IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHARLES HENRY RUDD

Defendant and Appellant.

S250108

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT

Fourth Appellate District, Division Three, Case No. G054241
Orange County Superior Court, Case No. 14CF3596
The Honorable David A. Hoffer, Judge

MARY K. MCCOMB
State Public Defender
BARRY P. HELFT
Chief Deputy State Public Defender

KATHLEEN M. SCHEIDEL
Assistant State Public Defender
Cal. State Bar No. 141290
1111 Broadway, Suite 1000
Oakland, CA 94607
Telephone: (510) 267-3300
Facsimile: (510) 452-8712
E-mail: Kathleen.Scheidel@ospd.ca.gov

Attorneys for Amicus Curiae

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BRIEF OF AMICUS CURIAE

I.
THIS COURT SHOULD USE ITS SUPERVISORY POWER TO MODIFY CALCRIM NO. 315 TO COMPORT WITH WELL-ESTABLISHED SCIENTIFIC EVIDENCE REGARDING THE UNRELIABILITY OF EYEWITNESS IDENTIFICATIONS AND IT SHOULD INSTITUTE PROCEDURES TO ENSURE ONLY RELIABLE EYEWITNESS EVIDENCE IS ADMISSIBLE

The court granted review on the following question: "Does instructing a jury with CALCRIM No. 315, which directs the jury to consider an eyewitness's level of certainty when evaluating an identification, violate a defendant's federal and state due process rights?" The answer is "yes." Justice Liu recognized in his dissenting opinion in *People v. Reed* (2018) 4 Cal.5th 989, 1028-1031 (*Reed*) that potential due process problems attendant to the reliability of eyewitnesses are myriad and complex and relate to more than just jury instructions. The high courts of other states, when faced with scientific evidence relating to the vagaries of eyewitness identifications, have revised both jury instructions and criminal procedures relating to the admission of eyewitness identification evidence. Commenting that the problems relating to the reliability of eyewitness identification suggest they need to "be addressed upstream," Justice Liu observed:

> The eyewitness evidence in this case could have benefited from the kind of screening that New Jersey and Oregon have adopted before it was allowed to go to the jury. The facts of this case illustrate both the stakes involved in eyewitness identification and the challenges such evidence presents. The time has come for the Legislature, the Judicial Council, or this court to develop principles that guide the admissibility of eyewitness identification evidence.

(*Id.* at pp. 1030-1031, dis. opn. of Liu, J.)

In short, fixing or eliminating one factor of CALCRIM No. 315 will do little to address the broader concerns with the reliability of eyewitness identification. For this reason, sister states have often addressed problems relating to the reliability of eyewitness identification in the context of both admissibility requirements and jury charges when eyewitness identification is an issue in the case.

This brief will discuss: (1) the history of the eyewitness identification jury instruction in this state; (2) how the high courts of other states have recognized the evolving science about how human memory works and addressed the inadequacies of instructions and procedures relating to the reliability and admissibility of eyewitness identification evidence; and (3) this court's broad authority to both (a) overhaul the jury instruction relating to eyewitness identification testimony under its supervisory authority over the state's courts and (b) institute new rules of criminal procedure governing the admission of eyewitness identification evidence under the court's inherent authority to create new rules of criminal procedure in order to protect a defendant's due process rights under both the state and federal Constitution. With regard to the latter point, this court has the authority to institute new rules of criminal procedure in order to ensure that a defendant's constitutional rights are protected when law enforcement does not follow identification procedures set forth in a statute set to take effect on January 1, 2020, discussed below. (Senate Bill No. 923, Chapter 977, adding section 859.7 to the Penal Code.)

A. The Origin of CALCRIM No. 315

The inadequacies of CALCRIM No. 315 cannot be discussed without reviewing the origin of its list of the factors to be considered by the jury when evaluating eyewitness identification evidence. The factors in CALCRIM No. 315 are similar to those in CALJIC No. 2.92. CALJIC No. 2.92 first appeared in 1987 after *People v. West* (1983) 139 Cal.App.3d 606, 610 (*West*) and was

entitled "Factors to Consider in Proving Identity by Eyewitness Testimony." (CALJIC 4th ed. 1987 pocket pt.). In *West*, the defense-requested instruction listed eight factors for the jury to consider in determining whether there was reasonable doubt as to the identification of the defendant as the perpetrator. (*West, supra*, 139 Cal.App.3d at p. 609.) It would have instructed the jury to consider evidence relating to such factors as the witness's opportunity to observe the alleged criminal act, the stress under which the witness made the observations, the cross-racial nature of the identification, and whether the witness had an uncorrected vision deficiency. These factors, with the addition of several others, were later reflected in the adoption of CALJIC No. 2.92. (CALJIC 4th ed. 1987 pocket pt.)

This court affirmed the validity of that instruction in *People v. Wright* (1988) 45 Cal.3d 1126, 1144 (*Wright*), in which the court held that "CALJIC No. 2.92 or a comparable instruction should be given when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence (citation omitted)." The *Wright* court explained the history of previous precedent in which it was found not necessary to give a requested instruction on eyewitness identification because general instructions on eyewitness identifications (usually CALJIC Nos. 2.20 and 2.91) were deemed sufficient. (*Id.* at p. 1139.) The court concluded that "the listing of factors to be considered by the jury will sufficiently bring to the jury's attention the appropriate factors and an explanation of the effect of those factors is best left to argument by counsel, cross-examination of the eyewitness and expert testimony where appropriate." (*Ibid.*)

However, in the last several decades a vast body of scientific research has emerged that casts significant doubt on some commonly held views relating to memory and calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications. The next section addresses other courts' recognition that eyewitness identification is the

leading cause of wrongful convictions in this country and details the responses of those courts to this threat to due process by changing criminal procedures relating to admissibility of and jury instructions on eyewitness identification evidence to ensure it is fairly and reliably admitted and evaluated.

B. High Courts of Other States Have Modified Rules of Criminal Procedure and Jury Instructions Relating to Eyewitness Identification Based on the Scientific Evidence Establishing the Problematic Nature of Such Evidence

Over the past fifteen years many state courts have evaluated the adequacy of their rules governing the admissibility of eyewitness testimony (from experts and percipient witnesses) and instructions thereon, in light of due process principles of reliability, accuracy and fairness. The overwhelming majority of these states, after measuring existing rules and the United States Supreme Court's pronouncements against an evolved body of scientific literature and findings, jettisoned their then-current practices, decisions, and rules. They also parted company with the United States Supreme Court, and offered greater protection to their citizens as a matter of state constitutional law or their own rule-making authority; all in an effort to reduce the number of questionable convictions.[1]

1. New Jersey

The most comprehensive review of the reliability of eyewitness identification evidence is memorialized in an opinion of the New Jersey

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[1] Respondent argues that the cases from sister states cited by appellant "address a wide range of approaches to improving identifications; they do not support his theory that instructions such as California's violate due process." (ABM, p. 39.) Respondent is correct that the cases present a number of different approaches to improving identifications, which Amicus Curiae addresses herein. However, Amicus Curiae argues in this section that those cases illuminate how CALCRIM No. 315 violates the due process clause of our state Constitution.

Supreme Court in *State v. Henderson* (N.J. 2011) 27 A.3d 872, 877-878 (*Henderson*). The state's high court considered an extensive special master's report on eyewitness identification evidence and modified the state's framework for evaluating such evidence.[2]

The court analyzed its existing test for the admissibility of eyewitness identification evidence, which had been derived from the principles the United States Supreme Court set forth in *Manson v. Brathwaite* (1977) 432 U.S. 98 (*Manson*). Under *Manson*, the court must first decide whether the procedure in question was impermissibly suggestive; if so, it must then decide whether the objectionable procedure resulted in a "very substantial likelihood of irreparable misidentification." (*Id.* at p. 114.) The United States Supreme Court explained: "reliability is the linchpin in determining the admissibility of identification testimony." (*Ibid.*) To assess reliability, courts must consider five factors adopted from *Neil v. Biggers* (1972) 409 U.S. 188, 199-200 (*Biggers*): (1) the "opportunity of the witness to view the criminal at the time of the crime"; (2) "the witnesses' degree of attention"; (3) "the accuracy of this prior description of the criminal"; (4) "the level of certainty demonstrated at the time of the confrontation"; and (5) "the time between the crime and the confrontation." (*Manson, supra,* 432 U.S. at p. 114, quoting *Biggers.*)[3]

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[2] The court appointed a Special Master to evaluate scientific and other evidence about eyewitness identification. (*Henderson, supra*, 27 A.3d at p. 877.) The Special Master presided over a hearing that probed testimony by seven experts and hundreds of scientific studies, and produced more than 2,000 pages of transcripts; the Special Master issued a report that the court adopted. (*Ibid.*) The report is detailed at length in the opinion.

[3] This test mirrors the existing test for the admissibility of eyewitness identification evidence in California. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 989-990; *People v. Yeoman* (2003) 31 Cal.4th 93, 123.) The factors also mirror to a large extent the factors listed in CALCRIM No. 315.

The *Henderson* court found five problems with the *Manson* framework. First, the defendant must show that the police procedures[4] were "impermissibly suggestive" before courts can consider "estimator variables" that also bear on reliability.[5] (*Henderson, supra*, 27 A.3d at p. 918.) Second, three of the reliability factors rely on self-reporting by the eyewitness, which can be skewed by the suggestive procedures themselves. (*Ibid.*) Third, the test may unintentionally reward suggestive police practices since it increases the chance the eyewitness will seem confident and report better viewing conditions. (*Ibid.*) Fourth, the test only addresses one option for questionable eyewitness identification – suppression – which does not account for the complexities of eyewitness identification evidence. (*Id.* at pp. 918-919.) Finally, although *Manson* instructs courts to evaluate reliability "from the totality of the circumstances," in practice trial judges routinely use the test's five reliability factors as a checklist, and there is little guidance to juries as to which estimator variables may be more significant than others in the way in which they matter or operate. (*Id.*, at p. 919, citation omitted.)

The court found:

> . . . that the scientific evidence considered at the remand hearing is reliable. That evidence offers convincing proof that the current test for evaluating the trustworthiness of eyewitness

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[4] Law enforcement procedures used in eyewitness identifications are known as "system variables." These may include blind administration, pre-identification instructions, lineup construction, avoiding feedback and recording confidence, multiple viewings, simultaneous v. sequential lineups, use of composites, and show-ups. (*Henderson, supra*, 27 A.3d at pp. 896-902.)

[5] Factors specific to an individual eyewitness's ability to accurately perceive and recall an event are called "estimator variables." Estimator variables include stress of the eyewitness during the event, weapons focus, duration of the view of the suspect, distance and lighting, characteristics of the witness and perpetrator, memory decay, race bias, private actors (such as newspaper accounts), and the speed of identification. (*Henderson, supra*, 27 A.3d at pp. 904-909.)

> identification should be revised. Study after study revealed a troubling lack of reliability in eyewitness identification. From social science research to the review of actual police lineups, from laboratory experiment to DNA exonerations, the record proves that the possibility of mistaken identification is real. Indeed, it is now widely known that eyewitness misidentification is the leading cause of wrongful conviction across the country.

(*Henderson, supra*, 27 A.3d at pp. 877-878.) The court further found that "memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications." (*Id.* at p. 878.) Those factors include system variables like lineup procedures, which are in control of the criminal justice system, and estimator variables like lighting and the presence of a weapon, over which the system has no control. (*Ibid.*)

Given the scientific evidence developed since *Manson*, the *Henderson* court instituted expanded procedures under the "court's obligation to guarantee that constitutional requirements are met and to ensure the integrity of criminal trials." (*Henderson, supra*, 27 A.3d at p. 914, citations omitted.) Acknowledging that it had no authority to modify *Manson*, the court rooted its expanded protections in "the due process rights under the State Constitution." (*Id.* at p. 919, fn. 10, citations omitted.)

The court ordered two procedures to address these concerns. First, when defendants can show some evidence of suggestiveness, all relevant system and estimator variables should be evaluated and considered at pretrial hearings. (*Henderson, supra*, 27 A.3d at p. 878.) Second, the court ordered that an enhanced jury charge on eyewitness identification be developed. (*Ibid.*) To that end, it asked the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current model charge and address the various system and estimator variables. (*Ibid.*) A link to the model instructions developed for use in New Jersey can be found at https://www.innocenceproject.org/new-jersey-supreme-court-issues-new-jury-

instructions-that-will-greatly-improve-the-way-courts-handle-identification-evidence/.

The court anticipated that, with enhanced jury instructions, there would be less need for expert testimony as jury charges offer a number of advantages: they are focused and concise; authoritative; cost-free; avoid possible confusion created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness' credibility. (*Henderson, supra,* 27 A.3d at p. 925.)

2. Connecticut

In *State v. Ledbetter* (Conn. 2005) 881 A.2d 290 (*Ledbetter*), the Supreme Court of Connecticut used its inherent supervisory authority over the administration of justice to create new jury instructions to be given whenever the state offers eyewitness identification evidence resulting from a procedure in which the administrator of the procedure failed to instruct the witness that the perpetrator may or may not be present in the photo array, lineup, or showup. (*Ledbetter, supra,* 881 A.2d at pp. 301, 317-318.) In light of the scientific research on eyewitness identifications, the court ordered trial courts to incorporate a jury instruction informing the jury of the risks inherent in eyewitness identification cases in which (1) the state has offered eyewitness identification evidence; (2) that evidence resulted from an identification procedure; and (3) the administrator of that procedure failed to instruct the witness that the perpetrator may or may not be present in the procedure. (*Id.* at pp. 314, 318-319.) The court then set forth the instruction to be given. (*Id.* at pp. 318-319.)

Several years later, in 2012, the Connecticut Supreme Court overruled its precedent relating to the admissibility of expert testimony on eyewitness identification. Prior decisional law had held that such testimony was disfavored because "the average juror knows about the factors affecting the

reliability of eyewitness identification and that expert testimony on the issue is disfavored because it invades the province of the jury to determine what weight to give the evidence." (*State v. Guilbert* (Conn. 2012) 49 A.3d 705, 712 (*Guilbert*), citations omitted.) The court held that such testimony is admissible upon a determination by the trial court that the expert is qualified and the proffered testimony is relevant and will aid the jury. (*Id.* at p. 715.) The court reasoned that its precedent was "out of step" with "near perfect scientific consensus" and the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. (*Id.* at pp. 720-721, footnotes omitted.) The court's footnotes set out the nation-wide judicial recognition of and scientific consensus regarding the need to change both admissibility rules and jury instructions relating to the reliability of eyewitness identification. (*Id.* at pp. 720-725, fns. 8 through 24.)

The *Guilbert* court also recognized that "research has revealed that jury instructions that direct jurors in broad terms to exercise caution in evaluating eyewitness identification are less effective than expert testimony in apprising the jury of the potential unreliability of eyewitness identification testimony." (*Guilbert, supra*, 49 A.3d at p. 726.) The court then discussed at length the New Jersey Supreme Court's opinion and analysis in *Henderson, supra*, 27 A.3d 872, and determined that, contrary to its prior holdings, it agreed with the New Jersey Supreme Court that a revised and enhanced jury instruction reflecting the substance of the scientific research should be given after the admission of eyewitness identification testimony. (*Guilbert, supra*, 49 A.3d at p. 727, fn. 27.) A link to Connecticut's jury instruction as revised November 20, 2017, can be found at https://www.jud.ct.gov/Search/JudSearch.aspx?col=allconn&qp1=url%3Awww.jud.ct.gov&ws=0&qm=0&st=1&nh=20&lk=1&rf=0&rq=0&qp2=url%3Awww.jud.ct.gov&qp3=url%3Awww.jud.ct.gov&qp=url.www.jud.ct.gov&SinglePane=Y&qt=jury+instructions. (See Rule 2.6-4 [Identification of Defendant].)

In *State v. Dickson* (Conn. 2016) 141 A.3d 810, 817, 822-826, 835-837 (*Dickson*), the high court of Connecticut created a new rule of criminal procedure for first-time in-court identifications to protect defendants' federal due process rights.[6] The court found first- time in-court identification to be inherently suggestive and that those identifications must first be screened by the trial courts. (*Ibid.*) The court cited numerous authorities for its determination that prophylactic constitutional rules may be made by courts to prevent the significant risk of a federal constitutional violation. (*Id.* at p. 825, fn. 11.) The court held that it was not using its supervisory power, but rather creating a new rule to protect a defendant's due process rights under the federal Constitution. Consequently, the new rule of procedure applied to pending appeals and future criminal trials. (*Id.* at pp. 838-840.)

More recently, in 2018 the court analyzed the *Biggers* factors in the context of the current scientific research and sister state precedent and found them inadequate to protect a defendant's due process rights under the state constitution. (*State v. Harris* (Conn. 2018) 191 A.3d 119, 123, 142-143 (*Harris*).) After reviewing various approaches used by courts around the country, the court concluded the most appropriate framework for evaluating the reliability of an identification that is the result of an unnecessarily suggestive procedure was the methodology adopted by the New Jersey Supreme Court in *Henderson, supra,* 27 A.3d 872, which the *Harris* court then adopted for future cases.

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[6] The court distinguished *Perry v. New Hampshire* (2012) 565 U.S. 228, 248 (*Perry*), which held that the "[d]ue [p]rocess [c]lause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification that was not procured under unnecessarily suggestive circumstances arranged by law enforcement." The *Dickson* court noted that the United States Supreme Court had not yet addressed the issue of whether first- time in-court identification are in the category of unnecessarily suggestive procedures that trigger due process protections. (*Dickson, supra*, 141 A.3d at p. 821.)

3. Alaska

In *Young v. State* (Alaska 2016) 374 P.3d 395, 399 (*Young*), the Supreme Court of Alaska reviewed its then-current test for admissibility of eyewitness identification; a test adopted from *Manson*. (*Id.* at p. 405; see *Manson, supra*, 432 U.S. at p. 114.) The *Young* court held that the existing test was insufficient to protect Alaskans' due process rights under the state constitution:

> We generally refrain from issuing advisory opinions, but at times we set aside this judicial policy of self-restraint to correct or clarify important aspects of the law. In the exercise of our general "supervisory power to formulate standards for the enforcement of criminal law in the courts of this state" and our more specific "supervisory powers over state courts pertaining to the admissibility of evidence" we today announce a new test for the admissibility of eyewitness identification testimony that we believe is consistent with the due process protections of Alaska's constitution.

(*Id.* at pp. 412-413, citations omitted.) The court held that although the United States Supreme Court in *Perry, supra*, 565 U.S. at pp. 237-240 had reaffirmed its reliance on *Manson* under the United States Constitution, federal law did not preclude the Alaska Constitution from providing more rigorous protections for the due process rights of Alaskans. (*Young, supra*, 374 P.3d at p. 413, fn. 79.)

In support, the *Young* court cited decisions of other states that have revised either rules for admissibility of eyewitness identification and/or jury instructions based on the scientific research since *Manson*. (*Young, supra*, 374 P.3d at pp. 414-417 [referencing changes, inter alia, in the states of New Jersey, Massachusetts, Connecticut, Oregon, Utah, Wisconsin].)

The *Young* court discussed at length, with footnotes to legal and scientific authority, how the understanding of the factors affecting eyewitness identifications have changed since *Manson*. (*Young, supra*, 374 P.3d at pp. 416-426.) In light of this evolved understanding, the court adopted the following procedure for the admissibility of eyewitness evidence: (1) to be

entitled to an evidentiary hearing, the defendant must present some evidence of suggestiveness that could lead to a mistaken identification that is tied to a system variable; (2) at the hearing the state must present evidence that the identification is nonetheless reliable, considering all the system and estimator variables under a totality of the circumstances; and (3) the defendant has the burden of proving a "very substantial likelihood of irreparable misidentification." (*Id.* at p. 427, citations omitted.) The court emphasized that the list of variables is non-exclusive because the scientific understanding of eyewitness memory continues to evolve and, because of that, "trial courts should not hesitate to take expert testimony that explains, supplements or challenges the application of these variables to different fact situations." (*Ibid.*).

Finally, the court held that jury instructions should take into account the new test for reliability of eyewitness identifications because the reliability of eyewitness identifications is not a matter within the knowledge of the average juror. (*Young, supra*, 374 P.3d at p. 428.) The court directed the Criminal Pattern Jury Instruction Committee to draft a model instruction on eyewitness testimony consistent with the principles announced in the opinion. (*Ibid.*) To date, there remains no pattern instruction on eyewitness identification evidence. (Alaska Court System, *Criminal Pattern Jury Instructions* No. 1.24 (Eyewitness Testimony) <http://courts.alaska.gov/rules/crimins.htm> [as of Aug. 20, 2019].)

4. Oregon

The Supreme Court of Oregon in *State v. Lawson* (Or. 2012) 291 P.3d 673, 727, 738 (*Lawson*), revised a judicially created rule, based on *Manson, supra*, 432 U.S. 98, for the admissibility of eyewitness identification reflective of scientific research dating back 30 years. The court discussed at length, both in the body of its opinion and the appendix to the opinion, the various factors

known to affect the reliability of eyewitness identification, i.e., systemic and estimator variables. (*Lawson, supra*, 291 P.3d at pp. 685-689, 700-711.) The court used its inherent authority over rules governing the admission of evidence (*id.* at p. 684) to fashion new procedures for determining the admissibility of eyewitness identification evidence based on the Oregon Evidence Code. (*Id.* at pp. 690-697.)

5. Wisconsin

In *State v. Dubose* (Wisc. 2005) 699 N.W.2d 582, 593-596, the Wisconsin Supreme Court held that the due process clause of Wisconsin's constitution required the exclusion of an out-of-court show-up identification, unless, based on the totality of the circumstances, the procedure was "necessary"; necessity only existing where the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array. The court based its decision on extensive studies and research in recent years showing that eyewitness testimony is "often 'hopelessly unreliable.'" (*Id.* at pp. 592, 593, fn. 9.) The court determined that it was "not required to interpret the Due Process Clause of Article I, Section 8 of the Wisconsin constitution in lock step with the Federal Constitution" and that the court "retain[ed] the right to interpret [its] constitution to provide greater protections than its federal counterpart." (*Id.* at p. 597.) The court "gained support" for its reliance on the Wisconsin Constitution by noting that the federal standard for out-of-court eyewitness identifications had been rejected on state constitutional grounds in "two prominent states – New York and Massachusetts." (*Id.* at p. 598, citing *People v. Adams* (N.Y. 1981) 423 N.E.2d 379, 383 and *Commonwealth v. Johnson* (1995) 650 N.E.2d 1257, 1261 [adopting a per se exclusionary rule based on state's constitution for unnecessarily suggestive show-ups].)

6. Utah

The Supreme Court of Utah in *State v. Long* (Utah 1986) 721 P.2d 483 (*Long*) held the standard pursuant to article 1, section 7 of the Utah Constitution for determining whether an identification was admissible diverged from the *Manson/Biggers* federal standard. The *Long* court confronted the question of the reliability of eyewitness identification in the context of a claim about an instruction cautioning the jury about the fallibility of such identifications. The court reviewed the scientific literature and concluded that it "is replete with empirical studies documenting the unreliability of eyewitness identification." (*Id.* at p. 488.) The court noted that jurors are unaware of these problems and that courts and lawyers tend to "ignore the teaching of other disciplines, especially when they contradict long-accepted legal notions. (*Id.* at p. 491.) The court cited *Biggers, supra*, 409 U.S. at p. 199 as an example of such a "lag between the assumption embodied in the law and findings of other disciplines." Given the "well-respected and essentially unchallenged empirical studies," the court determined that "in the area of eyewitness identification, the time had come for a more empirically sound approach" than the one announced by the country's high court. (*Id.* at pp 491-492.) The court set forth guidelines in *Long* for a jury instruction where an identification hewed to the teaching of the empirical research and diverged from the criteria listed in *Biggers*. (*Ibid.*)

In *State v. Ramirez* (Utah 1991) 817 P.2d 774 (*Ramirez*) the state high court squarely held "that for purposes of determining the due process reliability of eyewitness identification under article I, section 7, we will not limit ourselves to an analytical model that merely copies the federal." (*Id.* at p. 780.) The court believed its more empirically based approach would allow a court to more fully consider "the totality of the circumstances" surrounding the identification, as required by *Biggers* and its progeny." (*Ibid.*) The court also rejected the assumption in *Biggers* that the certainty demonstrated by the

eyewitness is invariably an indicator of the accuracy of the identification. (*Id.* at p. 781.)

In 2009, the state's high court disposed of its de facto presumption against the admission of expert testimony on eyewitness identification because "[e]mpirical research has convincingly established that expert testimony is necessary in many cases to explain the possibility of mistaken eyewitness identification." (*State v. Clopten* (Utah 2009) 223 P.3d 1103, 1108.)

7. Kansas

The Kansas Supreme Court adopted the *Ramirez, supra*, 817 P.2d 774, model for evaluating the reliability of eyewitness identifications as a "refinement in the analysis" since *Biggers*. (*State v. Hunt* (2003) 69 P.3d 571, 576 (*Hunt*).)[7]

8. Georgia

The Georgia Supreme Court in *Brodes v. State* (2005) 614 S.E.2d 766, 771 (*Brodes*) held that, in light of solid scientific consensus that certainty does not directly correlate with accuracy, trial courts are to refrain from informing jurors that they may consider a witness's level of certainly when instructing them on the factors that may be considered in deciding the reliability of that identification.

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[7] It is unclear whether the court in *Hunt* adopted the *Ramirez* framework as a matter of state constitutional law or state evidentiary law. Inasmuch as the court recognized that the question of whether an eyewitness identification resulting from an unnecessarily suggestive identification procedure was nevertheless reliable implicates the due process rights of the defendant (see *Hunt, supra*, 69 P.3d at p. 573) and that *Ramirez* was based on the Utah Constitution (see *id.* at p. 576), it is reasonable to conclude that *Hunt* is based on the Kansas Constitution.

9. Massachusetts

In *Commonwealth v. Gomes* (Mass. 2015) 22 N.E.3d 897 (*Gomes*), the Supreme Judicial Court of Massachusetts examined a model jury instruction much like CALCRIM No. 315.[8] The defendant below had asked for a different jury instruction which would have informed the jury about various scientific principles regarding eyewitness identification. (*Id.* at p. 900.) The court held the trial court did not err in refusing the defense-proffered instruction because the defendant had not offered any expert testimony, scholarly articles, or treatises establishing the principle laid out in the instruction. (*Ibid.*)

However, the court concluded that there were scientific principles regarding eyewitness identification that were "so generally accepted" that it was appropriate in the future to instruct juries regarding these principles so that they may apply them to their evaluation of eyewitness identification evidence.[9] (*Gomes, supra,* 22 N.E.3d at p. 900.) The problem perceived by the court with the old model instruction was that it focused on factors the jury should consider in examining the accuracy of an eyewitness's identification, but not on "*how* those factors may affect the accuracy of the identification." (*Id.* at p. 907, italics in original.) The earlier instruction generally identified factors a jury may consider in applying their common sense, but subsequent research had

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[8] The instruction delineated factors for the jury to consider when evaluating an eyewitness identification, such as (1) the opportunity the witness had to observe the offender; (2) the length of time between the crime and the identification; (3) the witness's prior familiarity with the offender; (4) the circumstances surrounding any identification procedure; (5) whether the identification procedure was a lineup or photographic array rather than a single-person showup; (7) whether the witness failed to make an identification or made an inconsistent identification before identifying the defendant; and (8) the credibility of the witness. (*Gomes, supra*, 22 N.E.3d at pp. 906-907.)

[9] The court based its ruling on the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Identification given to the court on July 25, 2013. (*Gomes, supra*, 22 N.E.3d at p. 900.)

made clear that common sense was insufficient to judge the reliability of an identification because many of the results of research are not commonly known, and some are counterintuitive. (*Id.* at p. 909, citation omitted.)

The court crafted a provisional instruction, including explanatory footnotes detailing the scientific and legal basis for the instruction, and directed trial courts to use it until a model instruction could be adopted. (*Gomes, supra*, 22 N.E.3d at pp. 918-927.) The model instruction, revised in November 2015, can be found at https://www.mass.gov/law-library/model-jury-instructions-on-eyewitness-identification.

10. Only Two State Courts to Consider the Issue Have Held that *Biggers* is Consistent with Their State Constitutions

Only two court that have considered this issue have held that *Biggers* is consistent with their state constitutions. (See *State v. Buti* (Idaho 1998) 964 P.2d 660 [reliability factors under Idaho constitution are identical to Biggers factors]; *State v. Leclair* (N.H. 1978) 385 A.2d 831 [noting the *Biggers* test "is based on federal constitutional minima and does not preclude the state from adopting a per se rule under [s]state law," and then applying *Biggers* test].) In contrast to the courts that have rejected *Biggers*, however, the Idaho and New Hampshire courts conducted only a cursory analysis, and did not engage in any review of recent scientific developments that have exposed the deficiencies of the *Biggers* reliability test.

C. This Court Has the Authority to Revise CALCRIM No. 315 to Comport with Modern Scientific Evidence and to Revise the Framework Used for Evaluating Eyewitness Identification Evidence

It is well established that this court may read the due process clause of the state Constitution more broadly than its counterpart in the federal Constitution. "The California Constitution is, and has always been, a 'document of independent force' [citation] that sets forth rights that are in no

way 'dependent of those guaranteed by the United States Constitution' (Cal. Const., art. I, § 24.)" (*People v. Buza* (2018) 4 Cal.5th 658, 684; see also Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal* (2017) 92 N.Y.U. L.Rev. 1307, 1314-1315 [states have the prerogative and duty to interpret their state constitutions independently].)

This court has followed these principles when considering what process is due its citizens, the crux of the issue here. Due process under the California Constitution is "more inclusive" and "protects a broader range of interests" than does due process under the federal Constitution. (*Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1069.) This court has specifically disagreed with the United States Supreme Court in granting broader protections under the state due process clause to protect capital defendants. (See *People v. Ramos* (1984) 37 Cal.3d 136, 154 [holding that despite the absence of a federal constitutional violation, the so-called "Briggs instruction" was unconstitutional because it created intolerable risk that the jury would "pass the buck" to the Governor and not take personal responsibility for its sentencing decision].)

Due process is not the only state constitutional provision that provides more protections to California citizens than does the federal Constitution. This court recently affirmed broader double jeopardy protections under the California Constitution than under the United States Constitution. (*People v. Aranda* (2019) 6 Cal.5th 1077, 1081, 1087-1088.) And in *Gardner v. Superior Court* (2019) 6 Cal.5th 998, 101, 1004, this court held that article I, section 15 of the California Constitution, which " . . . has also been understood to extend more broadly than its federal counterpart," entitles a defendant to the help of appointed counsel in responding to the prosecution's appeal of a suppression order.

In addition, this court's inherent supervisory power over trial courts permits revision of CALCRIM No. 315 as discussed herein. In *People v.*

Engelman (2002) 28 Cal.4th 436, 449, this court exercised its supervisory power to direct trial courts to refrain from delivering CALJIC No. 17.41.1 [Juror Misconduct] in any future trials because the instruction created a risk "to the proper function of jury deliberations that is unnecessary and inadvisable." The court cited as authority for the exercise of its supervisory power *In re Podesto* (1976) 15 Cal.3d 921, 938 and *People v. Vickers* (1972) 8 Cal.3d 451, 461 (*Vickers*), which are discussed below. (*Ibid.*) Similarly, the court used its "inherent supervisory powers . . . over the procedures of trial courts" to disapprove an instruction that was based on a law that had been repealed. (*People v. Brigham* (1979) 25 Cal.3d 283, 292.)

In *People v. Gainer* (1977) 19 Cal.3d 835, 852, disapproved of on other grounds by *People v. Valdez* (2012) 55 Cal.4th 82, the court adopted a judicially declared rule of criminal procedure that a trial court errs if it gives an instruction which either (1) encourages jurors to consider the numerical division or preponderance of opinion on the jury in forming or reexamining their views on the issues before them; or (2) states or implies that if the jury fails to agree the case will necessarily be retried.

In addition, the court has used its supervisory power over state criminal procedure in many instances in the past: to require the reasonable doubt standard to determine the admissibility of a confession (*People v. Jimenez* (1978) 21 Cal.3d 595, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 509); to require trial courts to render a brief statement of reasons when denying a motion for bail on appeal (*In re Podesto*, *supra*, 15 Cal.3d 921); to prohibit city attorneys with prosecutorial responsibilities from representing criminal defendants (*People v. Rhodes* (1974) 12 Cal.3d 180); to require representation by counsel for a probationer in a revocation proceeding (*Vickers*, *supra*, 8 Cal.3d 451); to exclude admissions made by a minor to the juvenile judge or the juvenile probation officer in a criminal prosecution (*Bryan v. Superior Court* (1972) 7 Cal.3d 575); to adopt a search and seizure

exclusionary rule (prior to its imposition upon the states) (*People v. Cahan* (1955) 44 Cal.2d 434), superseded by constitutional amendment as stated in *In re Lance W.* (1985) 37 Cal.3d 873); to require sequestered voir dire on death qualification in capital cases (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80–81, superseded by statute as stated in *People v. Jackson* (2016) 1 Cal.5th 269, 357-358); to prohibit trial courts in the future from making race-conscious assignments from the jury assembly room to a courtroom (*People v. Burgener* (2003) 29 Cal.4th 833, 860–861); and to direct the court of appeal to refrain from utilizing a waiver notice in future cases (*People v. Pena* (2004) 32 Cal.4th 389, 392).

In short, this court has the inherent authority to take action to revise the jury instruction relating to eyewitness identification, and to create rules of criminal procedure to correct the due process problems relating to the reliability of eyewitness identification "upstream." (*Reed, supra*, 4 Cal.5th at p. 1029, dis. opn. of Liu, J.)

D. At Minimum, this Court Should Delete the Factor Relating to the Certainty of the Eyewitness Identification from the Jury's Consideration

Respondent asserts that eyewitness certainty can correlate to accuracy. (ABM, pp. 37-39.) That is somewhat correct: studies have shown that certainty can correlate to accuracy when identification procedures (system variables) free of confirmatory or post-identification feedback are utilized. (See *Henderson, supra*, 27 A.3d at pp. 253-261.) However, most identification procedures are not free from these system variables, and lay jurors have no way of knowing extraneous factors that can influence confidence.

Confirmatory feedback occurs when the police signal to the eyewitness that they correctly identified the suspect; such confirmation can reduce doubt and engender a false sense of security in a witness. (*Henderson, supra,* 27

A.3d at p. 253.) Feedback can also enhance a witness' recollection of the quality of his or her recollection of an event. (*Ibid.*)

Similarly, multiple viewings of mugshots can create a risk of "mugshot commitment." (*Henderson, supra*, 27 A.3d at p. 255.) This occurs when a witness identifies a photograph that is then included in a later lineup procedure. Studies have shown that once witnesses identify an innocent person from a mugshot, a significant number reaffirm their final identification in a later lineup even if the actual target is present. (*Id.* at p. 256, citation omitted.)

In addition, sequential lineups have been shown to produce more reliable identifications then traditional simultaneous lineups. (*Henderson, supra*, 27 A.3d at p. 256-257.) Some experts believe that with sequential lineups, witnesses cannot compare photos and choose the lineup member that best matches their memory. (*Ibid.*)

Finally, it is well-established that the use of composite sketches and single person lineups carry their own significant risk of misidentifications. (*Henderson, supra*, 27 A.3d at pp. 258-261.)

At minimum, given the uniform scientific research that repudiates the simplicity of a positive correlation between witness certainty and reliability, and establishes the ways in which certainty is created by improper identification procedures, this court should use its supervisory authority to strike the certainty factor from CALCRIM No. 315, just as the Supreme Court of Georgia struck the same factor from its pattern instruction in 2017. (See *Brodes, supra*, 614 S.E.2d at p. 771.)

E. This Court Should Adopt Admissibility Standards for Eyewitness Identification Evidence in Order to Ensure That a Defendant's Constitutional Rights are Protected

As noted, *ante*, the California Legislature has addressed the problems with the system variables involved in eyewitness identification by enacting Penal Code section 859.7. Penal Code section 859.7 directs law enforcement

agencies and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses, and includes regulations with which those agencies must comply.

However, the statute does not address the consequences of failing to obey any or all of the mandatory statutory procedures. This court should ensure a defendant's constitutional and statutory rights are protected by delineating a procedural framework for trial courts to follow that comports with best practices regarding the admissibility of this type of evidence. Amicus curiae recommends the procedure adopted by New Jersey, in which, first, when a defendant can show any evidence of suggestiveness, all relevant system and estimator variables should be evaluated and considered at a pretrial hearing. (*Henderson, supra*, 27 A.3d at p. 878.) And second, an enhanced jury charge which addresses the various system and estimator variables should be delivered. (*Ibid.*)

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CONCLUSION

Too many wrongful convictions have resulted from the unreliable nature of eyewitness identifications. Mistaken eyewitness identifications contributed to approximately 71% of the more than 360 wrongful convictions in the United States overturned by postconviction DNA evidence. (The Innocence Project, *Eyewitness Identification Reform* (2019) <http://www.innocenceproject.org/eyewitness-identification-reform/> [as of August 20, 2019].) In cases in which there is no DNA to test, overturning a conviction based on an erroneous identification is nearly impossible. For every wrongfully convicted person, there is a guilty person free to commit more crimes.

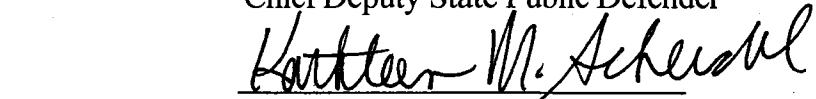
Amicus urges this court to act now and use its inherent supervisory power to (1) create eyewitness identification jury instructions which guard against wrongful convictions and (2) adopt rules of admissibility of such evidence to ensure that a defendant's constitutional rights are protected when the practices codified in Penal Code section 859.7 are not followed.

Dated: August 29, 2019

Respectfully submitted,

MARY MCCOMB
State Public Defender

BARRY P. HELFT
Chief Deputy State Public Defender



KATHLEEN M. SCHEIDEL
Assistant State Public Defender

Attorneys for Amicus Curiae

DECLARATION OF SERVICE

Re: ***PEOPLE v. CHARLES HENRY RUDD***
Supreme Court No. S250108
(Fourth Appellate District, Division Three, Case No. G054241)
(Orange County Superior Court, Case No. 14CF3596)

I, LAUREN EMERSON, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607; I served a true copy of the attached:

AMICUS CURIAE BRIEF
IN SUPPORT OF DEFENDANT/APPELLANT

on each of the following, by placing same in an envelope addressed respectively as follows:

Jeanine G. Strong
316 Mid Valley Center, Suite 102
Carmel, CA 93923
(Counsel for Defendant/Appellant)

Joshua Aaron Klein
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Clerk of the Court
Fourth Appellate District, Div. 3
601 W. Santa Ana Blvd.
Santa Ana, CA 92701

Minh U. Le
Office of the Attorney General
P.O. Box 85266
600 West Broadway, Suite 1800
San Diego, CA 92186-5266
(Counsel for Respondent)

Clerk of the Court
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

Each said envelope was then, on August 29, 2019, sealed and deposited in the United States mail at Oakland, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Signed on this 29th day of August 2019 at Oakland, California.

LAUREN EMERSON