No. 19 -___

IN THE

Supreme Court of the United States

JAMES JOSEPH GARNER,

Petitioner,

v.

COLORADO,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause imposes any check on an eyewitness's identification of a criminal defendant in the typically suggestive setting of trial where there was no police misconduct but there is nonetheless substantial reason to doubt the witness would identify the defendant in a nonsuggestive setting.

RELATED CASES

James Joseph Garner v. People of the State of Colorado, No. 16SC75, Supreme Court of Colorado (March 18, 2018).

People of the State of Colorado v. James Joseph Garner, No. No. 12CA2540 (December 15, 2015).

People of the State of Colorado v. James Joseph Garner, No. 10CR1565 Adams County (Colorado) District Court (August 20, 2012).

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statute

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner James Joseph Garner respectfully petitions for a writ of certiorari to review the judgment of the Colorado Supreme Court.

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported at 436 P.3d 1107 and reprinted in the appendix to the petition ("Pet. App.") at 1a-47a. The decision of the Colorado Court of Appeals is reported at 439 P.3d 4 and reprinted at Pet. App. 48a-74a.

JURISDICTION

The Colorado Supreme Court issued its decision on March 18, 2019. Pet. App. 1a. On May 31, 2019, Justice Sotomayor extended the time to file this petition until July 17, 2019. No. 18A1244. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

The prosecution's case against petitioner James Joseph Garner "hinged" on testimony from three witnesses identifying him, while he sat at defense counsel table, as the perpetrator of the crime. Pet. App. 3a. The question presented is whether the Due Process Clause permitted these in-court identifications to occur in the suggestive setting of the courtroom without any judicial screening at all—no matter how strong the reasons to doubt their accuracy.

And there were *extremely* compelling reasons to doubt the reliability of the identifications. The identifications were made by three brothers who, after a night of drinking in a crowded bar, were struck by a flurry of gunshots. Later that night and in the months after, each of the brothers gave wildly varying descriptions of the shooter. Pet. App. 46a. Almost nothing about those descriptions fit Mr. Garner. *Id.* What is more, when presented with a photo array containing Mr. Garner's image, *none* identified him as the shooter. *Id.* 5a.

Nonetheless, each brother told a very different story when put on the witness stand at trial three years later and presented in the courtroom with Mr. Garner, seated between his two female attorneys. One brother proclaimed he was "a hundred percent sure" Mr. Garner was the shooter; another said he was "positive" Mr. Garner was the gunman; and the last one said "the shooter's face was something he would never forget." Pet. App. 5a-6a. The prosecution then argued to the jury: "We have not one, not two, but three eyewitnesses who tell you they're 100 percent sure this man is the shooter. That's beyond a reasonable doubt." Rep. Tr. 227 (Aug. 17, 2012).

On appeal, the Colorado Supreme Court recognized that this Court's precedent "d[oes] not directly answer" the question whether due process imposes any limitations on in-court identifications under the circumstances here—namely, when no pretrial police misconduct has occurred but there is substantial reason to doubt the witness would identify the defendant in a nonsuggestive setting. Pet. App. 21a. The court also acknowledged that state and federal courts have long been split over the issue. *Id.*

17a-30a. A bare majority of the court then held that so long as the police did not arrange a suggestive pretrial identification, due process imposes no check on an ordinary in-court identification. *Id.* 32a-33a.

This split of authority needs resolution. And the Colorado Supreme Court's holding is mistaken. The Due Process Clause's framework designed to prevent undue risk of misidentifications applies *whenever* the state has arranged an impermissibly suggestive identification procedure. The suggestiveness inherent in a typical courtroom identification becomes impermissible where, as here, there is substantial reason to doubt that the witness would identify the defendant in a nonsuggestive setting.

Contrary to the Colorado Supreme Court's belief, *Perry v. New Hampshire*, 565 U.S. 228 (2012), does not signal otherwise. *Perry* held that a totally different sort of identification is exempt from due process scrutiny: an out-of-court identification not prompted by any state actor. *Id.* at 245-48. But in the end, only this Court can resolve whether *Perry* reaches far beyond its facts and insulates *in-court* identifications under the circumstances here from any constitutional oversight whatsoever. This Court should use this occasion to do so—and to confirm that the Due Process Clause does not recede into nothingness at the precise moment of a trial where procedural fairness and accuracy are most urgently required.

STATEMENT OF THE CASE

A. Factual Background

1. One night several years ago, three brothers—Arturo, Roberto, and Christian Adame-Diaz—were drinking at a Denver-area bar with a friend. Petitioner

James Joseph Garner and some friends—three men and three women—were also at the bar. Pet. App. 4a. Mr. Garner is 5'8", has dark hair, and was 36 years old at the time. Rep. Tr. 26-28, 70-72 (Aug. 13, 2012); Aff. for Arrest Warrant 8 (June 4, 2010). That night, he had some facial hair and was wearing glasses and a dark long-sleeved shirt. Rep. Tr. 26-28, 39, 49-50 (Aug. 14, 2012). None of the brothers knew Mr. Garner.

At about 2:00 a.m., something sparked an altercation among several of the patrons. Pet. App. 4a. Amidst the scrum, someone pulled out a gun and fired several shots, injuring each of the brothers. *Id.*

After the shooting, people were shoving each other and began running away. In the chaos, Mr. Garner fell and lost his glasses. Pet. App. 4a. A friend of his also dropped her cell phone as she was leaving. *Id.* The phone contained pictures of her, Mr. Garner, and the other people in their party. *Id.* 4a, 49a.

None of the workers in the bar saw who fired the shots. An employee at the bar later said she saw Mr. Garner depart via the back door and that he was *not* carrying a gun. Rep. Tr. 65, 102-05 (Aug. 14, 2012).

2. During the investigation, the brothers offered varying descriptions of the shooter. Almost none of the details they gave matched Mr. Garner.

Immediately after the shooting, Roberto conceded he had not clearly seen the shooter. Rep. Tr. 186 (Aug. 16, 2012). But he said he thought the shooter was a man wearing a bandana (Mr. Garner was not). *Id.*

Arturo told the police he had exchanged words with the shooter during the altercation. Rep. Tr. 16-17 (Aug. 16, 2012). Arturo described the shooter as a 27-year-old man (Mr. Garner was 36) who was 5'2" (Mr.

Garner is a half-foot taller, 5'8"), with short black hair. *Id.* 11-12, 16. In a second interview, Arturo was asked if the shooter had facial hair or tattoos. He responded, "I don't remember this guy. I don't remember." Rep. Tr. 117-18 (Aug. 15, 2012). But Arturo, who is 5'5" tall, repeated that the shooter was *shorter* than him. *Id.* 121. Arturo added that the shooter was wearing black clothes. *Id.*

Christian, who was the most seriously injured of the three, also described the shooter twice in the months following the shooting. The night of the altercation, he told a deputy while in the hospital that he thought the shooter was bald (Mr. Garner had hair). Rep. Tr. 15-16 (Aug. 17, 2012). More than three months after the shooting, he repeated his belief that the shooter was a bald man with a tattoo on the side of his head (Mr. Garner had no visible tattoos). Rep. Tr. 188-90 (Aug. 15, 2012). He said the shooter was nineteen or twenty years old (again, Mr. Garner was 36), did not have facial hair (Mr. Garner did), was wearing a hat (Mr. Garner was not) and a dark shirt, and was not wearing glasses (Mr. Garner was). *Id.* 189-93, 207. He described another man with glasses that stood out to him, but he indicated that this man was *not* the shooter. *See id.* 190, 200-02.

3. A few months after the incident, the police disseminated a bulletin to the community with photos pulled from the cell phone that Mr. Garner's friend had dropped at the bar. Pet. App. 53a. Someone responded to the bulletin and identified Mr. Garner as one of the men pictured in the photos. Rep. Tr. 93-94, 150 (Aug. 16, 2012). No other men in the bar that night could be identified.

Lacking any other leads, the police decided to present a "photo array" containing Mr. Garner and photos of five similar-looking "fillers" to the brothers to see whether they might identify him as the perpetrator. Pet. App. 5a; *see also* Ex. 23. The array was properly constructed and non-suggestive.[1] All six of the men in the array had short dark hair and facial hair—specifically, mustaches and hair on their chins. Ex. 23. None had any visible tattoos. *Id.*

Not one of the brothers identified Mr. Garner as the shooter. Pet. App. 5a. Only one brother, Christian, marked Mr. Garner as even "possibly" there. Rep. Tr. 195-97 (Aug. 15, 2012); Ex. 26. But he also indicated that two of the fillers were "definitely" there, and he said one of the fillers was the shooter. Rep. Tr. 195-97 (Aug. 15, 2012); Ex. 26.

4. Still lacking any other leads, the State proceeded to file attempted murder and assault charges against Mr. Garner.

At that point, the detective re-interviewed Arturo and Christian about the shooting. In line with the photo array, but not their initial statements, their

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[1] Properly conducted pretrial identification procedures "play an important role in our criminal justice system," enabling officers to test in a comparative setting whether witnesses identify suspects as perpetrators. U.S. Dep't of Just., Memorandum for Heads of Department Law Enforcement Components All Department Prosecutors from Sally Q. Yates, Deputy Attorney General (Jan. 6, 2017), https://www.justice.gov/file/923201/download. Such procedures are much more reliable than one-on-one "show-ups," particularly when conducted closer in time to the crime. Keith A. Findley, *Implementing the Lessons from Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 Mo. L. Rev. 377, 398-400 (2016).

descriptions of the shooter now both included the detail that he had facial hair. Pet. App. 46a. Arturo described the shooter as having a mustache and a soul patch on his chin. Rep. Tr. 119-20 (Aug. 15, 2012). Like Arturo, Christian now described the shooter as having a mustache and a soul patch, and he said the shooter was wearing a black shirt. *Id.* 207-10. At the same time, both brothers continued to insist the shooter had tattoos (an attribute that did not match Mr. Garner). *Id.* at 119-20, 207-10.

B. Procedural History

1. Three years after the shooting, the State brought Mr. Garner to trial.

During trial, Mr. Garner was seated at the defense table between his two female attorneys. Rep. Tr. 148-49, 152-53 (Aug. 14, 2012). Although none of the brothers had identified him before trial, all three proclaimed from the witness stand that they were positive Mr. Garner was the shooter. The prosecutor asked Roberto, the first witness, whether he saw anybody in the courtroom "who shot at [him] on that particular evening." Pet. App. 5a. In response, Roberto pointed at Mr. Garner. *Id.* He stated that he would "never forget" Mr. Garner's face. *Id.* Christian said the same thing. *Id.* 6a. And Arturo declared that he was "a hundred percent sure that it was him." *Id.* 5a.

Mr. Garner objected to all three identifications on the basis that the courtroom setting was "unduly suggestive." Pet. App. 5a. As defense counsel put it, the identifications amounted to one-on-one show-ups, *id.*—a practice that has long been "widely condemned" as unreliable, *Stovall v. Denno*, 388 U.S. 293, 302 (1967). The trial court overruled the objections. Pet. App. 5a-6a.

Unable to preclude the admission of the identifications, Mr. Garner's attorneys did their best to cross-examine the brothers regarding their prior inability to identify Mr. Garner. Roberto claimed that he was very confused the night of the shooting both because he had been drinking and because he believed Christian was on the verge of death. Rep. Tr. 7-11, 14-17, 19, 32, 41, 46 (Aug. 15, 2012). Arturo likewise asserted that his mind was not clear when he gave his initial statements to police. *Id.* 116-17. He told the jury that at the trial, three years later, it was. *Id.* 124, 134.

The brothers' in-court identifications were the only evidence implicating Mr. Garner as the shooter. Stressing this evidence at closing, the prosecutor asserted: "We have not one, not two, but three eyewitnesses who tell you they're 100 percent sure this man is the shooter. That's beyond a reasonable doubt." Rep. Tr. 227 (Aug. 17, 2012).

The jury convicted Mr. Garner of first-degree assault of Christian; second-degree assault of Arturo; and attempted reckless manslaughter of the two. Pet. App. 7a. The trial court sentenced Mr. Garner to thirty-two years in prison. *Id.* 50a.

2. Mr. Garner appealed, arguing as relevant here that the trial court violated the Fourteenth Amendment's Due Process Clause by permitting the brothers to identify him under impermissibly suggestive circumstances. Pet. App. 50a. The Colorado Court of Appeals rejected the argument and affirmed. *Id.* 49a.

The appellate court recognized that when in-court identifications follow impermissibly suggestive pretrial identification procedures, the Due Process Clause requires trial courts to ensure that the in-court

identifications are sufficiently reliable to be put before juries. Pet. App. 50a-51a. But the Colorado Court of Appeals held that absent improper pretrial identification procedures, due process imposes no check on in-court identifications. *Id.* 56a-57a.

3. A closely divided Colorado Supreme Court affirmed. The four-justice majority observed that state and federal courts have reached divergent conclusions about whether this Court's due process precedents require judicial oversight of in-court identifications "not preceded by an improper out-of-court identification procedure." Pet. App. 11a, 17a-21a, 24a-30a. The majority then chose its side in the conflict, ruling that due process is not violated "where an in-court identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where nothing beyond the inherent suggestiveness of the ordinary courtroom setting made the in-court identification itself constitutionally suspect." *Id.* 33a.

The majority did not deny—in fact, it openly acknowledged—that eyewitness identifications are "fallible." Pet. App. 2a. It also recognized the particular "power[]" and "suggestiveness that inheres in identifying a defendant for the first time in court." *Id.* 2a, 30a. Indeed, "precisely because identification testimony is so persuasive, a mistaken identification can lead to a wrongful conviction." *Id.* 2a.

Yet the majority read *Perry v. New Hampshire*, 565 U.S. 228 (2012), to signal that, absent an improperly suggestive pretrial identification procedure, the Due Process Clause is never violated by "ordinary" in-court identifications. Pet. App. 31a. Even where a witness's inability before trial to identify the

defendant gives rise to serious questions about the reliability of an in-court identification, the Colorado Supreme Court concluded that due process has nothing to say about the issue. *Id.* 31a-32a.

The three dissenting justices would have sided with other courts holding due process requires judicial prescreening of in-court identifications under the circumstances here. Pet. App. 44a-45a (Hart, J., dissenting). The dissent began by noting that in-court identifications are essentially show-ups, where "the witness is confronted with a single potential suspect and asked if he or she is the right one." *Id.* 43a. Indeed, an ordinary in-court identification is even more suggestive than the typical show-up, because it "presents a witness with the single person who the police and the prosecutor believe committed the crime and typically does so long after the commission of the crime." *Id.* Finally, the dissent stressed that the risk of "irreparable misidentification" is accentuated where, as here, a witness has "failed [before trial] to identify the defendant" in a properly administered photo array or line-up. *Id.* 35a.

The dissenters then turned to *Perry*. That case, they observed, "did not consider, and does not resolve, the question" in this case. Pet. App. 40a. Instead, it involved an *out-of-court* identification that occurred without any state action at all. The majority's reliance on *Perry*, the dissenters maintained, thus "unmoors that case from its factual setting and ignores the parallels between an unnecessarily suggestive pretrial identification procedure arranged by one branch of law enforcement—the police—and an unnecessarily suggestive in-court identification arranged by another branch of law enforcement—the prosecution." *Id.*

Turning to the facts, the dissent concluded not only that the trial court should have prescreened the brothers' in-court identifications, but that applying due process scrutiny probably would have precluded the identifications altogether. The shooting was quick and chaotic; the brothers "offered wildly varying descriptions of the shooter;" and all failed to identify petitioner in the photo array. Pet. App. 45a-46a. Conducting a pretrial reliability analysis, therefore, "quite likely would have led the court to conclude that the brothers' first-time in-court identifications lacked any likelihood of reliability." *Id.* 47a.

REASONS FOR GRANTING THE WRIT

I. State and federal courts are divided over the Due Process Clause's application to in-court identifications.

1. This Court has long held that due process requires judicial screening of identification evidence when law enforcement arranges an "impermissibly suggestive" identification procedure. *Simmons v. United States*, 390 U.S. 377, 384 (1968). An identification procedure is "impermissibly suggestive" when it unnecessarily creates (or increases) a danger that the witness will misidentify the defendant. *Id.* If a defendant makes such a showing, courts then consider the "totality of the circumstances" regarding the witness's observation of the crime and quality of memory to determine whether there is, in fact, a "substantial likelihood of misidentification." *Neil v. Biggers*, 409 U.S. 188, 199-201 (1972); *see also Manson v. Brathwaite*, 432 U.S. 98, 113-16 (1977). Where this reliability analysis shows that such a likelihood exists, the identification evidence cannot be presented to the

jury. *Biggers*, 409 U.S. at 201; *see also Foster v. California*, 394 U.S. 440, 443 (1969).

In *Perry v. New Hampshire*, 565 U.S. 228 (2012), the Court held that this due process framework does not apply to out-of-court identifications in the absence of "improper" police influence on the eyewitness. *Id.* at 233. Yet neither *Perry* nor any other case addresses whether pretrial police misconduct is a necessary prerequisite to raise a due process challenge to an *in-court* identification. Lower courts were divided before *Perry* over this question, *see In re R.W.S.*, 728 N.W.2d 326, 332-33 (N.D. 2007), and they have continued after *Perry* to be "divided," *United States v. Shumpert*, 889 F.3d 488, 491 (8th Cir. 2018); *see also United States v. Morgan*, 248 F. Supp. 3d 208, 212 (D.D.C. 2017) (recognizing that "courts have split" on the issue); *State v. Thurber*, 420 P.3d 389, 432 (Kan. 2018) (same).

2. Five federal courts of appeals and five state supreme courts have applied the Due Process Clause to screen the reliability of in-court identifications in the absence of pretrial improper police influence on the witness. The Connecticut Supreme Court has issued the most comprehensive decision on the issue. *See State v. Dickson*, 141 A.3d 810 (Conn. 2016), *cert. denied*, 137 S. Ct. 2263 (2017). Likening in-court identifications to highly suggestive show-ups, the court saw "no reason to distinguish inherently suggestive in-court identifications from inherently suggestive out-of-court identifications." *Id.* at 827. "[I]f an in-court identification following an unduly suggestive pretrial police procedure implicates the defendant's due process rights," so should such an identification orchestrated by a prosecutor where

there are equally compelling reasons to doubt "the witness would be able to identify the defendant in a nonsuggestive setting." *Id.* at 823-24.

Other courts also have employed a due process check on the reliability of in-court identifications. *See Kennaugh v. Miller*, 289 F.3d 36 (2d Cir. 2002); *United States v. Archibald*, 734 F.2d 938 (2d Cir. 1984); *United States v. Jones*, 126 Fed. Appx. 560 (3d Cir. 2005); *United States v. Greene*, 704 F.3d 298 (4th Cir. 2013); *United States v. Rogers*, 126 F.3d 655 (5th Cir. 1997); *Lee v. Foster*, 750 F.3d 687 (7th Cir. 2014); *City of Billings v. Nolan*, 383 P.3d 219 (Mont. 2016); *State v. Clausell*, 580 A.2d 221 (N.J. 1990); *In re R.W.S.*, 728 N.W.2d 326 (N.D. 2007); *Hogan v. State*, 908 P.2d 925 (Wyo. 1995). And the U.S. District Court for the District of Columbia also recently issued a detailed decision holding that due process requires prescreening in the circumstances here. *See United States v. Morgan*, 248 F. Supp. 3d 208 (D.D.C. 2017).

Like the Connecticut Supreme Court, these courts understand this Court's precedent to establish a "general due process standard, mandating that identification testimony must not lead to the likelihood of irreparable identification as a result of impermissibly suggestive procedures." *Kennaugh*, 289 F.3d at 44. Accordingly, they have screened in-court identifications for reliability when necessary to "avoid the 'very substantial likelihood of irreparable misidentification.'" *Id.* at 46 (quoting *Manson*, 432 U.S. at 116). And when the totality of the circumstances establishes a likelihood of misidentification, courts have held that due process forbade the in-court identifications. *See, e.g.*, *Greene*, 704 F.3d at 308-10; *Rogers*, 126 F.3d at 658-59. In the

alternative, some courts have suggested that due process may be satisfied by modifying the ordinary courtroom setting—such as by rearranging "the seating" and placing "some people of the defendant's approximate age and skin color" near him—to alleviate the undue suggestiveness of a typical in-court identification. *Archibald*, 734 F.2d at 942.

The First Circuit has not taken a definitive position on the issue. But in *United States v. Correa-Osorio*, 784 F.3d 11 (1st Cir. 2015), Judge Barron concluded in a separate opinion that a district court committed plain error by failing to subject an in-court identification to a due process screen. *Id.* at 29 (Barron, J., concurring in part and dissenting in part). He distinguished *Perry* as a case where the government was not responsible for the suggestiveness of an identification procedure. *Id.* at 31. And he took the remainder of this Court's case law to hold that where the "government *is* responsible for the suggestiveness"—whether outside the courtroom or inside—"due process requires an inquiry into the reliability of the identification." *Id.* (emphasis added).

3. The Colorado Supreme Court in this case joined three federal courts of appeals and thirteen other state courts of last resort in holding that, in the absence of suggestive pretrial procedures arranged by police, ordinary in-court identifications are categorically exempt from due process scrutiny. *See United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986); *United States v. Thomas*, 849 F.3d 906 (10th Cir. 2017); *United States v. Whatley*, 719 F.3d 1206 (11th Cir. 2013); *Young v. State*, 374 P.3d 395 (Alaska 2016); *State v. Goudeau*, 372 P.3d 945 (Ariz. 2016); *Byrd v. State*, 25 A.3d 761 (Del. 2011); *In re W.K.*, 323 A.2d

442 (D.C. 1974); *White v. State*, 403 So. 2d 331 (Fla. 1981); *Ralston v. State*, 309 S.E.2d 135 (Ga. 1983); *Fairley v. Commonwealth*, 527 S.W.3d 792 (Ky. 2017); *Galloway v. State*, 122 So. 3d 614 (Miss. 2013); *State v. Green*, 250 S.E.2d 197 (N.C. 1978); *State v. King*, 934 A.2d 556 (N.H. 2007); *State v. Ramirez*, 409 P.3d 902 (N.M. 2017); *State v. Hickman*, 330 P.3d 551 (Or. 2014); *State v. Lewis*, 609 S.E.2d 515 (S.C. 2005).

These courts offer different rationales for their decisions. Some think the jury's ability to observe identifications in the courtroom necessarily provides sufficient safeguards against the suggestiveness of that setting. *See, e.g.*, *Domina*, 784 F.2d at 1368; *Lewis*, 609 S.E.2d at 518. Other courts, like the Colorado Supreme Court in this case, read *Perry*'s focus on pretrial police misconduct to establish a categorical rule that ordinary in-court identifications are totally exempt from due process scrutiny absent such improper influence. *See, e.g.*, Pet. App. 30a-31a; *Thomas*, 849 F.3d at 910-11; *Whatley*, 719 F.3d at 1216-17; *Goudeau*, 372 P.3d at 981.

Furthermore, several of these court have enforced their categorical bars on screening ordinary in-court identifications even where, as here, the witness failed to identify the defendant in a reliable pretrial procedure, such as a properly administered lineup or photo array. *See, e.g.*, *Benjamin v. Gipson*, 640 Fed. Appx. 656, 658-59 (9th Cir. 2016); *Young*, 374 P.3d at 401, 411-12; *Goudeau*, 372 P.3d at 980-81; *Ralston*, 309 S.E.2d at 683; *Fairley*, 527 S.W.3d at 797; *Galloway*, 122 So. 3d at 664; *King*, 934 A.2d at 377. In these jurisdictions, a witness's previous inability to identify the defendant goes merely to the "credibility of the in-court identification, not to its admissibility."

King, 934 A.2d at 377 (citation omitted). The same is true where, also as here, a witness's pretrial descriptions of the perpetrator did not resemble the defendant. *See Whatley*, 719 F.3d at 1217.

II. The question presented is important and recurring.

1. In-court identifications are a regular and pivotal part of criminal trials. Consequently, as the numerous cases in the split show, the question presented arises frequently in state and federal courts.

2. The question presented also matters a great deal for the accuracy of criminal convictions. In its decision below, the Colorado Supreme Court recognized that an eyewitness identification in the courtroom is "extremely powerful evidence." Pet. App. 2a. Indeed, there is "almost *nothing more convincing* than a live human being who takes the stand," points at the defendant, and identifies him as the perpetrator. *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting Elizabeth F. Loftus, *Eyewitness Testimony* 19 (1979)). But eyewitness identifications are "peculiarly riddled with innumerable dangers." *United States v. Wade*, 388 U.S. 218, 228 (1967). Consequently, "the annals of criminal law are rife with instances of mistaken identification." *Id.*

The power and fallibility of in-court identifications combine to establish a simple truth: Mistaken identifications from the witness stand "can lead to a wrongful conviction." Pet. App. 2a. Indeed, more than seventy percent of wrongful convictions exposed by DNA evidence have involved mistaken identifications, and more than half of those misidentifications occurred in the courtroom. *See* Innocence Project,

Courtroom Identifications: Unreliable and Suggestive, https://www.innocenceproject.org/courtroom-identifications-unreliable-suggestive/. This is because jurors are generally "unaware of the sources of error in eyewitness testimony and place undue faith in its veracity." John C. Bingham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 19 (1983). In particular, jurors "seem to believe that perceptions of particular events are stored on something akin to memory 'tapes.'" *Id.* at 20. But in reality, intervening knowledge and contemporaneous perceptions shape recall, resulting in "distortions." *Id.*

3. State law enforcement officials themselves have recognized the importance of the question presented. Two years ago, Connecticut and twelve other states urged this Court to grant certiorari to decide whether the Due Process Clause requires judicial prescreening in the circumstances here. Br. for State of Michigan et al., as Amici Curiae, *Connecticut v. Dickson*, 137 S. Ct. 2263 (2017) (No. 16-866). Several attorneys general explained that the issue was one of "exceptional importance to the States." *Id.* at 14.[2]

To be sure, these states argued that the Due Process Clause imposes no limitations on ordinary in-

[2] While this Court denied certiorari in that case, it was a singularly poor vehicle for considering the question presented. The Connecticut Supreme Court had ultimately decided the case in the state's favor, holding that it was "clear beyond a reasonable doubt that the jury would have returned a guilty verdict even without [the eyewitness's] in-court identification of the defendant." *State v. Dickson*, 141 A.3d 810, 843 (Conn. 2016). This Court's resolution of the constitutional question in that case therefore would not have affected the judgment of conviction.

court identifications. But the relevant point for present purposes is that those who prosecute criminal cases also recognize the importance of the question presented and the need for this Court to resolve it.

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

The Colorado Supreme Court was mistaken in concluding that due process is never implicated by ordinary in-court identifications not preceded by pretrial police misconduct. The Due Process Clause's protections against unfair procedures are triggered whenever a state actor is responsible for impermissibly suggestive identification procedures. And an identification under the circumstances here—namely, where the prosecution generates it through a suggestive procedure at trial despite substantial reason to doubt the witness would identify the defendant in a nonsuggestive setting—fits that bill.

A. Due process requires judicial scrutiny of in-court identifications under the circumstances here.

1. A criminal trial, above all, is a "search for truth." *Nix v. Whiteside*, 475 U.S. 157, 166 (1986). The Due Process Clause accordingly requires the procedures at criminal trials to comport with "fundamental conceptions of justice," *Dowling v. United States*, 493 U.S. 342, 352 (1990) (citation omitted), and regulates the "fairness of the factfinding process," *Deck v. Missouri*, 544 U.S. 622, 630 (2005).

Applying these general due-process principles, this Court has established a two-step test to ensure that "the jury not hear eyewitness [identification] testimony unless that evidence has aspects of reliability." *Manson v. Brathwaite*, 432 U.S. 98, 112

(1977). First, courts must inquire whether law enforcement arranged an identification procedure that is "impermissibly suggestive." *Simmons v. United States*, 390 U.S. 377, 384 (1968). An identification procedure is impermissibly suggestive when it is "both suggestive and unnecessary." *Perry v. New Hampshire*, 565 U.S. 228, 238-39 (2012). When a defendant makes this threshold showing, a court must assess whether the "totality of the circumstances" reveals a "substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972) (quoting *Simmons*, 390 U.S. at 384).

This Court has applied this two-step framework not only to testimony regarding out-of-court pretrial identifications but to *in-court* identifications as well. In *Foster v. California*, 394 U.S. 440 (1969), for instance, the Court held that a witness's in-court identification of the defendant as the perpetrator of the crime violated due process. *Id.* at 443. The Court explained that the "suggestive elements" of the lineups and show-up that the police orchestrated made it "all but inevitable" that the witness would identify the defendant as the perpetrator at trial, "whether or not he was in fact 'the man.'" *Id.*

The Court similarly analyzed the admissibility of an in-court identification in *Simmons*. 390 U.S. at 382-86. The Court recognized that when an eyewitness was shown a photo array before trial that included an image of the defendant, that prior exposure can inform the likelihood that the witness will render an accurate identification in the courtroom. *See id.* at 383-84. But because neither the photo array in that case nor the witness's response to it gave rise to a serious risk of misidentification, due process allowed the in-court

identification. *Id.* at 384-86; *see also Coleman v. Alabama*, 399 U.S. 1, 5-6 (1970) (conducting due process analysis of in-court identifications but finding no violation because the pretrial lineups did not provide reason to question witness's ability to identify the perpetrator).

To be sure, these cases involving in-court identifications all included allegations that the police arranged pretrial identification procedures that tainted the reliability of the subsequent in-court identifications. But there is no reason that the reach of the Due Process Clause should be confined only to that scenario. To the contrary, *Simmons* explained that the question whether an in-court identification presents a "very substantial likelihood of irreparable misidentification" turns on "the totality of the circumstances." 390 U.S. at 383-84; *see also Foster*, 394 U.S. at 442. This means due process scrutiny must be brought to bear *whenever* an in-court identification procedure impermissibly gives rise to a substantial likelihood of misidentification.

2. Applying that principle yields a straightforward rule that governs here: Due process requires judicial prescreening of an in-court identification where pretrial events (such as a previous failure to identify the defendant) give substantial reason to doubt the witness would identify the defendant but for the suggestiveness of the courtroom.

a. As the Colorado Supreme Court and others have recognized, the "ordinary" courtroom setting—in which the defendant sits next to his attorney, having been singled out and charged by law enforcement—is "inherently suggestive." *United States v. Morgan*, 248 F. Supp. 3d 208, 213 n.2 (D.D.C. 2017); *see also, e.g.*,

United States v. Archibald, 734 F.2d 938, 941 (2d Cir. 1984); Pet. App. 4a. Indeed, one is "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." *State v. Dickson*, 141 A.3d 810, 822 (Conn. 2016); *see also Simmons*, 390 U.S. at 383 ("chance of mis-identification" is "heightened" when law enforcement indicates who it believes committed the crime).

Put another way, in-court identifications are essentially show-ups, where law enforcement presents the witness with only a single suspect. *See, e.g.*, *United States v. Greene*, 704 F.3d 298, 307 (4th Cir. 2013). Over fifty years ago, this Court acknowledged that show-ups are "widely condemned" for their extreme suggestiveness. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). And in-court identifications are particularly suggestive show-ups. The witness knows that law enforcement not only suspects the defendant committed the crime; he knows it has evidence it believes establishes guilt beyond a reasonable doubt. *See Dickson*, 141 A.3d at 822-23.[3]

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[3] Worse yet, the reliability of identifications resulting from show-ups rapidly declines as time passes between the crime and the show-up. *See State v. Henderson*, 27 A.3d 872, 903 (N.J. 2011) (citing A. Daniel Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 *Law & Hum. Behav.* 459, 464 (1996)). Thus, in-court show-ups taking place years after the crime—as in this case—are apt to be even less reliable than already untrustworthy pretrial show-ups.

b. The suggestiveness of the ordinary courtroom setting does not dictate that "*all* in-court identifications" elicited by the prosecution require due process scrutiny. *Perry*, 565 U.S. at 244 (emphasis added). But a prosecutor's generation of an in-court identification in an ordinary courtroom setting becomes *impermissibly* suggestive—and thus triggers a court's duty to screen for reliability—when pretrial events give substantial reason to doubt that the witness would identify the defendant in a nonsuggestive setting. In that circumstance, the state action of facilitating an in-court identification creates an unacceptable risk that a witness's naming the defendant as the perpetrator will be the product of the courtroom setting, rather than the witness's observation of "the criminal at the time of the crime," *Biggers*, 409 U.S. at 199.

The Connecticut Supreme Court has applied this reasoning to hold that due process imposes a check on the subset of in-court identifications where the witness is asked on the stand to identify the defendant for the first time and does not know the defendant. *Dickson*, 141 A.3d at 817. But at the very least, this Court should hold that an in-court identification is subject to due process scrutiny where, as here, the witness makes a first-time identification and was previously shown a photo array or lineup including the defendant and did *not* identify him as the perpetrator. *See Kennaugh v. Miller*, 289 F.3d 36, 46 (2d Cir. 2002) (Calabresi, J.) (stressing relevance of this factor).

The Colorado Supreme Court resisted this rule on the ground that it could penalize law enforcement for the use of "properly conducted" lineups or photo arrays. Pet. App. 31a. But this reasoning turns due

process on its head. It is one thing to honor proper police tactics when the witness positively identified the defendant in a pretrial procedure. But when the witness *failed* to identify the defendant in a pretrial procedure, the legitimacy of that procedure supports, rather than undercuts, the defendant's claim that it is constitutionally problematic to allow a subsequent identification in the inherently suggestive setting of the courtroom. In that circumstance, eliciting an in-court identification during trial looks much more like "an attempt to circumvent the due process constraints on one-man showups" than the routine use of a traditional courtroom procedure. *Morgan*, 248 F. Supp. 3d at 213 n.2. Put another way, if the prosecution would not have been allowed to conduct a suggestive show-up the day before trial, it should not be able to do so during it.

c. To be clear: Due process does not automatically bar an in-court identification where a pretrial photo array or the like gives substantial reason to doubt the witness would identify the defendant in a nonsuggestive setting. An in-court identification under those circumstances is still admissible if the totality of the circumstances demonstrates sufficient reliability to present the identification to the jury. For example, if the witness had a prolonged opportunity to view the perpetrator, *see Biggers*, 409 U.S. at 200-01, or if the witness had a prior relationship with the defendant, an in-court identification may comport with due process regardless of any pretrial hiccups. But "[t]he state is not entitled to conduct an unfair procedure merely because a fair procedure failed to produce the desired result." *Dickson*, 141 A.3d at 830. All the more so where, as here, the witnesses also gave pretrial descriptions of the perpetrator to the police,

and those descriptions did not match the defendant—thus compounding the doubt created by the witness's response to the photo array.

Alternatively, a court might alleviate due process concerns under the circumstances here simply by mitigating the suggestiveness of trial procedures. The Colorado Supreme Court speculated that sometimes a witness "might be better able" to identify a defendant in the flesh in the courtroom than in a photo array. Pet. App. 31a. But if that is all that is driving the desire for an in-court identification, there is an easy solution. A court can conduct an "in-court lineup" or seat the defendant in the gallery, near others with similar appearances. *See United States v. Correa-Osorio*, 784 F.3d 11, 33 (1st Cir. 2015) (Barron, J., concurring in part and dissenting in part). After all, the operative framework here is one of *procedural*, not substantive, due process. So long as the trial court finds some way to guarantee a fundamentally fair identification procedure, due process is satisfied.

B. *Perry v. New Hampshire* does not hold to the contrary.

While expressing sympathy at various points for Mr. Garner's argument, the Colorado Supreme Court believed that *Perry* forecloses any due process check under the circumstances here. Pet. App. 30a-31a. But the dissent was correct: "*Perry* did not even consider th[e] question" here, much less mandate that the Due Process Clause is inapplicable. *Id.* 36a (Hart, J., dissenting).

1. *Perry*'s holding that due process requires prescreening of *out-of-court* identifications only when they resulted from "improper police conduct," 565 U.S. at 241, does not apply to in-court identifications.

a. In *Perry*, an eyewitness identified the defendant at the crime scene "without any inducement from the police." 565 U.S. at 235 (citation omitted). In the absence of any "state action" related to the identification, the Court held that due process did not regulate the admission of the evidence. *Id.* at 233; *see also Colorado v. Connelly*, 479 U.S. 157 (1986) (Due Process Clause does not regulate admissibility of confessions obtained in the absence of state action).

This concern about extending due process beyond its proper bounds does not apply to in-court identifications. For an in-court identification to occur, state action must be brought to bear. The prosecution must bring a particular defendant to trial and call the eyewitness to the stand for questioning. Furthermore, prosecutors are generally free to structure in-court identifications as they wish, yet they typically allow the witness to identify the perpetrator while the defendant is seated at defense counsel table next to his attorney. When such law enforcement action is present—that is, when "the government is responsible for the suggestiveness" of an identification procedure—there is nothing untoward about bringing due process principles to bear on the reliability of the identification. *Correa-Osorio*, 784 F.3d at 31 (Barron, J., concurring in part and dissenting in part).

b. Nor does *Perry*'s focus on whether improper conduct generated the identification create an obstacle here. The "improper police conduct" that *Perry* required, 565 U.S. at 241, was simply a shorthand in the setting of an out-of-court identification for "unnecessarily suggestive circumstances arranged by law enforcement." *Id.* at 248. Applying that more general test here, the prosecution's decision to pursue

a suggestive in-court identification where substantial reason exists to doubt that the witness would identify the defendant in a nonsuggestive setting readily meets the Court's criterion. Simply put, it is improper to orchestrate an identification in a highly suggestive setting where there is substantial reason to doubt its reliability—particularly where less suggestive in-court procedures are available. *See Morgan*, 248 F. Supp. 3d at 213 n.2.

2. The Colorado Supreme Court also misread *Perry* to dictate that cross-examination and related trial safeguards are always enough to protect against misidentification in the ordinary courtroom setting. Pet. App. 32a. But this Court had previously made clear that the availability of cross-examination does not categorically suffice to protect defendants from the risks attendant to in-court identifications tainted by government-created suggestiveness. In *Foster*, the defendant had every opportunity to cross-examine the witness who identified him, yet the Court nonetheless held that the in-court identification was so unreliable that its occurrence violated the defendant's due process rights. 394 U.S. at 443. Similarly, the defendants in *Simmons* and *Coleman* were able to conduct cross-examinations, yet the Court conducted reliability analyses of the identifications.

Perry did not question those holdings—and for good reason. The Due Process Clause sometimes requires trial courts to craft protections beyond conventional trial safeguards. For example, due process prohibits the prosecution from introducing false evidence, even when the defendant could expose its falsity through cross-examination and other tools inherent in the adversarial process. *Napue v. Illinois*,

360 U.S. 264, 269-70 (1959). The Court also has indicated that other testimony implicates due process when jurors alone "will not be competent to uncover, recognize, and take due account" of its shortcomings. *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983); *see also Stein v. New York*, 346 U.S. 156, 192 (1953) (due process requires courts to regulate juries' exposure to evidence that "combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive").

Such is the situation here. Jurors are unusually ill-equipped to "take due account," *Barefoot*, 463 U.S. at 899, of the deficiencies of in-court identifications. Research demonstrates that suggestiveness "inflates witnesses' ratings of confidence." Elizabeth F. Loftus et al., *Eyewitness Testimony* § 3-12, at 70 (5th ed. 2013). And jurors are understandably swayed by witnesses who express great confidence in their testimony. Yet confidence "is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by its suggestiveness." *Commonwealth v. Crayton*, 21 N.E.3d 157, 168 (Mass. 2014); *see also* Neil Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification: The Effects of Reflection and Disconfirmation on Correlation and Calibration*, 8 J. Experimental Psychol. Applied 44, 44-45 (2002).

Cross-examination is no panacea for this problem. Adversarial questioning may be effective at revealing when witnesses are lying, but it is unlikely to expose as false what a witness is convinced is true. *See* James Michael Lampinen et al., *The Psychology of Eyewitness Identification* 250 (2012). This phenomenon is often present with in-court

identifications. *See United States v. Wade*, 388 U.S. 218, 235 (1967) (recognizing that cross-examination can be inadequate to test the "accuracy and reliability" of an identification). Therefore, where there is substantial reason to doubt that the witness would correctly identify the defendant outside the suggestive setting of the courtroom, the trial judge must ensure the identification meets a minimum threshold of reliability before the jury can be exposed to it.

IV. The facts of this case provide an ideal platform for addressing the question presented.

The facts of this case vividly illustrate the stakes involved in whether the Due Process Clause ever imposes a check, in the absence of pretrial police misconduct, on in-court identifications.

1. If due process requires courts to prescreen in-court identifications where there is substantial reason to doubt that the witness would identify the defendant in a nonsuggestive setting, then such prescreening was unquestionably required here. Shortly after the crime, when their memories were freshest, the brothers offered "wildly varying descriptions" of the shooter. Pet. App. 46a. None matched Mr. Garner. *See supra* at 4-5. Even more important, each brother was presented before trial with a properly-constructed pretrial photo array, and all three failed to identify Mr. Garner as the shooter. Pet. App. 5a.

2. In addition, if the trial court had conducted a due process analysis of the in-court identifications, "it is unlikely that the three brothers would have been permitted to identify Mr. Garner for the first time from the witness stand." Pet. App. 45a (Hart, J., dissenting).

The shooting at the center of this case unfolded rapidly and created a great deal of chaos, making it

hard for the brothers who were shot to pay close attention to the shooter. Pet. App. 45a. Furthermore, the brothers had been drinking. Rep. Tr. 27-28, 111-16 (Aug. 14, 2012). And the in-court identifications at Mr. Garner's trial took place three years after the event. Pet. App. 46a; *see United States v. Rogers*, 126 F.3d 655, 658-59 (5th Cir. 1997) (lapse of ten months weighed against a finding of reliability). There is every indication, in short, that factors besides the brothers' observation and memory of the crime drove them to identify Mr. Garner as the perpetrator.

To be sure, the brothers were emphatic at trial that Mr. Garner was the man who fired the shots in the bar. But "self-reported confidence at the time of trial is not a reliable predictor of eyewitness accuracy." Nat'l Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* 108 (2014). Rather, an eyewitness's degree of certitude is probative only when expressed "at the moment of initial identification," before other confounding variables—such as law enforcement feedback and implicit cues—are introduced. *See id.* And here, the brothers said immediately after the shooting that they did *not* remember the shooter—and almost all of the details they offered diverged from Mr. Garner. *See supra* at 4-5. It seems clear, therefore, that there was a substantial likelihood here of misidentification.

3. In fact, this case raises the unmistakable specter of a wrongful conviction. The prosecution offered no evidence other than the brothers' testimony establishing anything besides Mr. Garner's presence in the bar. The prosecution's allegation that Mr. Garner was the shooter "hinged on" the brothers' in-court identifications of him as the perpetrator. Pet.

App. 3a. Especially under these circumstances, the question whether the Due Process Clause has anything to say about the procedures governing such a pivotal moment of a criminal prosecution cries out for this Court's attention.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

APPENDIX A

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2019 CO 19

Supreme Court Case No. 16SC75
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 12CA2540

Petitioner:

James Joseph Garner,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
March 18, 2019

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JUSTICE MÁRQUEZ delivered the Opinion of the Court.

JUSTICE HART dissents, and **JUSTICE HOOD** and **JUSTICE GABRIEL** join in the dissent.

¶1 Eyewitness identifications are extremely powerful evidence. "[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, 352 (1981) (Brennan, J., dissenting) (quoting Elizabeth F. Loftus, *Eyewitness Testimony* 19 (1979)). But such evidence is also fallible. Indeed, "the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Precisely because identification testimony is so persuasive, a mistaken identification can lead to a wrongful conviction.

¶2 Criminal defendants therefore have access to certain safeguards at trial to test the reliability of identification evidence, including the right to counsel and the opportunity to cross-examine prosecution witnesses. The U.S. Supreme Court has also recognized "a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012). Specifically, in *Neil v. Biggers*, the Court held that where the State seeks either to admit evidence of a resulting out-of-court identification or to elicit a live identification from the witness at trial, due process requires the trial court to assess whether, under the totality of the circumstances, the identification is nevertheless reliable. 409 U.S. 188, 198–99 (1972).

¶3 Here, the People charged James Garner for a bar shooting that injured three brothers. The People's case hinged on the brothers' live identifications of Garner at trial almost three years later, though none of them could identify Garner as the shooter in an earlier photographic array. The core question before us is whether, in these circumstances, *Biggers* required the trial court to assess the reliability of the brothers' first-time in-court identifications before allowing them in front of the jury.

¶4 Garner argues that particularly given the brothers' inability to identify him before trial, their in-court identifications were the product of impermissibly suggestive circumstances, and the trial court should have suppressed them under both *Biggers* and the Colorado Rules of Evidence. The People respond that where an in-court identification does not stem

from a constitutionally defective out-of-court identification procedure, the court need not screen the in-court identification for reliability. Instead, any questions of reliability are for the jury to weigh.

¶5 We hold that where an in-court identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where nothing beyond the inherent suggestiveness of the ordinary courtroom setting made the in-court identification itself constitutionally suspect, due process does not require the trial court to assess the identification for reliability under *Biggers*. Because Garner alleges no impropriety regarding the pretrial photographic arrays, and the record reveals nothing unusually suggestive about the circumstances of the brothers' in-court identifications, we hold that the in-court identifications did not violate due process. We further hold that Garner's evidentiary arguments are unpreserved and that the trial court's admission of the identifications was not plain error under CRE 403, 602, or 701. Accordingly, we affirm the judgment of the court of appeals.

I. Facts and Procedural History

¶6 Near closing time at a Denver bar, two groups were celebrating birthdays. Christian Adame-Diaz was celebrating with his friend and his two brothers, Roberto and Arturo. The defendant, James Garner, was celebrating with his girlfriend and a few others. A fight broke out between the two groups. Someone pulled out a gun and fired six shots, injuring all three brothers. Following the shooting, Garner's group fled. Police recovered from the scene a pair of glasses splattered with Garner's blood, and a cell phone belonging to his girlfriend.

¶7 The People charged Garner with attempted murder of each brother; first-degree assault of Christian and Arturo; possession of a weapon by a previous offender;[1] and crime of violence sentence enhancers. The defense maintained that although Garner was at the bar on the night of the shooting, he was not the gunman.

¶8 During their investigation, police presented each brother with a photographic array that included Garner. Although Christian was able to identify Garner as someone present at the bar the night of the shooting, none of the brothers identified Garner as the gunman.

¶9 Despite failing to identify Garner in the pretrial photo arrays, all three brothers positively identified him almost three years later at trial as the shooter. Roberto testified first. When asked whether he saw "anybody . . . in the courtroom . . . who shot at [him] on that particular evening," Roberto pointed at Garner and identified the color of his shirt. Roberto said the shooter's face was something he would never forget. The following morning, defense counsel moved to strike Roberto's in-court identification of Garner "as an impermissible one-on-one show[-]up identification, not comporting with the factors that are required." The trial court took the issue under advisement.

¶10 Arturo was the next brother to testify. When asked how long he had stayed at the bar that night, Arturo spontaneously identified Garner, saying, "[U]ntil this individual here fired at us. I don't want to see this guy I remember with the gun." Arturo said he was "a hundred percent sure that it was him." Defense counsel objected to "the unduly suggestive nature of th[e] one-on-one identification," but did not specify

[1] The People later dismissed this charge.

what made the in-court identification suggestive. The trial court overruled the objection.

¶11 Christian likewise spontaneously identified Garner in the courtroom. While testifying about the events leading up to the shooting, Christian pointed at Garner and said, "[H]im, James that's here, pushed [Roberto] against the chairs. When he fell on top of the chairs and tables, he took out his gun and started shooting my brother." Christian was positive that Garner was the gunman. Defense counsel again objected "as to a one-on-one prejudicial show-up lineup," and the trial court again overruled the objection.

¶12 Throughout trial, defense counsel questioned the reliability of the brothers' identification testimony. In her opening statement, counsel asked the jury to note how the brothers' descriptions of the shooter initially conflicted but began to cohere over time:

> [T]he . . . brothers . . . give different descriptions of what they think the man looked like. . . . None of them describe a person with facial hair. Yet later they meet with the district attorneys and the detective at the bar, and suddenly all of their descriptions kind of start to line up a little bit more because now they are all describing a guy with facial hair.

¶13 Counsel highlighted these and many other discrepancies in the brothers' descriptions of the shooter through cross-examination, eliciting differences in the type, color, and detail of the shooter's clothing, and whether he had facial hair or wore glasses.

¶14 Defense counsel also confronted each brother with his earlier failure to identify Garner as the shooter in a photographic array. For example, Christian

acknowledged on cross-examination that when he saw Garner in the photo array, he told the detective, "He was there but he was not the shooter." And counsel engaged in the following exchange with Roberto:

> Q. Now, you spoke with [the detective] again . . . so that you could look at the [photo] lineup and see if you could find the man you'll never forget?
>
> A. Yes.
>
> Q. Which you did not?
>
> A. No, I didn't do it.

¶15 During closing argument, defense counsel again sought to undermine the brothers' in-court identifications. She retraced for the jury how "[e]veryone's initial description of the shooter [wa]s different," and how the brothers' descriptions changed over time. Counsel also contrasted the brothers' inability to identify Garner in the photographic arrays with their certainty that he was the shooter when they saw him in court: "They can't identify James Garner at . . . all, but when he's sitting in this chair, the one with the arrow over it, that's when they can say they're sure."

¶16 The jury convicted Garner of first-degree assault of Christian; second-degree assault of Arturo; and the lesser-included offenses of attempted reckless manslaughter of Christian and Arturo. The jury acquitted Garner of all attempted murder charges and of all the lesser-included charges against Roberto.

¶17 Garner appealed his convictions, arguing, as relevant here, that the admission of the brothers' in-court identifications violated his right to due process under the state and federal constitutions, and the requirements of CRE 403, 602, and 701.

¶18 The court of appeals rejected these contentions. *People v. Garner*, 2015 COA 175, __ P.3d __. The court reasoned that in *Neil v. Biggers*, the U.S. Supreme Court articulated a test for "the exclusion of impermissible pretrial identifications and the in-court identifications that follow them." *Garner*, ¶ 11. The harm to be avoided, the division explained, is the risk that "the in-court identification is the product of the illegal lineup and not the observation of the defendant's wrongful act." *Id.* at ¶ 10. The court recited the factors identified in *Biggers* that a trial court should consider when assessing the reliability of an identification that follows an impermissibly suggestive confrontation procedure: (1) the witness's opportunity to view the accused at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the witness's level of certainty at the confrontation; and (5) the length of time between the crime and the confrontation. *Id.* at ¶ 11 (citing *Biggers*, 409 U.S. at 199).

¶19 The court of appeals next observed that the majority of courts have declined to extend *Biggers* to in-court identifications that do not follow unlawful pretrial identifications. *Id.* at ¶ 12. The court also observed that Colorado has not applied "[t]he exclusionary rule . . . to in-court identifications alleged to be suggestive simply because of the typical trial setting." *Id.* at ¶ 13 (quoting *People v. Monroe*, 925 P.2d 767, 775 (Colo. 1996)).

¶20 Relying on these principles, the court noted that although Garner's counsel "objected to . . . the identifications on the basis that they were one-on-one show-ups," she offered no specific argument identifying the "constitutionally impermissible and suggestive circumstances other than the fact that the[] identifica-

tions occurred in the courtroom setting." *Id.* at ¶ 19. The court reasoned that, although "relevant and certainly grist for cross-examination," the brothers' inability to identify Garner as the shooter prior to trial did not, as a matter of law, "preclude [them] from making an identification upon seeing [Garner] in court." *Id.* at ¶ 21. The court explained that the brothers' previous failure to identify Garner went to the weight of their in-court identification testimony, rather than its admissibility. *Id.* at ¶¶ 21–22.

¶21 The court observed that "[e]ach identification was done in the presence of the jury," and that "defense counsel extensively cross-examined and impeached each of the brothers with their prior inconsistent statements and inability to identify defendant as the shooter from the photo lineup." *Id.* at ¶ 23. Thus, the court concluded, Garner "was given a full and fair opportunity to cross-examine each of the in-court identifications," and his right to due process was not violated. *Id.*

¶22 The court also summarily rejected Garner's "bare evidentiary arguments," noting that defense counsel had not made specific objections at trial under CRE 403, 602, or 701. *Id.* at ¶ 23 n.2. It concluded the trial court had not, in any event, abused its discretion under those rules in admitting the in-court identifications. *Id.*

¶23 We granted Garner's petition for a writ of certiorari to decide whether the in-court identifications were admitted in error.[2]

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[2] We granted certiorari to review the following issue:

II. Analysis

¶24 Garner argues that the admission of the brothers' first-time in-court identifications violated his rights to due process and a fair trial. Importantly, he does not allege that the pretrial identification procedures were improper. Instead, he contends that the brothers' first-time in-court identifications were the product of impermissibly suggestive circumstances, particularly given the brothers' inability to identify Garner as the shooter in the pretrial photographic arrays. Therefore, he argues, the trial court was required to assess the reliability of these in-court identifications under the *Biggers* test before admitting them. Garner also contends the trial court should have excluded the identifications under CRE 403, 602, and 701, though he failed to make specific objections under those rules at trial.

¶25 The People respond that in-court identifications not preceded by improper pretrial identification procedures do not implicate a defendant's right to due process. The People observe that in-court identification procedures historically have not been cause for concern, and point out that in *Perry v. New Hampshire*, the U.S. Supreme Court held that the *Biggers* reliability test is not required for identifications that were not procured under suggestive circumstances arranged by law enforcement. Although they acknowledge that all in-court identifications entail some element of suggestion, they contend that any inherent suggestiveness of the courtroom setting is not attributable to law enforcement. The People thus argue the

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1. Whether the court of appeals erred in affirming the trial court's admission of the in-court identifications of the defendant.

trial court was not required to prescreen the brothers' in-court identifications for reliability under the *Biggers* factors; rather, the reliability of their identification testimony was for the jury to weigh. Alternatively, the People argue that even under the *Biggers* factors, the identifications were sufficiently reliable to be admitted. Finally, the People contend that the trial court did not plainly err by failing, sua sponte, to exclude the challenged identifications under CRE 403, 602, and 701.

¶26 We begin our analysis by tracing the U.S. Supreme Court's development of the test articulated in *Biggers*. We then observe that in the wake of *Biggers*, courts have been divided on whether the *Biggers* reliability analysis applies to an in-court identification not preceded by an improper out-of-court identification procedure. We also note that in Colorado, we have recognized that certain in-court identifications might raise due process concerns, but we have declined to require prescreening of identifications alleged to be suggestive based merely on the ordinary courtroom setting.

¶27 Next, we turn to a discussion of the U.S. Supreme Court's decision in *Perry*. There, the Court held that out-of-court identifications that are not a product of suggestive circumstances arranged by law enforcement do not require judicial prescreening for reliability under *Biggers*. Though the Supreme Court in *Perry* did not squarely address whether *Biggers* applies to first-time in-court identifications, its reasoning has significantly reshaped that debate: the clear majority of courts to consider the issue since *Perry* have concluded that *Biggers* does not require trial courts to screen first-time in-court identifications for reliability. These courts have concluded that for

defendants identified for the first time in court, the ordinary safeguards of the trial process are sufficient to satisfy due process, and the reliability of the identification testimony is for the jury to weigh.

¶28 Relying on the Supreme Court's reasoning in *Perry*, we hold that where an in-court identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where nothing beyond the inherent suggestiveness of the ordinary courtroom setting made the in-court identification itself constitutionally suspect, due process does not require the trial court to assess the identification for reliability under *Biggers*. Because Garner does not allege that the pretrial identification procedures were improper, and the record reveals nothing unusually suggestive about the circumstances surrounding the brothers' in-court identifications, we hold that their admission did not violate due process. We further hold that the trial court's admission of the identifications was not plain error under CRE 403, 602, or 701. Accordingly, we affirm the judgment of the court of appeals.

A. Suggestive Out-of-Court Identifications and Subsequent In-Court Identifications

¶29 Historically, the questionability of eyewitness identification testimony went to the weight of such evidence and not its admissibility. But in a trilogy of cases decided in 1967, *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967), the U.S. Supreme Court held that in certain circumstances, an out-of-court identification obtained by means of improper police procedures, as well as any subsequent in-court identification tainted by the original improper one,

should be excluded from the jury's consideration altogether.

¶30 In both *Wade* and *Gilbert*, witnesses identified the defendant at a post-indictment lineup conducted in the absence of the defendant's counsel. *Wade*, 388 U.S. at 219–20; *Gilbert*, 388 U.S. at 269–70. In *Wade*, the Court considered whether the witnesses' subsequent courtroom identifications of the defendant at trial should be excluded from evidence. 388 U.S. at 219–20. In *Gilbert*, the prosecution sought to offer not only the witnesses' courtroom identifications, but also testimony relating their initial identifications at the pretrial lineup. 388 U.S. at 271.

¶31 In both cases, the Court held that the Sixth Amendment right to counsel applies to a post-indictment lineup because it is a critical stage requiring the presence of counsel to preserve the defendant's basic right to a fair trial. *Wade*, 388 U.S. at 236–37; *accord Gilbert*, 388 U.S. at 272. In so doing, the Court expressed concern about "the high incidence of miscarriage of justice from mistaken identification" resulting from "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Wade*, 388 U.S. at 228. The Court thus envisioned the presence of defense counsel as the antidote to potentially suggestive pretrial identification procedures—both to avert prejudice at the lineup itself, and to preserve the accused's meaningful ability to attack the credibility of the witness's resulting courtroom identification at trial. *See id.* at 228–37.

¶32 The Court then turned to the proper remedy for the Sixth Amendment violations. As to the pretrial identification testimony the State sought to admit in *Gilbert*, the Court reasoned that such evidence was

the "direct result of the illegal lineup 'come at by exploitation of []the primary[] illegality,'" and only the sanction of automatic exclusion could assure law enforcement authorities' respect for the accused's right to presence of counsel. 388 U.S. at 272–73 (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

¶33 But as to the in-court identifications in both *Wade* and *Gilbert*, the Court reasoned that a per se exclusionary rule would be unjustified. *Wade*, 388 U.S. at 240*; accord Gilbert*, 388 U.S. at 272. Instead, the Court held that the prosecution should be given an opportunity to establish by clear and convincing evidence that the witnesses' in-court identifications were based upon observations of the defendant other than during the lineup. *Wade*, 388 U.S. at 240; *Gilbert*, 388 U.S. at 272. The relevant question, the Court explained, was "[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wade*, 388 U.S. at 241 (quoting John MacArthur Maguire, *Evidence of Guilt* 221 (1959)). An in-court identification free from the taint of any improper pretrial procedure could thus properly go to the jury.

¶34 Finally, in *Stovall*, the Court held that the exclusionary rule identified in *Wade* and *Gilbert* did not apply retroactively. *Stovall*, 388 U.S. at 296–301. But in setting forth its reasons for giving those cases only prospective application, the Court made clear that a defendant could nevertheless seek to prove—independent of any Sixth Amendment violation—that a police identification procedure was so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to violate his Fourteenth Amendment

right to due process. *Id.* at 301–02. There, the victim-witness identified Stovall in a pretrial show-up conducted in her hospital room, where Stovall stood handcuffed to an officer and was the only black man present. *Id.* at 295. Ultimately, the Court found no due process violation, concluding that the highly suggestive procedure in that case was justified because no one knew how long the victim-witness might live. *Id.* at 301–02. But importantly, *Stovall* recognized a distinct due process protection from unnecessarily suggestive out-of-court identification procedures.

¶35 A year later, in *Simmons v. United States*, the Supreme Court again considered the due process protection against suggestive pretrial identification procedures. 390 U.S. 377 (1968). In that case, the prosecution relied on in-court identifications that were allegedly tainted by the witnesses' previous exposure to a suggestive photographic array. *Id.* at 381–83. The *Simmons* Court acknowledged that the police's improper use of photographs can lead to a mistaken identification, and that a witness "thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of [any] subsequent . . . courtroom identification." *Id.* at 383–84. But the Court also noted that the danger of such a technique can be mitigated through cross-examination at trial. *Id.* at 384. Thus, it declined to prohibit the already widespread use of photographic arrays. *Id.* Instead, it held that a conviction based on in-court identification at trial following a pretrial identification by photograph will be set aside where the pretrial identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* The Court ultimately declined to overturn Simmons' conviction, reasoning that the identification

procedure used in that case was justified, and that there was little chance that it led to a misidentification. *Id.* at 384–85.

In *Biggers*, the Supreme Court synthesized its prior cases and established the approach to be used to determine whether due process requires suppression of an identification tainted by suggestive procedures. In that case, the prosecution's evidence included a victim-witness's testimony regarding her visual and voice identification of the defendant at a station-house show-up. 409 U.S. at 189, 195–96. In discerning the guidelines that had emerged from its prior cases, the Court emphasized that "the primary evil to be avoided [from a suggestive confrontation] is 'a very substantial likelihood of irreparable misidentification.'" *Id.* at 198 (quoting *Simmons*, 390 U.S. at 384). That likelihood of misidentification is what violates a defendant's right to due process, the Court explained; it is what justifies the exclusion of an in-court identification made in the wake of a suggestive out-of-court identification, as well as testimony about the out-of-court identification itself. *See id.*

However, the Court rejected the idea that unnecessary suggestiveness alone requires the exclusion of evidence. *Id.* Instead, the Court held that the proper question is "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199. The Court then outlined five factors to be considered in evaluating the likelihood of misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty the witness demonstrated at the confronta-

tion; and (5) the length of time between the crime and the confrontation. *Id.* at 199–200. Applying these factors, the Court concluded there was no substantial likelihood of misidentification, and the evidence was properly allowed to go to the jury. *Id.* at 201.

¶36 A few years later, in *Manson v. Brathwaite*, the Court clarified that the *Biggers* analysis applied to out-of-court confrontations conducted both pre- and post-*Stovall*. 432 U.S. 98, 114 (1977). The Court again rejected a per se rule of exclusion whenever law enforcement officers use improper identification procedures, reemphasizing that "reliability is the linchpin in determining the admissibility of identification testimony" and explaining that the five factors outlined in *Biggers* are to be weighed against the "corrupting effect of the suggestive identification itself." *Id.* at 111–14. Ultimately, the Court could not conclude that there was a substantial likelihood of misidentification in that case, and "[s]hort of that point, such evidence [was] for the jury to weigh." *Id.* at 116. The Court observed that it was "content to rely upon the good sense and judgment of American juries," noting that evidence containing "some element of untrustworthiness is customary grist for the jury mill," and that juries can "measure intelligently the weight of identification testimony that has some questionable feature." *Id.*

B. First-Time In-Court Identifications

¶37 *Biggers* and *Brathwaite* did not answer the question before us today: whether a first-time in-court identification not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement should be subject to judicial screening under *Biggers*. In the wake of those cases, courts were split on the issue. Many began to evaluate the reliability of such first-time in-court identifications

under *Biggers*,[3] while still many others declined to do so.[4]

¶38 Courts that applied *Biggers* to such first-time in-court identifications tended to reason that *Biggers* was concerned primarily with preventing convictions based on mistaken identification, a rationale that supported applying its analysis to all eyewitness identifications, whether obtained before or during trial. *See, e.g.*, *United States v. Hill*, 967 F.2d 226, 232 (6th Cir. 1992) ("All of the concerns that underlie the *Biggers* analysis, including the degree of suggestiveness, the chance of mistake, and the threat to due process are no less applicable when the identification takes place for the first time at trial.").

¶39 Meanwhile, those courts that declined to apply *Biggers* reasoned primarily that unlike suggestive out-of-court identifications or in-court identifications

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[3] *See, e.g.*, *United States v. Douglas*, 489 F.3d 1117, 1126 (11th Cir. 2007); *United States v. Murray*, 65 F.3d 1161, 1168–69 (4th Cir. 1995); *United States v. Hill*, 967 F.2d 226, 232 (6th Cir. 1992); *United States v. Rundell*, 858 F.2d 425, 426–27 (8th Cir. 1988) (per curiam); *United States v. Aigbevbolle*, 772 F.2d 652, 654 (10th Cir. 1985); *Code v. Montgomery*, 725 F.2d 1316, 1319–20 (11th Cir. 1984) (per curiam); *Isom v. State*, 928 So. 2d 840, 846–49 (Miss. 2006); *In re R.W.S.*, 728 N.W.2d 326, 335–36 (N.D. 2007); *Commonwealth v. Silver,* 452 A.2d 1328, 1331–32 (Pa. 1982); *State v. Drawn*, 791 P.2d 890, 892–93 (Utah Ct. App. 1990); *Hogan v. State*, 908 P.2d 925, 928–29 (Wyo. 1995).

[4] *See, e.g.*, *United States v. Domina*, 784 F.2d 1361, 1367–69 (9th Cir. 1986); *Byrd v. State*, 25 A.3d 761, 767 (Del. 2011); *In re W.K.,* 323 A.2d 442, 444 (D.C. 1974); *White v. State*, 403 So. 2d 331, 335 (Fla. 1981); *Ralston v. State*, 309 S.E.2d 135, 136–37 (Ga. 1983); *State v. King*, 934 A.2d 556, 561 (N.H. 2007); *State v. Clausell*, 580 A.2d 221, 235–36 (N.J. 1990); *State v. Green*, 250 S.E.2d 197, 200 (N.C. 1978); *State v. Lewis*, 609 S.E.2d 515, 518 (S.C. 2005).

tainted by earlier suggestive procedures, first-time in-court identifications take place before the jury and are subject to all the ordinary protections of a criminal trial:

> The concern with in-court identification, where there has been suggestive pretrial identification, is that the witness later identifies the person in court, not from his or her recollection of observations at the time of the crime charged, but from the suggestive pretrial identification. Because the jurors are not present to observe the pretrial identification, they are not able to observe the witness making that initial identification. The certainty or hesitation of the witness when making the identification, the witness's facial expressions, voice inflection, body language, and the other normal observations one makes in everyday life when judging the reliability of a person's statements, are not available to the jury during this pretrial proceeding. There is a danger that the identification in court may only be a confirmation of the earlier identification, with much greater certainty expressed in court than initially.
>
> When the initial identification is in court . . . [t]he jury can observe the witness during the identification process and is able to evaluate the reliability of the initial identification.

United States v. Domina, 784 F.2d 1361, 1368 (9th Cir. 1986) (internal citations omitted); *accord Ralston v. State*, 309 S.E.2d 135, 136–37 (Ga. 1983); *State v. Lewis*, 609 S.E.2d 515, 518 (S.C. 2005).

¶40 Notably, even among the courts that deemed *Biggers* applicable to first-time in-court identifications, many ultimately concluded that the typical courtroom identification procedure posed no constitutional problem. *See, e.g.*, *Hogan v. State*, 908 P.2d 925, 929 (Wyo. 1995) ("[W]ithout more, the mere exposure of the accused to a witness in the suggestive setting of a criminal trial does not amount to the sort of impermissible confrontation with which the due process clause is concerned." (quoting *Middletown v. United States*, 401 A.2d 109, 132 (D.C. 1979))).

¶41 Colorado was in this camp. We recognized in *People v. Walker* "that under some circumstances an in-court identification may constitute an impermissible one-on-one confrontation which is unnecessarily suggestive and conducive to irreparable mistaken identification." 666 P.2d 113, 119 (Colo. 1983) (likening a witness's first-time confrontation with a defendant in court to a one-on-one show-up). Although the details of the in-court identification procedure in *Walker* are somewhat ambiguous, the prosecutor apparently "told [the witness], and she assumed, that the defendant on trial was the shotgun-wielding robber." *Id.* at 120.

¶42 We later clarified, however, that exclusion is not required for "in-court identifications alleged to be suggestive simply because of the typical trial setting." *People v. Monroe*, 925 P.2d 767, 775 (Colo. 1996).[5]

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[5] We observe that in several of our cases in this area, we seem to have conflated the Sixth Amendment and due process tests for admissibility, permitting a witness to make an in-court identification if based on an "independent source" distinct from any prior, unnecessarily suggestive identification procedure. *See, e.g.*, *Monroe*, 925 P.2d at 773–75; *Walker*, 666 P.2d at 119; *Gimmy v. People*, 645 P.2d 262, 270 (Colo. 1982); *People v.*

Distinguishing *Walker*, we noted several factors that made the identification procedure in *Monroe* comparatively less suspect, including that "[t]he prosecution made no improper remarks to the witness." *Monroe*, 925 P.2d at 774. We also emphasized the role of counsel in forestalling or exposing any suggestiveness in the identification and observed that special procedures may be appropriate in certain circumstances. *Id.* (acknowledging the trial court's discretion to order in-person lineups or Crim. P. 41.1 nontestimonial identifications).

C. *Perry* and Its Wake

1. *Perry v. New Hampshire*

¶43 More recently, in *Perry v. New Hampshire*, the Supreme Court considered whether *Biggers* requires a trial court to assess the reliability of an out-of-court identification obtained under suggestive circumstances *not* arranged by law enforcement. 565 U.S. 228 (2012). Although *Perry* did not directly answer whether *Biggers* applies to a first-time in-court identification, the Court's reasoning significantly reshaped the terms of that debate. We therefore discuss *Perry* and its rationale in some detail.

¶44 In *Perry*, police received a call that someone was trying to break into cars in the parking lot of an apartment building. 565 U.S. at 233. The responding officer encountered Perry in the lot, holding two car-stereo amplifiers. *Id.* A second officer remained with Perry while the first went upstairs to talk to a building resident who witnessed the break-in. *Id.* at 234. When

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Mattas, 645 P.2d 254, 261 (Colo. 1982); *People v. Thatcher*, 638 P.2d 760, 770 (Colo. 1981); *People v. Smith*, 620 P.2d 232, 238 n.11 (Colo. 1980); *People v. Bowen*, 490 P.2d 295, 298 (Colo. 1971); *Martinez v. People*, 482 P.2d 375, 377 (Colo. 1971).

the officer asked the resident for a description of the perpetrator, she spontaneously pointed to her window and said the person she had seen breaking into a car was standing in the parking lot next to the other officer. *Id.* The resident was later unable to identify Perry in a photographic array. *Id.* Perry moved to suppress evidence of the resident's out-of-court identification on due process grounds, arguing that it amounted to an impermissible one-person show-up. *Id.* at 234–35. The court denied the motion, reasoning that because the out-of-court identification did not result from an unnecessarily suggestive procedure manufactured by the police, the reliability of the testimony was for the jury to determine. *Id.* at 235.

¶45 After the jury convicted him of theft, Perry appealed, arguing that the suggestive circumstances surrounding the identification were enough to trigger the trial court's duty to evaluate the identification for reliability under *Biggers* before allowing the jury to consider it. *Id.* at 236. Perry's argument hinged largely on the Court's statement in *Brathwaite* that "reliability is the linchpin in determining the admissibility of identification testimony." *Id.* at 240 (quoting *Brathwaite*, 432 U.S. at 114). If "reliability is the linchpin" of admissibility under the Due Process Clause, Perry argued, then the *Biggers* reliability analysis should be triggered regardless of whether police were responsible for creating the suggestive circumstances that marred the identification. *Id.* at 240–41.

¶46 The Supreme Court rejected Perry's reading of its precedent, observing that he had "removed [the Court's] statement in *Brathwaite* from its mooring." *Id.* at 241. Read in context, the Court explained, its reference to reliability appeared in the Court's discus-

sion of the appropriate remedy "*when the police use an unnecessarily suggestive identification procedure*." *Id.* That remedy—the judicial screen for reliability—was adopted in lieu of an automatic exclusionary rule and, importantly, "comes into play only after the defendant establishes improper police conduct." *Id.* Far from suggesting that the risk of mistaken identification alone was enough to require judicial prescreening of identification evidence, the Court had made clear that the "purpose of the check . . . was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct." *Id.* (citing *Brathwaite*, 432 U.S. at 112–13).

¶47 In other words, the Court explained, the *Biggers* reliability analysis is triggered "only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id.* at 238–39. Revisiting the 1967 trilogy of cases and *Stovall*'s progeny, the Court observed that each case had involved improper procedures arranged by police. *See id.* at 237–38, 240–43. It discerned from those cases that "[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, show[-]ups, and photo arrays in the first place." *Id.* at 241. The Court concluded that "[t]his deterrence rationale is inapposite in cases, like Perry's, in which the police engaged in no improper conduct." *Id.* at 242.

¶48 Importantly, the Court also expressed concern that to require trial courts to prescreen eyewitness evidence for reliability under *Biggers* "any time an identification is made under suggestive circumstances," *id.* at 240, would "open the door to judicial preview, under the banner of due process, of most, if not all,

eyewitness identifications," *id.* at 243. This is because "most eyewitness identifications involve some element of suggestion. *Indeed, all in-court identifications do.*" *Id.* at 244. (emphasis added).

¶49 The Court recognized the fallibility of eyewitness identifications, but underscored that "[t]he Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Id.* at 237. Among the safeguards built into the adversarial system are the requirement that guilt be proven beyond a reasonable doubt, the right to counsel, and the right to confront and cross-examine the prosecution's witnesses. *Id.* at 246. Other safeguards, such as the rules of evidence, cautionary jury instructions, and the ability to call expert witnesses to testify about the shortcomings of eyewitness testimony, provide additional protection against convictions based on questionable identification evidence. *Id.* at 247. Given the safeguards available in the ordinary criminal trial, the Court concluded that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. *Id.* at 248.

2. After *Perry*

¶50 The *Perry* decision shifted the debate over whether *Biggers* requires judicial prescreening of first-time in-court identifications not preceded by suggestive out-of-court identification procedures. The clear majority of courts to consider the issue since *Perry* have concluded that, with respect to first-time

in-court identifications, "the requirements of due process are satisfied in the ordinary protections of trial." *United States v. Whatley*, 719 F.3d 1206, 1216 (11th Cir. 2013).[6]

¶51 Tracking the reasoning in *Perry*, these courts have concluded that *Biggers* does not apply to the type of first-time in-court identifications at issue here for three main reasons. First, because an ordinary in-court identification procedure involves no improper law enforcement action, exclusion of an identification made under such circumstances would serve no deterrent purpose and would thus be inappropriate under *Perry*. *See State v. Ramirez*, 409 P.3d 902, 912 (N.M. 2017) (concluding defendant's objections based on the suggestiveness of the courtroom setting "do nothing to establish that the alleged taint . . . if there was any, arose as a consequence of improper law enforcement influence"); *see also Whatley*, 719 F.3d at 1216.

¶52 Second, these courts reason that the *Perry* Court squarely rejected the notion that due process demands judicial prescreening of eyewitness identifications whenever they might be unreliable or the product of suggestion. *See*, *e.g.*, *Fairley v. Commonwealth*, 527 S.W.3d 792, 799 (Ky. 2017) ("Pointedly, the Court

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[6] *See also, e.g.*, *United States v. Thomas*, 849 F.3d 906, 910–11 (10th Cir. 2017); *United States v. Hughes*, 562 F. App'x 393, 398 (6th Cir. 2014); *Young v. State*, 374 P.3d 395, 411–12 (Alaska 2016) (but announcing new, more protective due process test under state law for future cases); *Fairley v. Commonwealth*, 527 S.W.3d 792, 798–800 (Ky. 2017); *Galloway v. State*, 122 So. 3d 614, 664 (Miss. 2013); *State v. Ramirez*, 409 P.3d 902, 911–13 (N.M. 2017); *State v. Hickman*, 330 P.3d 551, 571–72 (Or. 2014); *cf. Benjamin v. Gipson*, 640 F. App'x 656, 659 (9th Cir. 2016) (rejecting ineffective assistance of counsel claim for failure to move to suppress first-time in-court identification because, given *Perry*, motion likely to have been unsuccessful).

observed that many eyewitness identifications are problematic for any number of reasons including . . . a witness's poor vision, the stress of the encounter, personal grudges and cross-racial perceptions . . . ."). In so doing, the Court implicitly rejected the notion that due process requires judicial prescreening of all in-court identifications. *See id.*; *United States v. Thomas*, 849 F.3d 906, 910–11 (10th Cir. 2017); *Whatley*, 719 F.3d at 1215–16.

¶53 Finally, like *Perry*, these courts place their trust in the ordinary safeguards of trial that are at their height when an identification procedure takes place in open court. *See Young v. State*, 374 P.3d 395, 411–12 (Alaska 2016) ("An in-court identification . . . occurs in the presence of the judge, the jury, and the lawyers. The circumstances under which the identification is made are apparent. Defense counsel has the opportunity to identify firsthand the factors that make the identification suggestive and to highlight them for the jury."); *see also Fairley*, 527 S.W.3d at 799–800; *Whatley*, 719 F.3d at 1217; *Ramirez*, 409 P.3d at 913.

¶54 Notably, several courts that had previously applied *Biggers* to first-time in-court identifications shifted course after *Perry*, concluding that the Supreme Court's reasoning undercut their earlier decisions. The Eleventh Circuit observed:

> When the Supreme Court made clear in *Perry* that *Simmons*, *Biggers*, and indeed "every case in the *Stovall* line" relied upon the involvement of law enforcement officials in the creation of the suggestive circumstances of the identification and that the Due Process Clause "does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not

> procured under unnecessarily suggestive circumstances arranged by law enforcement," the Court removed the foundation upon which [the Eleventh Circuit's prior cases] rested. And when the Supreme Court rejected the argument that the Due Process Clause requires judicial prescreening of all identifications obtained under suggestive circumstances and expressly disapproved the idea that in-court identifications would be subject to prescreening, it made clear that our precedents are no longer good law.

Whatley, 719 F.3d at 1216 (quoting *Perry*, 565 U.S. at 248). The Sixth Circuit, which had earlier held that "[a]ll of the concerns that underlie the *Biggers* analysis . . . are no less applicable when the identification takes place for the first time at trial," *Hill*, 967 F.2d at 232, reversed course after *Perry*, observing that the Supreme Court had clarified that the "due process rights of defendants identified in the courtroom under suggestive circumstances are generally met through the ordinary protections in trial," *United States v. Hughes*, 562 F. App'x 393, 398 (6th Cir. 2014); *see also Thomas*, 849 F.3d at 911 (holding that prior Tenth Circuit precedent requiring judicial reliability assessment for first-time in-court identifications "is no longer viable" after *Perry*). And although the Eighth Circuit had previously applied *Biggers* to first-time in-court identifications, *see Rundell*, 858 F.2d at 426–27, that court likewise concluded that *Perry* changed the legal landscape enough that it was not plain error for a trial court to fail to conduct a reliability analysis of a first-time in-court identification, *see United States v. Shumpert*, 889 F.3d 488, 491 (8th Cir. 2018).

¶55 A small minority of courts have applied *Biggers* to first-time in-court identifications since *Perry* was decided.[7] Notably, some of those cases do not address *Perry* or its rationale in their analysis at all. *See, e.g.*, *United States v. Greene*, 704 F.3d 298, 305–06 (4th Cir. 2013); *City of Billings v. Nolan*, 383 P.3d 219, 224–25 (Mont. 2016).

¶56 Others of those courts have held that first-time in-court identifications will be excluded only where there is evidence of improper state action in eliciting the identification. For example, the U.S. District Court for the District of Columbia reasoned that an in-court identification procedure could be classified as state action under *Perry*, but that scrutiny under *Biggers* should be limited to those identifications where "the government d[oes] not have a basis for believing that the witness could make a reliable identification," and the identification is "merely an attempt to circumvent the due process constraints on one-man show[-]ups." *United States v. Morgan*, 248 F. Supp. 3d 208, 213 & n.2 (D.D.C. 2017). The Seventh Circuit similarly declined to consider all first-time in-court identification procedures impermissibly suggestive, but specifically held that a witness's failure to identify a defendant in a pretrial photographic array is not enough to trigger a *Biggers* analysis. *See Lee v. Foster*, 750 F.3d 687, 691–92 (7th Cir. 2014).

¶57 In a 4-3 decision, the Connecticut Supreme Court agreed that *Perry* did not foreclose application of *Biggers* to first-time in-court identifications because

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[7] *See, e.g.*, *Lee v. Foster*, 750 F.3d 687, 691–92 (7th Cir. 2014); *United States v. Greene*, 704 F.3d 298, 305–06 (4th Cir. 2013); *United States v. Morgan*, 248 F. Supp. 3d 208, 211–15 (D.D.C. 2017); *State v. Dickson*, 141 A.3d 810, 822–27 (Conn. 2016); *City of Billings v. Nolan*, 383 P.3d 219, 224–25 (Mont. 2016).

a prosecutor's conduct could involve improper state action that should be deterred. *State v. Dickson*, 141 A.3d 810, 827–28 (Conn. 2016). But the court went a step further, holding that in cases where identity is at issue, first-time in-court identifications are so suggestive that they necessarily "implicate due process protections and must be prescreened by the trial court." *Id.* at 822–25. The court dismissed the Supreme Court's reference in *Perry* to the dubiousness of subjecting all in-court identifications to a reliability analysis as a "passing, general reference" that could not foreclose the "conclusion that [such identifications] can implicate due process concerns under certain circumstances." *Id.* at 828. The court then delineated new procedures for prescreening first-time in-court identifications. *Id.* at 835. *But see id.* at 849–50 (Zarella, J., concurring) (doubting state court's authority to adopt prophylactic rules under the United States Constitution).

Massachusetts' Supreme Judicial Court has also created a rule limiting in-court identifications where the eyewitness either was not asked to make an out-of-court identification, *Commonwealth v. Crayton*, 21 N.E.3d 157, 164–73 (Mass. 2014), or made an equivocal prior identification, *Commonwealth v. Collins*, 21 N.E.3d 528, 534 (Mass. 2014). These decisions, however, turn on state "[c]ommon law principles of fairness," and explicitly acknowledge the court's departure from U.S. Supreme Court jurisprudence. *Crayton*, 21 N.E.3d at 165 (contrasting Massachusetts' test with the standard articulated in *Perry*).

Finally, the First Circuit has declined to take a side in the debate, concluding that the defendant's arguments for exclusion in that case failed either way. *United States v. Correa-Osorio*, 784 F.3d 11, 19–22

(1st Cir. 2015). If *Biggers* did not apply, the in-court identification was permissible because the defendant "received all the safeguards *Perry* stamped sufficient to protect . . . due process rights." *Id.* at 20. And even under *Biggers*, the First Circuit reasoned, the defendant "never gets to first base," because the only suggestion he alleged in his identification was "that he had a huge 'pick me' sign on him because . . . he was the only male defendant at counsel table." *Id.* at 21–22. *Correa-Osorio* suggests that the gap between these two approaches to in-court identifications may not be so wide: absent evidence of unusual suggestion, most courts ultimately allow in-court identifications to go to the jury.

D. The Brothers' In-Court Identifications

¶58 Relying on the reasoning in *Perry*, we hold that where an in-court identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where nothing beyond the inherent suggestiveness of the ordinary courtroom setting made the in-court identification itself constitutionally suspect, due process does not require the trial court to assess the identification for reliability under *Biggers*.

¶59 We acknowledge the suggestiveness that inheres in identifying a defendant for the first time in court. But *Perry* rejected the argument that the Due Process Clause requires judicial prescreening for reliability "any time an identification is made under suggestive circumstances." 565 U.S. at 240. And we cannot ignore that the Supreme Court implicitly dismissed the notion that the suggestiveness inherent in "all in-court identifications" itself justifies a *Biggers* analysis. *See id.* at 244. We further agree with the

Court's implication that such a broad rule would be unworkable. *See id.*

¶60 Although the prosecution functions as a state actor in connection with law enforcement, *see Dickson*, 141 A.3d at 824, *Perry* made clear that *Biggers* prescreening is not required in the absence of *improper* state action. *See* 565 U.S. at 241–42, 245. Indeed, "[t]he very purpose of the check . . . [is] to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper [law enforcement] conduct." *Id.* at 241. The inherent suggestiveness of an ordinary courtroom setting does not, without more, give rise to improper state action. The prosecution does not force the accused to sit at his counsel's table; instead, a defendant typically chooses to sit there (instead of in the audience) to assist in his defense. *See Correa-Osorio*, 784 F.3d at 20; *Whatley*, 719 F.3d at 1217. Because excluding a first-time identification made in an ordinary courtroom setting would not serve to deter improper law enforcement action, it would be inappropriate under *Perry. See* 565 U.S. at 241–42.

¶61 Nor are we inclined to require prescreening of in-court identifications in the narrower set of cases where, as here, the witness failed to identify the defendant in a pretrial procedure. Far from deterring improper state action, such a rule could disincentivize the use of properly conducted lineups and encourage the prosecution to try their luck in the (typically) suggestive trial setting. Moreover, there are legitimate reasons why a witness might be better able to identify a defendant at trial—live, and in person, with view of his expression and manner—than in the sort of photographic array used in this case.

¶62 Finally, *Perry* made clear that ordinary trial safeguards are the appropriate checks on identifications made under suggestive circumstances not attributable to improper law enforcement conduct. *See id.* at 246–48. Indeed, when a first-time identification takes place in court, counsel can expose—as defense counsel ably did in this case—any suggestiveness at work in the courtroom, *cf. Wade*, 388 U.S. at 230–31, while juries can make contemporaneous assessments of credibility. And where a witness makes a first-time in-court identification, the witness's previous failure to identify the defendant presents ideal fodder for impeachment on cross-examination. In short, we cannot, consistent with *Perry*, conclude that in-court identifications alleged to be suggestive simply because of the ordinary trial setting must be screened rather than subjected to cross-examination and argument before the jury.

¶63 Though we decline to require judicial prescreening of all in-court identifications under *Biggers*, we recognize, as we did in *Walker*, that some courtroom identifications not stemming from improper out-of-court identification procedures might still raise constitutional concern. Here, however, because Garner alleges no impropriety in the pretrial photographic arrays nor anything unusually suggestive about the circumstances surrounding the brothers' subsequent in-court identifications, we hold that federal due process[8] did not require their exclusion at trial.[9]

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[8] We do not separately analyze our state constitutional due process guarantee because Garner has not argued that it should be interpreted any more broadly than its federal counterpart.

[9] Because application of *Biggers*' reliability test was not required for the in-court identifications at issue, we have no

E. Evidentiary Challenges

¶64 That due process does not require a reliability hearing under Biggers does not strip judges of their role as gatekeepers under the rules of evidence. See *Perry*, 565 U.S. at 245–47 (declining to "enlarge the domain of due process" in part because of existing safeguards against questionable identifications, including state and federal rules of evidence). Here, however, because Garner failed to object to the brothers' in-court identifications under any particular rule of evidence, we agree with the court of appeals that his evidentiary arguments are unpreserved. We cannot hold that it was plain error for the trial court not to exclude the identifications under CRE 403, 602, or 701 sua sponte.

III. Conclusion

¶65 We hold that where an in-court identification is not preceded by an impermissibly suggestive pretrial identification procedure arranged by law enforcement, and where nothing beyond the inherent suggestiveness of the ordinary courtroom setting made the in-court identification itself constitutionally suspect, due process does not require the trial court to assess the identification for reliability under *Biggers*. Because Garner alleges no impropriety regarding the pretrial photographic arrays, and the record reveals nothing unusually suggestive about the circumstances of the brothers' in-court identifications, we hold that the in-court identifications did not violate due process. We further hold that Garner's evidentiary arguments are unpreserved and that the trial court's admission of the identifications was not plain error under CRE 403,

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occasion to consider the additional factors Garner urges us to fold into that analysis.

602, or 701. Accordingly, we affirm the judgment of the court of appeals.

JUSTICE HART dissents, and **JUSTICE HOOD** and **JUSTICE GABRIEL** join in the dissent.

JUSTICE HART, dissenting.

¶66 In *Neil v. Biggers*, the Supreme Court explained that when a procedure used to elicit eyewitness identification of a criminal defendant is "so unnecessarily suggestive and condu[cive] to irreparable mistaken identification that [the defendant] was denied due process of law" that procedure must be screened to ensure the reliability of the identification. 409 U.S. 188, 196 (1972) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)). In *Perry v. New Hampshire*, the Court made clear that the requirement for this due process check "turn[s] on the presence of state action . . . ." 565 U.S. 228, 233 (2012).

This case involves one of the most suggestive of all possible identification procedures—in-court identification. The in-court identifications made in this case were arranged by a prosecutor—a member of law enforcement. And they were conducive to irreparable misidentification because all three witnesses had failed to identify the defendant when presented with the opportunity to do so before trial. Mr. Garner was entitled to have the proposed eyewitness identifications screened by the judge to evaluate their likely reliability before or, if necessary, even during trial.[1]

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[1] I appreciate that the trial judge may not always know if the prosecution intends a first-time, one-on-one identification of the defendant at trial. In the ordinary course, defense counsel should request a pre-trial hearing when there seems to be the potential for such an identification procedure. If defense counsel is uncertain of the prosecution's intentions in this regard, she may request an order for discretionary disclosure to the defense by the prosecution under Crim. P. 16 (I)(d)(1). The trial court may also institute a standard procedure requiring the prosecution to disclose to the court and defense counsel if she intends to attempt such an identification at trial. *See* C.R.E. 104(a) ("Preliminary

¶67 The majority concludes that *Perry* settled the question of whether in-court identifications should be screened for reliability. In fact, *Perry* did not even consider that question. And while many courts since *Perry* have reached the conclusion that the majority reaches today, those courts have failed to adequately consider what a growing body of science and experience have taught us about eyewitness identifications. As a result, they have failed to take seriously the due process concerns raised by first-time in-court identifications.

A.

¶68 First-time in-court identifications are inherently suggestive. A witness appears in the courtroom, never having successfully identified the defendant before

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questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court . . . ."); C.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."); C.R.E. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."); C.R.E. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth . . . ."). Indeed, there is nothing about the court's holding today that prevents trial courts from imposing such restrictions on the admission of evidence, irrespective of the majority's conclusion today regarding what due process requires. Just because a court *need* not hold a pretrial hearing as a matter of constitutional law does not mean that a court *should* not hold such a hearing under the rules of evidence. *Cf.* C.R.E. 102 (The rules of evidence "shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.")

that moment, and is asked whether the defendant—the one person who the police and prosecutor believe they have enough evidence to try for the crime in question—is in fact the right one. "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty . . . ." *United States v. Wade*, 388 U.S. 218, 234 (1967) (discussing show-up identification procedures). "The prosecutor, the witness, and everyone else in the courtroom are aware that the suspect is the individual seated at the defense table," and "[t]here is no way to safeguard the witness from influence caused by subtle cues in the prosecutor's questioning or not-so-subtle cues in the courtroom itself." Aliza B. Kaplan & Janis C. Puracal, *Who Could it Be Now? Challenging the Reliability of First-Time In-Court Identifications After* State v. Henderson *and* State v. Lawson, 105 J. Crim. L. & Criminology 947, 985 (2015). Witnesses faced with such a suggestive circumstance "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." *Commonwealth v. Crayton*, 21 N.E.3d 157, 166–67 (Mass. 2014).

¶69 In-court identifications, like other eyewitness identifications, are also remarkably fallible. Amicus curiae, the Innocence Project, has found that eyewitness misidentification is the leading cause of DNA-confirmed wrongful convictions, with more than 70 percent of DNA exonerations involving eyewitness misidentification. Brief of Amicus Curiae The Innocence Project, at 3. "Of those [exonerees], more than half (53 percent) were misidentified in court." Shirley LaVarco & Karen Newirth, *Connecticut Supreme Court Limits In-Court Identification in Light of the Danger of Misidentification*, The Innocence Project (Aug. 29,

2016), https://perma.cc/4TSS-6D5G. Significantly, scientific research has demonstrated that eyewitness identifications are less reliable with the passage of time. Nat'l Acad. of Sci., *Identifying the Culprit: Assessing Eyewitness Identification* 110 (2014) (hereinafter NAS Report).

¶70 Despite their lack of reliability, in-court identifications are also especially persuasive to a jury. As the majority acknowledges, "there 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, 352 (1982) (Brennan, J., dissenting); *see also United States v. Correa-Osorio*, 784 F.3d 11, 29 (1st Cir. 2015) (Barron, J., concurring in part and dissenting in part) ("Eyewitness testimony is undeniably powerful. That testimony is all the more powerful when the eyewitness identifies the defendant right in front of the jury."); *United States v. Hill*, 967 F.2d 226, 231 (6th Cir. 1992) ("[O]f all the evidence that may be presented to the jury, a witness' in-court statement that 'he is the one' is probably the most dramatic and persuasive." (quoting *United States v. Russell*, 532 F.2d 1063, 1067 (6th Cir. 1976)); *State v. Henderson*, 27 A.3d 872, 889 (N.J. 2011) ("[T]here is almost *nothing more convincing* [to a jury] than" eyewitness identification of the defendant. (quoting *Watkins*, 449 U.S. at 352 (Brennan, J., dissenting))).

¶71 Unfortunately, in-court identification is also not susceptible to effective challenge through cross-examination because "cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs." *State v. Dickson*, 141 A.3d 810, 832 (Conn. 2016) (quoting *State v. Guilbert*, 49 A.3d 705, 725 (Conn. 2012)); *see also* NAS Report, *supra*, at 110.

A witness who mistakenly believes that he is accurately identifying the defendant will come across in cross-examination as quite sincere and confident. And while confidence "is not a reliable predictor of the accuracy of the identification, especially where the level of confidence is inflated by its suggestiveness[,]" *Crayton*, 21 N.E.3d at 168, confidence can be very persuasive to a jury. In fact, "[s]tudies show that eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification." *State v. Lawson*, 291 P.3d 673, 705 (Or. 2012). The impact of confidence on juror evaluation of an identification makes it very hard for cross-examination to undercut an in-court identification. And this is particularly troubling in light of the numerous studies showing that "under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy." *Id.* at 704. It is for these reasons that some state supreme courts are rethinking reliance on cross -examination as a guard against mistaken eyewitness identification. *See Dickson*, 141 A.3d at 832 (noting that "cross-examination is unlikely to expose any witness uncertainty or weakness" in the in-court identification); *Commonwealth v. Collins*, 21 N.E.3d 528, 536 (Mass. 2014) ("[C]ross-examination cannot always be expected to reveal an inaccurate in-court identification where most jurors are unaware of the weak correlation between confidence and accuracy and of witness susceptibility to manipulation by suggestive procedures or confirming feedback." (quoting Supreme Court Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 20 (July 25, 2013) (internal quotation marks omitted))); *Henderson*, 27 A.3d at 918 (concluding that the state's earlier test for evaluating the reliability of

eyewitness testimony rested too heavily on the assumption "that jurors would recognize and discount untrustworthy eyewitness testimony").

¶72 These characteristics of an in-court identification—its suggestiveness, fallibility, persuasiveness, and imperviousness to cross-examination—make first-time in-court identifications exactly the kind of identification procedure that is "conduc[ive] to irreparable mistaken identification . . . ." *Biggers*, 409 U.S. at 196. That, of course, is not the end of the analysis. The question remains: Are first-time in-court identifications *unnecessarily* suggestive and are they the product of state action, such that they fall under the ambit of the Constitution's protections?

B.

¶73 *Perry* did not consider, and does not resolve, the question we confront here today. *See Galloway v. State,* 122 So. 3d 614, 663 (Miss. 2013) ("The United States Supreme Court has not decided whether *Biggers* applies to an in-court identification not preceded by an impermissibly suggestive pretrial identification."), *cert. denied*, 572 U.S. 1134 (2014); *see also Dickson*, 141 A.3d at 821 ("The United States Supreme Court has not yet addressed the question of whether first time in-court identifications are in the category of unnecessarily suggestive procedures that trigger due process protections."). The majority's reliance on *Perry* unmoors that case from its factual setting and ignores the parallels between an unnecessarily suggestive pretrial identification procedure arranged by one branch of law enforcement—the police—and an unnecessarily suggestive in-court identification arranged by another branch of law enforcement—the prosecution.

¶74 In *Perry*, the Court was confronted with the following question: "Do the due process safeguards against the State's use of unreliable eyewitness identification evidence at trial apply to all identifications which arise from impermissibly suggestive circumstances and which are very substantially likely to lead to misidentification, or only to those identifications which are also the product of 'improper state action'?" Brief for Petitioner at i, *Perry*, 565 U.S. 228 (No. 10-8974). The uniform focus of both the parties' briefs and the amicus briefs submitted to the Court in *Perry* was whether state action was or was not required to call into question the reliability of an eyewitness identification. *See generally* Brief for Petitioner, *Perry*, 565 U.S. 228 (No. 10-8974); Brief for Respondent, *Perry*, 565 U.S. 228 (No. 10-8974); Brief for the Am. Psychological Ass'n as Amici Curiae Supporting Petitioner, *Perry*, 565 U.S. 228 (No. 10-8974); Brief for the Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae Supporting Petitioner, *Perry*, 565 U.S. 228 (No. 10-8974); Brief for Wilton Dedge et al. as Amici Curiae Supporting Petitioner, *Perry*, 565 U.S. 228 (No. 10-8974); Brief for the Innocence Network as Amici Curiae Supporting Petitioner, *Perry*, 565 U.S. 228 (No. 10-8974); Brief for the Criminal Justice Legal Found. as Amici Curiae Supporting Respondent, *Perry*, 565 U.S. 228 (No. 10-8974); Brief for the State of Louisiana et al. as Amici Curiae Supporting Respondent, *Perry*, 565 U.S. 228 (No. 10 -8974); Brief for the United States as Amici Curiae Supporting Respondent, *Perry*, 565 U.S. 228 (No. 10-8974); Brief for the Nat'l Dist. Attorney's Ass'n as Amici Curiae Supporting Respondent, *Perry*, 565 U.S. 228 (No. 10-8974).

¶75 Of course, the context in which that question was being answered was a pretrial identification that

had not been arranged by the police. The opinion, not surprisingly, in addressing the need for state action to implicate constitutional protections, focused on the need for police participation in the unnecessarily suggestive identification procedure. The only context in which *Perry* focused on in-court identification was when the Court rejected Mr. Perry's argument that *any* suggestive identification should be subject to judicial screening. 565 U.S. at 240–44. I agree with the majority that the Supreme Court's reasoning in *Perry* forecloses the conclusion that *all* in-court identifications should be screened merely because in-court identification always involves an element of suggestiveness. But the Court's reasoning in *Perry* and in *Biggers* does not foreclose—and, I believe, requires—judicial screening of *some* in-court identifications. *See United States v. Morgan*, 248 F. Supp. 3d 208, 213 (D.D.C. 2017) ("Although the Supreme Court implied in *Perry* that it did not want *all* in-court identifications to be subject to judicial reliability screening, due process concerns require such screening for an initial in-court identification that is equivalent to a one-man showup." (internal citation omitted)). In particular, first-time in-court identifications like the one here are unnecessarily suggestive, conducive to irreparable misidentification, and arranged by law enforcement.

¶76 First-time in-court identifications are at least as suggestive as the pretrial identification processes disapproved of by this and other courts. *Dickson*, 141 A.3d at 822–23 ("[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. If this procedure is not

suggestive, then *no* procedure is suggestive."). A first-time in-court identification is effectively a "show-up"—the witness is confronted with a single potential suspect and asked if he or she is the right one. But in-court identifications are in fact more suggestive than show-ups. A show-up might happen quite soon after a crime, at a time when the police are still investigating and might not yet have settled on a suspect. An in-court identification, by contrast, presents a witness with the single person who the police and the prosecutor believe committed the crime and typically does so long after the commission of the crime.

¶77 Second, the chances of mistake in a first-time in-court identification are at least as likely and the consequences of the mistake are the same—a wrongful conviction. *See Hill*, 967 F.2d at 232 ("The due process concerns are identical in both cases and any attempt to draw a line based on the time the allegedly suggestive identification technique takes place seems arbitrary. All of the concerns that underlie the *Biggers* analysis, including the degree of suggestiveness, the chance of mistake, and the threat to due process are no less applicable when the identification takes place for the first time at trial.").

¶78 And finally, first-time in-court identification, like impermissibly suggestive pretrial identifications, involves the state action that *Perry* explained was necessary to raise due process concerns. In pretrial identifications, the law enforcement arm whose misconduct might be deterred by the *Biggers* screening requirement is the police. When a prosecutor—another arm of law enforcement—is considering asking for a first-time in-court identification, requiring a judicial screening will deter that prosecutor from simply gambling that the courtroom setting will produce the

desired identification. As the Connecticut Supreme Court recognized in prohibiting in-court identifications that were not preceded by an appropriate pretrial identification, "the rationale for the rule excluding identifications that are the result of unnecessarily suggestive procedures—deterrence of improper conduct by a state actor—applies equally to prosecutors." *Dickson*, 141 A.3d at 824.[2]

¶79 A first-time in-court identification will only occur when a witness has either not had an opportunity to identify the defendant before trial or, as happened here, has failed to identify the defendant when given the opportunity. In either case, the prosecution should be required to explain why it believes the in-court identification will be sufficiently reliable to avoid the irreparable harm of a mistake caused by the suggestive setting.

C.

¶80 For these reasons, I believe that a first-time in-court identification requires pretrial screening applying the factors set forth in *Biggers*.[3] If the trial

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[2] The rule adopted by both the Connecticut and the Massachusetts courts—that an in-court identification must be preceded by an appropriate pretrial identification—has much to recommend it and may one day be recognized as required by due process. Cognizant of concerns about a state supreme court's authority to adopt prophylactic rules under the federal Constitution, I confine myself here to the application of the Supreme Court's established test for screening eyewitness identifications procured through unnecessarily suggestive state action.

[3] I agree with the majority that requiring this screening only for in-court identifications that are preceded by a failure to identify could disincentivize the police to use appropriate pretrial identification procedures. And I believe that the conduct that application of the *Biggers* screen would seek to deter in this

court had conducted that screening here, it is unlikely that the three brothers would have been permitted to identify Mr. Garner for the first time from the witness stand. *Biggers* requires a court to consider

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation[,]

and to assess the reliability of an identification. 409 U.S. at 199–200. Considering each of those factors here, the likely reliability of the brothers' in-court identifications was extremely low.

¶81 As described by many witnesses in attendance, the shooting occurred in a very short period of time, during which the three brothers were scared for themselves and for each other. They had very little time to view who was shooting and each of them testified that their attention during that time was not on the shooter's face. Substantial scientific evidence shows that "eyewitness memory for persons encountered during events that are . . . highly stressful . . . may be subject to substantial error." *Henderson*, 27 A.3d at 904 (quoting Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J.L. & Psychiatry 265, 274 (2004)); *see also Lawson*, 291 P.3d at 700–01. Moreover, as we

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context is *any* use of first-time in-court identifications. Of course, the brothers' failure to identify Mr. Garner in a photo line-up is something the court would consider as part of the screening process.

have previously acknowledged, "recognition accuracy [is] poorer when the perpetrator [holds] a weapon." *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002) (quoting Vaughn Tooley et al., *Facial Recognition: Weapon Effect and Attentional Focus*, 17 J. of Applied Soc. Psychology 845, 854 (1987)).

¶82 The passage of time between the crime and the confrontation was significant; the shooting occurred three full years before the trial. Research demonstrates that "the more time that passes, the greater the possibility that a witness' memory of a perpetrator will weaken." *Henderson*, 27 A.3d at 907.

¶83 The three brothers offered wildly varying descriptions of the shooter over the course of the investigation. Initially, one described him as a young, bald man with the word "north" tattooed on his head. Another described him as a Hispanic man with short black hair. Later, two of the brothers said the shooter had both a mustache and a soul patch. Each of the brothers also gave differing descriptions of the shooter's clothes—one said he wore a bandana, another said jeans and tennis shoes, and the third said a dark shirt. Of these various items of clothing, the only one that Mr. Garner was wearing that night was a dark shirt.

¶84 If the court had screened for reliability before trial, the only evidence it would have had that would go to the brothers' "level of certainty" would be the fact that none of the three was able to identify Mr. Garner in a photo array as the person who shot at them that night, notwithstanding their later courtroom assertions of certainty and that they would never forget Mr. Garner's face. In fact, one of the brothers specifically said that Mr. Garner had been in the bar but that he was not the shooter. The brothers had no certainty at

all before walking into the courtroom about their ability to identify Mr. Garner as the shooter.[4]

¶85 Given these facts, a pretrial screening for reliability quite likely would have led the court to conclude that the brothers' first-time in-court identifications lacked any likelihood of reliability and prevented a very high risk of the irreparable mistaken identification that due process protects against. Mr. Garner may or may not have committed the crime for which he was convicted. The process by which he was convicted was fundamentally unfair. Our Constitution requires more.

¶86 I respectfully dissent. I am authorized to state that JUSTICE HOOD and JUSTICE GABRIEL join in this dissent.

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[4] While the brothers' testimony from the stand reflected an extremely high level of certainty, certainty and accuracy do not have a high level of correlation. *See, e.g.*, Neil Brewer, et al.*, The Confidence-Accuracy Relationship in Eyewitness Identification*, 8 J. Experimental Psychol. Applied 44, 44–45 (2002) ("[T]he outcomes of empirical studies, reviews, and meta-analyses have converged on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak . . . ."). For that reason, many states have replaced the "certainty" factor in the *Biggers* analysis. *See, e.g.*, *State v. Herrera*, 902 A.2d 177, 186 (N.J. 2006); *Brodes v. State*, 614 S.E.2d 766, 771 (Ga. 2005).

APPENDIX B

COLORADO COURT OF APPEALS **2015COA175**

Court of Appeals No. 12CA2540
Adams County District Court No. 10CR1565
Honorable Mark D. Warner, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

James Joseph Garner,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division IV
Opinion by JUDGE GRAHAM
Román and Vogt*, JJ., concur

Announced December 17, 2015

Cynthia H. Coffman, Attorney General, Jillian J. Price, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Rachel C. Funez, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2015.

¶1 Defendant, James Joseph Garner, appeals the judgment of conviction entered on a jury verdict finding him guilty of two counts of attempted reckless manslaughter, one count of first degree assault, and one count of reckless second degree assault. We affirm.

I. Background

¶2 According to the People's evidence, C.A.D. and his brothers R.A.D. and A.A.D. were celebrating C.A.D.'s birthday at a bar. Defendant, his girlfriend Jaime Velasquez, and approximately four other individuals were also at the bar. During the night, a male from defendant's group approached C.A.D. and asked him whether he belonged to a gang. C.A.D. said he did not. Shortly after this encounter, C.A.D. left the bar to go home.

¶3 However, C.A.D. returned to the bar with his friend Gabriel Reyes to give his two brothers a ride home. Before the group left, R.A.D. went to the bathroom. On his way back from the bathroom, someone from defendant's group pushed R.A.D. into a table. During the ensuing chaos, defendant shot at R.A.D., grazing his wrist. Defendant then turned, shot, and injured both C.A.D. and A.A.D. After the shooting, defendant and his group fled through the back door. Defendant's glasses, spattered with his blood, were found on the floor of the bar. Also, a bar employee found Velasquez's cell phone containing pictures of defendant and Velasquez taken at the bar. These photos were used to locate and identify defendant.

¶4 Before trial, no witness was able to positively identify defendant from a photo lineup. However, at trial, all three brothers identified defendant as the

shooter. The defense argued at trial that defendant was not the shooter.

¶5 Defendant was found guilty and sentenced to thirty-two years in the custody of the Department of Corrections.

II. In-Court Identifications

¶6 Defendant first contends that his right to due process and the requirements of various rules of evidence were violated when the court allowed the brothers to make impermissibly suggestive in-court identifications after failing to make a pretrial identification. We disagree.

A. Standard of Review

¶7 Reviewing the constitutionality of in-court identification procedures is a mixed question of law and fact. We give deference to the trial court's finding of fact while conclusions of law are reviewed de novo. *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002).

¶8 We review the admission of first time, in-court show-up identifications by considering whether the identification is the product of constitutionally impermissible suggestive circumstances. *People v. Monroe*, 925 P.2d 767, 775 (Colo. 1996).

¶9 We review evidentiary rulings for an abuse of discretion. *People v. Clark*, 2015 COA 44, ¶ 14.

B. Applicable Law

¶10 An in-court identification, made by a witness who attended an illegal, pretrial lineup, is permissible only after there is a determination that the in-court identification is based upon a source independent of the improper lineup identification. This determination is made by the trial court, considering the totality of

the circumstances. *United States v. Wade*, 388 U.S. 218, 242 (1967); *Monroe*, 925 P.2d at 770. The harm sought to be precluded is the likelihood that the in-court identification is the product of the illegal lineup and not the observation of the defendant's wrongful act. *Monroe*, 925 P.2d at 774.

¶11 In considering the totality of the circumstances the trial court should review five factors to gauge the likelihood of misidentification and apply an exclusionary rule: (1) the opportunity of the witness to view the accused; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). This analysis deals with the exclusion of impermissible pretrial identifications and the in-court identifications that follow them. *United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986).

¶12 The majority of courts addressing this issue have determined that *Neil v. Biggers* does not apply to in-court identifications. *See Byrd v. State*, 25 A.3d 761, 765 (Del. 2011) (remedy for alleged suggestiveness is cross-examination and argument); *State v. King*, 934 A.2d 556, 559-60 (N.H. 2007) (fact finder can observe witness during in-court identification process and evaluate the reliability the identification); *State v. Lewis*, 609 S.E.2d 515, 517-18 (S.C. 2005) (remedy for alleged suggestiveness is cross-examination and argument).

¶13 Colorado has rejected a rule that one-on-one show-up identifications are per se violations of due process. *Monroe*, 925 P.2d at 773. Indeed, *People v. Monroe* made it clear that "[t]he exclusionary rule has not been extended to in-court identifications alleged to

be suggestive simply because of the typical trial setting." *Id.* at 775. It is the duty of the jury to assess the reliability of identification evidence unless there is a very substantial likelihood of misidentification. *Id.*

C. Analysis

¶14 The parties dispute whether this issue was properly preserved for appeal. Here, all three brothers made in-court identifications of defendant as the shooter. The first identification was made late in the afternoon, and the court adjourned roughly ten minutes after this identification. The following morning, before questioning continued, defendant objected to the identification as an impermissible one-on-one show-up identification. The court allowed the People to submit case law on the issue and took it under advisement. Defendant contemporaneously objected to the next two in-court identifications, and the court overruled both objections.

¶15 The People contend that defendant waived any objection because he failed to ask the trial court to make a final ruling regarding the identifications. However, it is unclear from the record whether the trial court did in fact make a final ruling on the objection.[1] Because the record is not clear as to the trial court's intentions in overruling the objection and defendant clearly contemporaneously objected to the second and third in-court identifications, we conclude that this issue was preserved.

1. Lack of Pretrial Identifications

¶16 During the police's investigation and at trial, the brothers gave varying descriptions of the shooter

[1] After the second and third objections, the trial court made no record of whether the issue was still under advisement.

and his clothing. The brothers' description of the events leading up to the shooting was also wide-ranging. As part of the investigation, the brothers had each been shown a photo lineup with the defendant's picture prior to trial; however, at no point were the brothers given the opportunity to identify the defendant in an in-person lineup. None of the witnesses was able to definitively identify defendant as the shooter from the photos. C.A.D. was able to positively identify defendant as being present at the bar the night of the shooting, but could not confirm that he was the shooter. A.A.D. and R.A.D. were not able to identify defendant from the photos as being present at the bar the night of the shooting.

2. Defendant's Presence at the Bar

¶17 While there were varying accounts and descriptions of the events on the night of the shooting, it was definitively established at trial that defendant was at the bar on the night of the shooting. First, defendant's DNA was found on a pair of glasses found at the crime scene. Second, a bar employee testified that she saw defendant and Jaime Velasquez taking pictures together on Velasquez's phone a short time before the shooting. That same employee found the phone on the floor following the shooting and, using the photos of defendant and Velasquez from the phone, the police created a bulletin to help locate defendant as a person of interest.

3. In-Court Identifications

¶18 At trial, each brother identified defendant as the shooter. Each identification took place while defendant was sitting at the defense table. Despite not having been able to identify defendant as the shooter from the photo lineup, all three of the brothers were

certain at trial that defendant was the individual who shot them. The following testimony by one of the brothers is typical of how the in-court identifications were made:

> [Prosecutor]: Now, Mr. [R.A.D.], do you see anybody here in the courtroom today who shot at you on that particular evening?
>
> [R.A.D.]: Can I point?
>
> [Prosecutor]: If you recognize somebody as the person who shot at you and the person who shot your brother [C.A.D.], yes, you can tell the Court or the jury where he's seated and tell them an item of clothing he is wearing.
>
> [R.A.D.]: Right now?
>
> [Prosecutor]: Yes.
>
> [R.A.D.]: He's got a shirt that's blue in color.
>
> [Prosecutor]: And can you tell the jury where he's seated? You can point to him if you need to.
>
> [R.A.D.]: Yeah. It's over there.
>
> [Prosecutor]: Let the record reflect the defendant's been identified . . . .

¶19 Although counsel contemporaneously objected to two of the identifications on the basis that they were one-on-one showups, there was no specific argument about what counsel contended were the constitutionally impermissible and suggestive circumstances other than the fact that these identifications occurred in the courtroom setting.

¶20 One-on-one confrontations are viewed with disfavor because they tend to be suggestive and

present greater risks of mistaken identification than a lineup. *People v. Walker*, 666 P.2d 113, 119 (Colo. 1983). But, one-on-one confrontations are not per se violations of due process. *Id.* An in-court identification is properly considered by the jury if it does not stem from a constitutionally defective identification procedure. *Monroe*, 925 P.2d at 771 (citing *Coleman v. Alabama*, 399 U.S. 1, 4-5 (1970)).

¶21 Here, counsel argued that the brothers had been unable to identify defendant as the shooter prior to trial. While the inability of a witness to identify the defendant in a photographic lineup is relevant and certainly grist for cross-examination, it does not, as a matter of law, preclude him from making an identification upon seeing the defendant in court. *People v. Horne*, 619 P.2d 53, 57 (Colo. 1980); *People v. Borrego*, 668 P.2d 21, 23 (Colo. App. 1983). Instead, the previous inability to identify goes to the weight of his identification testimony rather than its admissibility. *Horne*, 619 P.2d at 57; *see also United States v. Brown*, 200 F.3d 700, 707 (10th Cir. 1999) (victim's identification of the defendants at trial, while the product of a suggestive procedure, occurred in the presence of the jury and the victim was fully and fairly cross-examined about the process and his previous inability to positively identify the defendants); *United States v. Aigbevbolle*, 772 F.2d 652, 654 (10th Cir. 1985) (failure to identify the defendant from the photo array pretrial reflected merely on the weight of her in-court identification rather than its admissibility).

¶22 Defendant maintains that it would have been impossible for the brothers to all fail to identify defendant as the shooter in a photo lineup yet successfully identify him in court. That is certainly a fair argument. But as the cases hold, the previous

failure to identify defendant is an issue that goes to weight of the identification and not the admissibility of the identification. *Byrd*, 25 A.3d at 767.

> "When the initial identification is in court, . . . [t]he [fact finder] can observe the witness during the identification process and is able to evaluate the reliability of the initial identification." *Domina*, 784 F.2d at 1368 (citation omitted). In addition to affording the fact finder the opportunity to observe and assess the identification itself, an initial in-court identification is subject to immediate challenge through cross-examination. Not only is counsel present, but the jury has full opportunity to view the circumstances and assess evidentiary worth.

King, 934 A.2d at 560 (some citations omitted).

¶23 Here, while the three brothers' in-court identifications may have been the product of a suggestive procedure, we conclude that the trial court did not err in admitting the evidence.[2] The fact that the brothers could not identify defendant as the shooter using a photo lineup goes to the weight, not the admissibility of the in-court identifications. This was the first time since the shooting that the brothers had seen the defendant in person. At trial each brother was certain that defendant was the shooter. Each identification was done in the presence of the jury and the jurors were in the best position to assess the

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[2] We similarly reject the bare evidentiary arguments made under CRE 403, 602, and 701. Defendant did not make specific objections under those rules, and on the basis of our ruling that the identifications were proper, we see no abuse of discretion by the trial court under those evidentiary rules.

credibility of each brother. Indeed, defense counsel extensively cross-examined and impeached each of the brothers with their prior inconsistent statements and inability to identify defendant as the shooter from the photo lineup. Because the jury had the opportunity to give the in-court identifications whatever weight it deemed appropriate and defendant was given a full and fair opportunity to cross-examine each of the in-court identifications, we conclude that his right to due process was not violated and the trial court did not err in admitting the in-court identifications.

III. Prosecutorial Misconduct

¶24 Defendant next contends that numerous instances of prosecutorial misconduct violated his right to a fair trial. We agree that there was one potential instance of misconduct, but conclude it does not require reversal of defendant's conviction.

A. Standard of Review and Applicable Law

¶25 Prosecutors must "refrain from improper methods calculated to produce a wrong conviction." *Wilson v. People*, 743 P.2d 415, 418 (Colo. 1987) (citation omitted). In reviewing prosecutorial misconduct claims, "the reviewing court engages in a two-step analysis." *Wend v. People*, 235 P.3d 1089, 1096 (Colo. 2010). First, we "determine whether the prosecutor's questionable conduct was improper based on the totality of the circumstances." *Id.* In doing so, we "must evaluate the severity and frequency of misconduct, any curative measures taken by the trial court to alleviate the misconduct, and the likelihood that the misconduct constituted a material factor leading to the defendant's conviction." *People v. Hogan*, 114 P.3d 42, 55 (Colo. App. 2004). The determination of whether a prosecutor's words and

actions amount to misconduct is generally left to the sound discretion of the trial court. *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005); *People v. Rhea*, 2014 COA 60, ¶ 42. Second, we consider whether such actions warrant reversal according to the proper standard of review. *Wend*, 235 P.3d at 1096.

B. Preserved Contentions

¶26 Defendant presents three instances of alleged misconduct in which a contemporaneous objection was made. "As to preserved issues, the trial court's rulings on prosecutorial misconduct 'will not be disturbed by an appellate court in the absence of a gross abuse of discretion resulting in prejudice and a denial of justice.'" *Rhea*, ¶ 42 (quoting *People v. Moody*, 676 P.2d 691, 697 (Colo. 1984)). We review preserved errors for harmlessness. *Wend*, 235 P.3d at 1097.

1.

¶27 First, defendant contends the prosecutor misled the jury during his direct examination of the investigating detective. Specifically, defendant maintains the prosecutor misstated C.A.D.'s previous statements to police.

¶28 We perceive no error. Defendant objected when the prosecutor began asking about C.A.D.'s previous interview with the police. In response, the court instructed the prosecutor to ask questions using "what was said in the transcript specifically." Because the prosecutor asked questions quoting directly from C.A.D.'s previous interview we cannot conclude the prosecutor misled the jury and, thus, these questions were not improper.

2.

¶29 Next, defendant contends the prosecutor improperly asked the detective whether in-person lineups are more likely to produce an identification rather than a photo lineup without having given pretrial notice that the detective would offer expert testimony.

¶30 The following exchange took place:

> [Prosecutor]: Have you had the opportunity to have in-person lineups done?
>
> [Detective]: Yes.
>
> [Prosecutor]: And based on your training and experience are those a preferred method to a photographic lineup?
>
> [Defense counsel]: Objection. This witness is not endorsed as an expert, this is 702 material. We don't have an expert endorsement.
>
> . . .
>
> [Court]: Well, I think the question was what he preferred and the jury can only use it for that purpose what this particular witness prefers. I'll allow it, allow him to answer that question.
>
> . . .
>
> [Detective]: Yes, I prefer an in-person lineup.
>
> [Prosecutor]: Why is that?
>
> [Detective]: Because an individual during an in-person lineup can actually see more than what's in a photograph. They can see the height, the weight, the stature of the individual, the facial gestures, motion, things like that.

> [Prosecutor]: And based upon your personal experience, when you do an in-person lineup, are those – are you more likely to get an identification than in a photographic lineup?
>
> [Defense counsel]: Objection
>
> [Court]: Sustained

¶31 We discern no error. The court sustained defense counsel's objection and did not allow the detective to answer whether in-person lineups were more likely to produce identifications. The initial exchange went to the detective's personal preference and these questions were proper, because the detective, as a lay witness, had substantial experience conducting photo lineups.

3.

¶32 Last, defendant contends that the prosecutor improperly impeached defendant's ex-girlfriend, Irma Cisneros, with a pending felony charge, which the Adams County District Attorney was also prosecuting. We discern no error.

¶33 Here, outside the presence of the jury, defense counsel requested that the prosecution not be permitted to inquire about Cisneros' pending felony charge. Using the reasoning of *Davis v. Alaska*, 415 U.S. 308, 316 (1974), the court determined that the prosecution was able to inquire into the pending felony charge to show bias. The court limited questions that could be asked and did not allow the prosecution to bring up the specific charge of felony assault on a police officer. The prosecutor complied with the limiting instructions and on cross-examination[3] asked,

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[3] In addition, we note that it was defense counsel who first brought up the pending charges on direct examination.

"you are currently facing charges and being prosecuted by our office for other crimes?" Thus, we conclude it was proper to impeach Ms. Cisneros regarding her felony charge, and no misconduct occurred.

C. Unpreserved Errors

¶34 Defendant next presents roughly fifteen instances in which he contends the prosecutor committed reversible misconduct to which he did not contemporaneously object to. Because defendant's remaining misconduct claims were not preserved, our review is for plain error. *Wend*, 235 P.3d at 1097. Prosecutorial misconduct rarely constitutes plain error. *People v. Estes*, 2012 COA 41, ¶ 19. To warrant reversal, the "misconduct must be flagrant or glaring or tremendously improper, and it must so undermine the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction." *People v. Weinreich*, 98 P.3d 920, 924 (Colo. App. 2004), *aff'd*, 119 P.3d 1073 (Colo. 2005).

¶35 "Defense counsel's failure to object is a factor that may be considered in examining the impact of a prosecutor's argument and may 'demonstrate defense counsel's belief that the live argument, despite its appearance in a cold record, was not overly damaging.'" *People v. Strock*, 252 P.3d 1148, 1153 (Colo. App. 2010) (quoting *People v. Rodriguez*, 794 P.2d 965, 972 (Colo. 1990)).

1.

¶36 Defendant first contends the prosecutor improperly injected her personal knowledge of outside evidence and bolstered the brothers' credibility when she asked the detective, "And in your report did you include everything that they had said or just the

additional information." And, "When you wrote the report in that case, did you report everything that was said that day?" Defendant alleges that these questions implied that the brothers had been giving consistent statements when speaking to detectives. However, these questions merely established that the detective's second report after interviewing a witness would not contain information that the witness had previously given. We are not persuaded that this line of questioning injected the prosecutor's personal knowledge of outside evidence.

2.

¶37 Defendant next claims the prosecutor improperly asked questions on redirect of the bar manager that misstated his previous testimony. At issue was whether the bar manager had seen what the shooter was wearing. During the exchange the prosecutor asked:

> [Prosecutor]: Now, the person who ran past you who was firing shots, can you please tell the jury what shirt he was wearing?
>
> [Bar manager]: He had a black shirt on. It was a black shirt kind of like this with a red stripe on the sleeve on this side.

Later the prosecutor asked:

> [Prosecutor]: The person that you saw that ran by you with the black shirt and the red stripes on the sleeve, that was the person that you saw firing shots; right?
>
> [Bar manager]: No, I didn't see anybody shooting. As I was saying, the bar is high and I wasn't able to see, so I couldn't see their hands. I just saw him running past.

On redirect examination defendant contends the prosecutor committed misconduct by asking:

> [Prosecutor]: The person that you saw come through the bar shooting with the black shirt with the red stripes, that person was with the group with the women?
>
> [Bar manager]: You know, that he was – the one causing the problems, yes. If he was the one that fired, I don't know. But that they all left together.
>
> . . . .
>
> [Prosecutor]: And you never saw the face of the person who was firing shots, just the shirt; right?
>
> [Bar manager]: Yes.

¶38 We disagree that the prosecutor's questions on redirect were improper. The bar manager first testified that the shooter had a black shirt with red stripes. The bar manager later testified he did not see the shooter. Thus, the prosecutor's questions on redirect were proper given the inconsistent testimony and the varied answers already given.

3.

¶39 Defendant also contends the prosecutor, in multiple instances, improperly asked questions that implied a man described as "norteño pelón" had not previously been identified as the shooter. We conclude the prosecutor's questions were proper. Defendant fails to point out any conclusive statements the brothers made that specifically identified the shooter as the "norteño pelón." Thus any questions clarifying witnesses' statements were proper especially given the

fact that many of the witnesses had given varied descriptions of the shooter on different occasions.

¶40 Defendant also contends that the prosecutor improperly elicited testimony that interchanged the words "pelón" and "bald" from witness statements. However, we find no misconduct because it was clearly established that pelón means "bald" in Spanish.

4.

¶41 Additionally, defendant asserts the prosecutor asked the detective a question that mischaracterized Gabriel Reyes' testimony. The prosecutor asked, "Do you remember Gabriel Reyes testifying that a man came in moments after him with two guns and handed one to the defendant?" In his testimony Reyes used the word "shooter" instead of "defendant." However, defense counsel objected to the question as leading. The court sustained the objection stating, "This is closing argument stuff." Although the prosecutor misstated the previous testimony, we perceive no misconduct because the detective never answered the question. Further, even if it was improper to misstate this testimony, we conclude this was not so flagrant or glaring or tremendously improper so as to rise to the level of plain error. *See Rhea*, ¶ 71.

5.

¶42 Next, defendant states the prosecutor improperly attempted to discredit R.A.D.'s statements made to police the night of the shooting by implying an interpreter had not been present. We disagree that any misconduct occurred.

¶43 First, R.A.D. confirmed that the interview with detectives was given with an interpreter present. Second, the detective confirmed that C.A.D.'s wife was

helping translate. Third, the prosecutor only asked whether the detectives who interviewed R.A.D. were fluent in Spanish. Because the record does not support defendant's contention, we find no misconduct.

6.

¶44 Defendant further argues the prosecutor improperly implied in questioning R.A.D. and the detective that R.A.D. had never said which of the three men was the shooter. Defendant's own brief states this is technically true. Thus, we conclude the questions were proper.

7.

¶45 Moreover, defendant declares that the prosecutor elicited testimony that a bar employee never identified the man who came in after defendant's group as the shooter. Defendant fails to point out specifically where in the record the bar employee identified the man who walked into the bar later as the shooter. Instead, the bar employee testified that shooting started right after the man walked into the bar and thus she believed he was the shooter. However, she also testified that she never saw the shooter. Therefore these questions clarifying witness statements were proper.

8.

¶46 Defendant also avers that, in questioning the detective, the prosecutor improperly misstated previous statements that A.A.D. had made to him during an interview. Specifically, the detective testified that he did not recall A.A.D. telling him that the man in glasses was not the shooter. We conclude these questions were proper. First, the prosecutor did not improperly lead the detective to answer that

A.A.D. had not made the previous statements. Further, defense counsel impeached this testimony and elicited testimony from A.A.D. that he had in fact stated the man with glasses was not the shooter.

9.

¶47 Additionally, defendant says the prosecutor improperly pointed to C.A.D.'s and R.A.D.'s medical condition after the shooting to discredit their out-of-court identifications, but failed to bring this up again during other statements which supported the People's case. We conclude that the prosecutor's actions were proper. The prosecution was highlighting a reason, as testified to, why the brothers' statements might have been inconsistent. This is proper argument and no misconduct occurred. *See Domingo-Gomez*, 125 P.3d at 1048.

10.

¶48 Furthermore, defendant maintains that the prosecutor improperly encouraged the three brothers' in-court identifications of defendant. However, each of the three in-court identifications followed the pattern of the sample testimony we have included above and was the product of witnesses who had been sequestered. Each witness pointed to or identified the defendant as the shooter prior to ever being asked to identify defendant as the shooter. Thus, we disagree that the prosecutor improperly encouraged the in-court identifications.

11.

¶49 Defendant contends the prosecutor improperly bolstered the brothers' in-court identifications by using a hypothetical in closing argument. The prosecutor proposed that jury members would have a

difficult time remembering what the other prosecutor was wearing during trial but would easily recognize her during a later face-to-face encounter. She used this comparison to argue that the brothers may not have recognized the photo of defendant but could have easily recognized him as the shooter during the face-to-face encounter.

¶50 Defendant claims that the prosecutor had no good faith basis to argue that the brothers would be able to identify defendant as the shooter three years after the shooting.

¶51 We discern no misconduct. During closing argument, counsel may employ rhetorical devices, engage in oratorical embellishment, and employ metaphorical nuances, insofar as they do not induce the jury to determine guilt based on passion or irrelevant issues. *People v. Allee*, 77 P.3d 831, 837 (Colo. App. 2003). During closing argument, prosecutors have wide latitude to address the strength and significance of evidence, as well as any reasonable inferences that may be drawn from the evidence. *Domingo-Gomez*, 125 P.3d at 1048.

¶52 Rather than improperly misleading the jury the prosecutor may have been demonstrating the point that it can be much easier to recognize a person one has met or seen in the past as opposed to describing what that person was wearing at the time of the interaction. Further, it is a reasonable inference that the brothers would not be able to identify defendant from the photos yet would be able to identify him in court. *See, e.g.*, *Borrego*, 668 P.2d at 23; *see also United States v. Toney*, 440 F.2d 590, 591 (6th Cir. 1971).

¶53 Next, defendant contends that the prosecutor improperly implied through questioning the detective that, if the brothers had been asked to specifically identify the shooter from the lineup rather than being asked it they simply recognized anyone, they would have been able to identify defendant as the shooter.

¶54 We disagree that the prosecutor committed misconduct. Throughout the trial it was clearly established that the brothers were unable to identify defendant as the shooter in any photo lineup. Defense counsel also established that C.A.D. was the only witness who identified defendant as being present the night of the shooting. Thus, we cannot conclude that the prosecutor implied that the brothers would have identified defendant as the shooter if they had been asked that specific question.

13.

¶55 Defendant also claims that the prosecutor improperly made herself a witness by placing words into witnesses' mouths. Because we have concluded that the above contentions of misstating witness testimony did not constitute prosecutorial misconduct, we also conclude that the prosecutor did not improperly make herself a witness.

14.

¶56 As well, defendant insists that the prosecutor improperly used the word lie during rebuttal closing argument when she stated:

> Is it possible that all three of these guys come in here and lie to you and tell you that they're 100 percent sure he's the shooter and that they're all three willing to send an innocent person to get convicted of this? I would submit

> to you that its [sic] not even possible, but it's certainly not reasonable.

¶57 Prosecutorial use of the word "lie" and the various forms of "lie" are improper. *Wend*, 235 P.3d at 1096. In this instance the prosecutor used the word "lie" when hypothecating about the veracity of the three brothers as witnesses, and thus, we will assume it was improper.[4]

¶58 In evaluating a prosecutor's argument under the plain error standard, we must "focus on the cumulative effect of the prosecutor's statements using factors including the exact language used, the nature of the misconduct, the degree of prejudice associated with the misconduct, the surrounding context, and the strength of the other evidence of guilt." *Id.* at 1098; *see People v. McMinn*, 2013 COA 94, ¶ 60.

¶59 In *Wend*, the prosecutor, during both opening and closing arguments, repeatedly used the words "lie," "lies," and "liar" to describe the defendant's various stories. Here, the prosecutor used the word "lie" one time in an otherwise proper closing argument to question the motives not of the defendant but of material witnesses. Further, she did not suggest that they were lying; rather, she was arguing that they had no motive to lie. Moreover, the defendant did not object to this statement at trial, and it may not have stood out to the jury. Viewing the comments in context and in light of all of the evidence, we conclude that the prosecutor's single use of the word "lie," even if inappropriate, was not so flagrantly, glaringly, or tremendously improper as to rise to the level of plain

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[4] We give the benefit of the doubt to defendant, recognizing that simply using the word "lie" is not improper unless it is used to characterize testimony.

error. *See Domingo-Gomez*, 125 P.3d at 1051-52; *People v. Herrera*, 1 P.3d 234, 240-41 (Colo. App. 1999) (prosecutor's comment that the defendant was lying was improper but did not constitute plain error).

15.

¶60 Finally, defendant contends that the prosecutor improperly implied that Irma Cisneros may have been present at the bar during the shooting despite knowing this was false. During direct examination, both A.A.D. and C.A.D. spontaneously identified Cisneros, who was sitting in the courtroom, as having been present the night of the shooting. However, Cisneros later testified that she and defendant had previously broken up and she was not with defendant at the bar. She further testified that the woman who was with defendant in the photos at the bar had caused the break-up. The prosecutor cross-examined her on this issue and inquired as to why she had been present throughout the trial. The investigating detective also testified that there was no information confirming or denying Cisneros's presence at the bar.

¶61 We conclude the prosecutor's actions were not improper. Contrary to defendant's contention, nothing in the record offers definitive proof that Cisneros was not present at the bar. Although she denied having been at the bar, two witnesses spontaneously identified her as having been present at the bar and she was present in the courtroom throughout the duration of the trial supporting defendant. Thus, it was proper for the prosecutor to explore this possibility.

IV. Exhibit 25

¶62 Defendant next contends that the trial court committed reversible error in admitting Exhibit 25, a report containing the data extracted from Velasquez's cell phone found at the crime scene. Defendant argues that the data included text messages and photos that were irrelevant and unfairly prejudicial. We disagree.

A. Standard of Review and Applicable Law

¶63 A trial court's evidentiary ruling is reviewed for an abuse of discretion. *Kaufman v. People*, 202 P.3d 542, 553 (Colo. 2009). Trial courts have considerable discretion in determining the relevance, probative value, prejudicial impact, and ultimate admissibility of evidence. *People v. Ibarra*, 849 P.2d 33, 38 (Colo. 1993). We will not disturb a trial court's evidentiary ruling unless it is manifestly arbitrary, unreasonable, unfair, or based on a misapprehension of the law. *People v. Carter*, 2015 COA 24M, ¶ 27; *People v. Chavez*, 190 P.3d 760, 765 (Colo. App. 2007).

¶64 "Evidence which is not relevant is not admissible." CRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." CRE 401. Relevant evidence may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. CRE 403. "'All effective evidence is prejudicial in the sense that it is damaging to the party against whom it is being offered.'" *People v. Cardenas*, 2014 COA 35, ¶ 52 (quoting *People v. Fasy*, 813 P.2d 797, 800 (Colo. App. 1991)). In assessing the admissibility of evidence over a party's CRE 403 objection, "we must assume the maximum probative

value of the evidence and the minimum prejudice reasonably to be expected." *People v. Curtis*, 2014 COA 100, ¶ 49.

B. Analysis

¶65 Here, the cell phone data admitted contained a number of photos from the phone as well as one text message. The data on the phone was relevant to the identification of defendant and the other individuals present at the shooting. The collection of photos included pictures of defendant and Velasquez taken at the bar the night of the shooting. The bar employee who found the phone looked through it with police to see if pictures taken that night would help police identify individuals involved in the shooting. The judge admitted all photos from the phone, even the ones that might have appeared to have been taken on a different date, because the precise date of each photo was not known. Because the photos are relevant to the issue of identification we cannot conclude that the trial court abused its discretion in admitting them into evidence.

¶66 Defendant further contends that, even if relevant, the probative value of the data was substantially outweighed by the danger of unfair prejudice. Specifically, defendant alleges that the photos of individuals making hand gestures were unfairly prejudicial because the jury could infer gang affiliations from the gestures. The court determined that the photos were not indicative of gang activity but that it would reconsider its ruling if there was testimony linking the hand gestures in the photos to gang affiliations. However, this testimony was never elicited and the court had no need to address the issue again. This speculative inference is not prejudicial

enough to conclude that the trial court abused its discretion in admitting the photos.

¶67 Finally, defendant alleges the text message included in the admitted report was unfairly prejudicial. Specifically, the text message sent from the phone on page eight of the report which stated "Na Wre @ cass' hm!es cr!b.. Bt h!s G!tchs mak!nG dum Statements shes Gun Get smashed" was unfairly prejudicial because of its violent nature. This bare and unintelligible text message was not interpreted for the jury nor was it tied to any evidence in the case. Therefore, it was irrelevant; but we find its admission was harmless. Moreover, the court addressed the potentially prejudicial text messages when it excluded page seven of the report that contained text messages forwarded from the Limon Correctional Facility. The probative value of the report was not substantially outweighed by the danger of unfair prejudice. Thus we cannot conclude that the trial court abused its discretion in admitting Exhibit 25.

V. Cumulative Error

¶68 Finally, defendant contends that his conviction should be reversed due to cumulative error. We disagree.

¶69 Although an appellate court may find that individual errors do not require reversal, numerous irregularities may in the aggregate show the absence of a fair trial. *People v. Jenkins*, 83 P.3d 1122, 1130 (Colo. App. 2003). However, cumulative error applies only if the trial court committed numerous errors. A defendant's mere assertions of error are insufficient to warrant reversal. *People v. Blackwell*, 251 P.3d 468, 477 (Colo. App. 2010).

¶70 Here, we have rejected all but a portion of one of defendant's claims of error as harmless. The remaining asserted errors did not singly or cumulatively deny defendant a fair trial. He thus is not entitled to reversal based on a theory of cumulative error.

VI. Conclusion

¶71 The judgment is affirmed.

JUDGE ROMÁN and JUDGE VOGT concur.