IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Respondent-Appellee, v. **CHAZ BUNCH**, Petitioner-Appellant.	Case No. 2021-0579 Discretionary Appeal from the Mahoning County Court of Appeals, Seventh Appellate District Case No. 18MA22

BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT, INC. AND THE OHIO INNOCENCE PROJECT IN SUPPORT OF PETITIONER-APPELLANT CHAZ BUNCH

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STATEMENT OF INTEREST OF AMICI CURIAE

The Innocence Project, Inc. (the "Innocence Project") is a non-profit organization dedicated to providing pro bono legal and related investigative services to indigent people whose innocence may be established through post-conviction DNA testing. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration by post-conviction DNA testing of more than 375 people. In addition to post-conviction litigation, the Innocence Project works to prevent future miscarriages of justice by identifying the causes of wrongful convictions, participating as amicus curiae in cases of broader significance to the criminal justice system, and advancing legislative and administrative reforms that aim to improve the truth-seeking function of the criminal justice system.

The Ohio Innocence Project at University of Cincinnati College of Law is a free legal clinic which provides legal and investigatory services to indigent clients who are innocent, were wrongfully convicted, and are fighting to secure their freedom. The Ohio Innocence Project has freed 33 innocent people across the state who have together served more than 650 years in prison for crimes they did not commit.

The United States Supreme Court has long recognized the unreliability of eyewitness identification evidence, finding that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor." *United States v. Wade,* 388 U.S. 218, 229, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (citation omitted). Because erroneous eyewitness identification is a leading contributing cause of wrongful convictions—playing a role in 69% of wrongful convictions identified through post-conviction DNA testing—*amici* have a compelling interest in ensuring that courts evaluate eyewitness identification evidence and allegations of ineffective assistance of counsel premised upon an attorney's

inadequate challenge to unreliable identification evidence in light of applicable scientific principles.

To help guard against future wrongful convictions, amici will urge this Court to revisit the standard for the admission of eyewitness identification evidence to ensure that the judicial inquiry aligns with the overwhelming scientific consensus regarding the variables that may result in unreliable identification evidence. This case—which involves patently unreliable identification evidence implicating Appellant, who was excluded as a donor of the relevant DNA evidence—presents this Court with an opportunity to provide lower courts with clear guidance as to which factors are relevant in assessing the reliability of eyewitness identification evidence before such evidence can be placed before a jury. It is an opportunity this Court should seize, as other courts around the country have done. *See e.g.*, *State v. Henderson,* 208 N.J. 208, 27 A.3d 872 (2013), *holding modified by State v. Chen*, 208 N.J. 307, 27 A.3d 930 (2011), *holding modified by State v. Anthony*, 237 N.J. 213, 204 A.3d 229 (2019); *see also Young v. State,* 374 P.3d 395 (Alaska 2016). To prevent against the injustice that unfolds when a mistaken identification results in a wrongful conviction, amici respectfully submit that this Court should reverse the ruling below, remand for an evidentiary hearing and, in so doing, announce a new, scientifically sound test for the analysis of the reliability of eyewitness evidence.

INTRODUCTION

Despite being excluded as a possible donor of the male DNA recovered from the victim during the rape kit examination, Chaz Bunch—at only 17 years old—was convicted of rape and other related charges, primarily based upon a suggestive in-court, cross-race identification, by the victim in the instant case, who: (1) failed to identify him in a photographic lineup days after the crime, (2) was, thereafter, exposed to Mr. Bunch's photograph in prejudicial media coverage of the offense, and (3) only positively identified him more than one year after the offense, in the courtroom at proceedings in which Mr. Bunch was clearly presented to her as the accused. Despite expanding awareness in criminal courts around the nation about the fallibility of eyewitness memory, and his original counsel's efforts to obtain an expert witness, Mr. Bunch's trial counsel—who has since been indefinitely suspended from the Ohio bar[1]—inexplicably did not present expert testimony to help the jury weigh the reliability of the eyewitness identification evidence.

For the reasons that follow, amici urge this Court to modify the current legal framework for assessing the reliability of eyewitness identification evidence and to remand the instant matter for the presentation of scientific evidence regarding the identification at issue—an identification that bears several indicia of unreliability.

[1] *See Mahoning Cty. Bar Assn. v. DiMartino*, 145 Ohio St.3d 391, 2016-Ohio-536, 49 N.E.3d 1280, ¶ 15. Since 1994, Mr. Bunch's trial attorney, Dennis A. DiMartino, has been repeatedly sanctioned for violating various rules of professional conduct, including neglecting client matters and "failing to act with reasonable diligence in representing a client." WFMJ, *Youngstown attorney suspended indefinitely after repeated violations*, https://www.wfmj.com/story/33039120/youngstown-attorney-suspended-indefinitely-after-repeated-violations (accessed Sept. 7, 2016).

STATEMENT OF THE CASE

A robust canon of scientific research has established that an eyewitness's identification may be unreliable when, as in the instant case, a witness is exposed to suggestive images of a person labelled as the suspect, the witness is of a different race than the suspect, and the crime involved a high degree of stress. Because no DNA or physical evidence tied Mr. Bunch to the crime in this case, the victim's in-court identification of him at trial was key to his conviction. Indeed, the only other direct evidence of guilt was testimony from an interested witness who received a significant, material benefit in exchange for his testimony, as discussed below, and inconclusive[2] video surveillance that purports to show Mr. Bunch in the vicinity of the other assailants at approximately 11:30pm on the evening that the crime occurred. Further, despite a dearth of physical evidence to demonstrate Mr. Bunch's involvement in the crime, the trial testimony revealed that law enforcement largely abandoned their lead on an alternate suspect.[3]

[2] The stills of the surveillance footage that were entered into evidence were ambiguous on the issue of identification because of their poor quality, t.p. 1727, and thus this evidence was subject to human analysis, interpretation, and forensic confirmation bias. *See* Saul Kassin, *The Social Psychology of Confession*, Psychological Science (May, 1996) 409 ("Classic studies show that prior exposure to images of a face or a body * * * can bias what people see in an ambiguous figure. Indeed, the presence of ambiguous objective evidence, by providing the perception of support, may actually exacerbate the effects of preexisting stereotypes."). *See also* Vicki Bruce, et al., *Matching Identities of Familiar and Unfamiliar Faces Caught on CCTV Images*, Journal of Experimental Psychology: Applied (Sep., 2001) 207. Because "there is considerable room for expectation to affect matching in police and court room situations," experts caution against inviting "people unfamiliar with the alleged offenders" to "compare the appearance of a CCTV image (often low in quality) with that of the defendant," as "such judgments are highly prone to error." *Id*. at 212, 217.

[3] Detective Shuster acknowledged on cross-examination that he had photographs of an alternate suspect, named Dominic Brancho, whose nickname was "Shorty Mack"—the name a codefendant provided to investigating officers as the fourth person involved in the crime. T.p. 1518. The Detective seemingly did not follow-up on this lead. T.p. 1519, 1527-28.

Mr. Bunch's initial defense attorney[4] focused the court on the eyewitness identification issues during the bindover proceeding[5] which occurred less than two months after the incident. Bunch Pre. Hearing, t.p 197, Jan. 4, 2002. Prior to being relieved from Mr. Bunch's case, and before being replaced by trial counsel whose performance is primarily at issue in this appeal, the attorney also filed a motion to hire an eyewitness identification expert to prepare to challenge the identification evidence and, possibly, to have the expert testify at trial.[6] *Id*. at 3-4. The trial judge granted Mr. Bunch's motion, allocating up to $500 for counsel to consult with an expert. *Id* at 4. More than eight months later, however, when Mr. Bunch's case was tried before a jury, trial counsel inexplicably did not call an expert to help the jury understand the eyewitness identification evidence—the primary evidence against Mr. Bunch. *State v. Bunch*, 7th Dist. Mahoning No. 18 MA 0022, 2021-Ohio-1244, *appeal allowed*, 163 Ohio St.3d 1501, 2021-Ohio-2307, 170 N.E.3d 889, ¶1. Without expert testimony to explain the often-counterintuitive science regarding the factors that impacted the victim's ability to perceive and recall the perpetrator she identified as Mr. Bunch, the jury found Mr. Bunch guilty. Mr. Bunch was sentenced to eighty-nine years of imprisonment.[7]

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[4] Mr. Bunch's first attorney in this case did not represent him at trial.

[5] A "bindover" proceeding, also known as a "transfer," refers to the process by which a juvenile court transfers "its jurisdiction to the appropriate adult court for criminal prosecution." *Smith v. May*, 2020-Ohio-61, 159 Ohio St. 3d 106, 107, 148 N.E.3d 542, 544, *reconsideration denied*, 2020-Ohio-877, 158 Ohio St. 3d 1437, 141 N.E.3d 254; *see also* Juv.R. 30(A) ("In any proceeding where the court considers the transfer of a case for criminal prosecution, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that the act would be an offense if committed by an adult.").

[6] While the scientific literature has developed substantially since the pre-trial proceedings in Mr. Bunch's case, there was nonetheless significant and reliable research available, that could have been presented to the jury by a qualified expert. *See e.g.*, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* was published on Jan 15, 1996; *Eyewitness Testimony* on March 15, 1996; and *Memory: Surprising New Insights Into How We Remember and Why We Forget* on Jan 1, 1988.

[7] Although originally sentenced to eighty-nine years in prison, following the United States Supreme Court's ruling in *Graham v. Florida*, 560 U.S. 48, 82, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), *as modified* (July 6, 2010),

In affirming the denial of an evidentiary hearing, the appellate court found that Mr. Bunch was not deprived of effective assistance of counsel, despite counsel's failure to call an expert witness regarding the unreliability of the identification testimony at issue. *Id* at ¶26. The court reasoned that defense counsel's choice to cross examine eyewitnesses rather than present expert testimony was a strategic decision that does not rise to the level of constitutionally defective performance. *Id* at ¶24. Further, the court reasoned that there was an additional identification of Mr. Bunch by his co-defendant, an interested witness, and that the absence of the expert testimony, therefore, would not have changed the result at trial. *Id* at ¶25. As explored below, the appellate court's reasoning is inconsistent with extensive research which demonstrates that the eyewitness identification evidence in this case is uniquely unreliable, yet undoubtedly persuasive to the jury, and that an expert would have been critical to the jury's assessment of the weight of the identification evidence.

Current Ohio jurisprudence dictates that eyewitness testimony, and thus a defense attorney's challenge to it,[8] be analyzed pursuant to *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). *See State v. Moody*, 55 Ohio St.2d 64, 67, 377 N.E.2d 1008 (1978); *see also State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988). However, as developed more fully below, state courts that have previously relied on the *Manson* standard have been adopting new standards because the scientific consensus regarding the fallibility of eyewitness identification is entirely inconsistent with the *Manson* test. Indeed, the standard announced more than 40 years

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and this Court's ruling in *State v. Moore*, 149 Ohio St.3d 557, 2016-Ohio-8288, 76 N.E.3d 1127, ¶64, Mr. Bunch was re-sentenced to forty-nine years, due to his young age at the time of the offense.

[8] *Accord State v. Lott*, 51 Ohio St.3d 160, 175, 555 N.E.2d 293 (1990) (holding that because, under *Manson*, a motion to suppress the eyewitness identification at issue would probably not have been granted, the defense attorney was not ineffective for failing to challenge the admission of the eyewitness evidence); *see also State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 118, *holding modified by State v. Downour*, 126 Ohio St.3d 508, 2010-Ohio-4503, 935 N.E.2d 828, ¶ 118.

ago has led directly to countless wrongful convictions, infected criminal trials with unreliable misidentification evidence, and, when applied to assess post-conviction claims, risks insulating wrongful convictions from sufficient judicial review.

Amici thus respectfully urge this Court to abandon the outdated and unscientific *Manson* test, adopt a test consistent with scientific consensus that safeguards against wrongful conviction, and remand this case for a hearing on the merits of Mr. Bunch's ineffective-assistance-of-counsel claim, at which he can present relevant expert testimony regarding the unreliability of the eyewitness evidence at issue here.

ARGUMENT

I. UNRELIABLE EYEWITNESS IDENTIFICATION TESTIMONY IS A LEADING CAUSE OF WRONGFUL CONVICTION; EXPERT TESTIMONY REGARDING EYEWITNESS MISIDENTIFICATION SAFEGUARDS AGAINST THE INJUSTICE OF WRONGFUL CONVICTION.

An eyewitness identification is powerful evidence of guilt. "[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (Brennan, J., dissenting). Yet such evidence is known to be "*among the least reliable* forms of evidence." *See United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir.2006) (alternation in original) (citation omitted); *see also* Boyce et al., *Belief of Eyewitness Identification Evidence*, Handbook of Eyewitness Psychology: Memory for People (Jan. 1, 2007) 508-09 ("Research indicates that people overestimate the abilities of eyewitnesses.").

While the "vagaries of eyewitness identification," *Wade,* 388 U.S. 218, 229, 87 S.Ct. 1926, 18 L.Ed.2d 1149, have long been recognized, the advent of DNA testing has brought the contours of that problem into sharp relief. We now know that eyewitness misidentification is one of the

most "pervasive factor[s] in the conviction of the innocent." Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 Vill.L.Rev. 337, 358 (2006). At the date of filing, the National Registry of Exonerations lists 2,870 exonerations nationwide. The National Registry of Exonerations, *% Exonerations by Factor*, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (accessed Sep. 24, 2021). Of those, just under one-third (805) list mistaken eyewitness identification as a contributing cause. *Id.* Eyewitness misidentifications are particularly prevalent in cases like the instant matter—cross-racial identifications in a sexual assault case. Indeed, two of every three sexual assault exonerations nationwide involved a mistaken identification. *Id*. And, of all misidentification cases in which the wrongfully convicted person was convicted of rape as a top charge, nearly half (approximately 48%) involved cross-racial identifications.[9] Likewise, over half (54%) of all people wrongfully convicted of sexual assault based on a misidentification, who were represented and exonerated by the Innocence Project, were misidentified by a person of a different race.[10]

Because jurors are generally unaware of "deficiencies in human perception and memory and thus give great weight to eyewitness identifications," expert testimony is necessary for juries to understand how the relevant circumstances at the time of a witness's observation and during the identification procedure affect the eyewitness evidence presented to them. *See State v. Clopten,* 2009 UT 84, 223 P.3d 1103, 1108 (2009); *see also Com. v. Walker,* 625 Pa. 450, 788, 92 A.3d 766 (2014) (recognizing that the potential fallibility of eyewitness identification is "beyond [the

[9] Data was obtained from internal records on file with the National Registry of Exonerations, and now on file with the Innocence Project, Inc.

[10] Data was obtained from internal records on file with the Innocence Project, Inc.

knowledge] possessed by a layperson"). Indeed, "[a] meta-analysis assessing lay knowledge concluded that 75% of 16 factors known to influence eyewitness identification accuracy are not common sense to jurors." Jones et. al, *Comparing the Effectiveness of Henderson Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence*, Journal of Experimental Criminology, (Mar., 2017) 31; *see State v. Lawson,* 352, Or. 724, 291 P.3d 673, 705 (2012); *see also People v. McDonald*, 37 Cal.3d 351, 690 P.2d 709, 721, 208 Cal.Rptr. 236 (1984) (concluding that jurors are sufficiently unaware of psychological factors bearing on eyewitness identification to warrant the admission of expert opinions to "assist the trier of fact"). As one court aptly explained, "[s]tudy after study has shown very high error rates in the identification of strangers[.] * * * That jurors have beliefs about [the fallibility of memory] does not make expert evidence irrelevant; to the contrary, it may make such evidence vital, for if jurors' beliefs are mistaken then they may reach incorrect conclusions." *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir.2009).

In light of the outsized role misidentification has played in convicting the innocent, this Court, along with the vast majority of courts around the nation, have long held that expert testimony regarding the factors that impact eyewitnesses' ability to perceive, remember, and recall the appearance of a perpetrator of a crime provides critical information aiding a jury's evaluation of such evidence. *See State v. Buell*, 22 Ohio St.3d 124, 131, 489 N.E.2d 795 (1986) (holding that "the expert testimony * * * concerning the variables or factors that may impair the accuracy of a typical eyewitness identification is admissible under Evid.R. 702"); *see also People v. Santiago*, 17 N.Y.3d 661, 669, 958 N.E.2d 874, 934 N.Y.S.2d 746 (2011) (finding that "expert testimony on the subject of eyewitness recognition memory can educate a jury concerning the circumstances in which an eyewitness is more likely to make such mistakes, [and, therefore,] 'courts are encouraged

* * * in appropriate cases' to grant defendants' motions to admit expert testimony on this subject") (internal citation omitted); *Walker* at 782 (recognizing the advancement of scientific research in overturning its ban on eyewitness expert testimony and observing that, as of 2014, courts in 44 states,[11] the District of Columbia, and all federal circuit courts that have ruled on the issue, permit expert testimony on eyewitness identifications "for the purpose of aiding the trier of fact in understanding the characteristics of eyewitness identification"); *People v. Lerma*, 2016 IL 118496, 47 N.E.3d 985, 992-93 (2016) (holding that expert testimony on eyewitness identification should have been admitted, citing developing research in eyewitness identifications and noting the "clear trend" toward the admission of eyewitness identification expert testimony).

Expert testimony regarding eyewitness identifications is especially critical in a case where, as here, the eyewitness evidence is central to the prosecution's case and the identification bears indicia of unreliability. Expert testimony in cases like the instant matter assures that jurors have adequate tools to assess powerful, yet potentially unreliable, identification evidence and, in turn, reduces the risk of wrongful convictions.

II. BECAUSE THE CURRENT TEST DOES NOT COMPORT WITH SCIENTIFIC CONSENSUS NOR ADEQUATELY SAFEGUARD AGAINST WRONGFUL CONVICTION, THIS COURT SHOULD MODIFY THE LEGAL FRAMEWORK FOR EXCLUDING UNRELIABLE IDENTIFICATION EVIDENCE

To determine the admissibility of eyewitness identification evidence in the face of a due process challenge, Ohio courts follow the legal framework outlined by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), and formally adopted in *Manson*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140. *See Moody*, 55 Ohio St.2d 64, 67, 377 N.E.2d 1008; *see also Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682. Under this two-part test, a court

[11] All fifty states now allow for the admission of expert identification testimony, under certain circumstances, either through State Supreme Court rulings or statute. *See e.g.*, La. Code Evid.Ann.Art. 702; Neb.Rev.Stat. 27-707.

must first determine whether an identification procedure was unnecessarily or unduly suggestive. *Manson* at 113-14. If the procedure is found to be suggestive, courts then inquire whether, despite the suggestive procedure, the identification is nonetheless reliable. *Broom* at 284 (citing *Biggers* at 198). In reaching this conclusion, courts must consider the "totality of the circumstances" including, but not limited to: "the opportunity of the witness to view the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the perpetrator, the level of certainty demonstrated by the witness at the time of the confrontation, and the time between the crime and the confrontation." *State v. Jells*, 53 Ohio St.3d 22, 27, 559 N.E.2d 464 (1990) (*quoting Biggers* at 199-200) (internal quotation marks omitted). Under the *Manson* test, even highly suggestive identification procedures may be admissible if deemed reliable, as "reliability is the linchpin in determining the admissibility of identification testimony." *Manson* at 113-14.

Since the *Manson* test was articulated, there has been a veritable explosion in social science research concerning the reliability of eyewitness identifications demonstrating that the *Manson* test is fundamentally flawed. As discussed below, the *Manson* test allows for the admission of unreliable, and potentially false, identification evidence, thereby placing innocent people at risk of wrongful conviction. To prevent against miscarriages of justice, this Court must replace the *Manson* framework with a legal inquiry that aligns with the well-established science regarding witness perception, memory, and recall.

a) The *Manson* Test Does Not Align with Current Scientific Consensus About the Fallibility of Memory

The *Manson* test is inherently and critically flawed in at least four ways. First, and most significantly, research has shown that suggestive identification procedures can artificially inflate

a witness's "self-reports" regarding three of the five *Manson* reliability factors—namely, (1) opportunity to view; (2) degree of attention; and (3) certainty. *See Henderson,* 208 N.J. 208, 27 A.3d 872 (noting that "research has shown that [t]hose reports can be skewed by the suggestive procedures themselves and thus may not be reliable"); *see also* Wells & Bradfield, "*Good, You Identified the Suspect": Feedback to eyewitnesses distorts their reports of the witnessing experience*, Journal of Applied Psychology (1998) 367; Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later,* Law & Human Behavior (Feb. 27, 2009) 10-12 ("The reality of *Manson* is that the suggestive procedure can affect not only the identification decision, but also affect the witness' self-reports on the *Manson* factors."). Moreover, the inflation of one self-report may have collateral effects on other self-reports. *See, e.g.*, Bradfield & Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria,* Law & Human Behavior (Oct., 2007) 587-91 (noting the surprising collateral effects that "manipulations of the *Biggers* criteria have * * * on perceptions of multiple criteria"). "Because the *Manson* reliability factors come into consideration once it is already determined that a procedure was suggestive, courts are using the *Manson* reliability factors under precisely the conditions that make the *Manson* criteria questionable and likely misleading." Wells & Quinlivan at 12. Thus, the ironic result 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 are, therefore, encouraged to admit identifications based on criteria that have been tainted by the very suggestive practices the test aims to deter. *Henderson* at 286; *see* Wells & Quinlivan, *supra* at 18 (explaining that under *Manson,* trial courts are hamstrung because "the inflated certainty, statement of view, and statement of attention resulting from suggestive procedures effectively guards against exclusion,

thereby undermining incentives to avoid suggestive procedures," and may actually "provide[ ] an incentive to use suggestive procedures.").

Second, the test erroneously assumes that a witness's honest testimony about three of the five reliability factors serves as probative evidence. However, research demonstrates that people who are not attempting to deceive triers of fact and believe they are being honest are, nonetheless, 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*, Law & Human Behavior (Feb. 6, 2008) 526-35 (noting the poor ability of eyewitnesses to estimate distances); *see also,* E. Loftus et al., *Time Went by So Slowly: Overestimation of Event Duration by Males and Females*, Applied Cognitive Psychology (1987) 3 (noting the tendency of eyewitnesses to overestimate duration of events).

Third, the *Manson* test is premised on the assumption that two factors—a witness's confidence in their identification and a witness's ability to describe the perpetrator—are indicators of the witness's accuracy, despite decades of scientific research that has 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 to nonexistent. *See Lawson,* 352, Or. 724, 777-78, 291 P.3d 673 (summarizing scientific findings on this factor); *see also State v. Ramirez*, 817, 889, P.2d 774 (Utah 1991) (rejecting certainty as a relevant factor). Indeed, there is vast consensus among this nation's leading scientists that "eyewitness confidence is malleable and influenced by factors unrelated to accuracy." Kassin, et al., *On the "General Acceptance" of Eyewitness Testimony Research* (May 2001) 410. 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 (citing Meissner et al., *Person Descriptions as Eyewitness Evidence*, The Handbook of Eyewitness Psychology: Memory for People (Jul. 22, 2007); *see also* Wells, et. al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, Law & Human Behavior (Feb. 2020) 9 (noting that several variables, including the "manner in which a witness is interviewed by an investigator[,] can undermine the accuracy of a witness's [description] statement.").

Fourth, although the test directs courts to consider the "totality of the circumstances," in practice, courts generally only analyze the five enumerated factors, and no other circumstances. *See Henderson,* 208 N.J. 208, 27 A.3d 872. Scientific literature has indisputably shown that many other variables, discussed below, significantly affect the reliability of eyewitness identifications. *See generally* Wells, et. al., *Policy and Procedure*, at 6, 10 (discussing a variety of factors that impact eyewitness reliability that are not accounted for in the *Manson* test).

These problems warrant a reevaluation and reformation of the *Manson* test in order to ensure the suppression of the most unreliable and prejudicial identifications. The new framework 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.

b) To Protect Against Wrongful Conviction, Some States Have Abandoned *Manson;* This Court Should Do the Same

The risk that the *Manson* test may contribute to wrongful convictions has led several states to craft alternative legal standards regarding the admission of eyewitness evidence. In a landmark

case, *State v. Henderson*, the New Jersey Supreme Court replaced the *Manson* test with a standard that accurately reflects scientific consensus. *Henderson* at 303-304 (explaining that courts must be informed by sound evidence on memory and eyewitness identification, "which is generally accepted by the relevant scientific community" to weed out unreliable identifications). As the New Jersey Supreme Court observed, *Manson* "does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury's innate ability to evaluate eyewitness testimony." *Id.* at 285. New Jersey has since been joined by Oregon, Alaska, Connecticut, Utah, and Hawaii in explicitly replacing the *Manson* test with a scientifically sound totality-of-the-circumstances test. *See Lawson,* 352, Or. 724, 746-748, 291 P.3d 673 (*Manson* "does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence[,] * * * [as] the reliability factors [are] * * * both incomplete and, at times, inconsistent with modern scientific findings."); *Young,* 374 P.3d 395, 413 ("Developments in the science related to the reliability of eyewitness identifications, and courts' responses to those developments, have significantly weakened our confidence in the [*Manson*] test as a tool for preventing the admission of unreliable evidence at trial"); *State v. Harris*, 330 Conn. 91, 114-18, 191 A.3d 119 (2018); Utah Evid.R. 617; *State v. Kaneaiakala*, 145 Hawai'i 231, 241-48, 450 P.3d 761 (2019).

Likewise, a growing systemic acknowledgement of the inherent unreliability of human memory is leading some state supreme courts around the country to modify jury instructions and other traditional approaches to eyewitness identification evidence in accordance with the scientific research. *See, e.g.*, *Com. v. Gomes*, 470 Mass. 352, 368, 22 N.E.3d 897 (2015) (holding that scientific research on eyewitness identifications should be incorporated into model jury instructions); *State v. Almaraz*, 154 Idaho 584, 595, 301 P.3d 242 (2013) (instructing courts

to consider variables in addition to those enumerated in *Manson)*; *Ramirez*, 817 P.2d 774, 779-81 (holding that at least some of the *Manson* factors are "scientifically unsound"). Federal courts have done the same. *See, e.g., Young v. Conway*, 698 F.3d 69, 78-85 (2d Cir.2012) (citing approvingly to scientific reports regarding eyewitness testimony); *Brownlee,* 454 F.3d 131, 141-44 (acknowledging the importance of scientific research establishing the inherent unreliability of human perception and memory); *United States v. Greene*, 704 F.3d 298, 308 (4th Cir.2013) (citing *Henderson* and the scientific research in holding that an in-court identification was unreliable). In short, courts around the country have agreed that applying social science research to eyewitness identification evidence is essential to protect individuals' due process rights, and that *Manson* is out of step with that research.

Despite the scientific consensus demonstrating the inherent problems with the *Manson* test and the expanding judicial acknowledgment of *Manson*'s flaws, lower courts throughout Ohio are currently bound to apply the test, unless and until this Court acts. Indeed, some appellate courts in Ohio have, in recent years, noted *Manson*'s misalignment with scientific principles, but acknowledged that "as an intermediate court of appeals, [the court] must continue to follow the factors articulated in * * * *Manson*, as required by Ohio Supreme Court precedent." *State v. Mayberry*, 2nd Dist. Montgomery No. 27530, 2018-Ohio-2220, ¶ 16, fn.2; *see also State v. Wright*, 2nd Dist. Montgomery No. 28831, 2021-Ohio-2133; *Moody*, 55 Ohio St.2d 64, 67, 377 N.E.2d 1008; *State v. Green*, 2nd Dist. Montgomery No. 28614, 2020-Ohio-5206, ¶ 21, fn.1 ("We have previously noted that several factors identified in *Neil* may bear reconsideration in light of the significant advancement of scientific understanding of memory. * * * Nonetheless, as an intermediate court of appeals, this court must continue to follow the factors articulated in *Neil* and *Manson*, as required by Ohio Supreme Court precedent."); *State v. Frazier*, 2nd Dist. No. 26495,

2016-Ohio-727, 60 N.E.3d 633, ¶ 18, fn.1 (noting that modern science requires the reconsideration of "[s]everal factors identified" in the requisite test regarding identification evidence, yet "as an intermediate court of appeals, we must continue to cite the factors * * * required by Ohio Supreme Court precedent."); *State v. Mabberly*, 2nd Dist. Montgomery No. 27729, 2019-Ohio-891, ¶ 44, *appeal not allowed,* 161 Ohio St.3d 1422, 2021-Ohio-254, 161 N.E.3d 720, ¶ 44 (noting the difference between "apparent expert consensus" and the current "test for the evaluation of eyewitness identifications"). This case presents the Court with an opportunity to provide necessary guidance to the Ohio judiciary.

The tragic injustice that may ensue when courts rely on *Manson* to admit identification evidence or deny other forms of relief based on unscientific assessments of the reliability of eyewitness evidence, is aptly demonstrated by the State of Ohio's wrongful conviction of Christopher Miller. Maurice Possley, *Christopher Miller* (Jun. 29, 2018), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5349 (accessed Sept. 24, 2021). In 2001, Christopher Miller was arrested on suspicion of home robbery, sexual assault, and kidnapping (crimes he did not commit) after the crime victim misidentified him in a photographic lineup and, thereafter, at trial, as one of the two men who sexually assaulted her. *Id.; State v. Miller*, 8th Dist. Cuyahoga No. 82100, 2003-Ohio-2320. Similar to the instant case, in advance of trial, DNA tests were performed on a rape kit, a single male DNA profile was identified, and Mr. Miller was *excluded* as the donor of the male DNA. The prosecution explained away the exculpatory DNA by arguing that the victim was incorrect in her belief that both of her two attackers ejaculated and, thus, Mr. Miller was involved, but just did not leave his DNA at the scene. Possley, *Miller*. Likely due to the powerfully persuasive—yet, false—identification testimony from the victim, Mr. Miller was convicted and sentenced to 40 years in prison. *Id*. In 2017, more

sensitive DNA testing conclusively identified the two male DNA profiles in the rape kit and excluded Mr. Miller, thereby eliminating Mr. Miller as a participant in the crime. *Id*. Significantly, in his direct appeal, Mr. Miller had argued that the victim's identification of him in the photographic lineup was impermissibly suggestive and, therefore, the admission of the identification evidence violated due process. *Miller* at ¶ 1. The Court of Appeals, applying *Manson*, held that the identification procedure—which we now know resulted in the identification of an innocent man—"was not impermissibly suggestive." *Miller* at ¶ 38. Accordingly, Mr. Miller spent twenty years wrongfully imprisoned, until his exoneration in 2021. *See* Possley, *Miller*. Since 1990, at least seven other people in Ohio have, like Mr. Miller, been exonerated by DNA evidence in sexual assault cases where mistaken eyewitness identification was a contributing factor. The National Registry of Exonerations, *Exonerations in the United States*, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (accessed Sept. 24, 2021). Undoubtedly, the Ohio courts assessing the admissibility of the wrongful identifications in these cases applied the *Manson* test and deemed these now demonstrably false identifications sufficiently "reliable."

Mr. Miller's case amply demonstrates the need for this Court to reconsider Ohio law to prevent future miscarriages of justice that will inevitably result if unreliable eyewitness identification evidence continues to be admitted into evidence and upheld as sufficiently reliable in post-conviction proceedings.

III. THIS COURT SHOULD ADOPT AN EVIDENTIARY FRAMEWORK FOR EXCLUDING UNRELIABLE EYEWITNESS IDENTIFICATION TESTIMONY TO ENSURE THAT SUCH EVIDENCE IS NOT PRESENTED IN TRIAL AND THAT INNOCENCE PEOPLE, DEPENDENT UPON TRIAL COUNSEL TO CHALLENGE EYEWITNESS EVIDENCE, MAINTAIN MEANINGFUL AVENUES FOR RELIEF

Because *Manson* inadequately safeguards against wrongful conviction as it fails to prevent unreliable—and potentially false—identification evidence from being presented to juries, this Court should adopt a new framework for assessing the reliability of identification evidence. A new framework, like those adopted in New Jersey, Oregon, Alaska, Connecticut, Utah, and Hawaii, will encourage courts and parties to explore all relevant variables, rather than rely solely on the five factors required by *Manson* which, as discussed above, may result in facades of reliability.

a) This Court Should Adopt a Test that Accounts for all Relevant "System" and "Estimator" Variables

As noted, Ohio trial courts currently test the reliability of eyewitness identification evidence by applying the archaic standard outlined in *Manson*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140. *See Moody*, 55 Ohio St.2d 64, 67, 377 N.E.2d 1008; *Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682. However, since *Manson* was decided nearly 45 years ago, the scientific research has revealed that various factors bearing upon the reliability of eyewitness evidence—many of which are not adequately accounted for in the *Manson* test—may dramatically affect witness memory and, therefore, accuracy. Researchers divide these factors into two categories: estimator variables and system variables.

Estimator variables refer to factors that affect the witness's ability to correctly make and store a memory of the event. *See, e.g.,* Supreme Judicial Court Study Group on Eyewitness Evidence, *Report and Recommendations to the Justices* (2013), https://www.mass.gov/doc/supreme-judicial-court-study-group-on-eyewitness-evidence-report-

and-recommendations-to-the/download ("SJC Report") (accessed 24 Sept. 2021) at 59-71; National Academy of Sciences ("NAS"), *Identifying the Culprit: Assessing Eyewitness Identification* (2014), https://www.nap.edu/read/l 889 l/ (accessed Sept. 24, 2021) 16-17. These include the amount of stress on the witness at the time of the event in question, the presence of a weapon, the race of the witness as compared to the perpetrator, the perpetrator's use of "disguises,"[12] as well as lighting and distance[13] between the witness and perpetrator, and time between the event and the identification.[14] *See, e.g., id.* at 65-66. Three estimator variables are of particular import here. Specifically, studies have shown that high levels of stress induce a defensive mental state that results in a diminished capacity to accurately process and recall events, and therefore, victims of violent offenses—like the primary eyewitness here—necessarily have a diminished ability to accurately recall the appearance of the perpetrator. *See, e.g.,* NAS, *Identifying the Culprit* at 65-66; SJC Report at 59-61; Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memor*y, Law & Human Behavior (2004); *Henderson,* 208 N.J. 208, 261-62, 27 A.3d 872; *Lawson,* 352, Or. 724, 769-70, 291 P.3d 673. Additionally, the respective racial groups of the assailant and the witness play a role in memory retention, in that people have greater difficulty identifying members of another racial

[12] If the perpetrator is wearing even a subtle disguise, such as a hat, a witness's perception and later memory of the encounter with the perpetrator is negatively impacted. Cutler & Kovera, *Evaluating Eyewitness Identification* (2010) 43 (discussing impact of disguises); Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables,* Law & Human Behavior (1987) 244-45 (finding that a disguise reduced accuracy of identifications from 45% to 27%).

[13] Distance from the suspect and lighting conditions can substantially decrease the accuracy of an identification. R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, Law & Human Behavior (2008) 526.

[14] The more time that passes between the incident and identification, the less reliable the identification becomes. Deffenbacher et al., *Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation,* Journal of Experimental Psychology: Applied (2008) 142.

group. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own–Race Bias in Memory for Faces: A Meta–Analytic Review*, Psychology, Public Policy, and Law (2001) 21 (finding that, across dozens of studies, eyewitnesses were more likely to remember faces of their own race and more likely to incorrectly identify faces of any other race); *see also Com. v. Bastaldo*, 472 Mass. 16, 32 N.E.3d 873 (2015) (finding that the "cross-race effect" has reached "near consensus" and therefore requiring jury instructions in all cases where the witness is of a different race than the defendant). Further, the presence of a weapon causes the witness to focus on the weapon rather than the person, decreasing the accuracy of identifications. *See e.g.,* NAS Report at 64-65 (compiling studies on the presence of weapons); Fawcett et al., *Of Guns and Geese: A Meta Analytic Review of the 'Weapon Focus' Literature*, Psychology, Crime & Law (2011) 1.

System variables are factors which may affect how the memory is retrieved, and typically involve circumstances that criminal justice system actors can control, including the way police identification procedures are conducted. *See* NAS, *Identifying the Culprit* at 16-17. Among other factors, system variables include multiple viewings of a suspect's photograph, pre-lineup witness instructions, the composition of the identification group, whether the administrator of the procedure knows the identity of the suspect, and post-identification feedback.[15] *See id.* at 72-73; *Henderson* at 218. Each of these factors can independently have a negative effect on a witness's ability to make accurate identifications. Most relevant here, empirical research has confirmed the insight that when witnesses are subjected to successive viewings of the same suspect, they are

[15] *See, e.g.*, Nancy K. Steblay et al., *The Eyewitness Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, Psychology, Public Policy & Law (2014) 11 ("Confirming feedback significantly inflates eyewitness reports on an array of testimony-relevant measures, including attention to and view of the crime event, ease and speed of identification, and certainty of the identification decision").

more likely to identify that suspect, regardless of actual guilt—a concept known as "mugshot exposure" effect. Deffenbacher et. al, *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, Law & Human Behavior (2006) 306. "Witnesses who encountered a[n] innocent person's photo in an initial identification procedure were more likely to misidentify a different photo of him in a second procedure even if they did not misidentify him in the first procedure." Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, Law & Human Behavior (2008) 8. The risk of misidentification is increased under these circumstances because the witness is at risk of confusing the memory of the suspect from the initial procedure for a memory of the suspect from the incident itself. *Id.*

In light of the system variables that impact identification reliability, many modern science-based recommendations—including those embedded in the Ohio's legislature's 2010 law on identification procedures[16]—direct law enforcement officers to advise witnesses before identification procedures that the culprit might not be in the lineup at all. Such instructions discourage witnesses, who are predisposed toward making positive identifications, from assuming the presence of a suspect, and thereby reducing the risk that a witness will simply choose a subject who is merely a "reasonable match to their memory." *See* Wells, et. al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, Law

[16] In 2010, the Ohio State Legislature adopted a law imposing "[m]inimum requirements for live lineup or photo lineup procedures," that is aligned with modern scientific consensus, and instructs police officers who are conducting an identification procedure to, *inter alia*, inform the witness that a "photograph of the alleged perpetrator of the offense may or may not be included in the photographs the eyewitness is about to see and that the administrator does not know which, if any, of the folders contains the photograph of the alleged perpetrator." R.C. 2933.83.

& Human Behavior (Feb., 2020) 20. Furthermore, law enforcement officers coordinating lineup or photo array identification procedures should ensure the same are double-blind—where neither the administrator nor the witness knows which person is the suspect—to prevent the administrator from giving intentional or unintentional cues about a suspect's identity to the witness. *Id*. at 14-17; R.C. 2933.83(B)(1) (requiring that "[u]nless impracticable, a blind or blinded administrator shall conduct the live lineup or photo lineup"). Research has demonstrated that when administrators are aware of the suspect, they may unknowingly send cues to the witness, who is, in turn, more likely to select the suspect from the lineup, whether the suspect is indeed the culprit or not. *See* M.B. Kovera & A.J. Evelo, *The Case for Double-Blind Lineup Administration*, Psychology, Public Policy, and Law (2017) 421-437.

Appropriate analysis of these variables would help triers of fact more accurately weigh the reliability of eyewitness identification evidence, yet most of these variables are not even addressed by *Manson*—the flawed standard which reigns in Ohio courts. Rather than continue to rely on *Manson* and risk the admission of misidentification evidence, this Court should develop a scientifically sound legal framework for the admission of eyewitness testimony.

Specifically, this Court should instruct that, to prevent due process violations under the state constitution, Ohio "courts must carefully consider identification evidence before it is admitted to weed out unreliable identifications," and that a court's decision on admissibility "must be informed by sound evidence on memory and eyewitness identification, which is generally accepted by the relevant scientific community." *Henderson,* 208 N.J. 208, 302-03, 27 A.3d 872. Further, this Court should hold that eyewitness identification evidence should only be admissible after all relevant system and estimator variables have been explored at a pretrial hearing, which must be ordered upon the defendant's threshold showing of suggestiveness. *Id.* At the hearing, if the State

does not "offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables," then the eyewitness evidence at issue should be excluded. *Id*. Such a new test is consistent with current science and flexible enough to accommodate future scientific advances and thus will help courts reach more accurate determinations about eyewitness identification evidence. *Id.*

b) This Court Should Remand Mr. Bunch's Case for an Evidentiary Hearing to Allow Him an Opportunity to Demonstrate that the Victim's Identification was Unreliable and that the Trial Attorney's Failure to Call an Expert Witness Amounted to Constitutionally Deficient Performance[17]

[17] Amici acknowledge that this Court has found that "the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel." *State v. Wilks*, 154 Ohio St.3d 359, 395, 2018-Ohio-1562, 114 N.E.3d 1092 (quoting *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993)). This proposition, when applied to eyewitness-identification experts, is not well-aligned with the science, explored throughout this brief, and is premised upon legal precedent developed under entirely distinct circumstances. Specifically, *Nicholas* and its progeny primarily involve ineffective-assistance-of-counsel claims in which a petitioner challenges counsel's choice to cross examine the *State's expert witnesses* rather than call a defense expert to combat the prosecution's expert's testimony. *See e.g.*, *Nicholas* at 436 (finding it was not ineffective for counsel to cross-examine the State's DNA expert rather than call their own DNA expert); *State v. Thompson*, 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407 (1987) (finding no constitutional violation where "counsel decided not to request the appointment of a forensic pathologist, choosing instead to rely on their cross-examination *of the state's expert* in order to rebut the evidence of rape") (emphasis added); *State v. Coleman*, 45 Ohio St.3d 298, 308, 544 N.E.2d 622 (1989) (holding that counsel was not ineffective where the attorney cross-examined the State's handwriting expert rather than calling their own handwriting expert); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 66 (reasoning that the attorney was not ineffective by failing to call a defense witness to "undermine the testimony of the state's expert witnesses" and instead cross-examine the State's experts); *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 118 (finding that the "decision to rely on cross-examination [of State's DNA experts] instead of calling an expert witness does not constitute ineffective assistance"); *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 97 (finding that the "record reveals that trial counsel's decision to rely on cross-examination [of the State's DNA experts] appears to have been a legitimate 'tactical decision'").

This Court in *Wilks* then applied the language from *Nicholas* to the distinct circumstance of a defense attorney's decision to rely on the cross examination of *lay witnesses'* testimony regarding eyewitness identification, rather than call a defense expert to educate the jury about the counterintuitive science of perception, memory, and recall. Amici respectfully submit that, in addition to this Court's reconsideration of *Manson*, guided by relevant science, the Court likewise should reconsider *Wilks*, as it fails to account for this distinction in precedent and the counterintuitive science of memory that cannot be adequately elicited from lay witnesses. Indeed, the *Wilks* decision, if upheld, may disallow innocent, misidentified petitioners from challenging the representation they received with regard to powerfully persuasive eyewitness identification evidence.

Amici respectfully submit that, at an evidentiary hearing, Mr. Bunch should be permitted to present evidence that the lack of an identification expert here regarding counterintuitive science was not "strategic" as—unlike in *Nicholas* and its progeny—there was no *expert* witness available for counsel to cross-examine regarding the scientific information that should have been presented to the jury.

Analysis of the identification evidence at issue here reveals that the victim's identification of Mr. Bunch was highly unreliable. Indeed, there are various generally-accepted estimator variables involved in the eyewitness identification at issue, including cross-racial identification, the presence of a weapon, and the high stress of the incident, that inevitably diminished the victim's ability to perceive and recall the distinct features of the perpetrator's face. *See* Kassin, et al., *On the "General Acceptance" of Eyewitness Testimony Research* (May, 2001) 412 (noting the high percentage of relevant experts who agree that the science concerning these particular estimator variables is reliable).

Further, at least one particularly problematic system variable was at issue: the victim was exposed to Mr. Bunch's photograph *before* she ever positively identified him—first by law enforcement officers during the photographic lineup procedure, at which she did not affirmatively identify Mr. Bunch, and at least once more[18] in a newspaper labeling him as a "suspect." Accordingly, by the time the victim identified Mr. Bunch at the pretrial probable cause hearing and subsequently at trial, she had seen him depicted in at least two photographs, both under highly suggestive circumstances. As noted above, such an identification procedure which involves more than one viewing of the suspect, creates the risk of what has been termed "mugshot exposure," which occurs "when a witness initially views a set of photos and makes no identification, but later selects someone—who had been depicted in the earlier photos—at a later identification

[18] At trial, the victim acknowledged seeing Mr. Bunch's face in the news after failing to point him out in the initial police-arranged photographic lineup procedure which took place the day following the crime. T.p. 85. Given the amount of media coverage this case received prior to trial, it is reasonable to assume that the victim may have seen Mr. Bunch's face more than the one time she recalled viewing him in the newspaper, prior to identifying him at the 2001 pre-trial proceeding.

procedure."[19] *Henderson,* 208 N.J. 208, 255-56, 27 A.3d 872; *see also Dennis v. Secy., Pennsylvania Dept. of Corr.*, 834 F.3d 263 (3d Cir.2016) ("Allowing a witness to view a suspect more than once during an investigation can have a powerful corrupting effect on that witness' memory.") (McKee, J., concurring). Accordingly, the victim's recognition of Mr. Bunch during the already-suggestive in-court procedures[20] may well have "stem[med] from exposure [in the media and] at the first identification task rather than from the crime scene. A memory failure for the circumstances of the previous encounter makes the face seem familiar although the correct context for that memory has been lost." Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures With the Same Suspect*, Journal of Applied Research in Memory and Cognition (2016) 285. These pre-identification exposures likewise may have falsely inflated the victim's reported degree of confidence in her identification of Mr. Bunch. *See* John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, Psychological Science in the Public Interest (Mar. 22, 2017) 48.

Moreover, by Detective Shuster's admission, t.p. 151, the police-arranged identification procedure, during which the victim was exposed to Mr. Bunch's photograph and failed to affirmatively identify him, was not conducted under what are now known as "pristine" testing

[19] A related concern, "mugshot commitment," occurs "when a witness identifies a photo that is then included in a later lineup procedure. Studies have shown that once witnesses identify an innocent person from a mugshot, 'a significant number' then 'reaffirm[ ] their false identification' in a later lineup—even if the actual target is present." *Henderson* at 255-56 (quoting Gunter Koehnken, et al., *Forensic Applications of Line-Up Research*, Psychological Issues in Eyewitness Identification (1996) 218); *see also State v. Green*, 239 N.J. 88, 99, 216 A.3d 104 (2019).

[20] An in-court identification is often analogized to a "show-up" identification, or an identification in which there are no "fillers and instead[,] [police] simply present the suspect alone." Wells, et. al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence*, Law & Human Behavior (Feb. 2020) 7. "In terms of suggestiveness, the in-court identification is arguably even more suggestive than a typical showup because it clear to the witness that the defendant has already been indicted. * * * The low probative value of an in-court identification raises serious concerns that its prejudicial value exceeds it probative value." *Id*. at 27-28.

conditions[21] and thus may have further contributed to the victim's possible memory distortion. As discussed above, the detective, for example, did not provide adequate pre-lineup instructions—he did not advise the victim that the suspect's image may not be present in the photo array (t.p. 196)—and the procedure was not blinded but, rather, conducted by the detective on the case, who may have, inadvertently, sent cues to the victim. *See* Wells, et al. at 15.

Despite the presence of various estimator and system variables that necessarily diminished the victim's perception and memory in this matter, the appellate court summarily concluded that Mr. Bunch was not denied effective assistance of counsel because his defense attorney cross-examined lay witnesses regarding the reliability of the victim's identification rather than proffer expert witness testimony regarding the relevant science. However, an examination of trial counsel's cross-examination reveals that he did not—and could not—elicit scientific testimony from the lay witnesses at trial to address, for example, cross-racial identification or the impact of the presence of a weapon.

Further, the Appellate Court reasoned that counsel was not ineffective for failing to call an expert regarding the victim's identification of Mr. Bunch because a co-defendant, Jamar Callier, testified to Bunch's involvement in the crime and also identified him as one of the assailants. However, the record demonstrates that Callier, who admitted his own involvement in the crime, testified on behalf of the prosecution in exchange for a reduced, *seven-year* prison sentence—instead of exposure to, potentially, a *seventy-six-year* prison term, t.p. 1354, 1396—and thus, had

[21] "Pristine" conditions include, for example, interviewing the witnesses in advance of the lineup procedures to document witnesses' descriptions and self-reports of other relevant information, instructing the witnesses "to not discuss the event with other cowitnesses, and warn[ing] the witnesses against attempting to identify the culprit on their own[,]" as well as conducting double-blind procedures, and obtaining an immediate confidence statement from the witnesses. Wells, et al. at 8-9.

significant personal incentive to implicate Mr. Bunch and corroborate the victim's unreliable identification.

Reliance on an interested witness's testimony to conclude that counsel's failure to call an eyewitness-identification expert had no impact on the trial, ignores the reality that interested witnesses—whose testimony is often found in cases of wrongful conviction, lending false credence to unreliable eyewitness evidence—may be unreliable. *Accord United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir.1987) (noting that "[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence"); *see also* Harris, *Testimony for Sale: The Law & Ethics of Snitches & Experts*, 28 Pepp. L. Rev. 1 54 (2000) ("A witness whose future depends on currying the government's favor will formulate a consistent and credible story calculated to procure an agreement with the government, and will adhere religiously at trial to her prior statements"). Indeed, there are *fifty-six* factually innocent people that were wrongfully convicted based on both eyewitness identification and an interested witness's testimony. National Registry of Exonerations, *Exoneration Detail List*, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=ST&FilterValue1=OR (accessed Sept.

24, 2021).[22] Two of those innocent people—Dale Beckett[23] and Dewey Jones[24]—were wrongfully convicted in Ohio. Maurice Possley, *Dale Beckett*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4634 (accessed Sept. 24, 2021); Maurice Possley, *Dewey Jones*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4369 (accessed Sept. 24, 2021).

Moreover, regardless of Mr. Callier's strong incentives to implicate Mr. Bunch, misidentification evidence often results in additional evidentiary errors that, at surface, appear to "corroborate" the unreliable identification. *See* Kassin, et al., *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, Journal of Applied Research in Memory and Cognition (Mar. 2013) 46-47. "In fact, many Innocence Project cases contained *two or more*

[22] Fifty-one of those cases were capital matters, in which "perjured informant testimony [was] accepted by jurors as true." Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice*, NYU Press (2009) 77.

[23] At Mr. Beckett's homicide trial, an eyewitness misidentified him as the man she saw in a field near where she heard a gunshot. Maurice Possley, *Dale Beckett*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4634 (accessed Sept. 24, 2021). Additionally, an interested witness testified that Beckett confessed to the murder while they were incarcerated together. *Id*. Years later, the interested witness revealed that he implicated Beckett because the prosecutor promised that, in exchange for his testimony against Beckett, he would be released from jail on his unrelated charge, and that law enforcement officers threatened to charge him with the homicide if he did not cooperate. *Id*. After federal post-conviction litigation, in 2013, the prosecution dismissed the charges against Beckett, and he was released, after spending seventeen years in prison. *Id*.

[24] At Mr. Jones's trial for the homicide that he was wrongfully convicted of, two different eyewitnesses identified him as being near the scene of the crime and, thereafter, near the decedent's car, in close temporal proximity to the time of the crime. Possley, *Jones*. Significantly, like the victim that identified Mr. Bunch, both witnesses identified Jones at trial only "after being shown numerous photographic lineups" and failing to identify him during the pretrial identification procedure. *Id.* Additionally, a person who was incarcerated with Mr. Jones while he was awaiting trial—and who was later "exposed as having acted as a jailhouse informant for the police on multiple occasions"—testified that Jones admitted to shooting the victim while they were jailed together. *Id.* After hearing from two eyewitnesses and the interested witness, Mr. Jones was convicted of first-degree murder and related charges, and was sentenced to life in prison. *Id.* After nearly two decades of wrongful imprisonment, post-conviction DNA testing revealed the DNA profile of the true perpetrator and excluded Mr. Jones, who was, thereafter, awarded a $1.15 million settlement from the City of Akron, Ohio. *Id.*

mistaken eyewitnesses who expressed high levels of certainty in their identifications [,]" and "[i]n some instances, these multiple errors can occur independently[.]" *Id.* at 46 (emphasis added).

Amici submit that, regardless of other evidence which may seem to corroborate the victim's identification, if, as here, estimator and system variables are implicated in the identification of an individual—particularly an individual who was *excluded* from the relevant DNA evidence—it is possible that a grave miscarriage of justice may have occurred, and thus careful judicial scrutiny, consistent with relevant science, is warranted.

CONCLUSION

The complainant's in-court identification was both unreliable and critical to the State's case, yet defense counsel inexplicably failed to offer expert testimony to contextualize the reliability of the witness's testimony, leaving the jury that convicted Mr. Bunch without any context to understand how the victim may have made an honest mistake. Accordingly, this Court should remand this case to the trial court for a hearing on Mr. Bunch's petition, at which time he should be permitted to present relevant scientific evidence regarding the estimator and system variables at issue and fully present his argument regarding trial counsel's representation. Further, to prevent future wrongful convictions, this Court should announce a new test under Ohio law that replaces *Manson*, so that Ohio courts are equipped with meaningful tools to adequately and scientifically assess the reliability of identification evidence.

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Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2021, I caused copies of the foregoing to be served via electronic mail upon the following persons:

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