NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2008

JULIAN MARQUEZ,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
CONNECTICUT SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether or not an eyewitness's out-of-court identification is reliable and therefore admissible when it is the product of an unduly suggestive identification procedure, Neil v. Biggers, 409 U.S. 188 (1972) and Manson v. Brathwaite, 432 U.S. 98 (1977) require a trial court to consider various factors, including the level of certainty communicated by the eyewitness. The question presented is whether Biggers and Brathwaite should be overruled or modified such that the subjective eyewitness-certainty factor is eliminated and such that the implementation of double-blind procedures and the sequential viewing of potential suspects in photographic arrays are made mandatory in order to satisfy due process.

LIST OF PARTIES

The caption of the case contains the name of the petitioner, Julian Marquez, and the prosecuting authority, the State of Connecticut.

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The Petitioner, Julian Marquez, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court which entered in the above-entitled proceeding on April 14, 2009 (App. p. A2) and became final on said date.

OPINION BELOW

The opinion below was from the Connecticut Supreme Court. It was published and filed on April 14, 2009. The case was styled *State of Connecticut v. Julian Marquez, No. SC 17663*. It is published as State v. Marquez, 291 Conn. 122 (2009). The entire text of this opinion is reproduced in the appendix (App. pp. A1-A93).

BASIS FOR JURISDICTION

The date the Connecticut Supreme Court's judgment entered was April 14, 2009.

The statutory provision believed to confer jurisdiction to review judgment in this matter on a writ of certiorari is 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Article V of the Amendments to the Constitution of the United States:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentiment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in a Militia, when in actual service in time of War of public danger; nor shall a person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation."

Article XIV of the Amendments to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPREME COURT RULES

United States Supreme Court, Rule 10. Considerations Governing Review on Writ of Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another Untied States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATUTES INVOLVED IN THIS CASE

Connecticut General Statutes:

Sec. 53a-49. Criminal attempt: Sufficiency of conduct; renunciation as defense. (a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Sec. 53a-54c. Felony murder. A person is guilty of murder when, acting either alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, sexual assault in the first degree, aggravated sexual assault in the first degree, sexual assault in the third degree, sexual assault in the third degree with a firearm, escape in the first degree, or escape in the second degree and, in the course of and in furtherance of such crime or of flight therefrom, he, or another participant, if any, causes the death of a person other than one of the participants, except that in any prosecution under this section, in which the defendant was not the only participant in the underlying crime, it shall be an affirmative defense that the defendant: (1) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and (2) was not armed with a deadly weapon, or any dangerous instrument; and (3) had no reasonable ground to believe that any other participant was armed with such a weapon or instrument; and (4) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

Sec. 53a-134. Robbery in the first degree: Class B felony. (a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon.

United States Code

28 U.S.C. § 1257 State courts; certiorari;

(a) Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the Untied States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

STATEMENT OF THE CASE

A. INTRODUCTION

On January 11, 2006, the petitioner, Julian Marquez, was convicted by a jury of one count of felony murder in violation of Connecticut General Statutes § 53a-54c and two counts of robbery first degree in violation of §53a-134(a)(2) and one count of attempted robbery first degree in violation of Connecticut General Statutes § 53a-49(a) . The petitioner was acquitted of one count of attempted robbery. The petitioner was thereafter sentenced by the trial court to a term of incarceration of 50 years, execution suspended after 35 years, with five years probation. (3-10-06 Tr. pp. 69-70, App. pp. A355-A356).

The petitioner then took a direct appeal to the Connecticut Supreme Court based on one due process claim, that his convictions should be overturned because the trial court failed to suppress the two eyewitness identifications. The Connecticut Supreme Court affirmed.

B. FACTS RELEVANT TO THIS PETITION

The petitioner claimed that the trial court's denial of his Motion to Suppress two eyewitness identifications violated his rights to a fair trial and due process under the fifth and fourteenth amendments to the United States Constitution. Prior to trial, the petitioner had filed a Motion to Suppress these eyewitness identifications. The trial court held a suppression hearing and issued a detailed memorandum of decision, denying suppression. (App. pp. A94-A128). The preliminary factual history is summarized in the Connecticut Supreme Court's decision.

> "On the evening of Friday, December 19, 2003, Mark Clement and his friend, Christopher Valle, were visiting at the apartment of a mutual

friend, Miguel Delgado, Jr., at 134 Babcock Street in Hartford. . . . The apartment itself was on the third floor of the building and could be accessed by visitors through a front door that opened into a lighted common hallway at the top of the interior staircase.

. . . On the evening of December 19, the living room was illuminated only indirectly by light emanating from the kitchen and game room. There was a couch on the back wall of the living room that faced the front door.

After arriving at the apartment, Delgado, Clement, Valle and another man named Amauri Escobar primarily remained in the game room playing video games and drinking alcoholic beverages. . . .

At around midnight on December 20, as Valle was preparing to leave the apartment, he exited the game room to say goodnight to Delgado, who was standing just inside the front door attempting to get rid of two men who stood facing him in the common hallway. As Valle approached the front door, one of the strangers, a Hispanic male in his early twenties wearing braids and black clothing, pointed a handgun directly at him and entered the apartment, forcing Valle and Delgado backward into the living room and ordering them to sit on the couch. Shortly thereafter, the intruders entered the game room, announced their presence and ordered Clement and Escobar to join Valle and Delgado. Once everyone returned to the living room, the intruders were only one or two feet away from their victims for a period of several minutes. Importantly, both Valle and Clement had multiple opportunities to see the faces of the perpetrators, particularly the gunman. Valle initially saw the gunman in the brightly lit common hallway while Delgado was trying to get rid of him. Clement observed the gunman's face when the gunman entered the lighted game room and announced that "it was a stickup." Further, while Valle and Clement were seated on the couch, they both viewed the intruders' faces with the light from the kitchen and the game room providing illumination.

The intruders then ordered all of them to surrender their money and jewelry, which Clement, Valle and Escobar did promptly. The intruders . . . demanded to be taken to inspect the back bedroom. Delgado, who was now standing to the side of the couch and blocking the entrance to the kitchen, refused. Delgado suddenly rushed at the gunman and grabbed his arm. A struggle ensued, during which Delgado forced the gunman back toward the front of the apartment, and a shot rang out. Valle jumped to his feet from his position on the couch and began to head for the perceived safety of the game room. He then

> heard a second shot and saw Delgado fall to his knees on the floor. Valle made it to the game room with Clement behind him, while Escobar apparently escaped out of the rear exit of the apartment.
>
> Valle heard a third shot fired, and, once it was apparent that the intruders had fled, he eventually emerged from the game room. Feeling around on the floor in the relative darkness of the hall near the front door, Valle discovered Delgado lying in a pool of blood. When he turned the living room light on, Valle realized that Delgado was critically wounded and called the police. Immediately after the incident, both Valle and Clement expressed to police investigators their confidence that they could identify the gunman."

291 Conn. 122 at 126-129 (App. pp A5-A8).

Mr. Valle testified that he gave a description of the shooter to the police. He told the police the shooter was "5' 8" or over" with "long hair, medium build, light-skinned." This witness testified that a few days after the shooting, he went to the Hartford parole office and that he recognized the petitioner (who walked in there at the same time) as "the guy that robbed me at my boy's house." (Tr. 1-4-06, p. 59, App. p. A358). This led the police to set up a photographic array at the police station. Over written and verbal defense objections regarding the suggestiveness of the photograph depicting the petitioner, the witness selected him as one of the perpetrators. (Tr. 1-4-06, pp. 61-63, App. pp. A359-A361.) The witness admitted on cross-examination that he was at the probation office because he was a drug dealer and he was on probation regarding a 42 month sentence. (Tr. 1-4-06, pp. 98-99, App. pp. A362-A363.)

Mr. Mark Clement testified. He testified that the victim grabbed the man with the gun and while he (Clement) was looking "down" "there was a gunshot." (1-4-06 Tr. 147, App. p. A364.) He testified he followed Mr. Valle into the game room (1-4-06 Tr., pp. 147-148, App. pp. A364-A365). He testified he had his "eyes closed" and then "another shot went off." He told the police he thought he could more confidently identify the perpetrator who held the gun than he could

identify the perpetrator without the gun. (Id., p. 152., App. p. A154). He gave Hartford Police a written statement shortly after the shooting occurred. "Four to seven days later" he spoke with Detective Beaudin who came to his father's house in Newington. She showed him photographs. He testified "there was one photograph that caught my attention." (Id., p. 155, App. p. A154). Over defense objection this witness identified the petitioner in the courtroom. He testified that he circled the photograph of the person who held the gun when he was shown the photographic array. (1-4-06 Tr., pp. 156-157, App. pp. A366-A367.) State's Exhibit 9 is the photographic array and the witness identified the photograph he previously identified. (Id., p. 159, App. p. A155).[1]

During cross-examination Mr. Clement admitted that he and friends "were under the influence of alcohol that evening." (1-5-06 Tr., p. 4, App. p. A370). He admitted he was "not paying a whole lot of attention to how these people looks (sic)." (Id., pp. 7-8, App. pp. A155). He admitted that in his written statement to the police he "didn't say anything to the police ... about his [the gunman's] eyes." (Id., p. 18, App. p. A155).

Regarding the photographic array, the following cross-examination occurred:

"Q Now you felt that they wouldn't be coming over there just showing you a bunch of photos unless they thought that there was a suspect in here?
A Yeah. Or they want to eliminate some suspects.
Q Okay. But they're not just coming over there to waste your time, there's probably a suspect in here for you to pick?
A Yeah, maybe.
Q So you felt you had to pick somebody?
A They didn't give me – they didn't make it sound like that though, that I had to pick somebody.
Q Okay. But that's what you're thinking at the time, that there's probably a suspect in here, so I should pick somebody?

[1] The photographic array is published in the Appendix at pages A414-A416.

A That's the first time I ever went through something like this, maybe, yeah.
...
Q *Would you agree with me that the photo of Mr. Marquez is the only one that has a white ruler in the photograph?*
A I didn't even notice the ruler.
Q *Now that you look at it, would you agree that's the only one that has a white ruler?*
A *Yeah.*
Q *Would you agree with me that the lighting of that photograph is brighter then the other suspects' photographs?*
A *I guess so. His face is a little brighter.*
Q *It's illuminated brighter then some of the others?*
A *Yeah...."* (1-5-06 Tr., pp. 19-21, App. pp. A371-A373) (emphasis added).

The witness also admitted that he had considered another photograph in the eight photograph array. He "ultimately" "decided that the photograph of Mr. Marquez looked more like the gunman than the person in the second photo." (1-5-06 Tr., p. 21, App. p. A373.) The witness was also questioned about what Detective Beaudin told him right after he identified the petitioner's photograph.

"Q And when you indicated to Detective Beaudin that number three was the photograph that you selected, she said to you, you did a good job, Chris picked the same guy?
A Right." (1-5-06 Tr., p. 22, App. p. A374).

Detective Patricia Beaudin testified. (1-6-06 Tr., pp. 39-88.) She obtained permission from the shooting victim's mother, the lessee of the Babcock Street apartment, to "process the scene." (Id., p. 40, App. p. A156.) She did not initially interview Mssrs. Valle, Clement or Escobar. The morning of December 23, 2003 she received word that one of the suspects had been seen at the "office of parole." (1-6-06 Tr., p. 42, App. p. A377). When asked, "... and what did you do when you got to the parole office?" – her unobjected to response was: "That's when I first

spoke to the witness Christopher Valle, who said that he saw the person that had robbed him that night and the same person that had shot his friend." (Id.) She obtained photographs of all people "who had signed in" from the office of parole and then she "eliminated the ones that didn't fit the description of the suspects...." (Id., pp. 42-43, App. p. A156-A157). She then "took the one that most resembled the suspect's description." It was the petitioner's photograph. (Id., p. 43, App. p. A157). That photograph became part of the photographic array of eight photographs which were shown all at the same time to Mr. Valle. (Id., p. 44, App. p. A157.) She testified that Valle pointed out the petitioner's photograph. (Id., p. 45, App. p. A157.) She testified that Mr. Valle "circled number six, which is Mr. Marquez." (Id., p. 46, App. p. A157.) This was part of State's Exhibit 1. She further testified that she repeated the same process with Mr. Clement, albeit using a different array. (Id., p. 48, App. p. A157.) She testified that "Mr. Clement circled Mr. Marquez's photograph." (Id., p. 50, App. p. A157.) That photograph of the petitioner was in State's Exhibit 9. (App. p. 157.)

The following additional testimony was elicited during cross-examination of Detective Beaudin:

"Q Now this picture is the only picture out of those eight where the measuring stick in the back is white?
A Yes.
Q With black background?
A Yes.
Q And because it's white, the lighting, it's the only picture in the array where the lighting is really yellow?
A Yes.
Q And it's distinct from all seven of the other pictures?
A Yes.
...
Q And now I'd like to show you what's been marked as State's Exhibit 9; this is the array that was shown to Mr. Clement?
A Yes.

Q I think all eight pictures are exactly the same?
A Yes. They are.
Q They're just arranged in a different order?
A Yes. They are.
Q And again, there's only one picture in that photo spread with a white ruler, what number is that picture?
A Number three.
Q And that's the same picture that Mr. Clement picked out?
A Yes. It is.
Q And after he picked it out, you told him, you said to him, hey, that's good, Mr. Valle picked out the same person?
A I don't remember if I said that or not.
Q You don't remember if you said it or not, but you could have said it?
A I may have." (1-6-06 Tr., pp. 78-80, App. pp. A378-A380.)

Detective Beaudin also testified to this effect at the suppression hearing which occurred on December 20, 2005. (12-20-05 Tr., pp. 3-30, App. pp. A382-A409.) The hearing was held in response to the defendant's motion to suppress these identifications.

The Connecticut Supreme Court noted:

> "In its memorandum of decision, the trial court determined that the identification procedures used were unnecessarily suggestive but nonetheless sufficiently reliable under the totality of the circumstances to be admissible at trial. The court based its determination primarily on what it termed the "universal judgment of the relevant scientific community" that sequential identification procedures, pursuant to which a witness views photographs or live suspects one at a time, are superior to the traditional lineup or photographic array in which a witness views all of the individuals simultaneously. The court was persuaded by the suggestion in the literature that sequential procedures may be superior because they limit the operation of " `relative judgment,' " whereby a witness may be tempted to choose the photograph or individual who looks the most like their memory of the perpetrator relative to the others viewed through a process of elimination, rather than by actually comparing each individual to their memory of the perpetrator. Sequential procedures reduce or eliminate this tendency, it is argued, by depriving a witness of the opportunity to compare subjects to each other and by forcing the witness to rely strictly on his memory rather than on the relative judgment process.

> The trial court also was "troubled" by the fact that the identification procedures in this case were not "double blind." To qualify as double-blind, a photographic array must be administered by an uninterested party without knowledge of which photograph represents the suspect. Again relying on the scientific literature, the court found that "[t]he risk of producing a misidentification in such circumstances, due to conscious or unconscious bias by a highly interested person administering the procedure, is so well established in the relevant scientific literature that experts have strongly recommended that all pretrial identification procedures be conducted only by persons who do not know which member of the lineup or photospread is the suspect." The court was concerned that Beaudin's statement to Clement congratulating him on choosing the same photograph as Valle was outward evidence of a bias in the process that subtly and perhaps subconsciously infected the procedure before Clement had made his choice.
>
> For the foregoing reasons, and on the basis of the scientific research, the trial court essentially concluded that the traditional identification procedure that the police used in this case was per se unnecessarily suggestive. The court further directed that "[p]olice . . . conducting photo[graphic] identifications should henceforth strive to eliminate the danger of misidentification arising from the simultaneous showing of multiple [photographs] by making all such showings sequentially." Despite finding these flaws in the identification process in the present case, the court nonetheless examined the totality of the factual circumstances under the *Manson* test, determined that the identifications by Valle and Clement were reliable, and denied the defendant's motion to suppress." 291 Conn. 122, App. pp. A10-A13.

Relying on Sumner v. Mata, 455 U.S. 591, 597 (1982), the state supreme court decided that the standard of review involved "a mixed question of law and fact," 291 Conn. at 136. (App. p. A15). The state supreme court, after reviewing state precedent, also stated that in the past it had "improperly [made] the test of suggestiveness so rigorous" that it had "made the reliability prong of the analysis vestigial." Id., at 144, (App. p. A23). It further declared that "[t]he suggestiveness prong *should be less stringent and more focused on the mechanics of the photographic array itself as well as the behavior of the administering officers.*" Id., at 145. (App. p. A24, emphasis added.)

Despite declaring that evaluating suggestiveness should be less stringent and "more focused on the mechanics" of the array and the "behavior" of the investigating officers, relying in part on State v. Ledbetter, 275 Conn. 535, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082 (2006), the state supreme court declared that "the judgement of the relevant scientific community with respect to eyewitness identification procedures is far from universal or even well established..." Marquez, supra at 155 (App. p. A34.)

The Connecticut Supreme Court held that "due process does not require the suppression of a photographic identification that is not the product of a double-blind sequential procedures." (Id. at 156, App. p. A35.) The majority held that the trial court abused its discretion in concluding that the procedures used in the subject case did present "a very substantial likelihood of irreplaceable misidentification." (Id., at 165, App. p. A44.) "We conclude that the procedures employed in this case, although not ideal, were within the acceptable parameters of effective and fair police work, and satisfy the requirements of due process." (Id., at 165, App. p. A44.) In light of the trial court's finding of suggestiveness being held to be error, no further constitutional analysis was undertaken and the convictions were affirmed.

Justice Katz concurred in the result. However, she disagreed with the plurality holding that the procedures used were not suggestive.

> "Because, however, the trial court also reasonably relied on the fact that the detective in charge of the investigation not only administered the procedure but also conveyed approval of the identification made by one of the witnesses as a basis for its determination that the identification procedure was unnecessarily suggestive, I would not conclude, as the majority does, that the trial court abused its discretion when it determined that the identification procedure as a whole was unnecessarily suggestive." (Id., at 168, App. p. A47.)

Justice Katz concurred in the result because she decided that the trial court appropriately

analyzed the Manson v. Brathwaite factors in finding that the admission of the identifications did not violate due process. (Id., at 181-185, App. pp. A60-A64.)

REASONS FOR GRANTING THE PETITION

This Court has noted that "[w]hen governing decisions are unworkable or are badly reasoned,' this court has never felt constrained to follow precedent.'" Payne v. Tennessee, 501 U.S. 808 at 828 (1991). In 2005, the Wisconsin Supreme Court took a new constitutional path and failed to strictly follow Neil v. Biggers 409 U.S.188 (1972) in State v. Dubose, 699 N.W. 2d 582 (Wis. 2005). Instead, it held that suggestive identification procedures are inherently unreliable and presumptively inadmissible. Id. at 593-94. It relied on over 30 years worth of sound social scientific research, comparing its reasoning with the reasoning of this Court in Brown v. Board of Education, 347 U.S. 483 (1954). It stated that this Court in Brown:

> "relied on comprehensive studies to support its legal conclusion that the doctrine of separate but equal was violative of the United States Constitution, and, thus, that *Plessy v. Ferguson,* 163 U.S. 537 (1896) should be overruled. For support of this much-needed shift in constitutional law, the United States Supreme Court based its decision on several modern studies and on the effects of segregation in public education." Dubose, supra at 598.

The petitioner makes an analogous argument. The writ of certiorari should be granted because in the three decades following Biggers, supra, and following Manson v. Brathwaite 432 U.S. 98 (1977), scientific studies prove beyond legitimate dispute that the Biggers/Manson five-factored reliability test is flawed [2] and that a better approach exists.[3] Certiorari should be granted so that the

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[2] A 2001 survey of 64 experts in the field reveals that many of the scientific conclusions are generally well accepted. Saul M. Kassin et al., On the "*General Acceptance" of Eyewitness Testimony Research: A New Survey of Experts*, 56 Am Psychol. 405 (May 2001)

[3] The petitioner submits that the lower court's declaration that "the judgment of the relevant scientific community with respect to eyewitness identification procedures" is not "even

chances of convicting innocent citizens are reduced and due process protections are increased. It is time for the law to catch up to the science. It is time to change the rules governing eyewitness identification procedures.

ARGUMENT

The Neil v. Biggers test adopted in Manson v. Brathwaite, 432 U.S. 98 (1977) must be modified, if not overruled. When this Court has found it to be a "necessity", it will overrule a prior decision. Ring v. Arizona, 536 U.S. 584, 608 (2002). The time has come for this Court to revisit Biggers based on sound social scientific research that has been established in the 32 years following Manson v. Brathwaite.

In 1972, this Court decided Neil v. Biggers, 409 U.S. 188 (1972). It was held that even an unnecessarily suggestive show-up identification did not violate due process if "under 'the totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." Id. at 199. For the first time, a five factor test was articulated by which reliability would be analyzed. As was summarized in Neil v. Biggers:

> "'To determine whether an identification that resulted from an unnecessarily suggestive procedure is reliable, the corruptive effect of the suggestive procedure is weighed against certain factors, such as the opportunity of the [victim] to view the criminal at the time of the crime, the [victim's] degree of attention, the accuracy of [the victim's] prior description of the criminal, the level of certainty demonstrated at the [identification] and the time between the crime and the [identification].' (Internal quotation marks omitted.) Neil v. Biggers, 409 U.S. 188, 199-200."

In Manson v. Brathwaite, 432 U.S. 98 (1977), this Court held that "reliability is the linchpin in

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well established" (App. p. A11) is clearly erroneous. If this court believes that this declaration of the lower court is accurate, then petitioner concedes that certiorari should be denied.

determining the admissibility of identification testimony." Id. at 114. In 1974, Professor Charles A. Pulaski predicted that the Neil v. Biggers test (later adopted in Manson, supra) would "reduce... the due process test to a handy device by which courts can legitimately overlook suggestive confrontations."[4] Social science research of the past 32 years confirms that the "handy device" is deeply flawed. In *Manson v. Brathwaite Revisited: Towards A New Rule Of Decision For Due Process Challenges To Eyewitness Identification Procedures*, 41 Valparaiso Law Rev. 109, Vol. 2006, No. 1, it is explained in detail how and why the Biggers/Manson reliability factors are flawed and how admissibility based on them evinces unfairness. (Id., 109-132.)

> "*The reliability factors are not only discredited, they also are poorly suited to the task of ensuring fairness and reliability in out-of-court identifications.* Indeed, the Manson reliability factors have functioned in such a way as to create safe harbor provisions, but not ones that, to borrow Professor Susan Klein's terms 'instrumentally advance[]' Due Process Clause values or 'offer[] bright-line guidance for officers in the field.' *All too often, if a police officer, prosecutor, or trial court elicits a subjective statement of confidence from a witness, or a subjective statement that the witness got a 'good look,' the identification will be deemed reliable and admitted. Thus, the Manson checklist creates an incentive to elicit a statement of confidence, but not necessarily to use procedures that are reliable.* Moreover, rote application of factors such as certainty that are acknowledged by social science to be only weakly correlated with reliability undermines respect for the courts. As the DNA exonerations have now demonstrated, *Manson routinely allows the juries to consider mistaken eyewitness testimony thus failing in its avowed purpose of preventing wrongful convictions based on this testimony*. It is time for Manson to go." Id. at 22 (emphasis added).

After the trial court found that the Hartford police employed unnecessarily suggestive identification procedures, it put stock in the alleged 'good look' that one of the eyewitnesses got and it gave credence to both eyewitnesses' subjective levels of confidence in their eyewitness identifications. The petitioner

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[4] *Neil v. Biggers : The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 Stan. L. Rev. 1097 at 1119 (1974).

argued to the Connecticut Supreme Court that the trial court erred and reached an incorrect reliability conclusion in the way it applied and interpreted the Biggers/Manson factors. In finding that the identifications were not unreliable, the trial court did note that neither Mr. Valle's nor Mr. Clement's descriptions described "facial features such as eye color, hair color, distinguishing marks or tattoos." (App. pp. A162.) The trial court did not comment on all of the actual discrepancies in the witnesses' initial descriptions to the police. For example, Mr. Clement testified before the jury that "... his eyes I could probably catch if I saw him again." (Id.) (1-4-06 Tr., p. 152.) Clement testified at the suppression hearing that in making the photographic identification he remembered "the eyes. I remember his eyes. And I remember the hair...." (12-7-05 Tr., p. 66, App. p. A411.) However, during cross-examination, Clement was forced to admit that he never told the police anything about the gunman's eyes when he was interviewed.

> "Q And isn't it true that you didn't say anything to the police in your description of the gunman about his eyes?
> A Yeah. Not in this." (1-5-06 Tr., p. 18, App. p. A375.)

A discrepancy the trial court did comment about was Mr. Clement's description of the weight or body shape of the perpetrator with the gun. The statement Mr. Clement gave the police a few hours after the shooting described the shooter as being "skinny." The trial court noted:

> "Mr. Clement's description of the gunman, like Mr. Valle's, assertedly lacked many details about the gunman's facial features. *In his post-arrest statement to police, moreover, he described the gunman as slim, not broad-shouldered like the defendant now appears and appeared in his photo*, ..." (App. p. A168, emphasis added.)

Although at the suppression hearing Mr. Clement testified that he remembered the shooter's hair (12-7-05 Tr., p. 66, App. p. A411), the trial court correctly observed another discrepancy in Clement's description, namely, in his statement to the police, "he mentioned nothing at all about the gunman wearing

braids or corn rows in his hair." (12-7-05 Tr., p. 84, App. p. A413.)

In weighing the "corrupting" effect of the suggestive identification itself on the Biggers/Manson scales against the reliability factors, the defendant argued that "the scientific studies he cited to the trial court and, which in large measure were credited by the trial court, should be given even greater consideration than the trial court gave." (Def. Brief to the Connecticut Supreme Court, pp. 21-22, App. pp. A170-A171.)

> "The corrupting effect of these unnecessarily suggestive identifications does outweigh the Biggers/Manson factors and thus the trial court erred by holding otherwise.
>
> The corrupting influences which occurred here can be summarized. First, there was a failure to employ a double-blind procedure. Double-blind testing is crucial.
> "The reason for keeping the tester blind is to prevent the tester from *unintentionally* influencing the outcome of the results. The double-blind testing recommendation for lineups does not assume that the tester intends to influence the eyewitness, or is even aware of any such influence. This is not an integrity issue. Instead, it is merely an acknowledgment that people in law enforcement, like people in behavioral and medical research, are influenced by their own beliefs and unknowingly 'leak' this information, both verbally and nonverbally, in ways that can influence the person being tested. *Vast scientific literature shows that the need for double-blind testing procedures is particularly crucial when there is close face-to-face interaction between the tester and the person being tested. The need for double-blind lineup testing is particularly critical for photo lineups. This is because, unlike live lineups, there is no right to the presence of defense counsel in photographic identification procedures and, hence, no one to observe possible suggestiveness in the procedure. Typically, the primary police investigator in the case will assemble the photo lineup, contact the eyewitnesses, and meet with the eyewitness for the purpose of showing these photos. The investigator, of course, knows which person in the photo lineup is the suspect.*"[5]
>
> Obviously the same detective, Detective Beaudin, met with the

[5] Wells, G.L. *Eyewitness Identification: Systemic Reforms*, Wisconsin Law Review 2006, no. 2: 615 at 629 (2006) (emphasis added).

> eyewitnesses and she was not a "blind" tester.
> Second, the police failed to use a sequential procedure and instead had eight photographs displayed on one board (or page). The flaw is that this: "easily permits eyewitnesses to examine all six photos at once and determine who looks the most like the offender, which *tempts them to make a decision based on relative judgments.* A sequential lineup, on the other hand, shows the eyewitness only one person at a time and requires the eyewitness to make a 'yes,' 'no,' or 'not sure' response to each one before moving on to the next.
> *The psychological experience for the eyewitness is dramatically different using the sequential procedure than it is using the simultaneous procedure.* Using the sequential procedure, the eyewitness cannot simply compare one photo to another and decide who looks the most like the offender relative to the others. Although the eyewitness can mentally compare the current photo to those presented previously, *the eyewitness cannot be sure what the next photo will look like; maybe the next one will look even more like the offender.* The sequential procedure is conducted such that the witness does not know when the last photo is being shown. As a result, *the sequential procedure appears to lead eyewitnesses to set higher criteria for making a positive identification because they cannot be sure that they have seen all of the lineup members.*
> *Research comparing the simultaneous lineup procedure to the sequential lineup procedure shows that using the sequential lineup procedure produces fewer mistaken identifications.*" (Id., pp. 625-626, emphasis added.)
>
> The trial court acknowledged that the procedure used caused the eyewitnesses to make "relative judgments" . . . and the court gave credence to the defense argument that this contributed to the unnecessary suggestiveness of the procedure used. . . . The error lies in the trial court not correctly "measuring" the weights on each side of the Biggers/Manson scales."

(Def. Br. supra, pp. 22-23, App. pp. A171-A172.)

Irrespective of whether or not the plurality opinion reflects error by holding that "the trial court overemphasized the significance of the scientific research and improperly applied a per se analysis to the challenged identifications" (App. pp. A35-A36), the petitioner now concedes, based on the credibility findings the trial court made and based on the application of Biggers/Manson *as it stands now*, that the trial court predictably found that the two eyewitness identifications were reliable. The petitioner agrees with

the lower court that the standard of review entails "a mixed question of law and fact." (App. p. A15. Sumner v. Mata, 455 U.S. 591, 597 (1982). In short, by relying on the scientifically flawed Biggers factors, the trial court predictably concluded that the suggestive eyewitness identifications were nevertheless reliable. That might end the inquiry except for the constitutional challenge the petitioner is advancing in his petition.

The petitioner therefore argues that Biggers/Manson must be overruled or modified. The petitioner argues individually and collectively that the federal due process clause requires either (a) a per se rule that excludes out-of-court identification evidence generated through unnecessarily suggestive identification procedures such as occurred here and/or (b) a new decisional rule requiring affirmative minimum guidelines for line-ups and photographic arrays utilizing a presumption of unreliability when they are not followed and/or (c) the deletion of an eyewitnesses' alleged certainty as a factor under Biggers/Manson. The petitioner therefore seeks nothing short of a correction in controlling constitutional law.

The third argument, which calls for the outright elimination of the Biggers' witness-certainty factor, is addressed first. In its amicus curiae petition to this Court in Perez v. United States, 05-596[6], the National Association of Criminal Defense Lawyers represented:

> "Federal appellate and district courts alike have expressed dissatisfaction with the witness-certainty prong of *Biggers*. These federal courts struggle to do justice within the *Biggers* framework, but are ultimately bound to follow this Court's precedent. For example, even though the Seventh Circuit has acknowledged that '[d]eterminations of the reliability suggested by a witness's certainty after the use of suggestive procedures are complicated by the possibility that the certainty may reflect the corrupting effect of the suggestive procedures,' it has obligingly adhered to *Biggers* in the criminal law context. *United States ex. rel. Kosik v. Napoli,* 814 F.2d. 1151, 1159 (7th Cir. 1987). . . .

[6] 138 Fed Appx 379, 248 F. Supp. 2d 111, 414 F.3d 302, Cert. denied, 547 U.S. 1002 (2006).

> The Seventh Circuit's skepticism towards witness certainty and eyewitness recollection is not unique. In *Grayer v. McKee,* 149 Fed. Appx. 435 (6th Cir. 2005), the court of appeals recognized that social science studies 'demonstrate that there is *no correlation* between the confidence of the witness and the accuracy of the identification,' and expressed 'concerns about the reliability of identification' made in that case. *Id.* at 447-48 (emphasis added). *Nonetheless, the court adhered to the 'established precedent' of Neil v. Biggers, finding that even in a 'close case,' if a witness said he was 'certain' of his identification, the 'level of certainty' factor supports the reliability of the identification and, thus, admission of it as evidence. Id.* at 448. In *Abdur-Raheem v. Kelly*, 98 F. Supp. 2d 295, 306-07 (E.D.N.Y. 2000), *rev'd on other grounds*, 257 F.3d 122 (2d Cir. 2001), the court argued that '[b]ased on empirical research into eyewitness identifications' the witness-certainty factor should be given little weight because it 'assign[s] too much predictive value to eyewitness confidence and also to witnesses' descriptions, neither of which is very predictive of identification accuracy in scientific studies.'
>
> Other judges have expressed similar concerns over application of *Biggers'* witness-confidence prong, all the while adhering – as they must – to precedent. *See e.g., United States v. Singleton*, 702 F.2d 1159, 1179 (D.C. Cir. 1983) (Wright, J. dissenting) ('[I]nnumerable authorities have concluded that a witness'[s] degree of certainty in making an identification generally does not measure its reliability. Indeed a *negative* correlation sometimes exists between a witness'[s] confidence and the accuracy of the identification.') (emphasis in original); *Ocasio v. Artuz,* No. 98-CV-7925 (JG), 2002 WL 1159892, *10 n.7 (E.D.N.Y. May 24, 2002) ('[I]n truth, *social science has convincingly revealed that there is little or no correlation between an eyewitness'[s] confidence in an identification and the accuracy of the identification.')* (citing psychological research." (Id., at pp. 6-8, emphasis added.)

This lack of a nexus between confidence in the identification and the identification's accuracy is counterintuitive on the one hand, but on the other hand it helps explain the ensuing growing body of DNA exonerations in cases where there was no corroborating forensic evidence.

The Innocence Project reports that as of February, 2007, of the 195 wrongfully convicted defendants who have been exonerated by DNA evidence, seventy-five percent were convicted based on mistaken eyewitness identification. It further reports that of those 195 wrongful convictions, many

involved multiple witnesses who incorrectly identified the accused. (Innocence Project, Press Release, 2-20-07, www.innocenceproject.org/Content/385.php.)

When this Court decided Manson in 1977, little social science research had been conducted into the factors that affect the reliability of eyewitness identification, which in one sense simply is the expression of a human being's mnemonic opinion regarding who they think they saw. Since 1977 there have been hundreds of published, peer-reviewed experiments on the subject of eyewitness identification.[7] A central due process concern arises because mistaken eyewitness identifications flowing from suggestive police procedures are largely immune to the "great engine of truth", cross-examination. The reason is simple. Cross-examination demonstrates:

> "inutility in confronting the truthful but mistaken witness, or in demonstrating the lessons of the science of perception, memory, and recall. A tool designed from its inception to root out *liars* is ill-suited for the task of exposing the risk or reality of *mistaken* identification."[8]

Dr. Gary Wells, a foremost researcher in the field, notes various flaws in applying the Biggers/Manson criteria. Wells' research reveals that the confidence level or witness-certainty of a given eyewitness has little value in assessing reliability. An expression of confidence or certainty in the eyewitness identification of a perpetrator has been shown to be "only modestly related to accuracy under pristine conditions." Wells, et al., *"Eyewitness Identification Procedure: Recommendations for*

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[7] Two recent journal articles refer to this body of research. Gary Wells and Deah S. Quinlivan, "Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: Thirty Years Later", 33 Law & Hum. Behav. 1, (Feb. 2009), Sandra Guerra Thompson, "Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Testimony", 41 U.C. Davis L. Rev. 1487 (2008).

[8] *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, Jules Epstein, 36 Stetson L.R. 747 at 766 (2007).

Lineups and Photo Spreads. Law and Human Behavior, vol 22, no 6. p. 20 (1998). Importantly, Wells notes that criminal juries place great weight on the confidence level expressed by eyewitnesses in making identifications. Unfortunately, confidence has little relationship to the accuracy of the identification. And, the degree of witnesses' confidence may be altered by suggestive police procedures such as the post-identification bolstering which occurred here. (Wells, supra, Id.). The DNA exonerations are consistent with false convictions arising from inaccurate, but confidently made, eyewitness identifications. The constitutional solution is the wholesale elimination of the eyewitnesses' expression of certainty from the Biggers/Manson test.

The petitioner now addresses his first two arguments, that due process requires a per se rule which excludes out-of-court identification evidence generated through unnecessarily suggestive procedures such as occurred here and/or that some new guidelines for line-up and photographic arrays should be imposed with a presumption of unreliability being the legal consequence when the guidelines are not followed. As to the former argument, it is conceptually close to re-instituting the per se exclusionary rule of Stovall v. Denno 388 U.S. 293 (1967).

In their recent journal article, Professors Gary L. Wells and Deah S. Quinlivan analyzed and compared the Manson test with the scientific findings made post-Manson.[9] Regarding the five Manson criteria of view, attention, certainty, time and description, the authors note that,

> "the science on the five factors in Manson points to very serious problems. First, none of the five criteria are unequivocally related to the accuracy of identifications. But, the most serious problem is that three of the five criteria (certainty, view, and attention) are self-reports by the eyewitnesses

[9] *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, Wells and Quinlivan, http://www.springerlink.com/content/p768m22542h2644q/fulltext.pdf, Law and Human Behavior (2008).

> and these self-reports are themselves products of suggestive procedures. The failure of the three self-reported Manson criteria to be independent of the suggestive procedure creates an 'ironic test' in the second inquiry." (Id. at p.16.)

In a sense then, the Manson test operates in something of a vicious circle. When suggestive procedures are used, the Manson factors are scored higher and become "inflated." Id. Thus:

> "[t]here is almost no threat of exclusion resulting from the use of suggestive procedures. *In other words, the inflated certainty, statement of view, and statement of attention resulting from suggestive procedures effectively guards against exclusion, thereby undermining incentives to avoid suggestive procedures."* (Id. at p. 17, emphasis added.)

This is crucial. The petitioner submits that these observations underscore the need for some bright-line rules, the imposition of double-blind procedures and the sequential display of array photographs. Two learned commentators believe:

> "*The single most important guideline would be the implementation of double-blind procedures, 'in which the administrator is not in a position to unintentionally influence the witness's selection.'* A report by the National Institute of Justice in 1999 explained that 'investigators' unintentional cues (e.g., body language, tone of voice) may negatively impact the reliability of eyewitness evidence,' and that 'such influences could be avoided if "blind" identification procedures were employed.' For this reason, double blind procedures are a fundamental part of scientific and social science research. *If double blind procedures are used, they will automatically eliminate a number of problems that the social science research has documented, including the experimenter-expectancy effect and the problem of confirming feedback. Such protections may be even more important in the context of a criminal investigation, because, as Professors Findley and Scott have recently described in their article on the problem of tunnel vision, police and other investigators are under tremendous pressure to close criminal cases and remove violent criminals from the streets.*"[10]

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[10] O'Toole, Timothy P. and Shay, Giovanna, Manson v. Brathwaite *Revisited : Towards A New Rule Of Decision For Due Process Challenges To Eyewitness Identification Procedures*, 41 Valparaiso Law Rev. 109 at 138 (2006) (emphasis added).

In August of 2004, the American Bar Association adopted "Guidelines For Administering Lineup And Photospreads." (App. p. A419.) These included the double-blind lineup or photospread procedures, sequential display of suspects, use of a "sufficient number of foils", advising the eyewitness that the "perpetrator may or may not be in the lineup" and having the police "avoid at any time giving the witness feedback on whether they selected the 'right man.'" (Id.) Yale Law School Professor Giovanna Shay wrote that:

> "Professor Taslitz has advocated the adoption of a number of measures recommended in the ABA report, practices 'so strongly supported by the scientific research and *so essential to avoiding mistaken identifications that ignoring any one of these requirements should presumptively constitute a due process violation*.'"[11]

This then constitutes the petitioner's argument. It is also pointed out that the concern Justice Thurgood Marshall voiced in his dissent in Manson v. Brathwaite, rings true today.

> "In my view, this conclusion totally ignores the lessons of Wade. The dangers of mistaken identification are, as Stovall held, simply too great to permit unnecessarily suggestive identifications. Neither Biggers nor the Court's opinion today points to any contrary empirical evidence. Studies since Wade have only reinforced the validity of its assessment of the dangers of identification testimony. While the Court is 'content to rely on the good sense and judgment of American juries,' the impetus for Stovall and Wade was repeated miscarriages of justice resulting from juries' willingness to credit inaccurate eyewitness testimony." 432 U.S. at 125 (Marshall, J., dissenting, footnote omitted, citation omitted).

[11] O'Toole, Timothy P. and Shay, Giovanna, *Manson v. Brathwaite Revisited : Towards A New Rule Of Decision For Due Process Challenges To Eyewitness Identification Procedures*, 41 Valparaiso Law Rev. 109 at 139 (2006) (emphasis added).

CONCLUSION

It is time for Neil v. Biggers and Manson v. Brathwaite to be overruled or modified. There is no question that a criminal defendant has a fourteenth amendment due process right to a fair trial free from a suggestive identification procedure that creates a substantial likelihood of mistaken identification. Neil v. Biggers, 409 U.S. 188 (1972). The trial court correctly found that the eyewitness procedures used in the case at bar were unnecessarily suggestive. A primary reason the trial court did not find unreliability based on the totality of the circumstances is because the trial court was required to apply the Biggers/Manson balancing test which gives weight to the subjective confidence and certainty expressed by the eyewitnesses themselves. The petitioner argues that the impact of irrefutable science teaches that no weight should be given to the eyewitness's subjective opinions of how certain or confident they are that they have identified the correct person as the perpetrator. Thus, Neil v. Biggers and Manson v. Brathwaite should be either overruled or modified such that the eyewitness-certainty factor is eliminated. Additionally, the implementation of two bright-line rules regarding police identification procedures are necessary in order to facilitate non-suggestive eyewitness identifications. Due process requires that the double-blind procedure and sequential viewing of potential suspects in photographic arrays both be made mandatory based on the vast scientific research in the field. This area of constitutional law requires modernization and a constitutional tipping point has been reached. Accordingly, the petitioner's petition for a writ of certiorari should be granted.

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