IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner-on-Review, v. JERRIN LAVAZIE HICKMAN, *aka* Jerrim Lavezie Hickman Defendant-Appellant, Respondent-on-Review.	Multnomah County Circuit Court Case No. 081235225 CA A144741 SC S061409

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK AND OREGON INNOCENCE PROJECT IN SUPPORT OF RESPONDENT HICKMAN

On Review of the Decision of the Court of Appeals
on Appeal from the Judgment of the
Circuit Court for Multnomah County

The Honorable MICHAEL H. MARCUS, Judge

Opinion Filed: March 20, 2013
Reversed and Remanded
Before: Schuman, P.J., Wollheim, J. and Nakamoto, J.

. . . continued

Barry C. Scheck Karen A. Newirth The Innocence Project 40 Worth Street, Suite 701 New York, NY 10013 (212) 364-5340 Email: knewirth@innocenceproject.org	Matthew McHenry (OSB #043571) Levine & McHenry LLC 1001 SW Fifth Avenue Suite 1414 Portland, OR 97204 (503) 546-3927 Email: matthew@levinemchenry.com
Janis C. Puracal (OSB #132288) Aliza B. Kaplan (OSB # 135523) Oregon Innocence Project P.O. Box 40588 Portland, OR 97240 (503) 768-7321 Email: janis.puracal@bullivant.com akaplan@lclark.edu	Mary Boyle M. Read Moore (OSB # 921009) Teri H.P. Nguyen Bruce Yen McDermott Will & Emery LLP 275 Middlefield Rd., Ste. 100 Menlo Park, CA 94025 (650) 814-7400 Email: mboyle@mwe.com mmoore@mwe.com thpnguyen@mwe.com byen@mwe.com Jocelyn D. Francoeur McDermott Will & Emery LLP 227 W. Monroe, Suite 4400 Chicago, IL 60606 (312) 984-7551 Email: jfrancoeur@mwe.com

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I. STATEMENT OF *AMICUS CURIAE*

The Innocence Network (the "Network") is an association of sixty-six member organizations[1] dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The current signatories of the Innocence Network's amicus briefs[2] represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom and the Netherlands. The Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

Oregon Innocence Project (OIP) is a joint project of the Oregon Justice Resource Center (based out of Lewis & Clark Law School) and Metropolitan Public Defender whose mission is to (1) exonerate the innocent, (2) educate and train law students, and (3) promote legal reforms aimed at preventing wrongful convictions. OIP is the only program in Oregon dedicated to securing the release

[1] The member organizations are listed in Appendix A of the Amicus Curiae Brief filed contemporaneously with this application.
[2] The signatories are listed in Appendix B of the Amicus Curiae Brief filed contemporaneously with this application.

of wrongfully convicted inmates. Additionally, OIP works with community partners to build support for comprehensive criminal justice reform to improve eyewitness identification, interrogation practices, discovery practices, and other Oregon policies that do not serve to protect the innocent or punish the guilty.

Amici seek to use their collective institutional knowledge to provide additional context for issues presented in this case. In *Amici*'s experience, the vast majority of individuals eventually exonerated were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. Because *Amici* have a compelling interest in minimizing the risk of wrongful convictions based on eyewitness misidentifications, they also have a compelling interest in the adoption of a rule excluding first-time in-court stranger identifications, which are inherently suggestive and produce identifications whose reliability cannot be properly tested. Such a rule is supported by the scientific research reviewed and approved by this Court in *Lawson*, the new legal framework set forth by this Court in that case, and the Court's stated commitment to ensuring the reliability of identification evidence admitted at trial.

II. QUESTION PRESENTED AND PROPOSED RULE

Question Presented: How does the test for the admissibility of eyewitness identification evidence in *State v. Lawson/James*, 352 Or 724, 291 P3d 673 (2012),

apply to an in-court identification, if no attempt at a pretrial identification preceded it?

Proposed Rule: Trial courts have a heightened role as evidentiary gatekeepers in all cases involving eyewitness identifications. First time, in-court stranger identifications are inherently suggestive procedures, and the reliability of the identifications they produce cannot be properly tested. As such, first time in-court identifications must be prohibited under the *Lawson* analysis. The state is encouraged to seek leave to conduct a reliable out-of-court identification, but may not circumvent the *Lawson* analysis by delaying identification until trial.

III. SUMMARY OF ARGUMENT

In its landmark decision *State v. Lawson*,[3] this Court recognized the dangers presented by eyewitness identification evidence resulting from suggestive procedures or otherwise lacking indicia of reliability. Relying on Oregon's Evidence Code, the Court formulated a legal framework for such evidence that incorporated existing scientific research while remaining open to evolving scientific findings. This framework now guides trial courts' consideration of the admissibility of, and appropriate intermediate remedies for, challenged identification evidence, and it should also guide the appropriate result in this case.

[3] 352 Or 724.

First time, in-court stranger identifications like the ones that occurred here present many of the unique dangers of suggestive identification procedures identified in *Lawson.* Like single person show-ups, they are unduly suggestive; the deck is impossibly stacked against the individual easily identified as the defendant. They are also unnecessarily suggestive—there can be no claim that an in-court identification procedure is necessary to protect public safety or quickly eliminate an innocent suspect. Indeed, there is no valid reason at all why the state would fail to subject a witness who is available to testify, and of whom the state intends to elicit an identification, to a non-suggestive, out-of-court identification procedure.

In light of these issues, there is no rational basis to treat first time, in-court stranger identifications in a manner inconsistent with the framework set forth in *Lawson*. Indeed, when this small subset of identifications is subjected to the *Lawson* analysis, it is clear that they cannot meet the preliminary requirements for admissibility. Because of the unduly and unnecessarily suggestive nature of first time, in-court identification procedures, it is impossible for a fact finder to determine whether a resulting identification is the product of the witness's original memory or a product of the suggestive nature of the identification procedure. As a result, it will be impossible for the proponent to establish by a preponderance of the evidence that these identifications are rationally based on the witness's personal knowledge and will be helpful to the trier of fact, as required by OEC 601

and 702. At the same time, as this Court recognized in *Lawson*, these identifications create the risk of extraordinary prejudice that cannot be cured through the traditional methods of adversarial testing, including cross-examination and argument. Jurors "over-believe" in-court identifications, even when the witness's testimony is demonstrated to be unreliable. As a result, the opponent of this evidence will be able to demonstrate, under OEC 403, that the prejudicial value far outweighs any minimal probative value offered by the identification.

In light of these very serious concerns—and the very easy fix that is available—*Amici* urge the Court to adopt a bright line rule prohibiting first time, in-court stranger identifications. Such a rule would not only be consistent with the Court's decision in *Lawson* and the scientific research relied upon therein, it would also have commendable policy benefits. First, a contrary rule would create a false distinction between in-court and out-of-court identification procedures, when the two in fact rely on the same memory processes and present the same risks of contamination that cannot be cured by cross-examination or argument. Second, the rule creates an important incentive for the state to subject witnesses who are available of whom the state intends to elicit an identification to non-suggestive, out-of-court identification procedures that truly test the witness's memory. This will have multiple benefits: it will lead to an overall improvement in the quality of identification evidence in criminal prosecutions; it will allow law enforcement to

identify cases where the police suspect may not in fact be the perpetrator and, accordingly, lead to better investigations; and it will prevent defendants from being unfairly surprised by in-court identifications where they have been given no reason to believe that a witness will be making such an identification. Third, such a rule will deter any state actor from attempting to use a first-time, in-court identification procedure to avoid the requirements of *Lawson* by mitigating the possibility of an exculpatory non-identification or ensuring that a witness with a compromised ability to make an identification nevertheless positively identifies the defendant. For all of these reasons, *Amici* respectfully request that the Court adopt a bright-line rule excluding first-time, in-court stranger identifications.

IV. FACTS[4]

It is not surprising that witnesses D and N could not identify the perpetrator of the shooting they witnessed on December 31, 2007 in that event's immediate aftermath. The crime's duration was brief[5] and the context chaotic; the witnesses were not looking in the direction of the shooting when it occurred;[6] the crime

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[4] *Amici* adopt the facts as set forth in Mr. Hickman's brief on the merits.

[5] "Scientific studies indicate that longer durations of exposure (time spent looking at the perpetrator) generally result in more accurate identifications." *See State v. Lawson*, 352 at 772 (citation omitted).

[6] D testified that she was talking to N at the time of the shooting. (Tr. 1528). N testified that at the time of the crime, she heard one or two gunshots and ducked down. (Tr. 1778; Tr. 1798). She said she looked up and saw the shooter in the couple of seconds before the car took off. (Tr. 1798-99). "In assessing eyewitness

involved a visible weapon that was discharged;[7] the witnesses and the perpetrator were of different races;[8] and the witnesses were under a great deal of stress at the time they observed the shooting.[9] As D and N explained to first responders, they had such a poor opportunity to view the perpetrator at the time of the crime that they did not believe they could identify him. (Tr. 53; Tr. 1790-91). They could only provide the most general of descriptions. (Tr. 53; Tr. 1790-91). Just minutes after the shooting, D told police she "didn't see the shooting and couldn't describe much." (Tr. 53; Tr. 1517). N provided only a general description, describing the

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reliability, it is important to consider not only what was within the witness's view, but also on what the witness was actually focusing his or her attention … A person's capacity for processing information is finite, and the more attention paid to one aspect of an event decreases the amount of attention available for other aspects." *See Lawson*, 352 Or at 744 (citation omitted).

[7] "Studies consistently show that the visible presence of a weapon during an encounter negatively affects memory for faces and identification accuracy because witnesses tend to focus their attention on the weapon instead of on the face or appearance of the perpetrator, or on other details of the encounter." *See Lawson*, 352 Or at 771-72 (citation omitted).

[8] D informed police that she "didn't feel comfortable" as a white woman at the party in Northeast Portland because there were 25-50 people, primarily African Americans, outside the house and she was "out of [her] element." (Tr. 1517; Tr. 1528; Tr. 1582-83). "[W]itnesses are significantly better at identifying members of their own race than those of other races." *See Lawson*, 352 Or at 745 (citation omitted).

[9] "High levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications … research shows that high levels of stress significantly impair a witness's ability to recognize faces and encode details into memory." *Lawson*, 352 Or at 769 (citation omitted).

shooter as a "black male, stocky, in his mid-twenties, and wearing a do-rag." (Tr. 1517; Tr. 1790-91).

In light of these general descriptions and D and N's professed inability to identify a suspect, the state never asked them to make a pre-trial identification of Jerrin Hickman or anyone else during the two years between the crime and Mr. Hickman's trial. (Tr. 1538-39). Indeed, it was only at the time of Mr. Hickman's trial, when the circumstances could leave absolutely no doubt as to the identity of the State's suspect, that these witnesses were finally asked to attempt an identification of the perpetrator. In light of the extensive research on suggestive identification procedures,[10] it should come as no surprise that, when the witnesses saw Mr. Hickman—the only African-American man in the well of the courtroom, the only African-American man at the defense table, and the obvious criminal defendant in the case—they identified him as the shooter. They made this identification despite the scientifically established fact that their memories could not have improved over the two years between the incident and the trial.[11]

[10] "[M]any of the reliability concerns surrounding eyewitness identification evidence stems from the basic premise that eyewitness testimony can be led or prompted by suggestive identification procedures, suggestive questioning, and/or memory contamination from other sources." *Lawson*, 352 Or at 753.

[11] *Lawson* 352 Or at 779, *quoting State v. Henderson*, 208 NJ 208, 267, 27 A3d 872 (2011) ("Scientists generally agree that memory never improves.").

Not only were the in-court identifications of D and N inconsistent with their statements in the immediate aftermath of the crime, they were also inconsistent with statements offered by D to a defense investigator just a few weeks before Mr. Hickman's trial. In that conversation, D remained unable to describe the perpetrator with any specificity. D told the investigator that she could only describe the men in the altercation as "big black men." (Tr. 1597). She further explained that "all black men look the same" to her.[12] (Tr. 1596). D told the investigator that the shooter had a "big Afro," but could give no further details of the shooter's hair. (Tr. 1596; Tr. 1598). Notably, D's recollection of a "big Afro" was inconsistent with N's initial description—which N maintained at trial—that the perpetrator was wearing a do-rag or a piece of fabric that would have covered the perpetrator's hair (and flattened an Afro) and served to make identification more difficult.[13]

D's description changed the day after her conversation with the defense investigator. In an unrecorded interview with the prosecutor, D stated that the shooter had "twisties" with "close black hair" (Tr. 1599)—a description that directly contradicted her earlier "big Afro" description as well as N's description

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[12] At trial, D denied making this statement. (Tr. 1595-96).

[13] "[S]tudies confirm that hats, hoods, and other items that conceal a perpetrator's hair or hairline also impair a witness's ability to make an accurate identification." *Lawson*, 352 Or at 775 (citation omitted).

of a head covering. Even still, D told the prosecutor that she was not certain that she could identify the shooter. (Tr. 1558; Tr. 1601). In response, the prosecutor proposed that, at trial, D should signal him with a "look in the eye" if she could recognize the shooter when she took the stand. (Tr. 1559). The prosecutor told D, "If you do [recognize the perpetrator], then let the Court know—let the trier of fact know. If you don't, then you don't." (Tr. 1559). In other words, the prosecutor directed the witness to remain silent if she did not recognize the shooter in the courtroom. He never told the witness to inform the trier of fact if the defendant was *not* the perpetrator, nor did he tell the witness that the perpetrator might not even be in the courtroom.[14]

After two years without a detailed description from D or N, and without risking an exculpatory identification either before or during trial, the state created the ideal circumstance to elicit a positive identification of Mr. Hickman from D and N. Mr. Hickman was isolated in the courtroom, the only person fitting the witnesses' general descriptions of the perpetrator, and already identified by the

[14] As the intermediate court recognized, had the witness failed to make an identification and the prosecutor not disclosed this information, as the secret agreement suggests he would not have, the failure to disclose the non-identification would have amounted to a *Brady* violation. *See State v. Hickman*, 255 Or App. 688, 692 n 1, 298 P3d 619, 621, *rev allowed*, 354 Or 61 (2013).

state as the shooter.[15] Yet despite its intentions, the state failed to properly inform the defense that it intended to elicit in-court identifications from both witnesses. Indeed, defense counsel had no reason to suspect that either D or N would be asked to make an identification, much less offer a positive in-court identification, given that the witnesses were unable to describe the shooter to investigating officers just moments after the incident occurred (much less in the two intervening years) and the state never sought to have either witness participate in a pre-trial identification procedure. Given the timing and lack of notice, the defendant could not prepare proper motions to seek enhanced jury instructions to counter the weight of the in-court identifications, to limit the testimony of the witnesses, or to have judicial notice taken about relevant factors that may have affected the reliability of the identifications.[16] While the defense objected immediately prior to the witness's testimony, this objection was, of course, made in front of the jury and had the negative effect of suggesting that the defendant wanted to silence the witness, rather than that the defendant was concerned with the reliability of the identification.

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[15] D was aware that the man sitting at the defense table was charged with the crime and even identified the two individuals on either side of Hickman as "his lawyers." (Tr. 1573).

[16] *See Lawson*, 352 Or at 762-63. As set forth below, when it became clear that the state would ask the witnesses to make an identification, the defense objected and raised many of the issues described herein. (Tr. 1532).

At trial, D took the stand, but did not signal to the prosecutor that she saw the perpetrator in the courtroom, despite the fact that she saw Mr. Hickman sitting at the defense table and observed him as the courtroom was asked to rise for the judge and jury. (Tr. 1559, 1573-74). During a break in the proceedings, D left the courtroom, passing Mr. Hickman. (Tr. 1557). According to the prosecutor's later statements to the trial court, D began hyperventilating in the hallway and exclaimed to the prosecutor "Oh, my God that's him, that's him, that's him." (Tr. 1557). This interaction took place outside of the presence of the jury.[17]

When D re-took the stand, she was able, for the first time ever, to provide a comprehensive description of the shooter. (Tr. 1530-32). Unsurprisingly, D's description differed dramatically from her prior general descriptions but closely matched Mr. Hickman, who sat before her. For the very first time, D described the perpetrator as black, in his twenties to early thirties, stocky, tall (5'7" to 6'), and as having a close Afro or braids (a deviation from D's prior descriptions and inconsistent with N's description), a broad nose, and big lips (Tr. 1531). D then pointed to Mr. Hickman, an African American male sitting between his two Caucasian attorneys and the only African American at the defense table or in the well of the courtroom, and—for the very first time—identified him as the shooter.

[17] On re-direct, the jury learned only that, during the break, D was "emotional" outside the courtroom and told the prosecutor "that was the shooter, that it was him." (Tr. 1601).

(Tr. 1573). D went on to testify that she was 95% certain of the accuracy of her identification.[18] (Tr. 1574; Tr. 1576).

As with D, in the two years between the shooting and her appearance at trial, N had never been subjected to an out-of-court identification procedure and had never identified anyone as the perpetrator. (Tr. 1538-39). Yet, two years after the shooting, N pointed to Mr. Hickman, sitting at the defense table, and identified him as the shooter. (Tr. 1783). Consistent with her earlier description, N described the shooter as black, stocky, and wearing jeans with a t-shirt and a do-rag. (Tr. 1777; Tr. 1781; Tr. 1799). For the first time, however, and while looking at Mr. Hickman, N also described the shooter as being 5'7'' and having hair that was three inches long and nappy. (Tr. 1781-82). These new additions to N's description matched Mr. Hickman's appearance at trial. (Tr. 1600).

The inconsistencies in the witnesses' testimony were not limited to their newly created descriptions of the perpetrator. D and N each testified that she believed that the shooter tried to get into their car just before the car drove off, and that the person who tried to enter the car was Mr. Hickman. (Tr. 1781; Tr. 1790). D was less certain than N that Mr. Hickman was the man who tried to get into the car. (Tr. 1578). As the state concedes, however, Officer Mast's testimony

[18] *Lawson*, 352 Or at 759 (recognizing that this kind of testimony "ordinarily [has] little probative value, but significant potential for unfair prejudice").

demonstrates that Mr. Hickman was definitively *not* the man who tried to get in their car. At the time in question, Officer Mast was speaking with Mr. Hickman and another man (the alternate suspect) at a distance from the car. (Tr. 2093-4; Tr. 2509-10; Tr. 3137). D and N were simply wrong when they "remembered" that the man they identified as the shooter—Mr. Hickman—was the man who tried to get into their car immediately after the shooting.

Over defense counsel's objections, the trial court allowed these identifications to occur for the first time in court. The state called seven additional witnesses to the shooting, five of whom were unable to positively identify Hickman as the shooter. The two individuals who did identify Mr. Hickman were convicted felons who testified in exchange for a reduction of their own prison time. *State's Brief* at 40. This, together with the unreliable identifications by D and N, comprised the critical eyewitness identification evidence against Mr. Hickman. Mr. Hickman was convicted of the murder.

On appeal, the Court of Appeals remanded the case for consideration in light of this Court's decision in *State v. Lawson*. The state appealed.

V. ARGUMENT

In *Lawson*, this Court recognized that the balancing test set forth in *Manson v. Brathwaite*, 432 US 98 (1977) and adopted in Oregon in *State v. Classen*, 285 Or 221, 590 P2d 1198 (1979) is scientifically flawed and cannot achieve the goal "of

ensuring that only sufficiently reliable identifications are admitted into evidence." *Lawson*, 352 Or at 746. The Court identified two fundamental problems with the *Classen* framework: first, that the "threshold requirement of suggestiveness inhibits courts from considering evidentiary concerns," and second, that the "inquiry fails to account for the influence of suggestion on evidence of reliability." *Id.* at 746-48. To remedy these failings, the Court set forth a scientifically valid set of inquiries grounded in Oregon's Rules of Evidence. *Id.* at 749-763.

While the rubric set forth in *Lawson* remedied the problems of *Classen* by allowing a court to consider information beyond the role of suggestion in an identification procedure, this Court remained properly concerned with suggestion and its effects on memory. In particular, the Court focused on the vulnerability of a witness's original memory—the only evidence that "has any forensic or evidentiary value"—to alteration through suggestion, and it noted the difficulty "for either the court or the witness to analytically separate the witness's original memory of the incident from later recollections tainted by suggestiveness." *Lawson*, 352 Or at 748 n 4. In light of the contaminating effects of suggestion on a witness's memory, the *Lawson* court emphasized that "trial courts have a heightened role as an evidentiary gatekeeper." *Id.* at 758. This role is critical because, as the Court recognized, eyewitness identification evidence has an extraordinarily powerful effect on jurors, regardless of the probative value of the

evidence, and "'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence." *Id.*; *see* R.C.L. Lindsey *et al., Can People Detect Eyewitness—Identification Inaccuracy Within and Across Situations?,* 66 J APPLIED PSYCHOL 79 (1981) (discussing an experiment conducted for another study).

The concerns identified by this Court in *Lawson* are implicated here in perhaps their purest form: a witness who has never been subjected to a fair out-of-court identification procedure is asked, for the first time, to identify a defendant as he sits at the defense table at his criminal trial months or years after the original event. It is simply impossible to know if the witness's identification is a product of his or her original memory, which has never been properly tested, or a product of the extraordinarily suggestive circumstances of the in-court identification procedure. As the Fifth Circuit explained in a case involving an in-court identification made ten months after the crime where no prior out-of-court identification had been made, "Even the best intentioned among us cannot be sure that our recollection is not influenced by the fact that we are looking at a person we know the Government has charged with a crime." *United States v. Rogers*, 126 F3d 655, 659 (5th Cir. 1997).

The risk of misidentification stemming from an in-court identification procedure is elevated by the inherently suggestive circumstances of an in-court identification procedure, which is often rightly likened to a show-up.[19] The defendant has been identified by the state as the likely suspect, is seated with counsel at the defense table, and is often the only person matching the perpetrator's description not just at counsel table, but in the well of the court. Complicating matters further, the safeguards recommended by the Court for use in out-of-court identification procedures are largely impossible to implement for in-court identification procedures. As a result, some in-court identification procedures may, as a class, result in identifications that are so unreliable that they must be excluded. *Amici* submit that an identifications of a stranger made for the first time

[19] "A 'show up' is a procedure in which police officers present an eyewitness with a single suspect for identification[.]" *Lawson*, 352 Or at 742,. *See also United States v. Kaylor*, 491 F2d 1127, 1131 (2d Cir. 1973), *vacated on other grounds sub nom. United States v. Hopkins*, 418 US 909, 94 S Ct. 3201, 41 L Ed 2d 1155 (1974) (finding an in-court identification equivalent to a show-up but noting that the procedure was inadvertent and there was not "the slightest suggestion that the prosecution was in any way attempting to bring the confrontation about in the fashion that it occurred."); *see also United States v. Archibald*, 734 F2d 938, 941 (2d Cir. 1984) (trial court has an obligation to ensure that an in-court identification does not amount to a show-up); *accord* Nicholas A. Kahn-Fogel, *Manson and its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA CR & CL L REV 175, 201 (2012) (noting that experts recognize that "[i]n-court identifications almost invariably amount to show-ups, for it is generally clear to the witness where the defense table is located and who the defendant is, and to allow witnesses to make such identifications after having failed to identify the defendant from a lineup or after police failed to conduct any lineup at all is undeniably both suggestive and unnecessary.")

in court (*i.e.*, not preceded by an out-of-court identification procedure) is just such a subgroup.

An in-court identification of a stranger that has not been preceded by an out-of-court identification procedure is not only inherently suggestive, it is unnecessarily so. *See Neil v. Biggers*, 409 US 188, 198 (1972) ("Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."); *accord Manson*, 432 US at 99 (finding a single photo identification by an undercover police officer both suggestive and unnecessary). Because there can be no justification for the state's failure to subject a witness, who is available to testify and who intends to attempt an in-court identification, to a fairly composed and administered out-of-court identification procedure, this Court should prohibit such unnecessarily suggestive first-time in-court identification procedures. The state is, of course, free to subject the witness to an out-of-court identification procedure at any time, subject to proper notice to defense counsel.

It is the collective experience of *Amici* that first time, in-court identifications of a stranger occur only rarely.[20] The Innocence Network and Oregon Innocence

[20] In contrast, confirmatory identifications between parties who are known to each other often occur for the first time in court. This is because the witness generally offers sufficient identifying details—such as the perpetrator's name, complete

Project respectfully submit that this Court should adopt a bright line rule prohibiting this type of procedure in light *Lawson's* recognition of voluminous scientific research on the issue and, more importantly, commitment to ensuring the reliability of identification evidence admitted at trial. To allow such first time in-court stranger identifications threatens both.

A. First time, in-court stranger identifications should be excluded under *Lawson* and Oregon's Evidence Code.[21]

In-court stranger identifications have long been disfavored as unnecessarily suggestive. As early as 1970, the Ninth Circuit noted this problem:

> When asked to point to the robber, an identification witness—particularly if he has some familiarity with courtroom procedures—is quite likely to look immediately at the counsel table, where the defendant is conspicuously seated in relative isolation. Thus the usual physical setting of a trial may itself provide a suggestive setting for an eye-witness identification.

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physical description, date of birth, address, etc.—to render unnecessary an out-of-court identification procedure. We do not address this distinct procedure in this brief, but would direct the Court's attention to the standard followed by New York courts to determine if a procedure is a confirmatory identification. *See People v. Rodriguez*, 79 NY2d 445, 453 (1992) (A confirmatory identification occurs where the "protagonists are known to one another, or where . . . there is no mutual relationship, that the witness knows defendant so well as to be impervious to police suggestion.")

[21] While we do not believe that the Court need reach a federal due process analysis as first time, in-court stranger identifications must be excluded under *Lawson* and Oregon's Evidence Code, we believe that these identifications also fail due process scrutiny.

United States v. Williams, 436 F2d 1166, 1168 (9th Cir. 1970), *cert. denied* 402 U.S. 912 (1971). *Accord Archibald*, 734 F2d at 941 (in-court identification procedures were "so clearly suggestive as to be impermissible" where defendant was only African-American in the courtroom and was seated at defense table with defense counsel); *Rogers*, 126 F3d at 658 ("it is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant.").

Notably, courts considering the propriety of in-court identifications have historically done so under the *Manson* due process analysis and without the benefit of the thousands of studies considered by this Court in *Lawson*. When first time, in-court stranger identifications are analyzed under the rubric set forth in *Lawson* and with the benefit of the research findings of which this Court took judicial notice, the danger of first time, in-court stranger identifications becomes even more clear. Indeed, *Lawson's* goal—"that only sufficiently reliable identifications are admitted into evidence"—effectively mandates the exclusion of such identifications, which are akin to inherently suggestive show-ups. The proponent of such an identification will never be able to demonstrate by a preponderance of the evidence that an identification is rationally based on facts personally known and perceived by the witness and helpful to the trier of fact (as required by OEC 602 and 701), and the opponent of such an identification will always be able to

demonstrate that its prejudicial nature far exceeds its probative value (contrary to the requirements of OEC 403). As set forth more fully below, each of these issues supports the establishment of a bright-line rule excluding first-time in-court stranger identifications.

1. First-time, in-court identifications unnecessarily present all of the risks of show-ups.

Although in-court and out-of-court identification procedures can each be unnecessarily suggestive, this suggestiveness can be tempered out of court by using system variables that enhance reliability (*e.g.*, blind administration, fair lineup construction, sequential presentation, recorded witness confidence statements at the time of the identification) while avoiding those system variables that undermine reliability (*e.g.*, post-event contamination, suggestive feedback, and conducting show-ups more than two hours after the incident). *Lawson*, 352 Or at 740. In-court identifications, in contrast, are much more analogous to "inherently suggestive" show-ups. *See id.* at 742-43. As such, they present a significantly increased risk of misidentification for innocent suspects, who the witness knows has been identified by the state as the perpetrator and likely feels an understandable pressure to identify at trial. *See Manson*, 432 US at 134 (Marshall, J., dissenting) (criticizing "the display of a single live suspect" as "a grave error . . . because it dramatically suggests to the witness that the person shown must be the culprit" and "it is deeply ingrained in human nature to agree with the expressed opinions of

others—particularly others who should be more knowledgeable—when making a difficult decision") (citations omitted)).

Importantly, as with show-ups, when misidentifications occur with first time, in-court stranger identifications, they will be difficult (if not impossible) to identify. As the New Jersey Supreme Court recognized in *Henderson*:

> Experts believe the main problem with showups is that—compared to lineups—they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect. In essence, showups make it easier to make mistakes.

Henderson, 27 A3d at 903. *Accord Lawson*, 352 Or at 783 (noting that in a show-up, "every witness who guesses will positively identify the suspect," making misidentifications "less likely to be discovered as mistakes.") Moreover, like show-ups and other suggestive identification procedures, first time, in-court identifications of strangers are particularly dangerous because they can alter the witness's original memory of the event—the only evidence with any forensic or evidentiary value—without the awareness of the witness and in such a way that it is impossible for the fact-finder to distinguish whether the identification is a product of the witness's original memory or the suggestive procedures. *Lawson*, 352 Or at 748. And once altered, a witness's original memory cannot be recaptured. "[E]yewitness researchers generally believe that, 'once an eyewitness has mistakenly identified someone, that person 'becomes' the witness' memory

and the error will simply repeat itself.'" *Lawson*, 352 Or at 748 n 4; 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 LAW & HUM BEHAV 1, 14-15 (2008).

Significantly, the redeeming aspects of show-up identifications—namely, that they can be as reliable as a lineup when conducted within two hours of the incident[22] and they allow law enforcement to quickly identify criminal actors and innocent suspects, contributing substantially to public safety—are not present in first-time in-court identifications. In-court identification procedures generally occur long after the original event (and necessarily far beyond after the two-hour threshold identified by research) and by the time of the trial, there are no concerns relating to exigent circumstances or public safety. Thus, first-time in-court identifications present all of the risks associated with show-ups and none of the benefits. There is, however, an easily implemented solution that eliminates the associated risks while offering the benefit of a real memory test that will allow the finder of fact to determine whether the witness is, in fact, capable of making an

[22] *Lawson*, 352 Or at 783 ("In as little as two hours after an event occurs, however, the likelihood of misidentification in a show-up procedure increases dramatically.").

identification based on his or her original memory: a fair out-of-court identification procedure.[23]

2. The inherent, unnecessary and incurable suggestiveness of first time, in-court stranger identifications precludes admissibility under OEC 602 and 701

The unnecessary and incurable suggestiveness inherent in a first time, in-court stranger identification will thwart a proponent's ability to establish by a preponderance of the evidence, under OEC 602 and 701, that any eyewitness identification testimony it intends to offer is rationally based on the witness's personal knowledge and perceptions and is helpful to the trier of fact.[24] As an

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[23] Courts finding in-court identifications inherently suggestive have often drawn a distinction between those in-court identifications that are preceded by non-suggestive out-of-court identification procedures and those involving no prior identification. *See, e.g., United States v. Domina*, 784 F2d 1361, 1368 (9th Cir. 1986) (contrasting the dangers associated with in-court identifications following suggestive pretrial identifications and first time in-court identifications); *Archibald*, 734 F2d at 943 (finding impermissibly suggestive in-court identifications harmless because each witnesses had previously identified the defendant from a non-suggestive out-of-court photographic array).

[24] OEC 602 provides that:

Subject to the provisions of ORS 40.415 (Rule 703). Bases of opinion testimony by experts), a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.

OEC 701 provides that:

If the witness is not testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are:

initial matter, because there has been no initial out-of-court identification procedure, virtually all of these in-court identifications will suffer from significant temporal delay, which this Court has recognized has a profound impact on the reliability of a witness's identification. *Lawson*, 352 Or at 746. Scientific literature conclusively establishes that the best chance for a specific recollection or description of an event is immediately after it occurs, because memory decays with time. *Id.* at 778-79. Notably, this decay is exponential rather than linear, with the greatest proportion of memory loss occurring shortly after an initial observation. *Id.* The more time that elapses between an initial observation and a later identification procedure, the greater the decay and the less reliable the later recollection will be. *Id.* In cases like the present one, where nearly two years passed between the initial incident and trial, it is almost impossible to conclude that the witness's original memory of the events is being called upon in identifying the defendant. *Id.* at 748. Moreover, as this case illustrates, where a witness's memory demonstrably "improves" over that period of time, it is reasonable to conclude that the witness's memory has been contaminated by suggestive feedback or post-event information.

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(1) Rationally based on the perception of the witness; and

(2) Helpful to a clear understanding of testimony of the witness or the determination of a fact in issue.

Temporal delay is not the only factor that precludes admissibility under the evidentiary rules. As this Court noted in *Lawson*, "the purpose of the personal knowledge requirement [under Rule 602] is to ensure reliability." *Lawson*, 352 Or at 753. The proponent of a first time, in-court identification of a stranger, however, will never be able to establish that the identification is a reliable product of the witness's personal knowledge, *i.e.*, that it is based on an original memory, because the suggestion inherent in the identification procedure is overwhelming. And although counsel and the court can inquire regarding estimator variables (including stress and weapons focus, duration of exposure, and environmental conditions), which are critical to the determination of a witness's personal knowledge, even a witness's self-reports about these variables must be questioned where the witness has been subjected to a suggestive identification procedure. *See Lawson*, 352 Or at 748 (noting that "current scientific knowledge and understanding regarding the effects of suggestive identification procedures indicates that self-reported evidence of the *Classen* factors can be inflated by the suggestive procedure itself. That fact creates in turn a sort of feedback loop in which self-reports of reliability, which can be exaggerated by suggestiveness, are then used to prove that suggestiveness did not adversely affect the reliability of an identification"); *see also* Gary L. Wells, "*Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83

J APPLIED PSYCHOL 360 (1998). Notably, because a witness making an in-court identification will be immediately confronted with the defendant upon entering the courtroom, there is no way to inoculate her from the effects of suggestion prior to inquiring into the basis for her personal knowledge. Thus, the only way that a proponent of an in-court identification of a stranger can establish that it is the product of her personal knowledge would be to subject her to a non-suggestive out of court identification procedure.

This case illustrates this problem. In the two years after the shooting, neither D nor N was able to offer a specific description of the perpetrator, and both women told law enforcement that they did not believe they could make identifications. (Tr. 53; Tr. 1790-91). These facts strongly suggest that both D and N lacked sufficient personal knowledge to meet the requirements of OEC 602. But, when faced with the defendant in court, each witness altered her description to more closely match Mr. Hickman, and one even testified that she was 95 percent certain of her identification. *See Lawson*, 352 Or at 745 ("Under most circumstances, witness confidence or certainty is not a good indicator of identification accuracy"). Because we know that memory does not improve, the only reasonable conclusion is that neither of these identifications was based on the witnesses' personal

knowledge. Instead, each was the product of the unnecessarily suggestive circumstances surrounding the identification procedure.[25]

In light of the unduly suggestive nature of a first time, in-court stranger identification, it will be equally difficult (if not impossible) for a court to determine what a witness initially perceived and whether her identification is rationally based on those perceptions. *See* OEC 701. As the Court explained in *Lawson*:

> When a witness's perceptions are capable of supporting an inference of identification, but are nevertheless met with competing evidence of an impermissible basis for that inference—*i.e.,* suggestive police procedures—an issue of fact arises as to whether the witness's subsequent identification was derived from a permissible or impermissible basis. When there are facts demonstrating that a witness could have relied on something other than his or her own perceptions to identify the defendant, the state—as the proponent of the identification—must establish by a preponderance of the evidence that the identification was based on a permissible basis rather than an impermissible one, such as suggestive police procedures.

Lawson, 352 Or at 755. Given the high degree of suggestion and the substantial time delay involved in the first time, in-court stranger identification process, we submit that no court would be able to find that "it was more likely that the witness's identification was based on his or her own perceptions than on any other

[25] This conclusion is particularly warranted when the witnesses presumably identified Mr. Hickman based on their opportunity to view the shooter when he attempted to get into the car, but the state has conceded that individual was *not* Mr. Hickman. (Tr. 2093-94; Tr. 2509-10; Tr. 3137).

source." *Id.* at 756. Indeed, we believe that in every circumstance a court would find the contrary: it is more likely than not that the witness's identification was based on the suggestion inherent in the in-court identification procedure.

Finally, the helpfulness prong of OEC 701 cannot be met in cases involving a first time, in-court stranger identification. *Lawson* offers, as an example of the type of testimony that would not be helpful to the trier of fact, a witness who viewed a masked perpetrator's hands. *Lawson*, 352 Or at 756. The Court found that an identification based on such a limited viewing would be no more helpful to a jury than the witness simply describing what was observed; the jury could then determine whether the description matched the defendant's appearance. *Id.* First time, in-court stranger identifications suffer from even greater infirmities. Because it is far more likely that such an identification is merely confirmation that the witness can identify the defendant in the courtroom, rather than an accurate reflection of the witness's memory, this information will not help the fact finder in determining the ultimate question of identity. In fact, such an identification is more likely to be *unhelpful* by suggesting to the jury that an eyewitness can make an identification with confidence even when that identification is made months or years after the event at issue, made when there is no possible wrong answer, and when the identification often contradicted by the witness's original descriptions.

For each of these reasons, first-time in-court stranger identifications should be excluded under OEC 602 and 701.

3. The probative value of a first-time, in-court stranger identification is substantially outweighed by its prejudicial nature under OEC 403.

Lawson provides that even if the state can satisfy its burden to prove the admissibility of the eyewitness identification under OEC 602 and 701, the evidence may be excluded if, under OEC 403, "the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence." *Lawson*, 352 Or at 761-62.

Under Oregon law, "[p]robative value is essentially a measure of the persuasiveness that attaches to a piece of evidence." *Id.* at 757 (citing *State v. O'Key*, 321 Or 285, 299 n 14, 899 P2d 663 (1995)). "The persuasive force of eyewitness identification testimony is directly linked to its reliability." *Lawson*, 352 Or 757. As this Court recognized in *Lawson*, "[t]he more factors—the presence of system variables alone or in combination with estimator variables—that weigh against reliability of the identification, the less persuasive the identification evidence will be to prove the fact of identification, and correspondingly, the less probative value that identification will have." *Id.* Evidence is "unfairly prejudicial" when it has "an undue tendency to suggest a decision on an improper basis." *Id.* at 758 (citing *State v. Lyons*, 324 Or 256, 280,

924 P2d 802 (1996)). That is, evidence is "unfairly prejudicial" if "the preferences of the trier of fact are affected by reasons essentially unrelated to the persuasive power of the evidence to establish a fact of consequence." *Lawson*, 352 Or at 758.

The opponent of a first-time in-court stranger identification can easily bear the burden set forth by OEC 403. The extreme and incurable suggestiveness inherent in first-time in-court stranger identifications, together with the substantial time delay that occurs when a witness is not asked to make an identification until the time of trial, decreases the reliability and probative value of any resulting eyewitness identification evidence. This very limited probative value is easily outweighed by the unfairly prejudicial nature of the identification testimony. As Justice Brennan recognized in *Watkins v. Sowders*, "[t]here is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says "That's the one!" 449 US 341, 352, 101 S Ct 654, 66 L Ed 2d 549 (1981) (emphasis in original). The experience of the Innocence Network's clients bears out this point: the majority of their wrongful conviction cases involved at least one in-court identification. Indeed, almost all of the eyewitnesses in the DNA exoneration cases testified at trial that they were positive they had identified the right person, yet in 57% of those cases the witnesses had earlier not been certain at all. *Henderson*, 27 A3d at 236-37 (citing Brandon L.

Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 63-64 (2011).

The power (and potential danger) of in-court identifications can also be seen in the so-called "imposter cases"—cases where defense counsel switched the defendant for a look-alike. While courts have looked unfavorably on the tactics, these cases illustrate just how much juries want to believe eyewitnesses, even when they are clearly wrong. *See, e.g., United States v. Sabater*, 830 F2d 7, 8 (2d Cir. 1987) (defendant convicted after police officer witness first identified her and later identified her sister, who had been moved to the defense table and given defendant's blazer while the defendant was moved to another part of the courtroom); *People v. Gow*, 382 NE2d 673, 675 (Ill. App. Ct. 1978) (three eyewitnesses, two of whom had made prior out-of-court identifications, identified the look-alike who sat at defense table as the perpetrator).

There is strong scientific evidence that jurors widely "over believe" the reliability of eyewitness identification: "evidence of identification, however untrustworthy, is taken by the average jur[or] as absolute proof." Brigham, John C. & Bothwell, Robert K., *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 20 (1983). As a result, eyewitness testimony is highly incriminating. In a pioneering demonstration of juries' credulity of eyewitnesses, Dr. Elizabeth Loftus had

participants in a study read a summary of a court case that either included or did not include the positive identification testimony of an eyewitness together with some other incriminating testimony. The percentage of participants voting guilty was 18 percent when no eyewitness was present and 72 percent when one was.[26] In another study, the conviction rate by mock juries increased from 49 percent to 68 percent when a single, vague eyewitness account was added to the circumstantial evidence described in a case summary.[27] Even when demonstrably unreliable eyewitness identification testimony is admitted, therefore, juries are quite likely to believe what they have heard.[28]

In a seminal 1983 study, researchers presented individuals with crime scenarios derived from previous empirical studies and asked the individuals to

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[26] Loftus, *The Incredible Eyewitness*, 8(7) PSYCHOL TODAY 116 (Dec. 1974). Shockingly, 68 percent of participants voted guilty even when they were informed that the eyewitness was legally blind when not wearing corrective lenses and that he wasn't wearing his corrective lenses at the time he witnessed the crime.

[27] *See, e.g.,* Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N AM J PSYCHOL 143, 146 (2002).

[28] Leippe & Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, 169, 171 (Brian L. Cutler ed., 2009). Judges are perhaps as much in need of guidance as jurors, if the decisions below are a representative sample. For example, courts commonly accept the proposition that a witness's stress might have imprinted the defendant's picture on the victim's memory. This reflects a common—and scientifically unsupportable—misconception. *See* Richard A. Wise & Martin A. Safer, *What US Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL 427 (2004).

predict the accuracy rate of eyewitness identifications observed in the studies.[29] Nearly 84 percent of respondents overestimated the accuracy rates of identifications.[30] Moreover, the magnitude of the overestimation was significant. For example, the study's respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had in fact made a correct identification.[31] This tendency to over believe eyewitnesses is compounded when the witness expresses certainty in his or her identification, as D did in this case. As this Court has recognized, despite the fact that certainty is a "poor indicator of reliability […] jurors can find such statements persuasive, even when contradicted by more probative indicia of reliability. Accordingly, when such statements are presented at trial, they ordinarily have little probative value, but significant potential for unfair prejudice." *Lawson*, 352 Or at 759.

The state argues that an identification made for the first time in court does not present any danger of unfair prejudice because the jury can see the identification as it happens and weigh the credibility of the witness in light of system variables, if any. *State's Brief* at 22-23. This argument is misguided. The state presumes that the jury can independently identify the suggestiveness in the in-

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[29] *See* Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications,* 7 L & HUM BEHAV 19, 22-24 (1983).
[30] *See id*. at 28.
[31] *See id.* at 24.

court identification proceeding and then judge its effect on a witness's testimony. Yet, in *Lawson*, this Court recognized that while eyewitness identification research enjoys consensus in the scientific community, jurors are not familiar with the research findings, many of which are counterintuitive. *Lawson*, 352 Or at 761; *see also id.* at 760 (noting that "many factors affecting eyewitness identifications are unknown to average jurors or are contrary to common assumptions") (citing *State v. Guilbert*, 306 Conn 218, 49 A3d 705 (2012)).

Extensive surveys of the lay understanding of eyewitness issues show a "discrepancy between lay understanding of factors affecting eyewitness accuracy and what decades of empirical research has reliably demonstrated to be true" and that "jurors … exhibit important limitations in their knowledge of eyewitness issues, their knowledge diverges significantly from expert opinion, and it is not high in overall accuracy."[32] Even when jurors do have an understanding of system or estimator variables, they do not know how to apply this understanding to the evidence.[33] A 2010 meta-analysis of surveys assessing lay knowledge of eyewitness issues reviewed 23 surveys, with a total of 4,669 participants,

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[32] Desmarais and Read, *After 30 Years, What Do We Know about What Jurors Know? A Meta-Analystic Review of Lay Knowledge Regarding Eyewitness Factors*, 35 LAW HUM BEHAV 200-210 (2011).

[33] Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 3, 9 (Cutler ed., 2009).

performed over the past 30 years.[34] A meta-analysis testing 16 variables found that lay witnesses did not understand 75 percent of them.[35] While juror knowledge varied by topic, they reported low levels of comprehension about the kinds of issues that arise in first time, in-court stranger identifications:

- 51 percent understood that confidence and accuracy have a weak relationship;
- 61 percent understood the effect of the forgetting curve;
- 65 percent understood that a mugshot could induce bias towards making an identification (the same process at work in an in-court identification);
- 74 percent understood the effects of post event information;
- 69 percent understood the process of unconscious transference.

Thus, contrary to the state's assertion, the simple act of viewing an identification procedure does not enable a viewer to determine whether and to what extent the procedure has had an impact on the validity of the identification. The mere recognition of system variables does not make a trier of fact any more adept at being able to distinguish a reliable identification from an identification contaminated by outside forces.

The state further argues that prejudice from a first time in-court identification does not rise to a level of "unfairness" because defense counsel can observe the identification and "cure" any prejudice with an effective cross-examination of the witness. *State's Brief* at 23. This argument is not only faulty; it

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[34] Desmarais and Read at 202.
[35] *Id*. at 203.

ignores the entire basis for *Lawson*. Indeed, the *Lawson* court gave trial courts a "heightened role as an evidentiary gatekeeper because 'traditional' methods of testing reliability—like cross-examination—can be ineffective at discrediting unreliable or inaccurate eyewitness identification evidence." *Lawson*, 352 Or at 758; *see also id.* at 760 (finding that "cross-examination, closing argument, and generalized jury instructions are not effective in helping jurors spot mistaken identifications").

As the New Jersey Supreme Court has explained, "most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and because the eyewitness is testifying honestly (*i.e.*, sincerely) he or she will not display the demeanor of the dishonest or biased witness." *Henderson*, A3d at 889 (citing Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 772 (2007)). Thus the traditional tools of adversarial testing will be ineffective. *See State v. Clopten*, 2009 UT 84, 223 P3d 1103, 1110 (2009) (citing Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1277 (2005)) ("Cross-examination will often expose a lie or half-truth, but may be far less effective when witnesses, although mistaken, believe that what they say is true."). Even when acting in good faith, "eyewitnesses are likely to use "their 'expectations, personal experience, biases, and prejudices' to fill in the gaps

created by imperfect memory. Because it is unlikely that witnesses will be aware that this process has occurred, they may express far more confidence in the identification than is warranted." *Clopten*, 2009 UT at ¶ 21, 223 P3d at 1110 (citations omitted). Cross-examination, therefore, is poorly suited to reveal the vulnerabilities of eyewitness identification. It is especially inadequate to reveal weaknesses when the identification happens for the first time in court because the identification has not been tested pre-trial—without the suggestiveness of the in-court procedure—for comparison.

Courts considering in-court identifications have generally placed the burden of seeking a remedy on the defendant. *See, e.g.*, *United States v. Brown*, 699 F2d 585, 594 (2d Cir. 1983) ("[W]hen a defendant is sufficiently aware in advance that identification testimony will be presented at trial and fears irreparable suggestivity, as was the case here, his remedy is to move for a line-up order to assure that the identification witness will first view the suspect with others of like description rather than in the courtroom sitting alone at the defense table"); *Domina*, 784 F2d at 1368-69 (concluding that "procedures could be used in court to lessen the suggestiveness [of in-court identifications], such as an in-court line-up, or having the defendant sit somewhere in the courtroom other than the defense table."). For the reasons set forth above, however, forcing a defendant to identify and seek safeguard or remedial measures is an inadequate response to a problem that is

entirely within the control of the state. It is the state that controls its witnesses both before and at trial, decides whether to subject the witness to an out-of-court identification procedure, decides whether to call a particular witness, and decides whether to ask the witness to make an in-court identification. A rule prohibiting in-court identifications that have not been preceded by a non-suggestive out-of-court identification procedure will simply place the state on notice that it must first subject identification witnesses to a proper out-of court identification procedure. This rule will not only mitigate the suggestiveness of the in-court identification procedure; it will also improve the overall reliability of identification evidence admitted at criminal trials.

B. Important policy concerns animate the proposed prohibition against in-court identifications where there has been no prior out-of-court identification.

A bright-line rule excluding first-time in-court stranger identifications is the correct remedy from both a law and a policy perspective. A contrary rule would create a false distinction between in-court and out-of-court identification procedures, when the two in fact rely on the same memory processes and present the same risks of contamination that cannot be cured by cross-examination or jury instructions. Witnesses are susceptible to the same suggestive variables in both situations, and juries may not be able to discern or appreciate the degree of influence such suggestive procedures may have on a witness's testimony. Indeed,

as set forth above, jurors—even when explicitly told how suggestive procedures may improperly shape a witness' testimony—are no less influenced by the witness's testimony.

Additionally, anything short of a prohibition on first-time in-court identifications would allow the state to evade the requirements set forth in *Lawson*. Implicit in *Lawson* is the recognition that the system should work to make the identification process more reliable. 352 Or at 741 ("[W]e believe that it is imperative that law enforcement, the bench, and the bar be informed of the existence of current scientific research and literature regarding the reliability of eyewitness identification because, as an evidentiary matter, the reliability of eyewitness identification is central to a criminal justice system dedicated to the dual principles of accountability and fairness.") *Lawson's* analysis, flowing from this principle, identified the system variables and best practices that should be used to reduce the prejudice that can result from each variable. *Id.* at 741-44.

When a pre-trial identification is at issue, the state is in a position to reduce the factors that lead to an unreliable identification; if it fails to do so, the defense is in a position to challenge the identification. *Id.* at 762-63. With a first time in-court identification, however, the system variables are inherent in the process and cannot be manipulated to reduce the impact on the identification. The witness is aware that the individual at the defense table has been charged with the crime and

the state believes him to be guilty. There is no basis for comparison, because the witness's in-court identification has not been tested pre-trial. And it is highly unlikely that the state can provide any good-faith basis for failing to attempt such a test.[36]

A rule that admits identification testimony not preceded by a prior out-of-court identification also creates an incentive for prosecutors to avoid having witnesses with weaker memories participate in an out-of-court identification procedure. Instead, prosecutors could wait for the inevitable decay of any original memories (particularly any contradictory ones) and instead employ a suggestive in-court identification procedure before a captive jury and defendant. A witness with a deteriorated independent recollection would be even more vulnerable to such a suggestive approach, and any resulting identification would be tainted by the witness having his or her memory "reinforced" under suggestive elements in play over the course of trial.

In light of these significant policy concerns, the only appropriate rule is one that prohibits in-court identifications in stranger cases unless they are preceded by

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[36] As discussed above, although show-ups may sometimes be necessary to preserve evidence or ensure public safety, no such justification exists with in-court identifications. Generally speaking, there is no excuse not to conduct a proper, non-suggestive out-of-court identification procedure prior to trial. *Amici* do not suggest that the out-of-court identification would be admissible, but only that this proper test of the witnesses' memory is available to the state prior to trial (in this case, for two years).

a properly structured out-of-court identification procedure. Any contrary rule would reward, rather than deter, unnecessarily suggestive procedures and would encourage prosecutors to delay identifications with tentative witnesses until the right result is essentially guaranteed.

C. Even if the Court declines to adopt a bright line rule, it should set forth minimum standards for first-time in-court identifications.

Should the Court decline to adopt the bright line rule suggested here, it should at least set forth minimum standards to guard against unnecessarily suggestive in-court identifications. In *Kirby*, the Seventh Circuit—recognizing the potential for a "serious risk of miscarriage of justice" when a show-up identification is introduced—concluded that "evidence of, or derived from, a show-up identification should be inadmissible ***unless*** the prosecutor can justify his failure to use a more reliable identification procedure." *Kirby*, 510 F2d at 405 (emphasis added). A similar standard should be adopted here. If the state seeks to introduce an in-court identification when no prior out-of-court identification procedure has taken place, it must (1) justify its failure to conduct an out-of-court identification procedure before trial and (2) seek leave to conduct a non-suggestive out-of-court identification procedure. Of course, any ensuing identification(s) will still be subject to the analysis set forth in *Lawson*. Only if these standards are met should an in-court stranger identification be permitted.

D. <u>The in-court identification in this case should have been excluded under *Lawson*.</u>

As set forth more fully above, the suggestiveness of first-time in-court stranger identifications will almost always render such identifications inadmissible under Oregon evidentiary rules and *Lawson*. That general principle is certainly applicable here, where the in-court identification procedure was infected with suggestion.

The identification procedure below was conducted not by a blind administrator, but by a prosecutor who knew exactly who the defendant was and where he sat; it was preceded by an agreement to an improper "secret signal" that was not disclosed to the defense until after the witness made the identification; it suffered from the same suggestiveness as an out of court show-up; it provided immediate confirming feedback to the witnesses; and it occurred nearly two years after the events at issue. It was only under the influence of these procedures that D and N (who admittedly viewed the events of December 31 for only a limited time and under extraordinary stress) could make an identification they had never previously been asked to make. Simply put, the in-court identifications D and N made require an observer to believe, despite all scientific evidence to the contrary, that their memories actually *improved* during the two-year gap between the events at issue and the trial, when they had no specific or clear memory of the perpetrator

in the immediate aftermath of the crime. As set forth more fully below, each of these identifications should have been excluded.

1. The relevant system variables support exclusion.

A review of those system variables detailed by this Court in *Lawson* suggests that D and N's identifications were not a result of their personal knowledge or rationally based on their own perceptions. Rather, they were the result of suggestive procedures, including the prosecutor's witness preparation prior to trial and questioning during trial. The formation of D's testimony began "a handful of days" prior to trial, during a conversation with the lead prosecutor. (Tr. 1558). Although D had previously disclaimed any ability to identify the shooter, she expressed hope to the prosecutor that she could identify him at trial. In response, the prosecutor and D arranged a "secret signal" that D would give if she could identify the shooter—a signal flawed from the beginning, since D was never told that it was possible that the perpetrator would not be in the courtroom.[37] (Tr. 1559).

In its merits brief, the state suggests that "it was far more likely that the prosecutor simply wanted to know *when*, not *whether*, to ask D if she could

[37] As defense counsel's brief notes, there is a substantial difference between telling a witness that she does not have to identify anyone and telling the witness the perpetrator might not be in the courtroom.

identify the defendant." *State's Brief* at 36, n 15.[38] But this speculation assumes that D could have identified Mr. Hickman if he was not sitting at the defense table in a courtroom, an assumption that is completely unsupported by D's equivocal statements prior to trial. Indeed, if the state was so confident that it was simply a matter of "when," not "whether," then it should have had D identify a suspect *prior to trial* in a properly structured line-up or photo array. The state's failure to implement best practices substantially undermined the reliability of D's identification.

So, too, did the suggestive questions asked by the prosecutor. During D's testimony, the prosecutor asked "You had described an individual that had a gun. Any my question [is]: [The] individual that had a gun, do you see that person in this courtroom today?" (Tr. 1573). Similarly, the prosecutor asked N, "The person that you saw that did the shooting * * * and that then approached the car, * * * is that person-do you recognize anybody meeting that definition * * * in this courtroom today?"[39] (Tr. 1783). Not surprisingly, both D and N answered "yes"

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[38] This assertion is contradicted by the prosecutor's own statements to the court that he was not certain D would be able to make an identification — thus the need for a "secret signal." (Tr. 1559).

[39] Of course, as set forth more fully above, the state has now conceded that the person who approached the car was *not* Mr. Hickman, rendering the entire premise of the state's question faulty.

and pointed out Mr. Hickman, the only African-American individual at counsel table, as the shooter.

The Court should not ignore the strong likelihood that the inherently suggestive setting of the courtroom, in which Mr. Hickman was singled out at the defense table, irreparably contaminated D and N's independent memory. The state cannot now extricate an untainted identification from the procedure used to make the identification. These first time in-court identifications were tainted by the suggestiveness of the procedure, and the state could not—and cannot—establish, by a preponderance of the evidence, that the identifications satisfy the evidentiary requirements set forth in *Lawson*. *See Lawson*, 352 Or at 763 (finding system variables favored exclusion where police officers used leading questions and "implicitly communicated their belief that [the] defendant was the shooter").

2. The relevant estimator variables support exclusion.

Although an assessment of estimator variables is not necessary under the rule proposed by *Amici*, the variables at play in this case are remarkably similar to those in *Lawson*. There, the Court concluded that poor environmental conditions, limited exposure duration, unspecific initial descriptions, and a two-year gap between the events at issue and the trial undermined the reliability of the witness's testimony that she "always knew that the shooter was defendant." *Lawson*, 352 Or at 763-64. As detailed below, these estimator variables further support exclusion

in this case, because they undermine any claim that either D or N observed or perceived sufficient facts to testify about the identity of the shooter, or that any identification of Mr. Hickman was in fact rationally based on their knowledge.

i. *Stress and Weapon Focus*

Studies show that "high levels of stress or fear can have a negative effect on witness's ability to make accurate identifications." *Lawson*, 352 Or at 769. While moderate amounts of stress can improve focus, when under high amounts of stress, witnesses are often unable to remember details like facial features or clothing. Recall ability diminishes further when a weapon is involved. Studies consistently show that pursuant to the "weapon-focus effect," the visible presence of a weapon during an encounter negatively affects memory for faces and identification accuracy. *Id*. at 772. Unsurprisingly, witnesses tend to focus their attention on the weapon rather than on the face or appearance of the perpetrator. *Id*.

Here, D and N heard at least four loud pops that sounded like fireworks, and then saw that one of the men who had been in the fight was holding a gun in the air. D testified that the entire experience was "traumatic" and "very upsetting." (Tr. 1597-98). She "felt out [of her] element" in the Portland neighborhood where the events took place because she was "new to the area." (Tr. 1517). Moreover, when she arrived at the party, she was left in the car with two other women; because of that, she and witness N "didn't feel comfortable at the place and wanted

to leave." (Tr. 1528). Similarly, witness N "was very upset" by what she observed. (Tr. 1795). The stress that both D and N experienced, coupled with their focus on the shooter's weapon, significantly diminished the reliability of their eventual identifications.

ii. *Exposure Duration*

Studies indicate that longer durations of exposure (time spent looking at the perpetrator) generally result in more accurate identifications. *Lawson*, 352 Or at 771-2. Here, D and N observed a rapid succession of startling events at night. The shooting was a fleeting event, and the car from which D and N viewed the shooting sped away from the scene quickly. (Tr. 1586). Unlike in *James*, neither witness in this case confronted the shooter face-to-face. Not surprisingly, in the immediate aftermath of the crime, D told one of the police officers that "she didn't see the shooting and couldn't really describe much" and that she "could not give specific descriptions of who was involved." (Tr. 53). The momentary exposure duration in this case, like the stress and weapons focus, casts significant doubt on the reliability of the identifications made by D and N.

iii. *Cross-Race Identification*

At least one study has found that cross-racial identifications are 1.56 times more likely to be incorrect than same-race identifications. Conversely, subjects are 2.2 times more likely to accurately identify a person of their own race than a

person of another race. *Lawson*, 352 Or at 775. Despite the widespread acceptance of this impact in the scientific community, however, fewer than half of jurors surveyed actually understood this factor. *Id*. Here, between the night of the crime and the beginning of trial, 23 months passed where neither D nor N made any identification. Shortly before the trial, D met with the defense attorney and an investigator. When asked about the shooter, she described his hair style as "Afro-ish or tight braids" but was unable to provide further details because "[a]ll black men look the same" to her and "they are big and they are black." (Tr. at 1563).[40] These comments succinctly reflect D's own difficulty with cross-race identification. Simply put, identification by a white female of a single African-American male in a crowd of 25-50 African-American men, at night, and in the context of startling events of fleeting duration, casts significant doubt on its reliability.

iv. *Environmental Conditions*

Environmental conditions, including weather, lighting, and clarity of view, can play a significant role in recall and identification. Studies have confirmed, for example, that visual perception decreases with either distance or diminished lighting. *Lawson*, 352 Or at 773. Here, the crime occurred around 11:30 p.m. (Tr.

[40] Although D denied making these statements at trial (Tr. at 1595-96), she provided a similar assessment regarding the individuals at the party (the other people whom she noticed "pretty much looked, like, the same"). (Tr. 1527).

1601). N testified that the shooter was 25 feet away; D (although present in the same car) testified that the shooter was 12 feet away on the driveway, and further stated that he "seemed very tall. . . maybe 5'7'', 6 feet." (Tr. 1576; Tr. 1780) Other witnesses testified, however, that the driveway was sloped upwards towards the house, which would make an individual standing on the driveway appear taller than he actually was. (Tr. 2456; Tr. 2638). The environmental conditions at the time of the event, including lighting, viewing angle, and distance, all likely impaired D and N's ability to clearly view the shooter and make an accurate identification. These facts, as well as the other estimator variables outlined above, only underscore that exclusion is the appropriate result in this case.

3. The prosecutor's "signal" arrangement violated the Sixth Amendment and the federal Due Process clause.

The Sixth Amendment guarantees a defendant the right to counsel at critical stages in the proceedings, including during an in-court witness identification. *United States v. Wade*, 388 US 218, 227, 236-237, 87 S Ct 1926, 18 L Ed 2d 1149 (1967); *Moore v. Illinois*, 434 US 220, 229, 98 S Ct 458, 54 L Ed 2d 424 (1977); *see also Kirby v. Illinois*, 406 US 682, 689, 92 S Ct 1877, 32 L Ed 2d 411 (1972). In *Moore v. Illinois*, the defendant was subjected to an in-court identification during a preliminary hearing in the absence of counsel. *Moore*, 434 US at 222. The *Moore* court, stating "[i]t is difficult to imagine a more suggestive manner in which to present a suspect to a witness for their critical first confrontation," found

a violation of the defendant's Sixth and Fourteenth Amendment right to counsel. *Id*. at 229. The court identified a number of specific infirmities with the identification: the victim was told that she was going to view a suspect; she was told his name; she then heard his name called as he was led before the bench; and she heard the prosecutor recite the evidence believed to implicate the petitioner prior to her identification.[41] *Id*. at 229-30. The court concluded that, had the defendant been represented by counsel, "some or all of this suggestiveness could have been avoided." *Id*. at 230.

Here, the prosecutor's "secret signal" agreement with D constituted a non-disclosed identification attempt at a critical stage of the proceedings that violated Mr. Hickman's Sixth Amendment and due process rights. Unknown to defense counsel, the prosecutor had told D to signal to him with "a look in the eye" if she could recognize the shooter when she took the stand at trial. (Tr. 1559). Although defense counsel was physically present during D's testimony, because of the surreptitious nature of the procedure, defense counsel was not aware of the identification process and could not meaningfully act to avoid some or all of the

[41] A number of the system variables discussed *supra* are analogous to the infirmities that the Supreme Court identified in *Moore*. D was presented with information that identified Hickman as the man accused of the offenses. D knew that the accused perpetrator would be in the courtroom and saw Hickman sitting at the defense table. Moreover, one of the few identifying characteristics that D could recall about the accused perpetrator was that he was a "big black [man]" (Tr. 1597). The only black man on the witness' side of the bar was Hickman.

suggestiveness inherent in D's identification. Defense counsel could only intervene (as he did) when the prosecutor asked the witness to identify the defendant. (Tr. 1532).

Permitting "secret" in-court identification procedures places the burden on the defendant to peremptorily object to any in-court identification as a matter of course, whether or not the state has given the defendant reason to believe that an in-court identification would be attempted. If no objection is made and the prosecutor fails to inform counsel properly that he or she intends to seek an in-court identification, the likely result is that defense counsel will be forced to object when the identification question is asked. This approach all but ensures that the jury will conclude the witness would have correctly and reliably identified the defendant—a result that unquestionably prejudices the defendant and violates fundamental fairness principles.

Because secret in-court identification arrangements do not allow a defendant's counsel to meaningfully avoid suggestive identification procedures, or otherwise prejudice the defendant by forcing defense counsel to object to a witness's identification in front of the jury, such arrangements violate the Sixth Amendment and fundamental fairness principles of the Federal Due Process Clause and further support exclusion of the identifications in this case.

VI. CONCLUSION

In *Lawson*, this Court recognized the danger of unreliable eyewitness identifications stemming from suggestive procedures. First time, in-court stranger identifications unequivocally fall within this category, and the prejudice resulting from their introduction cannot be cured. For these reasons, as set forth more fully above, *Amici* request that the Court prohibit the introduction of first-time, in-court stranger identifications and remand this case for proceedings consistent with that rule.

Respectfully submitted,

s/ Matthew G. McHenry
Matthew McHenry (OSB #043571)
Levine & McHenry LLC
1001 SW Fifth Avenue, Suite 1414
Portland, OR 97204
(503) 546-3927
Email: matthew@levinemchenry.com

CERTIFICATE OF COMPLIANCE
with ORAP 5.05(2)(d)

I certify that this brief complies with the word-court limitation in ORAP 5.05(2)(b) and the word count of this brief, as described by ORAP 5.5(2)(a), is 12,907 words.

I certify that the size of the type in this brief is not smaller than 14 points for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

s/ Matthew G. McHenry
Matthew McHenry (OSB #043571)
Levine & McHenry LLC
1001 SW Fifth Avenue, Suite 1414
Portland, OR 97204
(503) 546-3927
Email: matthew@levinemchenry.com

PROOF OF SERVICE

I certify that on January 30, 2013, I directed the original BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK AND OREGON INNOCENCE PROJECT IN SUPPORT OF RESPONDENT HICKMAN to be electronically filed with the Appellate Court Administrator, Appellate Records Section and the following people by using the electronic filing system:

RYAN SCOTT (OSB #955267)
Scott and Huggins Law Offices
1549 SE Ladd Ave.
Portland, OR 97204
Telephone: (503) 471-1338
Email: ryan@scotthugginslaw.com

Attorney for Defendant-Appellant Jerrin Lavazie Hickman

ELLEN F. ROSENBLUM (OSB #753239)
Attorney General
ANNA M. JOYCE (OSB #013112)
Solicitor General
ANDREW M. LAVIN (OSB #033696)
Senior Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: andrew.m.lavin@doj.state.or.us

Attorneys for Plaintiff-Respondent State of Oregon

s/ Matthew G. McHenry
Matthew McHenry (OSB #043571)
Levine & McHenry LLC
1001 SW Fifth Avenue, Suite 1414
Portland, OR 97204
(503) 546-3927
Email: matthew@levinemchenry.com