No. 96597-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

CHRISTOPHER RAMIREZ

Petitioner.

MEMORANDUM OF *AMICI CURIAE* THE INNOCENCE PROJECT, INC. AND THE INNOCENCE NETWORK IN SUPPORT OF PETITION FOR REVIEW

LENELL NUSSBAUM
WSBA NO. 11140
2125 Western Ave #330
Seattle, Washington 98121
(206) 728-0996

DAVID S. FRANKEL
AARON L. WEBMAN
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Counsel for Amici Curiae
The Innocence Project, Inc.
The Innocence Network

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Innocence Project, Inc. and the Innocence Network are dedicated to providing pro bono legal and related services to indigent prisoners whose actual innocence may be established through post-conviction DNA testing or other evidence. To date, the work of *amici* has led to the exoneration of 362 wrongly convicted individuals. Eyewitness misidentification is the leading contributing cause of these wrongful convictions, appearing in 254 – that is, fully 70% – of these cases. And in 134 of the 254 (53%) there was an in-court identification of an innocent defendant. Thus, *amici* have a compelling interest in seeking to ensure that courts employ appropriate legal frameworks for determining the admissibility of eyewitness identifications, including in-court identifications.[1]

ISSUES TO BE ADDRESSED BY *AMICI CURIAE*

In *Manson v. Brathwaite*, 432 U.S. 98 (1977), the U.S. Supreme Court established a due process test for determining the admissibility of eyewitness identifications obtained through unnecessarily suggestive procedures. In the four decades since, an

[1] The Innocence Project Northwest, which was individually identified as one of three *amici* in the court below, is a member of the Innocence Network.

extensive, well-accepted body of social scientific research has emerged, undermining the premises of the *Manson* test, under which unreliable eyewitness testimony is routinely admitted. *Amici* respectfully submit that this Court should revisit its adherence to the *Manson* test, in light of this intervening science. This case also provides the Court the opportunity to assess whether an in-court identification should be inadmissible as a violation of due process where it was (i) preceded by one or more unnecessarily suggestive identification procedures; or (ii) preceded by the witness's failure to identify the defendant.[2]

ARGUMENT[3]

1. This Court Should Revisit the Rules for Assessing the Admissibility of Eyewitness Identification Testimony, as Many Other State High Courts Have Done

Under the test established in *Manson*, eyewitness identifications obtained through unnecessarily suggestive

---

[2] The Supreme Judicial Court of Massachusetts and the Connecticut Supreme Court have established limits on the admissibility of an in-court identification where, as here, it follows an unnecessarily suggestive identification procedure or a non-identification, and have also limited first-time in-court identifications. *Com. v. Crayton*, 21 N.E.3d 157, 169 (Mass. 2014); *Com. v. Collins*, 21 N.E.3d 528, 536-37 (Mass. 2014); *State v. Dickson*, 141 A.3d 810, 835-39 (Conn. 2016), *cert. denied*, 137 S. Ct. 2263 (2017).

[3] *Amici* respectfully refer the Court to the petitioner's Statement of the Case. *Amici* note that the in-court eyewitness identification of Ramirez was preceded by two photo identification procedures. On both occasions, photos of the petitioner were among those shown to the witness, yet the witness did not identify petitioner as the man he saw on the night of the crime. *See* Ramirez Petition for Review at 3-4.

procedures may be admissible if found to be reliable "under the totality of the circumstances." 432 U.S. at 99. In assessing reliability, the trial court must consider five non-exhaustive factors, which are supposedly able to establish reliability. *Id.* at 114 (citation omitted). This Court appears to have adopted the *Manson* test. *See, e.g., State v. Vickers*, 148 Wn.2d 91, 118 (2002).

The two-part *Manson* test is based on the premise that identification evidence may be reliable even if highly suggestive procedures were used, when certain external indicia of reliability are present. The scientific research that has developed since *Manson* refutes this notion. *See generally* Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law Hum. Behav. 1 (2008) ("*30 Years Later*"). We now know that a trial court's assessment of the *Manson* factors itself relies on witnesses' often-flawed memory of the circumstances of the identification; that suggestive procedures and exposure to post-event information and feedback further distort the witnesses' memory and artificially boost the witnesses' confidence; and that several of the factors are not diagnostic of reliability. *Id.* at 9. As a result, the *Manson* test fails to deter the use of suggestive identification procedures or safeguard against wrongful convictions. *Id.* at 2.

Recognizing this, several state high courts have adjusted their eyewitness identification jurisprudence to reflect accurately the scientific consensus about how eyewitness memory works. *See* Ramirez Petition for Review at 10-11 (collecting cases). *Amici* respectfully submit that this Court, too, should revisit its adherence to the *Manson* test.

2. This Court Should Revisit the Rules for Assessing the Admissibility of In-Court Eyewitness Identification Testimony, In Light of a Robust Body of Scientific Research Which Demonstrates that In-Court Identifications are Particularly Suggestive and Unreliable

Since 1992, 134 defendants were positively identified in court as the perpetrator, only to be exonerated, after conviction, by conclusive DNA evidence. This result is hardly surprising in light of the substantial scientific research, now routinely accepted and relied on by courts, demonstrating how suggestive identification procedures – including in-court identifications – contaminate eyewitness evidence and compromise its reliability.[4]

In-court identifications are not effective memory tests. Empirical

[4] This Court has credited this research. *See State v. Allen*, 176 Wn.2d 611 (2013) ("the State does not provide contrary evidence or research nor seriously question the scientific data relied upon by Allen"); *id.* at 633 (Madsen, C.J., concurring) (research "increasingly cast[s] doubt on the reliability of cross-racial identification"); *id.* at 634-635 (Chambers, J., concurring in result) ("The amici briefs . . . bring a wealth of research demonstrating the dangers of cross-racial identification"); *id.* at 639 (Wiggins, J., dissenting) ("There is a large body of persuasive scientific research concluding that eyewitness testimony is frequently unreliable."). *See also*, Brief of *Amici Curiae* The Innocence Project, Inc., The Innocence Project Northwest, and The Innocence Network in Support of Appellant, No. 34872-5, pp. 7-17 (filed Mar. 19, 2018) (discussing the scientific research).

research has shown that an identification procedure is most reliable when the witness is tasked with picking the culprit out of a lineup or photo array that includes plausible, but innocent, fillers. *30 Years Later* at 7. By contrast, show-ups – identification procedures in which police present only one subject – are not effective tests of a witness's memory because "they suggest to the witness *which* person to choose." *Id.* Similarly, an in-court identification does not test the witness's memory because there is only one choice. *Dickson*, 141 A.3d 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."); *see also Crayton*, 21 N.E.3d at 166 ("in-court identifications may be more suggestive than showups").

Proper practice is to use a double-blind procedure, *i.e.*, one in which neither the officer nor the witness knows the identity of the suspect. Greathouse & Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 Law Hum. Behav. 70, 79 (2009) ("*Instruction Bias*"). When the officer administering the identification procedure knows who the suspect is, that officer can subtly, even unconsciously, signal to the witness whom to

choose. *Id.* at 80. In-court identifications are *never* double blind because the prosecutor, and everyone else, knows who the defendant is. Under these circumstances, "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 166–67.

Research has also shown that officers should avoid insinuating that the suspect is present in the lineup or photo array because such "biased instructions" prompt witnesses "to guess even when they are unsure that the lineup member that they are choosing is indeed the perpetrator." *Instruction Bias* at 73. In the trial context, even an unbiased instruction cannot ease the pressure the witness will feel to make an identification. "The pressure of being asked to make an identification in the formal courtroom setting and the lack of anonymity" can create "conditions under which a witness is most likely to conform his or her recollection to expectations." *Crayton*, 21 N.E.3d at 166 (quotation omitted).

Empirical research has confirmed the insight that when witnesses are subjected to successive viewings of the same suspect, they are more likely to identify that suspect, regardless of actual guilt. Deffenbacher, Bornstein, & Penrod, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*,

30 Law Hum. Behav. 287, 306 (2006). Researchers have recommended "not allowing a person to appear in a lineup whose photograph had been exposed in a prior set of mugshots, but not identified by the witness." *Id.* An in-court identification is the last in a series of procedures including the same suspect, and is thus particularly unreliable.

Social science research has confirmed that a witness's memory fades over time. Deffenbacher et al., *Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation,* 14 J. Experimental Psychol. Applied 139, 147-48 (2008). In-court identifications typically occur many months, or even years, after the crime, when memory for the event is far weaker and less reliable than it would have been for a prompt, out-of-court procedure. *See United States v. Greene*, 704 F.3d 298, 309 (4th Cir. 2013) (finding that the seventeen months that passed between the incident and trial "is an unquestionably lengthy period of time that must weigh against reliability").

Suggestive identification procedures can artificially boost witnesses' confidence in their identifications, even when they are mistaken. Wixted & Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. in the Pub. Int. 10, 11 (2017). A recent study concluded that a high level of eyewitness confidence is only correlated with accuracy when the

identification procedure is "pristine." *Id.* at 14.[5] In-court identifications are non-pristine procedures and are particularly conducive to confidence inflation. As reflected in this case, witnesses who initially fail to identify a suspect or identify the suspect only tentatively, often later learn information or receive feedback that artificially inflates their confidence. Knowing that the prosecutor has enough evidence to put that suspect on trial can turn a hesitant witness into an assertive one. *Collins*, 21 N.E.3d at 534 ("[Eyewitnesses] are likely to regard the defendant's prosecution as confirmation that the defendant is the 'right' person and, as a result, may develop an artificially inflated level of confidence in their in-court identification.").

As other state high courts have done, *see supra* note 2, we ask that this Court consider whether to revise its rules for admitting in-court identifications in light of the social science.

3. Wrongful Convictions Arising from Erroneous Eyewitness Identifications Present an Issue of Substantial Public Interest

As noted, misidentification is the leading cause of wrongful convictions, and a majority of these cases include in-court identifications. Each wrongful conviction works a double injustice: An innocent

[5] A procedure is "pristine" if there is one suspect in the lineup, that suspect does not stand out, the procedure is double blind, the witness is instructed that the offender may not be present in the lineup, and the confidence statement is recorded immediately. *Id.* at 15-17. All of these components of a pristine identification procedure are easily complied with.

defendant is imprisoned and the actual perpetrator goes unpunished – and thus a dangerous criminal remains at large.

Eight defendants in Washington State have been exonerated by DNA following convictions where the state relied on eyewitness identifications.[6] Among them are Larry Davis and Alan Northrup, whose case illustrates, in particular, the risk of artificially inflated confidence. Both men were included in a photo array shown to a rape victim who tentatively identified Davis, but not Northrup. The victim picked both men out of a subsequent lineup, in which they were the only holdovers from the array. At trial, the victim confidently identified both men and both were convicted. Seventeen years later, DNA conclusively demonstrated that someone else had committed the crime.[7]

4. The Unreliability of Eyewitness Identifications Presents an Issue of Constitutional Dimension

This case raises a significant question of law under the federal and state constitutions. RAP 13.4(b)(3). *See* Ramirez Petition for Review at 8-12. Review in this case is particularly appropriate as this Court recently

---

[6] The Innocence Project, DNA Exonerations in the United States, https://www.innocenceprojectore/dna-exonerations-in-the-united-states/ (last visited Mar. 15, 2018). The number is likely higher, as most convictions are not susceptible to conclusive reexamination using DNA. Thus, more than 80% of DNA exonerations are in rape cases where DNA is most likely to be available. *See* https://www.convictingtheinnocent.com/graphics/eyewitness-misidentifications/.

[7] For an extended discussion of the Davis and Northrop cases, *see* The Innocence Project, Larry W. Davis, https://www.innocenceproject.org/cases/larry-w-davis (last visited March 15, 2018).

confirmed its "duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law." *State v. Gregory*, 427 P.3d 621, 631 (Wash. 2018) (quoting *Collier v. City of Tacoma*, 121 Wn.2d 737, 745 (1993)).

CONCLUSION

For the reasons stated, *amici* respectfully ask the Court to revisit its rules for determining the admissibility of eyewitness testimony, and, in particular, for in-court identifications.

DATED: January 11, 2019.

Respectfully submitted,

/s/ *David S. Frankel*

LENELL NUSSBAUM
WSBA NO. 11140
2125 Western Ave #330
Seattle, Washington
98121
(206) 728-0996

KRAMER LEVIN NAFTALIS
& FRANKEL LLP
David S. Frankel
Aaron L. Webman
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Counsel for Amici Curiae

LAW OFFICE OF LENELL NUSSBAUM PLLC

January 11, 2019 - 12:18 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96597-8
Appellate Court Case Title:	State of Washington v. Christopher B. Ramirez
Superior Court Case Number:	14-1-04287-7

The following documents have been uploaded:

- 965978_Briefs_20190111121430SC374030_3262.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Memorandum of Amici Curiae the Innocence Project.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- greg@washapp.org
- gverhoef@spokanecounty.org
- lsteinmetz@spokanecounty.org
- marla@marlazink.com
- scpaappeals@spokanecounty.org
- wapofficemail@washapp.org

Comments:

Sender Name: Lenell Nussbaum - Email: lenell@nussbaumdefense.com
Address:
2125 WESTERN AVE STE 330
SEATTLE, WA, 98121
Phone: 206-728-0996

Note: The Filing Id is 20190111121430SC374030