. Ed. 2d 1149 (1967)). "Decades of study, both before and particularly after *Long*, have established that eyewitnesses are prone to identifying the wrong person as the perpetrator of a crime, particularly when certain factors are present." *Clopten*, 2009 UT at ¶ 15).

[32] *State v Dubose*, 2005 WI 126, ¶ 29; 285 Wis. 2d 143; 699 NW2d 582 (2005) ("Over the last decade, there have been extensive studies on the issue of identification evidence, research that is now impossible for us to ignore").

state of research on eyewitness identification and to make recommendations for the use of eyewitness evidence in the legal system. Upon review of the research, the group found "principled and insurmountable limits of vision and memory that inevitably affect eyewitness accounts, bear on conclusions regarding accuracy and provide a broad foundation for the committee's recommendations."[33] The NAS Report concluded, in relevant part, "Research on eyewitness identification has appropriately identified the variables that may affect an individual's ability to make an accurate identification." *Id.* at 100

B. Research Has Identified Best Police Practices For Conducting Identification Procedures.

The research on system variables has led to the identification and general acceptance of best practices for law enforcement creating and conducting identification procedures. These best practices include:

(a) Blind Administration

Any eyewitness identification procedure presented to a witness should be conducted by a "blind" administrator[34] (i.e., one who does not know the identity of the suspect), or, where impracticable, a "blinded" administrator (i.e., one who does not know when the witness is viewing the suspect in the lineup or photo array). Research shows that lineup administrators who are aware of the identity of the suspect can and do, consciously or unconsciously, influence the witness, ultimately affecting the independence and reliability of the witness's identification.[35]

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[33] National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification, p xiii (hereinafter "NAS Report"), <http://public.psych.iastate.edu/glwells/NAS_Eyewitness_ID_Report.pdf> (accessed September 5, 2017).

[34] Blind administrators are sometimes referred to as "double blind" administrators.

[35] *State v Lawson*, 352 Or. 724, 741-42; 291 P3d 673 (2012); Steven E. Clark *et. al.*, *Lineup Administrator Influences on Eyewitness identification Decisions*, 15 J Experimental Psychol: Appl 63 (2009).

The effect is not limited to overt or explicit suggestion by the administrator. "[E]ven small changes in the experimenter's body posture or expression have been shown to affect participants' responses,' though the witness is often unaware that it is happening."[36]

(b) Pre-identification Instructions

Studies show that the likelihood of misidentification is significantly decreased when witnesses are instructed prior to the procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone.[37] Without these instructions, or if a witness is told that the suspect is in the lineup, the witness may use "relative judgment" and may choose "the lineup member who most resembles the witness['s] memory *relative* to other lineup members."[38] Thus, researchers recommend that unbiased instructions should precede identification procedures to minimize the risk of mistaken identifications.

(c) Fair Lineup Construction

Identification procedures are scientific experiments conducted by law enforcement officials to test their hypothesis that a certain suspect is the perpetrator.[39] Like any other scientific experiment, the soundness of the results depends on the design and implementation of the experimental procedures. The purpose of using a lineup with a suspect embedded in a group of "fillers" (or omitting the suspect entirely) is to test the witness's memory. If the suspect is highlighted in some way or stands out from the fillers, the witness may be led to select the suspect based on something other than his or her memory of the incident and the experiment will fail to adequately test the hypothesis. Identification procedures should contain one suspect and at

[36] *Young*, 374 P3d at 417-18.

[37] *State v Lawson*, 352 Or. 724, 742; 291 P3d 673 (2012); Roy S. Malpass & Patricia G. Devine, *Eyewitness identification: Lineup Instructions and the Absence of the Offender*, 66 J Applied Psychol 482, 485 (1981).

[38] *Young*, 374 P3d at 418.

[39] Wells & Olsen, *Eyewitness Testimony*, 54 Ann Rev Psychol 277, 285 (2003).

least five fillers.[40] Fillers should be selected based on their similarity to the witness's description and should not make the suspect stand out. In the case of photo arrays, all photos should be similar and should be free or any writings or markings.[41]

(d) Showups

"Showups are widely regarded as inherently suggestive—and therefore less reliable than properly administered lineup identifications—because the witness is always aware of who police officers have targeted as a suspect."[42] Research on showups confirms that empirical data "provide a dismal portrayal of [this] most commonly used identification task," 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."[43] Showups also prevent law enforcement from testing a witness's memory by exposing the witness to a known innocent filler. Despite the shortcomings of showups, they may be appropriate and reliable when conducted properly and within a short time period immediately following an incident.[44] The time window for a reliable showup is narrow: research shows that in as little as two hours after an event occurs, the likelihood of misidentification in a showup procedure increases dramatically.[45]

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[40] *Young*, 374 P3d at 419.

[41] *Id.*

[42] *Lawson*, 352 Or at 783.

[43] Neuschatz et al., *A Comprehensive Evaluation of Showups*, in 1 Advances in Psychology and Law 43, 63 (Miller & Bornstein eds., 2016).

[44] *Id.*

[45] *Lawson*, 352 Or at 783.

(e) Multiple Viewings

A witness who has been exposed to the same suspect multiple times through the course of an investigation is more likely to provide an unreliable identification and to have his or her sense of certainty artificially inflated. Research suggests that the multiple viewings limit the witness's ability to discern the source of his or her recognition of the suspect. Because of the possibility of confusion, once the witness has viewed the suspect in any context other than the initial incident—including law enforcement identification procedures or media exposure, it becomes impossible to determine whether the subsequent identification is based on the observation of the initial incident or the subsequent viewing of the suspect in another circumstance.[46] Thus, law enforcement should only be permitted to show each witness a suspect once.

(f) Suggestive Feedback and Witness Confidence

Suggestive feedback, whether provided before the identification or after it, whether in the form of explicit statements or unconscious cues, can lead a witness to choose the suspect, inflate the witness's confidence in his/her identification, and even alter a witness's memory for the original event.[47] A witness's increased confidence, in particular, may provide the appearance of reliability to factfinders, who place great weight on confidence, although it is not actually correlated with accuracy.[48]

To prevent factfinders from being unduly influenced by inflated confidence, law enforcement should immediately document the witness's level of confidence verbatim at the time of the first identification.

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[46] *Lawson*, 352 Or at 784.

[47] *Young*, 374 P3d at 420.

[48] *Lawson*, 352 Or 787.

(g) Recording of Entire Identification Procedure

All eyewitness identification procedures should be video recorded to capture the nuances of each procedure administration.[49] While video recording may present some challenges, including increased cost and concern for witness anonymity in some cases, it is important to obtain and preserve a permanent record of the initial identification.[50] If video recording is not practicable, the identification procedure should at least be audio recorded and fully documented.

C. These Best Police Practices Have Been Embraced by Law Enforcement Agencies, Legislatures, and Courts Around the Country—Including the State of Michigan.

In 2011, the Michigan State Bar established the Michigan Eyewitness Identification Task Force. The Task Force, co-chaired by Nancy Diehl, former Chief of the Trial Division of the Wayne County Prosecutor's Office, and Valerie Newman, a staff attorney with the State Appellate Defender Office, produced two reports in 2012: *Prosecutor Eyewitness Identification Training Guide* and *Law Enforcement and Eyewitness Identifications: A Policy Writing Guide*. Members of the task force included trial and appellate judges, prosecutors, police officers, and defense attorneys.

The Task Force largely adopted the NAS recommendations that law enforcement use the scientifically supported best practices described throughout this brief.[51] Since the release of the reports, police agencies covering 80% of the state's population have adopted recommended best practices. The Michigan Association of Chiefs of Police adopted the best practices as well.[52]

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[49] NAS Report at 108-09.

[50] *Id*.

[51] State Bar of Michigan Eyewitness Identification Task Force, *Law Enforcement and Eyewitness Identifications: A Policy Writing Guide* (Adopted 2012, Revised 2015).

[52] State Bar of Michigan, *Michigan Police Agencies Adopt Evidence-Based Eyewitness Rule*, <https://www.michbar.org/news/newsdetail/nid/5408> (accessed September 10, 2017).

Additionally, the Prosecuting Attorneys Association of Michigan adopted most of these best practices in their 2015 Best Practices Recommendation Eyewitness Identification and Procedures.[53]

Other states have responded to the risk of eyewitness misidentification by passing legislation related to eyewitness identification procedures conducted by law enforcement. To date, 16 states require by law that law enforcement use best practices in identification procedures, including blind or blinded administration, pre-lineup instructions, fair filler selection, and recording of confidence statements at the time of the identification. These states include Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Texas, Vermont, Virginia, and Wisconsin.

Nationally, law enforcement has also voluntarily adopted scientifically supported best practices. Most recently, the Department of Justice issued requirements for photo arrays that accord with scientific research on best practices. That policy requires all agencies under the DOJ's purview to use blind or blinded administrators, and whenever practicable, administer the photo array out of shot or earshot of any influencing forces, use at least five fillers, ensure that the administrator does not in any way influence the eyewitness, and recite particular instructions, after which the eyewitness should sign a verification that she understood the directions.[54]

Law enforcement agencies in Hawaii, Massachusetts, Montana, Nevada, and Rhode Island have also voluntarily adopted model policies incorporating best practices for eyewitness

[53] The policy encourages law enforcement agencies to: adopt clear, written policies and training on photo array, live lineup administration, and the variables that affect eyewitness identification, practices minimizing memory contamination, and on effective eyewitness identification protocols; use blind or blinded administration, adopting and using a standard set of easily understood instructions; document a witness' level of confidence verbatim at the initial identification; document the entire identification procedure by video to the extent practicable.

[54] U.S. Department of Justice, *Memorandum for Heads of Department Law Enforcement Components, All Department Prosecutors*, January 6, 2017, <https://www.justice.gov/file/923201/download> (accessed September 13, 2017).

identification. The New Jersey Attorney General, who has plenary authority over all law enforcement agencies in New Jersey, issued mandatory guidelines for preparing and conducting photo and live lineup procedures in 2001.[55]

Finally, courts have also recognized the importance of reforming police procedures used to elicit eyewitness identifications. In *Commonwealth v Silva-Santiago*, the SJC set forth a protocol that law enforcement should use in conducting photo arrays.[56] The protocol required pre-lineup instructions, blind administration, and fair composition.[57]

Recently, in *Commonwealth v Thomas*, the same court considered the consequence that should arise when law enforcement failed to follow the protocol.[58] The court found that the consequence of a failure to follow the protocol "is twofold: it affects a judge's evaluation of the admissibility of the identification; and, where it is found admissible, it affects the judge's instructions to the jury regarding their evaluation of the accuracy of the identification."[59] With respect to the former, the Court held that because "the failure to follow the protocol needlessly increases the risk of a misidentification, an identification procedure without such a protocol is unnecessarily suggestive."[60] With respect to the latter, where procedures recommended or required by the law enforcement agency conducting the procedure were not followed, Massachusetts' standard eyewitness instructions "direct juries to 'evaluate the identification with

[55] See New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (2001).

[56] *Commonwealth v Silva-Santiago*, 453 Mass 782, 797-98; 906 NE2d 299 (2009).

[57] *Id.*, citing United States Department of Justice, Eyewitness Evidence: A Guide for Law Enforcement 19, 31-32, 33-34 (1999).

[58] *Commonwealth v Thomas*, 476 Mass 451, 458-59; 68 NE3d 1161 (2017).

[59] *Id.*

[60] *Id.* at 460.

particular care' where the police fail to follow a protocol that is established or recommended by the law enforcement agency conducting the identification procedure."[61]

In *State v Henderson*, the New Jersey Supreme Court relied on its supervisory powers under its state constitution to augment the existing required best practices for eyewitness identification procedures.[62] Specifically, the court required that:

> "to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness' own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record—written or otherwise—of the witness' statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided."[63]

The court used the same supervisory powers to require that:

> "to uncover relevant information about possible feedback from co-witnesses and other sources, we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed."[64]

The *Henderson* court also ordered that the state turn this information over to the defense.[65]

In *State v Lawson*, the Oregon Supreme Court gave a detailed summary of the existing best practices for law enforcement identification procedures and made clear that courts considering challenges to the admissibility of eyewitness identification evidence should consider whether these best practices were used to elicit the identification.[66] These practices include blind administration, pre-identification instructions to the witness, fair filler selections, safeguards for

[61] *Id.* n.10 *citing* 473 Mass. 1051, 1056-1057 (2015).
[62] *State v Henderson*, 208 NJ 208, 254; 27 A3d 872 (2011).
[63] *Id.*
[64] *Id.* at 270-71.
[65] *Id.*
[66] *State v Lawson*, 352 Or 724; 291 P3d 673 (2012).

showups, recording confidence statements and considerations relating to multiple viewings, witness contamination and feedback.[67]

D. The Current Legal Framework Fails to Prevent Unreliable Evidence From Reaching the Jury, and Jurors Have Great Difficulty Accurately Assessing Eyewitness Identification Evidence.

Scientifically supported best practices for conducting eyewitness identification procedures only address the risk of eyewitness error. Courts, in their gatekeeping role, are responsible for determining whether eyewitness identification evidence is sufficiently reliable to be admitted in evidence. Courts in Michigan and elsewhere in the country have followed the legal framework for analyzing the reliability of identifications and for determining whether their admission would violate due process set forth by the Supreme Court more than 40 years ago in *Manson v. Brathwaite.*[68] The *Manson* test is a two part balancing test: first a judge determines whether the identification was unnecessarily suggestive, and, if so, rules on the reliability of the identification based on five "reliability" factors. The five factor reliability test was drawn from earlier judicial opinions and not scientific research. The factors identified are: 1) a witness's attention during the crime, 2) the witness's opportunity to view the perpetrator, 3) the time between the crime and the identification procedure, 4) the witness's stated certainty at the time of the identification and 5) the accuracy of the witness's prior description of the perpetrator.[69] While the *Manson* Court declared these factors not exhaustive, most courts, including those in Michigan, have applied them as if they were the only factors to be used to determine reliability.

[67] *Id.* at 741-44.
[68] *Manson v Brathwaite*, 432 US 98, 114; 97 S Ct 2243; 53 L Ed 2d 140 (1977).
[69] *Manson*, 432 US at 114-115.

This Court effectively adopted *Manson* when it adopted the test set forth in *Neil v Biggers*,[70] on which the *Manson* test is based, in *People v Anderson*.[71]

Prolific social science research has since demonstrated that the *Manson* test fails to effectively measure reliability. Thus, the scientific community has widely rejected the legal framework set forth in *Manson*. As the NAS Report recognized, "The best guidance for legal regulation of eyewitness identification evidence comes not from constitutional rulings, but from the careful use and understanding of scientific evidence to guide fact-finders and decision makers. As critics have pointed out, the *Manson v Brathwaite* test includes factors that are not diagnostic of reliability. Moreover, the test treats factors such as the confidence of a witness as independent markers of reliability when, in fact, it is now well established that confidence judgments may vary over time and can be powerfully swayed by many factors." NAS Report at 5-6. Courts that have considered the ongoing validity of the test have reached the same conclusion. *See State* v *Lawson*[72]; *State* v *Henderson*[73]; *State v Young*[74].

The *Manson/Anderson* test is fundamentally flawed in four ways. First, and most critically, research has shown that suggestive circumstances have a corrupting effect on several of the reliability factors. As a result, suggestion and reliability simply cannot be "balanced" against each other in any meaningful way; thus the very premise of the *Manson/Anderson* test is false. This fundamental flaw leads to the perverse outcome that a more suggestive identification

[70] *Neil v Biggers*, 409 US 188; 93 S Ct 375; 34 L Ed 2d 401 (1972)
[71] *People v Anderson*, 389 Mich 155, 178 205 NW2d 461 (1973)
[72] *State* v *Lawson*[72], 352 Or 724, 746 (2012) (concluding that Oregon's version of the *Manson* test "does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence" and that the reliability factors are both "incomplete" and "inconsistent with modern scientific findings")
[73] *State* v *Henderson*[73], 208 NJ 208, 285 (2011) (concluding that the *Manson* test "does not provide a sufficient measure for reliability")
[74] *State v Young*[74], 374 P3d 395, 420 (Alas, 2016)

appears more "reliable" (under the *Manson/Anderson* reliability factors) when, in fact, it is nearly indisputable that suggestive circumstances render identifications *less* reliable:

> The irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions. Courts in turn are encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter.

Henderson, 208 N.J. at 286. Because jurors are likely to "over-believe" eyewitnesses, the admission of such testimony can be unduly prejudicial. *See* M. Boyce et al., "Belief of Eyewitness Identification Evidence," *in* Handbook of Eyewitness Psychology: Memory for People 501, 508-09 (R.C.L. Lindsay et al. eds., 2007) ("Research indicates that people overestimate the abilities of eyewitnesses.").

Second, the test erroneously assumes that a witness's honest testimony about three of the five reliability factors serves as probative evidence. In actuality, research demonstrates that people, who believe they are being honest, are nevertheless unlikely to provide accurate self-reports about their opportunity to view, degree of attention paid, or certainty in the identification, even in the absence of suggestion. *See, e.g.*, R.C.L. Lindsay et al., "How Variations in Distance Affect Eyewitness Reports and Identification Accuracy," 32 L. Hum. Behav. 526, 526-35 (2008) (noting poor ability of eyewitnesses to estimate distances); E. Loftus et al., "Time Went by So Slowly: Overestimation of Event Duration by Males and Females," 1 Applied Cognitive Psychol. 3, 3 (1987) (noting tendency of eyewitnesses to overestimate duration of events).

Third, the *Manson/Anderson* test is premised on the assumption that two factors—a witness's confidence in his/her identification and a witness's ability to describe the perpetrator—are indicators of the witness's accuracy, even though decades of scientific research have disproven the strength of these correlations. Current scientific literature consistently

demonstrates that the correlation between confidence and accuracy occurs only in limited circumstances, and is otherwise weak. *See Lawson*[75], *see also State* v *Ramirez*[76]. Research has also demonstrated that there is "little correlation between a witness's ability to describe a person and the witness's ability to later identify that person." *Lawson*, at 774.

Fourth, although the test directs courts to consider the "totality of the circumstances," in practice, courts only analyze the five enumerated factors, and not other circumstances. *See Henderson*, 208 NJ at 281. Scientific literature has indisputably shown that many other variables significantly affect the reliability of eyewitness identifications. These problems warrant a reevaluation and reformation of the *Manson/Anderson* test in order to ensure the suppression of the most unreliable and prejudicial identifications. An improved legal framework, presented in Section III of this brief, should be a true totality of the circumstances test that is informed by—rather than at odds with—scientific research. Likewise, the new framework should be flexible enough to accommodate future scientific advances that can help courts reach accurate determinations about eyewitness identification evidence.

Courts have addressed the shortcomings of *Manson* in several ways. The supreme courts of New Jersey, Oregon and Alaska have abandoned the *Manson* balancing test in favor of scientifically sound totality of the circumstances tests that authorize a range of remedies (rather than simply suppression). These include enhanced jury instructions in New Jersey[77] (similar instructions are currently being formulated in Alaska[78]) and more expansive use of experts in

[75] *Lawson*, 352 Or at 777-78 (summarizing scientific findings on this factor)
[76] *State* v *Ramirez*, 817 P2d 774, 781 (Utah 1991) (rejecting certainty as a relevant factor entirely)
[77] New Jersey's jury instructions available at: https://www.innocenceproject.org/wp-content/uploads/2017/06/NJ-Jury-Instruction.pdf
[78] See *State v. Young*, *infra* at 428.

Oregon.[79] In a series of cases in Massachusetts, the SJC has taken a number of steps to address the problems of the current legal framework, including by creating a presumption of suggestiveness where law enforcement do not follow recommended procedures, restricting in-court identifications and mandating enhanced jury instructions that explain the factors that affect the reliability of eyewitness identifications.[80] And a number of states have reversed prior bans on expert testimony[81] or have ordered courts to favor, rather than disfavor, such testimony under a wider range of circumstances.[82]

[79] *See, e.g., State v Lawson*, 352 Or 724; 291 P3d 673 (2012).

[80] Scott P. Lopez and Laruen J. Weitzen, *Watershed Changes to Eyewitness Identification Law in Massachusetts* (https://bostonbarjournal.com/2016/01/13/watershed-changes-to-eyewitness-identification-law-in-massachusetts/) (accessed September 5, 2017).

[81] See *State v Guilbert*, 306 Conn 218, 224; 49 A3d 705 (2012)(overruling *State v Kemp*, 199 Conn 473, 477; 507 A.2d 1387 (1986) and *State v McClendon*, 248 Conn. 572, 586; 730 A.2d 1107 (1999) to the extent that they forbid expert testimony on the risks of misidentification); *Commonwealth v Walker*, 625 Pa 450, 455; 92 A3d 766 (2014)(holding that, in Pennsylvania, the admission of expert testimony regarding eyewitness identification is no longer *per se* impermissible and leave the admissibility of such expert testimony to the discretion of the trial court).

[82] *People v Santiago*, 17 NY3d 661, 669; 934 NYS2d 746; 958 NE2d 874 (2011)(encouraging court to admit expert testimony on the subject of eyewitness recognition memory to combat wrongful convictions); *People v Lerma*, 2016 IL 118496, ¶24; 400 Ill Dec 20; 47 NE3d 985 (2016)(recognizing that eyewitness identification research supports expert testimony in many cases).

III. THE MICHIGAN SUPREME COURT SHOULD NOW TAKE THIS OPPORTUNITY TO IMPROVE THE RELIABILITY OF IDENTIFICATION EVIDENCE AND REDUCE THE RISK OF WRONGFUL CONVICTIONS BASED ON UNRELIABLE IDENTIFICATION EVIDENCE.

In light of the overwhelming consensus of the scientific community and the identified wrongful convictions the Court should take critical steps to ensure the fairness of identification procedures throughout the state, the reliability of identification evidence admitted at criminal trials and the ability of jurors to accurately evaluate identification evidence before them.

A. The Court Should Create a Presumption of Undue Suggestiveness Where Best Practices Have Not Been Employed By Law Enforcement.

In light of the scientific research on best police practices, the consensus among Michigan stakeholders that these best practices are to be used – including the fact that 80 percent of Michigan law enforcement agencies are now employing best practices – the Court should now strongly encourage the use of these practices throughout the state. When law enforcement fails to use scientifically supported best practices, the Court should create a presumption of undue suggestiveness leading to a hearing on the reliability of the identification, to include an examination of all scientifically valid factors for evaluating the reliability of eyewitness identification. The scientifically supported best practices the Court should now endorse are:

a) Blind administration of lineups and showups. Where blind administration is not possible, the reason therefor must be documented and a blinded administrator (one who takes steps to shield himself from knowing when the witness is viewing the suspect) may be used.

b) Pre-procedure instructions. Witnesses should be informed, prior to any identification procedures, that the suspect may or may not be present and that an eyewitness is permitted not to make an identification

c) Fair lineup construction. Any identification procedure should contain one suspect and at least five innocent fillers. The fillers should be selected based on their match to the witness's description and should not make the suspect stand out. In a photo array, the size, style and background of photographs should be similar and free from writings.

d) Confirming feedback and suggestive remarks. Law enforcement should not make any statements, or otherwise convey information, before or after the eyewitness identification procedure, relating to the identity of the suspect, the status of the investigation, or the correctness of the witness's choice.

e) Recorded confidence statements. Law enforcement should seek and document, verbatim, a statement of the witness's confidence in his or her identification at the time of the identification.

f) Recording of procedure. Law enforcement should record, in its entirety, all identification procedures. Video recordings are strongly preferred but audio recordings will be permitted upon a showing, based on contemporaneous documentation, why video recording was not practicable. Law enforcement should also document and preserve all information regarding the identity of fillers, identifications made and not made, and any statements made by the witness or others present.

In addition, the Court should address the use of showups and multiple procedures:

a) Showups. Showups should be conducted within two hours of the crime and should be preceded by pre-procedure instructions. The Court should deem inadmissible showups conducted

more than two hours after an incident, showups conducted where probable cause existed to make a lawful arrest, and single photo showups[83].

b) Multiple viewings. Law enforcement should only show the suspect once per witness. Identifications made following subsequent showings should not be admitted in evidence.

This Court is empowered to establish rules that encourage law enforcement's use of scientifically supported best practices for identification procedures. As this Court has noted, courts may control the manner in which criminal evidence is gathered as part of an "exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts.'" *People v Maffett*[84]. Article 6, section 5 of the Michigan State Constitution empowers this Court to "by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." This Court has also held that "the provisions [of the Michigan Criminal Procedural Code] do not prohibit the Supreme Court from exercising its supervisory power over the courts of Michigan to accord defendants fair trials."[85]

B. The Court Should Replace the Flawed *Manson*/*Anderson* Test With a Scientifically Valid Test that Ensures the Reliability of Admitted Evidence and Provides Jurors With the Tools Necessary to Evaluate that Evidence.

Amici respectfully suggest that this Court should now follow the lead of the state supreme courts of New Jersey, Oregon and Alaska and abandon the balancing test announced in

[83] *State v Dubose*, 699 NW2d 582, 584-585 (Wis 2005); *Commonwealth v Johnson*, 650 NE2d 1257, 1261 (Mass 1995) and *People v Adams*, 440 NYS2d 902, 423 NE2d 379, 384 (NY Ct App 1981) all adopting a per se exclusionary rule for evidence about pre-trial show ups unless they are necessary.
[84] *People v Maffett*, 464 Mich 878, 884; 633 NW2d 339 (2001) (citing *Sherman v United States*, 356 US 369, 380; 78 S Ct 819; 2 L Ed 2d 848 (1958)).
[85] *People v Cazal*, 412 Mich 680, 683; 316 NW2d 705 (1982).

Manson and adopted in *Anderson*. This Court should mandate a new, scientifically sound totality of the circumstances test designed to ensure that reliability truly is the linchpin of admissibility.

Specifically, the new legal framework would: (1) take all scientifically relevant variables into account and respond appropriately to shifts in scientific consensus on these variables; (2) employ a burden-shifting regime at pre-trial screenings; and (3) incorporate intermediate remedies such as enhanced jury instructions, expert testimony and limitations on witness testimony, including in-court identifications.

Consistent with the contemporary scientific understanding of human memory and perception, the new framework would encourage courts and parties to explore all relevant variables and facts, rather than relying solely on the five factors set forth in *Manson*/*Anderson*. The framework would also be flexible and take into account the fact that scientific research is "dynamic"; "[t]rial courts [should not be limited] from reviewing evolving, substantial, and generally accepted scientific research."[86] Accordingly, Amici propose that this Court should provide guidance to the lower courts that they may "rely on reliable scientific evidence that is generally accepted by experts in the community" to "either consider variables differently or entertain new ones." [87]

Second, like trace evidence, eyewitness identification testimony under the new framework would be presented and vetted in pre-trial reliability hearings, where the initial burden to demonstrate reliability and admissibility is on the proponent of the evidence. Moreover, expert testimony would be admissible during these hearings, in order to provide the trial court with a complete picture of the variables that affect reliability in each case.

[86] *Guilbert*, 306 Conn. at 258.
[87] *Id.*

Third, the new framework would emphasize the importance of expert testimony and science-based jury instructions, as well as the ability to limit an eyewitness's testimony in court. Historically, courts have relied on cross-examination and closing arguments to expose the unreliability of eyewitness identification testimony. But we now know that these methods are largely ineffective at bringing the unreliability of an identification to light, at least in comparison to expert testimony.[88]

In addition, as discussed more fully below, the Court should encourage trial judges to use other intermediate remedies such as robust, carefully written jury instructions that are grounded in science, and to limit testimony in order to exclude material that is unduly prejudicial, including in-court identifications[89].

C. The Court Should Implement Enhanced Eyewitness Identification Instructions.

In addition to reforming *Manson*/*Anderson*, the Court should implement enhanced eyewitness identification-specific instructions that reflect the findings of the social science research. These instructions will help the jury better evaluate eyewitness identification evidence and mitigate the risk of wrongful conviction based on unreliable identification evidence.

All identification evidence should be accompanied by enhanced jury instructions that describe the factors that research has shown can affect the reliability of an identification. Instructions may be given both prior to the relevant testimony and at the close of testimony, in order to ensure that juror misconceptions have been dispelled before they hear and consider the evidence.

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[88] *Henderson*, 208 NJ at 234-38; Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 772 (2007).

[89] *See, e.g.*, *Lawson*, 352 Or. at 759 (instructing lower courts to exclude "particularly prejudicial aspects of a witness's testimony" and illustrating how science can inform the court on which aspects are, in fact, particularly prejudicial).

The jury instructions adopted in Massachusetts and New Jersey offer excellent models of these types of instructions. For example, the Massachusetts instructions include a pre-charge which addresses the nature of memory and many of the misconceptions jurors are known to possess:

> Where a witness has identified the defendant as the person who committed [or participated in] the alleged crime[s], you should examine the identification with care. As with any witness, you must determine the witness's credibility, that is, do you believe the witness is being honest? Even if you are convinced that the witness believes his or her identification is correct, you still must consider the possibility that the witness made a mistake in the identification. A witness may honestly believe he or she saw a person, but perceive or remember the event inaccurately. You must decide whether the witness's identification is not only truthful, but accurate.
>
> People have the ability to recognize others they have seen and to accurately identify them at a later time, but research and experience have shown that people sometimes make mistakes in identification.
>
> The mind does not work like a video recorder. A person cannot just replay a mental recording to remember what happened. Memory and perception are much more complicated. Remembering something requires three steps. First, a person sees an event. Second, the person's mind stores information about the event. Third, the person recalls stored information. At each of these stages, a variety of factors may affect – or even alter – someone's memory of what happened and thereby affect the accuracy of identification testimony. This can happen without the witness being aware of it.[90]

As with the New Jersey and Massachusetts instructions, the Court should adopt instructions that describe the research findings concerning estimator and system variables and their effects on memory and the reliability of eyewitness instructions. Instructions that address the factors that have been shown to affect eyewitness identification accuracy will help jurors to properly evaluate this critical evidence and will improve the accuracy of outcomes in criminal trials involving eyewitness identification evidence.

[90] Massachusetts Supreme Judicial Court, *Model Jury Instructions on Eyewitness Identification*, issued November 16, 2015.

D. The Court Should Limit the Availability of In-Court Identifications

Finally, the Court should also take this opportunity to limit the availability of in-court identifications. While courts have long recognized the inherent suggestiveness of in-court identifications, the scientific research now makes clear that in-court identifications are not only unduly suggestive but also lack any independent probative value and carry outsize weight with jurors. As the NAS Report explained:

> The accepted practice of in-court eyewitness identifications can influence juries in ways that cross-examination, expert testimony, or jury instructions are unable to counter effectively. Moreover, as research suggests . . . , the passage of time since the initial identification may mean that a courtroom identification is a less accurate reflection of an eyewitness' memory. In-court confidence statements may also be less reliable than confidence judgments made at the time of an initial out-of-court identification; as memory fails and/or confidence grows disproportionately. The 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[91].

For these reasons, amici now urge the Court to adopt a rule permitting in-court identifications only where (1) the witness and the defendant are not well-known to each other; (2) the state can show that the witness can identify the defendant in a non-suggestive out-of-court procedure and (3) there is good reason[92] for the in-court identification. Courts in Massachusetts

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[91] *NAS Report* at 110; *see also id.* at 65 (knowledge about memory "calls into question the validity of in-court identifications and their appropriateness as statements of fact").

[92] *See Com. v. Collins*, 21 N.E.3d 528, 536 (Mass. 2014) (good reasons are rare; examples include prior familiarity and circumstances where the witness failed to previously identify the defendant out of fear or refusal to cooperate); *accord State v. Dickson*, 141 A.3d 810, 836 n.30 (Conn. 2016).

and Connecticut have recently limited in-court identifications, and this Court should now follow suit[93].

[93] *See Commonwealth v. Crayton*, 470 Mass. 228 (2014) (first time in-court identifications barred, absent a showing of "good reason"); *Commonwealth* v. *Collins*, 470 Mass. 255, 261-62 (2014) (in-court identifications barred where prior out-of-court, non-suggestive identification resulted in "something less than an unequivocal positive identification of the defendant"); *State v. Dickson,* 141 A.3d 810, 823 (Conn. 2016) (consistent with due process, where the perpetrator's identity is at issue, the State must show (i) the witness knew the defendant before witnessing the crime or (ii) the witness "identif[ied] the defendant in a nonsuggestive out-of-court procedure" before being able to offer an in-court identification).

CONCLUSION

The Court should now take the opportunity to reform the judicial gatekeeping and treatment of identification evidence so that it is consistent with the scientific research. The Court should encourage the trial courts to exercise their discretion as was done in this case by applying the accepted scientific research to the specifics of the case. The court should urge the adoption of more detailed and specific jury instructions and abrogate the use of the so called *Manson* standard in favor of a totality of the evidence standard. In so doing, the Court will reduce the risk of mistaken eyewitness identification and reduce the overall risk of wrongful convictions based on eyewitness misidentification.

Specific to Mr. Thomas, the Court should reverse the appellate court and find that the trial court properly suppressed the challenged identification evidence.

Respectfully submitted,

/s/ Valerie Newman

BY:_____

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