

No. 20-5923

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IN THE  
*Supreme Court of the United States*

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CHARLES DON FLORES,  
*Petitioner,*

*v.*

TEXAS,  
*Respondent.*

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On Petition for a Writ of Certiorari  
To the Texas Court of Criminal Appeals

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BRIEF OF THE INNOCENCE PROJECT  
*AS AMICUS CURIAE*  
IN SUPPORT OF PETITIONER

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## INTERESTS OF AMICUS CURIAE<sup>1</sup>

The Innocence Project, Inc. is a nonprofit organization dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. The Innocence Project also seeks to prevent future wrongful convictions by researching their causes and pursuing legal, legislative, and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration of 375 individuals by post-conviction DNA testing—21 of whom had been sentenced to death.

The Innocence Project's efforts are particularly critical in the area of eyewitness evidence. Eyewitness misidentification has played a role in 69% of wrongful convictions identified through post-conviction DNA testing nationally—making it the leading contributing cause of these wrongful convictions. *See DNA Exonerations in the United States*, Innocence Project, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states> (last visited Oct. 10, 2020). This

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of *amicus curiae's* intention to file this brief at least 10 days prior to the due date. Counsel of record for petitioner and respondent have consented to the filing of this brief. No party authored this brief in whole or in part, no fee has been paid or will be paid for preparing this brief, and no person or entity other than *amicus curiae* and its counsel made any monetary contribution to the preparation or submission of this brief.

pattern holds true in Texas: of 69 DNA exonerations in the state, 50 involved eyewitness misidentification. *See* Exoneration Detail List, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>. Therefore, the Innocence Project has a compelling interest in ensuring that courts considering eyewitness evidence are informed by accurate scientific research, and that criminal trials reach accurate determinations of guilt and promote justice. Its experience with this issue, and the lessons learned from the DNA exoneration cases, can aid the Court in consideration of the question presented here.

### **SUMMARY OF ARGUMENT**

Eyewitness identification evidence is uniquely compelling to a jury but can be highly unreliable. As such, it has played an outsized role in wrongful convictions. Robust scientific research over the last two decades has identified a number of specific factors that erode the reliability of eyewitness evidence. A troubling number of these factors are present in this case, casting grave doubt on Jill Barganier’s eyewitness identification of Charles Flores, which she made for the first and only time in the suggestive courtroom environment, more than a year after the crime. The use of hypnosis—a discredited and highly suggestive method of eliciting identification evidence—compounded these doubts.

First, Barganier’s ability to form a strong memory of what she saw outside her house was necessarily limited by critical factors such as poor lighting, significant

distance—all the way across her house and past the driveway—and the limited time she had to observe the incident. Second, the record establishes that, by the time she testified at trial, Barganier had been exposed to contaminating information—including a photograph of Flores in the newspaper—that discernibly influenced and changed her account of what she had seen. Third, the law enforcement officers investigating this case used a number of highly suggestive identification practices, including hypnosis, that contaminate eyewitness memory. These factors interacted with each other to significantly erode the reliability of Flores' identification—a situation made all the more troubling because Barganier was the sole eyewitness placing Flores near the crime scene.

For all these reasons, this Court should grant certiorari and address the fundamental lack of reliability of hypnotically enhanced eyewitness identifications.

## **ARGUMENT**

### **THE USE OF HYPNOSIS, A HIGHLY SUGGESTIVE AND DISCREDITED METHOD OF SOLICITING IDENTIFICATION EVIDENCE, COMPOUNDED THE ALREADY-SEVERE RISK OF MISIDENTIFICATION IN THIS CASE.**

#### **A. Poor Encoding Conditions**

The conditions under which Barganier supposedly observed the incident weakened her ability to make an accurate identification.

The quality and reliability of an eyewitness identification “critically depends on the conditions in which the criminal was observed,” also known as the “encoding” conditions. Marloes de Jong et al., *Familiar Face Recognition as a Function of Distance and Illumination: A Practical Tool for Use in the Courtroom*, 11 *Psychol., Crime & L.* 87, 87 (2005); Ryan J. Fitzgerald et al., *Change Detection Inflates Confidence on a Subsequent Recognition Task*, 19 *Memory* 879, 879-80 (2011). The ability to accurately observe visual details is profoundly affected by encoding conditions, which include lighting, distance, and duration of observation. For that reason, the circumstances under which an eyewitness observes the perpetrator of a crime heavily influences the accuracy of her identifications.

Memory does not function like “a videotape, accurately and thoroughly capturing and reproducing” an image—rather, “[m]emory is . . . a constructive, dynamic” process. *Commonwealth v. Gomes*, 22 N.E.3d 897, 911 (Mass. 2015) (quotation marks omitted). In other words, the fidelity of our memory may be compromised by many factors, including encoding conditions. Without realizing it, we regularly perceive events in a biased manner and subsequently forget, reconstruct, and distort the things we believe to be true. National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 60 (2014) (hereinafter “*Identifying the Culprit*”); see also *State v. Henderson*, 27 A.3d 872, 894-95 (N.J. 2011) (“[R]etained memory can be unknowingly contaminated by post-event information.” (quotation marks omitted)).

The encoding conditions during Barganier's purported observation of Flores were particularly poor. Barganier was inside her home before sunrise when she saw two men in her neighbor's driveway on the other side of her house, past a grassy area. There were no streetlights and she had no reason to pay any particular attention to the men. Scientific studies have established "a systematic decrease of [facial] recognition performance" with decreasing illumination. de Jong et al., *Familiar Face Recognition as a Function of Distance and Illumination*, 11 Psychol., Crime & L. at 87. And researchers have found a "steep drop" in facial recognition of *familiar* faces beginning at a distance of forty feet. *Id.* at 95. Indeed, those same researchers concluded that low light and distance were each sufficient to render a recognition unreliable, even for familiar faces. *Id.* Barganier's observation took place in low light, and at a distance that would strain an individual's ability to identify a familiar face—much less an unfamiliar one.

In addition, Barganier's focus was not on the men's faces, further weakening her ability to make an identification. Instead, Barganier's first statement to the police focused heavily on the beer bottle that the driver was holding. Scientific literature confirms that an eyewitness's focus on unusual objects decreases the accuracy of image details falling outside that focus. Because memory is a finite resource, focusing on an unusual car or an object being held by a person results in less accurate memory of visual features of everything else. Gary L. Wells & Deah S. Quinlivan, *Suggestive*

*Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & Hum. Behav. 1, 10-11 (2008); Kerri L. Pickel, *Remembering and Identifying Menacing Perpetrators: Exposure to Violence and the Weapon Focus Effect*, in 2 *The Handbook of Eyewitness Psychology: Memory for People* 339, 353-54 (R.C.L. Lindsay et al. eds., 2007).

The fact that Barganier observed two men—and only for a short time—also limited her ability to form an accurate memory. Memory for an unfamiliar face is severely reduced if it is seen alongside a second person. *See, e.g.*, Ahmed M. Megreya & A. Mike Burton, *Recognising Faces Seen Alone or With Others: When Two Heads Are Worse Than One*, 20 *Applied Cognitive Psychol.* 957 (2006). And observations of short duration—as Barganier's was—also tend to result in less accurate identifications. Brian H. Bornstein et al., *Effects of Exposure Time and Cognitive Operations on Facial Identification Accuracy: A Meta-Analysis of Two Variables Associated with Initial Memory Strength*, 18 *Psychol., Crime & L.* 473 (2012).

In combination, these factors make it highly likely that Barganier's initial encoding was too weak to produce a reliable identification—as was the case in a large majority of the first 250 DNA exonerations that involved eyewitness misidentifications. *See* Brandon L. Garrett, *Convicting the Innocent* 70 (2011).

## **B. Indications of Memory Contamination by External Information**

Poor encoding conditions not only render one's original memory weak, but also have cascading effects through the entire process of storing and retrieving that memory, as they are especially susceptible to contamination.

Over thirteen months passed between when Barganier purportedly saw Flores and when she identified him for the first and only time. The passage of time alone would cast significant doubt on her identification, as memories fade with time and do not improve. *See Henderson*, 27 A.3d at 907; *accord Identifying the Culprit* at 65; *see also* Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 148 (2008).

Even more significantly, over the course of those thirteen months, Barganier was exposed to a significant amount of contaminating information. Not only was she subjected to a number of suggestive police practices (described in detail below), she also saw Flores' photograph in the news between her purported observation of him and her identification.

Indeed, there is evidence that Barganier's memory was, in fact, contaminated. For example, her initial description of the passenger did not match Flores—she first said that the passenger was a white male with

longer, darker hair, while Flores was a Latinx male with closely cropped hair. Unsurprisingly, studies have shown that the greater the mismatch between a witness's description and the person they ultimately identify, the greater the likelihood of an inaccurate identification. See Christian A. Meissner et al., *A Theoretical Review and Meta-Analysis of the Description-Identification Relationship in Memory for Faces*, 20 Eur. J. Cognitive Psychol. 414, 431, 435 (2008). A study of 250 DNA-based exonerations showed that over 60% of the cases involving eyewitness misidentifications involved a substantial disparity between the eyewitness's description and the defendant, highlighting the real risk of evolving, potentially contaminated descriptions. Garrett, *Convicting the Innocent* at 68-69.

The contamination of Barganier's memory is also apparent in her evolving description of the perpetrators' car. A few hours after the crime, when her memory was at its freshest, she told the police that the car she saw outside her house was yellow. By the time she testified at trial, she told the jury that it "was like purple and pink and divided by like waves"—echoing the description of the car that had appeared in a police bulletin and the Dallas Morning News. This dramatic shift demonstrates Barganier's incorporation of outside details into her own memory.

### **C. Suggestive Identification Proceedings, Compounded by a Police-Led Hypnosis Session**

Suggestive identification procedures have the power to influence what an eyewitness believes she has seen. And poorly encoded memories are especially susceptible to deterioration and revision under such procedures. *See Identifying the Culprit* at 63; *see also* Thomas D. Albright, *Why Eyewitnesses Fail*, 114 Proc. Nat'l Acad. Sci. 7758, 7761 (2017). A procedure that pressures an eyewitness to make an identification or cues the eyewitness as to the identity of the suspect is likely to influence the outcome of the procedure and therefore produce unreliable evidence. Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science*, 33 L. & Hum. Behav. at 6.

Recognizing the grave risk posted by suggestive identification procedures, state law enforcement systems and courts around the country have embraced scientifically sound approaches to eliciting eyewitness evidence. The Texas Legislature, for example, has required that law enforcement agencies adopt standard identification procedures, including blind administration where practicable, as well as the use of fairly composed photo arrays. *See* Tex. Code Crim. Proc. art. 38.20; Law Enf. Mgmt. Inst. of Tex., Model Policy on Eyewitness Identification, [http://www.lemionline.org/resources/documents/ewid\\_final.pdf](http://www.lemionline.org/resources/documents/ewid_final.pdf) (hereinafter "Texas Model Policy"). The identification procedures used in this case deviated sharply from these scientifically supported

protocols, significantly elevating the risk of misidentification. The procedures' major defects are addressed in turn below.

### 1. Hypnosis

The hypnosis session to which Barganier was subjected just before seeing pictures of Flores created a serious risk of memory contamination and magnified the contaminating impact of the flawed identification procedures that followed. Hypnosis as a memory retrieval tool is deeply prone to suggestion and, therefore, error. Since Flores' trial in 1999, it has been thoroughly discredited by empirical research as a pretrial procedure and abandoned by at least 27 jurisdictions as untrustworthy. Transcript of Record (Vol. 6) at 117, *Ex parte Charles Don Flores* (2017) (Writ No. W98-02133-N).

Critically, attempts to use hypnosis as a memory retrieval tool are based on the misconception that memory works like a video recorder that can be played back. In reality, a hypnotized witness can be led to believe that he or she has accessed a memory that in fact never existed or is contaminated with false details. See Scott Lilienfeld et al., *Myth #12: Hypnosis is Useful for Retrieving Memories of Forgotten Events*, in *50 Great Myths of Popular Psychology: Shattering Widespread Myths and Misconceptions About Human Behavior* 69 (2d ed. 2010); Jeffrey S. Neuschatz et al., *Hypnosis and Memory Illusions: An Investigation Using the Deese/Roediger and McDermott Paradigm*, 22 *Imagination, Cognition, & Personality* 3 (2003); Elisa

Krackow et al., *The Death of Princess Diana: The Effects of Memory Enhancement Procedures on Flashbulb Memories*, 25 *Imagination, Cognition, & Personality* 197 (2006). For example, merely suggesting answers in questions can lead subjects to come to “remember” things that they did not actually see. See, e.g., Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 *Learning & Memory* 361 (2005). This misunderstanding, combined with the witness’s desire to help the investigation and the pressure created by the proceedings to make an identification, renders post-hypnosis eyewitness testimony highly unreliable. Indeed, such testimony has played a role in a number of wrongful convictions. See, e.g., Frederick Clay, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5187>; Lesly Jean, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3324>.

Moreover, during hypnosis, the witness is typically asked to imagine things, which in turn increases the risk that the witness will incorporate and believe imagined details to be part of their true memory. This process also artificially inflates the confidence level of the witness, because false memories can be as vivid as real memories, and there is no easy way to distinguish between the two. See Steven J. Lynn et al., *Hypnosis and Memory in the Forensic Context*, Wiley Encyclopedia of Forensic Science (2015); Alan Scoboria et al., *Effects of Misleading Questions and Hypnotic Memory Suggestion on Memory Reports: A Signal Detection*

*Analysis*, 54 Int'l J. Clinical & Experimental Hypnosis 340 (2006); Alan Scoboria et al., *Immediate and Persistent Effects of Misleading Questions and Hypnosis on Memory Reports*, 8 J. Experimental Psychol. 26 (2002); *Identifying the Culprit* at 63.

The hypnosis session conducted by law enforcement rendered Barganier highly suggestible as a witness. Most concerningly, the police officer who conducted the hypnosis session asked Barganier questions that included details about Flores' appearance that were not part of Barganier's original description of the passenger or her responses to questions during the hypnosis session. For example, the officer asked, "[d]oes [the passenger] have [his hair] neatly cut or is it trimmed?" (like Flores), even after Barganier had already described his hair as "[a] lot like his friend's," "[d]ark, long," and "dirty." In sum, this procedure not only falsely created the impression that hypnosis would enhance Barganier's ability to recall forgotten events, but also supplied her with a critical piece of information that contributed to her evolving memory of the incident and eventually steered her towards Flores.

## **2. Use of Multiple Proceedings**

The suggestibility created by the hypnosis session compounded severe problems with the other identification procedures that were then used and were themselves unduly suggestive.

One such problem was Barganier's repeated exposure to Flores by both law enforcement and other

sources. Research has shown that exposing an eyewitness to the same suspect multiple times over the course of an investigation confuses the witness and adversely affects the reliability of her identification. This is because people often have difficulty discerning the source of their memory. When a witness has viewed a suspect in contexts other than the incident that he or she is trying to remember, the witness may not be able to determine where her familiarity comes from—or, worse, may mistakenly believe that her familiarity comes from the incident, rather than one of the later viewings. *State v. Lawson*, 291 P.3d 673, 686-87 (Or. 2012); *Henderson*, 27 A.3d at 900. Witnesses who have been exposed to an innocent suspect’s mugshot, for example, are likely to misidentify the suspect as the perpetrator. Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 L. & Hum. Behav. 287 (2006).

Unsurprisingly, this risk increases when the suspect is the only one who appears in multiple proceedings. *Lawson*, 291 P.3d at 708-09; *Henderson*, 27 A.3d at 900-01; Deffenbacher, *Mugshot Exposure Effects*, 30 L. & Hum. Behav. at 299; *see also* Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. Applied Res. Memory & Cognition 284, 285 (2016).

Multiple identification procedures or exposures to the suspect appear with alarming regularity in the DNA exoneration cases. Garrett, *Convicting the Innocent* at 59. In response to this fact and the research cited above,

the Texas Model Policy on eyewitness identifications discourages the use of “multiple identification procedures in which the same witness views the same suspect more than once.” Texas Model Policy at 4.

Here, Barganier was subjected to multiple photographic identification procedures before trial. In her first procedure, she was unable to identify anyone—but because Texas failed to preserve the record of most of the initial lineups, it is unclear whether she was shown Flores’ “mugshot” at that time. After she was hypnotized, she was shown a photographic lineup that included a recent mugshot of Flores, along with five other Latinx men—even though she had never described the passenger as a Latinx male. Once again, Barganier did not identify anyone in the lineup as the passenger. Nonetheless, that mugshot was distributed to the media and appeared in the Dallas Morning News several times, where Barganier saw it at least once. Thus once Barganier made her first and only identification of Flores in court, she had been exposed to Flores at least twice already and potentially multiple other times, further eroding the reliability of that in-court identification and exacerbating the contaminating influence of the hypnosis procedure.

### **3. Non-Blind Identification Procedures**

It is well established that non-blind administration of identification procedures erodes the reliability of any resulting identifications. Scientific research has consistently shown that test subjects are influenced by the expectations of those who perform the tests, and

that witnesses are susceptible to unspoken, often subconscious cues from law enforcement officers during identification proceedings. See, e.g., Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator-Witness Contact on Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1110 (2004). A prominent meta-analysis combined the findings of 345 previous studies on blind administration and concluded that in the absence of a blind administrator, individuals typically tailor their responses to meet the expectations of the administrator and that “[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero.” Robert Rosenthal & Donald B. Rubin, *Interpersonal Expectancy Effects: The First 345 Studies*, 3 Behav. & Brain Sci. 377, 377 (1978).

Blind administrators are especially important for eyewitness identification procedures, as eyewitnesses’ memories are easily contaminated by outside influences. The most likely source of such influence is an identification procedure administrator who is aware of the suspect’s identity, as they may lead the witness (often unintentionally) to choose a particular suspect or provide post-identification feedback to the witness, thus artificially affecting the witness’s confidence in his or her selection and recollection of the original viewing conditions. See L. Garrioch & C.A. Brimacombe, *Lineup Administrators’ Expectations: Their Impact on Eyewitness Confidence*, 25 L. & Hum. Behav. 299 (2001); Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. Applied Psychol. 940 (1999).

Relying on this research, law enforcement agencies across the country have mandated the use of blind administration. The Texas Model Policy, for example, states that, “[b]ecause witnesses may be influenced, however unintentionally, by cues from the person administering the procedure, a blind administrator should be used. This can be achieved through the use of a blind procedure or a blinded photo array procedure.” Texas Model Policy at 3. And Article 38.20 of the Texas Code of Criminal Procedure mandates that law enforcement agencies either adopt the model policy, or develop a policy that requires the use, where practicable, of a blind or blinded administrator in a photographic or live lineup identification procedure. Tex. Code Crim. Proc. Art. 38.20 § (3)(c)(2)(E), (F).

In this case, the officer in charge of the investigation conducted every photographic lineup. For the reasons described above, this created a significant risk that the officer drew Barganier’s focus to Flores during those procedures. This not only made the lineups unduly suggestive, but also compounded the improper influence of the hypnosis session and undermined the reliability of Barganier’s ultimate in-court identification by increasing the likelihood of misidentification.

#### **4. Biased Composition of Photographic Lineup**

As researchers and courts around the country have noted, the way a photographic lineup is constructed can significantly affect the reliability of an identification: biased lineups are more likely to produce

misidentifications, whereas a properly constructed lineup will test a witness's actual memory, decrease the chance that a witness is simply guessing, and minimize the risk of contaminating the witness's memory. See *Henderson*, 27 A.3d at 898. As the court in *Henderson* noted, "mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup." *Id.* at 798-98 (citing Roy S. Malpass et al., *Lineup Construction and Lineup Fairness*, in 2 *The Handbook of Eyewitness Psychology: Memory for People* 155, 156 (R.C.L. Lindsay et al. eds., 2007)). When a suspect's photograph stands out in some way from the rest of the lineup, the procedure is effectively guiding the eyewitness towards that suspect. *Lawson*, 291 P.3d at 706. Unsurprisingly, over 33% of the first 250 DNA exonerations that featured eyewitness testimony involved biased lineup procedures. Garrett, *Convicting the Innocent* at 55.

Here, Flores' mugshot was the only picture out of the six photographs that did not have a white strip covering the bottom portion, making it stand out among the other photographs. Meanwhile, despite the fact that Barganier described the passenger as a white male with long hair, all six photographs were of Latinx individuals with short, cropped hair. *Id.* Both of these flaws in the photographic lineup (conducted after Barganier's hypnosis session at which she was provided with information about the suspect's "neatly cut" or "trimmed" hair) guided her towards the suspect—Flores—that the police already had in mind. Notably, Texas law now requires law enforcement agencies to

develop or adopt procedures ensuring that photographs or participants in identification proceedings “are consistent in appearance with the description of the alleged perpetrator” and “do not make the suspect noticeably stand out.” Tex. Code Crim. Proc. Art. 38.20 § (3)(c)(2)(A).

The fact that Barganier failed to identify Flores despite these suggestive procedures is a powerful indicator of Flores’ innocence. As researchers have explained, “non-identifications are not merely ‘failures’ to identify the suspect, but rather carry important information whose value should not be overlooked.” Steven Clark et al., *Regularities in Eyewitness Identification*, 32 L. & Hum. Behav. 187, 211 (2008). Indeed, non-identifications have been shown to be more probative of innocence than identifications are of guilt. R.C.L. Lindsay & Gary L. Wells, *What Price Justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy*, 4 L. & Hum. Behav. 303 (1980). Simply put, the fact that Barganier failed to identify Flores multiple times, despite undergoing highly suggestive identification procedures, including a hypnosis session, is strong evidence that her in-court identification of Flores was mistaken.

### **5. Suggestive In-Court Identification Procedure**

The first and only identification of Flores as one of two men observed near the crime scene took place at trial. For all the reasons discussed above, this identification was unreliable because it was made in the

aftermath of weak encoding conditions, suggestive identification procedures, and exposure to contaminating information. Even apart from that, however, in-court identifications are patently suggestive and unreliable, particularly where the defendant was never previously identified in a properly administered identification procedure.

In-court identifications are suggestive and unreliable for a number of reasons. First, such identification procedures present the eyewitness with only one obvious choice. Second, memory quality tends to dissipate significantly over time, and an in-court identification typically occurs months, sometimes years, after the witnessed event—during which time the witness may well have been exposed to contaminating information. Third, there is significant pressure for a witness to identify the “right” person—i.e., the defendant—in an in-court identification procedure. The “pressure[] to help solve a heinous crime,” the witness’s “eager[ness] to be of assistance,” and a sense of “duty” all make in-court identifications especially unreliable. *United States v. Greene*, 704 F.3d 298, 306 (4th Cir. 2013) (quoting *Smith v. Paderick*, 519 F.2d 70, 75 (4th Cir. 1975)). And fourth, there is no possibility of blind administration at an in-court identification, and witnesses are likely to “regard the defendant’s prosecution as confirmation that the defendant is the ‘right’ person and, as a result, may develop an artificially inflated level of confidence in their in-court identification.” *Commonwealth v. Collins*, 21 N.E.3d 528, 534 (Mass. 2014).

As the Connecticut Supreme Court has explained, it is difficult 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, 822-23 (Conn. 2016), *cert. denied*, 137 S. Ct. 2263 (2017). “If this procedure is not suggestive, then *no* procedure is suggestive.” *Id.*

While it is certainly possible for an in-court identification to stem from an actual memory, in-court identifications are more often a result of an error of familiarity because the suspect’s face has been shown in other contexts, such as media coverage or in previous lineup procedures or “simple deduction on the part of the witness,” because the witness could tell who the defendant is in the courtroom. Steblay & Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. Applied Res. Memory & Cognition at 287; *see also Commonwealth v. Crayton*, 21 N.E.3d 157, 166-67 (Mass. 2014). Researchers have therefore cautioned that “an attempt by an eyewitness to identify the perpetrator in court based on ‘memory of the crime’ should be viewed with skepticism.” Steblay & Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. Applied Res. Memory & Cognition at 287. The risk is real: more than half of the first 250 DNA exoneration cases featured an incorrect in-court identification. The Innocence Project, *Courtroom Identifications: Unreliable and Suggestive* (July 14,

2017), <https://www.innocenceproject.org/courtroom-identifications-unreliable-suggestive>.

The in-court identification in this case was especially unreliable because Barganier had never identified Flores before she did so at trial, thirteen months after she saw two men getting out of a car in pre-dawn lighting. Only in court, with Flores seated at defense counsel's table, was Barganier able to identify Flores.

This latent identification had all the hallmarks of unreliability: From the outset, Barganier's memory of the initial sighting was weak, due to the poor encoding conditions. Not only did her memory then erode with time, it was affirmatively contaminated through hypnosis, outside information about Flores' appearance, and suggestive identification procedures. Even so, she failed to identify Flores in a photographic lineup. With no positive identification of Flores before trial, the inherently suggestive in-court identification procedure has essentially no probative value. That a person could be subject to execution on the basis of such unreliable evidence shocks the conscience.

## CONCLUSION

For the foregoing reasons, the Innocence Project urges the Court to grant certiorari in this matter, address the fundamental lack of reliability of hypnotically enhanced eyewitness identifications, and remand petitioner's case for further proceedings in accordance with this Court's guidance.

Respectfully submitted,

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