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State of Utah, Appellant, v. Manual Antonio Lujan, Appellee

Utah Supreme Court

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**IN THE
SUPREME COURT OF THE STATE OF UTAH**

STATE OF UTAH,
Appellant,
v.
MANUAL ANTONIO LUJAN,
Appellee.

**BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT, INC.
IN SUPPORT OF APPELLEE MANUAL ANTONIO LUJAN**

On Writ of Certiorari to the Utah Court of Appeals

Mr. Lujan is incarcerated.

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INTRODUCTION

Courts in this country have long recognized the dangers of eyewitness testimony: “[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor.” *United States v. Wade*, 388 U.S. 218, 229 (1967). Indeed, in its effort to address concerns about the risk of eyewitness misidentification, this Court has been on the forefront of efforts to incorporate social science research findings into the law governing the admissibility of eyewitness identification evidence. *State v. Long*, 721 P.2d 483, 493 (Utah 1986); *State v. Ramirez*, 817 P.2d 774 (Utah 1991). Concerns about eyewitness misidentification are particularly acute where, as here, the testimony of a single eyewitness is the sole evidence of a defendant’s guilt.

This case presents this Court with an opportunity to re-examine the legal framework for assessing eyewitness identification evidence, a task it has not done in the 30 years since it decided *Ramirez*. Over that period, social scientists have conducted extensive research in the area of eyewitness memory and perception that has significantly advanced our understanding of how memory works and what factfinders know about human memory. During the same period, the work of organizations like Amicus Curiae the Innocence Project have shed light on the role of eyewitness misidentification in contributing to wrongful convictions established through post-conviction DNA testing. Indeed, eyewitness misidentification is the leading contributing cause of wrongful convictions established through DNA, playing a role in 72 percent of 342 DNA exonerations to date.

These developments, together with this Court’s commitment to ensuring that the law governing eyewitness identification evidence is fully aligned with the findings of social science research, require revisiting and updating *Ramirez*, as both the majority and dissenting judges in the court below agreed.

Scientific research amply supports the Court of Appeals’ ruling that the witness’s identifications of Mr. Lujan should not have been admitted. The conditions under which Mr. Lujan was identified—the poor lighting, the fact that the perpetrator wore a hat and was of a different race than the victim, and that the victim experienced high levels of stress at the time he claimed to have viewed Mr. Lujan—have all been shown to negatively affect memory. *State v. Lujan*, 2015 UT App 199, ¶ 2, 357 P.3d 20.

Likewise, scientific research confirms that suggestive circumstances like those surrounding the show-up and in-court identifications in this case influence not only the reliability of the identification itself, but also the many self-reported factors that the *Ramirez* test relies on to determine the admissibility of a challenged identification.

This research can help to explain why the witness, who had three opportunities to identify Mr. Lujan, was only able to do so where suggestive circumstances made that identification obvious—first, at a highly suggestive show-up, where Mr. Lujan was handcuffed and was the only person not in a police uniform, *id.* ¶ 6, and then in an in-court identification at a preliminary hearing, where Mr. Lujan was the “only defendant at counsel table” and the only reasonable choice, *id.* ¶ 8. In contrast, the witness was unable to identify Mr. Lujan when he was presented as part of a six person lineup that was fairly composed and administered. *Id.* ¶ 7. The witness’s inability to identify Mr. Lujan in the

absence of suggestive circumstances that communicated to him that Mr. Lujan was the perpetrator suggests that the witness had not formed a reliable memory of the perpetrator at the time of the crime such that he could make a later accurate identification.

In addition, the Court of Appeals correctly determined that the State had not carried its burden of showing that the trial court's admission of the eyewitness identification was harmless error. Studies have shown that jurors tend to overvalue eyewitness testimony, overestimate the likely accuracy of eyewitness testimony, and confuse an eyewitness's certainty with his or her accuracy. Because the eyewitness's testimony was crucial to the prosecution, the admission of the eyewitness identifications was not harmless error. *Id.* ¶ 17 ("When the man's identifications of Defendant are removed, the State's case is severely weakened.").

Accordingly, this Court should affirm the Court of Appeals' decision and take this opportunity to revisit *Ramirez* in light of the last three decades of social science research and data from the DNA exonerations. In so doing, this Court should reaffirm that the appropriate approach to such evidence is a totality of the circumstances test that allows for trial courts to consider any relevant factors based on a consensus in social science research and should clarify what factors now enjoy a consensus in the social science research. Moreover, this Court should provide guidance to the lower courts on the use of intermediate remedies, including expert testimony, robust jury instructions, and limits on unreliable aspects of admissible eyewitness testimony, which can blunt the prejudicial effects of identification testimony that is the product of suggestive procedures or that may be unreliable, but is nonetheless admissible.

ARGUMENT

I. THIS COURT SHOULD REVISIT THE *RAMIREZ* FRAMEWORK BECAUSE IT IS UNDERMINED BY DECADES OF SOCIAL SCIENCE RESEARCH

A. This Court Has Recognized and Attempted to Guard Against the Dangers of Eyewitness Testimony for Decades

This Court first recognized and attempted to address the dangers of eyewitness identification testimony thirty years ago. It was one of the first state supreme courts in the country to do so. In *State v. Long*, the Court reviewed the scientific literature and concluded that it was “replete with empirical studies documenting the unreliability of eyewitness identification.” 721 P.2d 483, 488 (Utah 1986). The *Long* Court also recognized that, “[a]lthough research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems.” *Id.* at 490. To address these concerns, the Court required trial courts to give cautionary instructions on eyewitness identification testimony when requested by the defense in appropriate cases. This instruction would be used to “pinpoint identification as a central issue and highlight the factors that bear on the reliability of that identification.” *Id.* at 492.

The Court revisited the issue of eyewitness identification testimony five years later in *State v. Ramirez*. The Court’s opinion in that case reiterated its commitment to tackling the problems posed by eyewitness testimony through the application of scientific research findings to judicial decision making. The *Ramirez* Court established a framework for the admissibility of eyewitness identifications that required “an in-depth appraisal of the identification’s reliability,” 817 P.2d 774, 780 (Utah 1991), and that

rejected the federal standard, which the Court found to be “scientifically unsound.” *Id.* at 779–81. Critical to the Court’s decision was its view that the scientific literature, which it had described and relied on in *Long*, compelled it to adopt “an analytic course that diverges somewhat from that in federal case law.” *Id.* at 780.

This Court most recently sought to refine its approach to eyewitness testimony in *State v. Clopten*, 2009 UT 84, 223 P.3d 1103. There, the Court focused on the fact that “[d]ecades of study . . . have established that eyewitnesses are prone to identifying the wrong person as the perpetrator of the crime.” *Id.* ¶ 15. In light of that concern, it sought to align Utah’s rules of evidence with the latest research on expert eyewitness identification testimony. *Id.* ¶¶ 14, 16–18, 21–25, 30, 34 (recognizing that cautionary instructions and cross-examination were “poor substitutes” for expert eyewitness testimony and holding that the Utah rules of evidence should allow for “liberal and routine admission” of such testimony). Although this Court has revisited issues relating to eyewitness identification testimony as part of its commitment to tackling this difficult issue, the *Ramirez* framework for assessing the reliability and the admissibility of such testimony remains in place. When it was issued in 1991, *Ramirez* represented an important step forward in this area. But the same commitment to aligning the law with scientific research on eyewitness identification that this Court has shown in cases such as *Clopten*, now highlights the need to revisit the framework established in *Ramirez*.¹

¹ Indeed, because it took current scientific research into account to modify the law on the admissibility of eyewitness expert testimony, *Clopten* calls the viability of the *Ramirez* test into question. The modifications requested by the Innocence Project would bring the *Ramirez* test into line with *Clopten*.

B. Social Science Research Since *Ramirez* Demonstrates that the *Ramirez* Factors Are Insufficient to Protect Defendants from the Dangers of Eyewitness Identification Testimony

The *Ramirez* test requires trial courts to consider the “totality of the circumstances,” which “must” include five enumerated factors:

- (1) “The opportunity of the witness to view the actor during the event;
- (2) [T]he witness’s degree of attention to the actor at the time of the event;
- (3) [T]he witness’s capacity to observe the event, including his or her physical and mental acuity;
- (4) [W]hether the witness’s identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and
- (5) [T]he nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer’s.”

817 P.2d at 781.

The *Ramirez* Court set itself apart from federal and other state supreme courts by applying a test that was expressly designed to “meet or exceed in rigor the federal standard as expressed in *Biggers* and *Stovall*.” *Id.* at 780. Rejecting some of the federal test’s criteria as “scientifically unsound,” the Court refined the factors in the federal test, expressly including consideration of race, and expressly rejecting witness certainty as an indicator of reliability. *Id.* at 780–81. In other respects, the *Ramirez* test mirrored the

federal test, however. Both include the “opportunity of the witness to view” the perpetrator during the crime, and the “witness’s degree of attention,” factors that are, in many cases, evidenced by the witness’s own reporting of events which can undermine reliability. *See Neil v. Biggers*, 409 U.S. 188, 199–200 (1972).

Although *Ramirez* relied explicitly on then-current scientific studies, research in the field has continued to advance. Indeed, current social science research demonstrates that the *Ramirez* factors are insufficient to protect defendants from the dangers of faulty eyewitness identifications. Most importantly, in the 25 years since *Ramirez*, scientists studying eyewitness memory have come to understand more fully the power of suggestion. Today, research has demonstrated that suggestive circumstances can both (1) significantly impair a witness’s ability to make an accurate identification; and (2) artificially inflate a witness’s testimony concerning the other factors that remain part of both the federal and Utah tests.

Neither of these concerns is adequately addressed in the *Ramirez* test. That test buries the issue of suggestion in factor four: “whether the witness’s identification was made spontaneously and remained consistent thereafter, *or* whether it was the product of suggestion.” 817 P.2d at 781 (emphasis added). This treatment of suggestion is both inaccurate and incomplete. First, it incorrectly implies that identifications that are spontaneous and consistent have not been tainted by suggestive circumstances. In truth, social scientists agree that suggestive circumstances can lead to a witness being *more* consistent and insistent in his or her identification. *See* Charles A. Goodsell et al., *Effects of Mugshot Commitment on Lineup Performance in Young and Older Adults*, 23 *Applied*

Cognitive Psychol. 788, 789 (2009); Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 Law & Hum. Behav. 287, 299 (2006). Thus, in considering factor four, courts may conclude that an identification is reliable and admissible because it was spontaneous and the witness was consistent, even if the very reason it appears reliable is that the identification was tainted by suggestion.

Second, and more problematic, the *Ramirez* test fails to identify or offer courts guidance on how to address the pernicious effect of suggestive circumstances on witness memory, including as manifested in the other factors courts are required to consider. Indeed, in the 25 years since *Ramirez*, scientists have shown that that when an identification procedure is tainted by suggestion, that suggestion can contaminate a witness's memory of the event, undermining the accuracy of the evidence most likely to be used to gauge reliability—the witness's own testimony. Many studies have characterized at least two of the *Ramirez* factors—opportunity to view and degree of attention—as prone to this problem. *See, e.g.*, Gary L. Wells & Amy L. Bradfield, “*Good, You Identified the Suspect*”: *Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 366–67 (1998) (finding that the effect of suggestion was “large or very large” on witnesses’ “reports of certainty, view, ability to make out features of the face, attention, basis for making an identification, the amount of time taken to make an identification, willingness to testify, and trust of an identification made under these conditions”). Because suggestive circumstances can influence a witness's memory and recollection of both the original event and the

identification procedure itself, courts should be wary of basing a finding of reliability on these factors, which depend largely on witness testimony.

The New Jersey Supreme Court recognized that these flaws are inherent in the federal test in *State v. Henderson*, 27 A.3d 872 (N.J. 2011). It observed that “[t]he irony of the current test is that the more suggestive the procedure, the greater the chance eyewitnesses will seem confident and report better viewing conditions.” *Id.* at 918. Indeed, since *Henderson*, other courts and the prestigious National Academy of Science have highlighted the same flaw in the federal test. *See State v. Lawson*, 291 P.3d 673, 687 (Or. 2012); *Young v. State*, Nos. A-11006/11015, 2016 WL 3369222, at *16 (Alaska June 17, 2016); National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification*, at 65–66, available at <http://www.nap.edu/read/18891/chapter/6#65> (“NAS Report”). Even though *Ramirez* improves upon the federal test in this regard—by rejecting a balancing approach and focusing on reliability as the primary concern—*Ramirez* does not go far enough to solve the problems identified in *Henderson*. Under *Ramirez*, trial courts are instructed to consider “self-reported” factors, but are not given guidance on how suggestion can influence those factors or how it can undermine the reliability of an identification more generally. Thus, although the *Ramirez* test takes suggestive circumstances into consideration, as it should, it fails to adequately account for the interplay between suggestive circumstances and the other factors.

In addition, since *Ramirez*, scientific research has confirmed and reinforced that witness memory—and therefore accuracy—can be affected dramatically by factors that are present at the time of the crime (known as “estimator variables,” including stress, the

presence of a weapon, the race of the witness and the perpetrator, and disguises as seemingly minor as hats) and factors that are present at the time of the identification procedure(s) (known as “system variables,” including the use of an administrator who does not know the identity of the suspect, pre-lineup witness instructions, and fair composition of the identification procedure). *See, e.g.,* Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, *Report & Recommendations to the Justices*, at 59–71 (July 25, 2013), *available at* <http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf> (“SJC Report”); NAS Report at 65–69. The importance of these factors should not be overlooked; indeed, they likely undermined the reliability of the eyewitness identification in this case. This Court should take into account this extensive body of research and consider the effect that these variables can have on witness memory.

Ensuring that the law remains aligned with the last 25 years of scientific research requires revisiting *Ramirez*. Both the majority and dissent in the Court of Appeals agreed that it is time for this Court to revisit *Ramirez*, and Amicus Curiae respectfully asks this Court to do the same. *See Lujan*, 2015 UT App 199, ¶ 10 n.1 (“All of this, taken together, indicates that it is time for our Supreme Court to reconsider *Ramirez*, a proposition with which the dissent agrees.”).

C. This Court Should Confirm that *Ramirez* Requires a Totality of the Circumstances Approach, with Expert Testimony and Procedural Safeguards, to Limit the Harmful Prejudicial Effects of Unreliable Eyewitness Identification Testimony

In order to address the problems with the *Ramirez* test, this Court should, first, reiterate and reemphasize the importance of the “totality of the circumstances” nature of the *Ramirez* test. The Court should also give guidance to the lower courts sufficient to allow them to give meaning to the term and to do so in a way that is consistent across the state. Amicus Curiae respectfully submits that this Court should instruct the lower courts to consider the “totality” of factors that are supported by a consensus of social science research and to take this opportunity to identify and explain those factors that currently enjoy such consensus. The Court should emphasize nevertheless that the list of factors courts should consider in evaluating eyewitness identification evidence should be flexible enough to allow for the evolution of the relevant science, in recognition of the fact that scientific research is dynamic. As the Supreme Courts of New Jersey and Connecticut have instructed, “[t]rial courts [should not be limited] from reviewing evolving, substantial, and generally accepted scientific research.” *State v. Guilbert*, 49 A.3d 705, 735 (Conn. 2012) (quoting *Henderson*, 27 A.3d at 922); *see also Lawson*, 291 P.3d at 685–86 (recognizing that “research is ongoing” and cautioning that the court’s acknowledgment of the current research “is not intended to preclude any party . . . from validating scientific acceptance of further research”).

In other words, judicial understanding of the term “totality of the circumstances” should be given full force and effect: lower courts should consider the universe of factors

that bear on reliability in the particular case, regardless of whether any particular factor fits neatly into the five “reliability” factors enumerated in *Ramirez*. Emphasizing the fact that the *Ramirez* test requires consideration of the totality of the circumstances, including all system and estimator variables, the degree of suggestiveness, if any, and the effect of that suggestion on other factors, would reduce the likelihood of wrongful convictions based on suggestive identification procedures, like the show-up and in-court identification used in this case, or identifications that scientific research shows are otherwise likely to be unreliable.

We respectfully submit that, to accomplish this goal, the Court should issue findings on the current body of scientific research to guide lower courts on the factors they should consider in assessing the admissibility and reliability of eyewitness identifications. This Court should make these findings by evaluating the current body of research on its own as the Oregon Supreme Court did in *State v. Lawson*,² by appointing a special master³ or creating a study group,⁴ or by adopting the findings set forth by other

² (*See Lawson* appendix attached as Addendum A.)

³ The New Jersey Supreme Court appointed a special master to evaluate scientific evidence on eyewitness testimony. The special master heard testimony from seven experts that produced more than 2,000 pages of transcripts and reviewed hundreds of scientific studies. The special master issued an “extensive” 86-page report that the court later reviewed and adopted in part. *See Henderson*, 27 A.3d at 877.

⁴ The Supreme Judicial Court of Massachusetts convened a study group on eyewitness identification to “offer guidance as to how our courts can most effectively deter unnecessarily suggestive identification procedures and minimize the risk of a wrongful conviction.” SJC Report at 1; *Commonwealth v. Walker*, 953 N.E.2d 195, 208 n.16 (Mass. 2011) (announcing that the court will convene the study committee “[b]ecause eyewitness identification is the greatest source of wrongful convictions but also an

courts, as the Alaska Supreme Court did in *State v. Young*. After issuing such findings, the Supreme Court of Oregon articulated an approach to the admissibility of eyewitness identification that screens eyewitness identification testimony through a stringent and precise application of the rules of evidence.⁵ Any of these approaches, if adopted here, would address the problems of the *Ramirez* test and ensure that trial courts throughout the state will evaluate identification evidence in light of more than thirty years of generally accepted scientific research findings about memory, perception and eyewitness reliability.

The Oregon Supreme Court's decision in *Lawson* is instructive in this regard. There, the court *sua sponte* conducted a review of the social science research concerning eyewitness identification, reviewing more than 2,000 scientific studies. *Lawson*, 291 P.3d at 685. After concluding that the *Manson/Biggers* factors incorporated in the Oregon state test for evaluating identification evidence⁶ did not adequately ensure the reliability of eyewitness identification evidence, it took judicial notice of scientific

invaluable law enforcement tool . . . and because the research regarding eyewitness identification procedures is complex and evolving"). The study group issued its report in 2013, and the Supreme Judicial Court has ruled on its recommendations as they are presented in cases before the court. *See, e.g., Commonwealth v. Gomes*, 22 N.E.3d 897, 900 (Mass. 2015) (adopting provisional jury instructions based on the study group's findings).

⁵ Alternatively, the Court could instruct the Supreme Court's Advisory Committee on the Rules of Evidence to analyze current scientific research and reform the rules of evidence accordingly.

⁶ The *Manson/Biggers* factors that were incorporated into Oregon's test for the admissibility of eyewitness identifications prior to *Lawson* contained some of the same factors found in *Ramirez*: the witness's opportunity to view the crime and the witness's degree of attention to the perpetrator. *See Lawson*, 291 P.3d at 684.

research findings and set out a comprehensive list of the variables courts should consider in weighing the reliability of this type of evidence. (See Addendum A.) The *Lawson* court explained its approach:

[W]e believe that it is imperative that law enforcement, the bench, and the bar be informed of the existence of current scientific research and literature regarding the reliability of eyewitness identification because . . . the reliability of eyewitness identification is central to a criminal justice system dedicated the dual principles of accountability and fairness.

Id. at 685. This same principle applies equally here. The list of factors that can affect the reliability of eyewitness identifications is long and is not always well understood by litigants, jurists or jurors. By setting forth the factors that trial courts should consider in evaluating eyewitness identification evidence, this Court can encourage courts and factfinders to bring the law as it is practiced every day in courts throughout the state into alignment with current scientific research. In addition, requiring courts to consider relevant system variables, such as blind administration, fair lineup construction, pre-lineup instructions, and recorded, contemporaneous witness confidence statements will have the salutary effect of reducing the suggestiveness of out-of-court identification procedures, as well as in-court identification procedures that are based on out-of-court identifications.

The Supreme Court of Alaska recently took a similar approach to this issue in a decision issued in June of this year. In *State v. Young*, it rejected its state version of the *Manson/Biggers* test and adopted a new test to evaluate the reliability of eyewitness identifications, aligning their standard with the findings in *Lawson* and *Henderson*. *Young*, 2016 WL 3369222 at *19. The court concluded its extensive analysis of the

scientific research findings by holding that courts’ “analysis of reliability should consider all relevant system and estimator variables under the totality of the circumstances.” *Id.* at *29.

This Court should follow its sister courts in Alaska, Oregon, and New Jersey in comprehensively identifying the relevant system and estimator variables that trial courts and factfinders should consider when evaluating the reliability of eyewitness identifications. Identifying what scientific research currently considers the relevant variables while emphasizing the need to remain flexible to allow for the evolving nature of scientific research in the area will ensure that lower courts will evaluate the reliability of eyewitness identification through an approach that gives meaning to the term “totality of the circumstances,” and, most importantly, will reduce the risk of misidentification.

In addition, where eyewitness identification testimony is ruled admissible, trial courts should use intermediate remedies, such as expert testimony and robust jury instructions, to blunt the prejudicial effects of any remaining unreliability and to provide jurors with context and information to appropriately analyze this evidence. Although courts have historically relied on cross-examination and closing arguments to expose the unreliability of eyewitness identification testimony, social science research has shown—and this Court itself has recognized—that these methods are largely ineffective at bringing the unreliability of a mistaken but honest witness’s identification to light. *See, e.g., Clopten*, 2009 UT 84, ¶¶ 21–22 (“[R]esearch shows the effectiveness of cross-examination is badly hampered [where eyewitnesses express certainty about identifications that are inaccurate].”); *accord Guilbert*, 49 A.3d at 725–28; *State v.*

Copeland, 226 S.W.3d 287, 299–300 (Tenn. 2007) (citing scientific studies demonstrating that cross-examination is insufficient to educate the jury on the relevant factors).

Likewise, as this Court has also recognized, robust, carefully written jury instructions that are grounded in science and tailored to the facts of the case should be used to caution jurors that the factors that affect reliability may be counterintuitive. *See Long*, 721 P.2d at 492. As with *Ramirez*, Utah was a leader in adopting an eyewitness-specific jury instruction that referenced scientific research findings. *See* Utah Model Jury Instruction CR404, *available at* https://www.utcourts.gov/resources/muji/inc_list.asp?action=showRule&id=32. Recently, however, courts and commentators have concluded that instructions that comprehensively address all relevant factors that may have affected the reliability of the identification is necessary. Such instructions will provide jurors—who are often unfamiliar with, or hold views counter to, the scientific research findings—sufficient guidance to evaluate eyewitness identification evidence. The eyewitness-specific jury instructions recently adopted by Massachusetts and New Jersey offer excellent examples of modern instructions that accomplish this goal. *See Gomes*, 22 N.E.3d at 900 (adopting provisional jury instructions that were “intended to provide the jury with the guidance they need to capably evaluate the accuracy of an eyewitness identification” because “the research makes clear that common sense is not enough to accurately discern the reliable eyewitness identification from the unreliable”)⁷;

⁷ (*See also* Massachusetts Model Jury Instructions on eyewitness identifications attached as Addendum B.)

New Jersey Supreme Court, Jury Instructions (July 19, 2012), *available at* http://www.judiciary.state.nj.us/pressrel/2012/jury_instruction.pdf.⁸

II. CONSIDERATION OF THE ONGOING ADMISSIBILITY OF EYEWITNESS IDENTIFICATION EVIDENCE IS NOT AN ENLARGEMENT OF THE ISSUES

In its response to the Innocence Project’s Motion for Leave to File Amicus Curiae Brief (the “Motion”), the State suggests that any argument that the *Ramirez* test is outdated and should be replaced “has never been made in this case and would enlarge the issues and the evidence before this Court.” (State’s Resp. to Mot. for Leave to File Amicus Curiae Br. (“State’s Resp.”) at 3–4.) Accordingly, the State argues that this Court is unable to reach the “expanded issue” raised by the Innocence Project, and the State reserves the right to move to strike the present brief. (*Id.* at 4–5.) With all due respect, the State’s position is preposterous.

The Court should reject the State’s position for at least two reasons. First, this Court may consider the Innocence Project’s position regarding the sufficiency of the *Ramirez* test because the parties themselves have raised the issue. Second, this Court

⁸ Even if the Court were to refrain from modifying the *Ramirez* test in light of advancements in social science research, that research supports the lower court’s suppression of the challenged show-up and in-court identifications. (*See generally* Br. of Resp’t on Cert. Review (“Br. of Resp’t”).) The Court of Appeals correctly found that facts relating to each of the five *Ramirez* factors weighed in favor of inadmissibility. *See, e.g., Lujan*, 2015 UT App 199, ¶¶ 11–19.

may consider social science research because it is valuable reference material that does not expand the evidentiary record.⁹

A. This Court Can Consider the Sufficiency of the *Ramirez* Test Because it Bears on Issues Presented by Both Parties to this Court

Although an amicus brief cannot extend or enlarge the issues on appeal, this brief makes arguments “that bear on the issues pursued by the parties to [an] appeal.” *Madsen*, 658 P.2d at 629 n.3. As this Court has explained, “[r]eview on certiorari is limited to examining the court of appeals’ decision and is further circumscribed by the issues raised in the petitions.” *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 856 (Utah 1998). The statement of question presented, however, “will be deemed to comprise every subsidiary question fairly included therein.” Utah R. App. P. 49(a)(4); *see also Willardson v. Indus. Comm’n of Utah*, 904 P.2d 671, 673–74 (Utah 1995) (considering subsidiary issue to be included in issue framed for review). Furthermore, “this rule should be construed broadly to avoid the rigid exclusion of reviewable issues, however peripheral.” *State v. Leber*, 2009 UT 59, ¶ 10, 216 P.3d 964 (quoting *Sevy v. Sec. Title Co.*, 902 P.2d 629, 637 (Utah 1995)). Contrary to the State’s suggestion that the issue “has never been made in this case,” its own petition for certiorari repeatedly referenced the Court of Appeals’

⁹ The State mischaracterizes the relevant case law in arguing that the introduction of an alternative test to *Ramirez* would enlarge the issues before this Court. Even accepting those cases it cites at face value, however, both are easily distinguishable from the present case. In *United Parcel Service, Inc. v. Mitchell* and *Madsen v. Borthick*, the parties had not pursued the issue that the amicus brief discussed. *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Madsen v. Borthick*, 658 P.2d 627, 629 n.3 (Utah 1983). In the present case, the Utah Court of Appeals, the State’s brief, and the defendant’s brief all discuss whether *Ramirez* should be reexamined. *Lujan*, 2015 UT App 199, ¶ 10 n.1; Br. of Pet’r at 19; Br. of Resp’t at 25–31.

invitation to this Court to revisit the *Ramirez* test. (See, e.g., Pet. for a Writ of Cert. at 10.)

Throughout its petition, the State criticized the Court of Appeals for its treatment of *Ramirez* and its recommendations to this Court. The State claimed the majority merely “paid lip service to *Ramirez*,” while “it in effect imposed a standard exceeding that required in *Ramirez*.” (*Id.*) The State also took issue with the Court of Appeals’ conclusion that the *Ramirez* standard “does not accurately reflect the changed views about handling this problematic evidence.” (*Id.* (quoting *Lujan*, 2015 UT App 199, ¶ 10 n.1); see also *id.* at 17 (same).) Accordingly, the State specifically asked this Court to grant certiorari “to clarify that state due process does not require the exclusion of eyewitness identification unless it determines that it results from an unnecessarily suggestive police identification procedure.” (*Id.* at 17.)

In its opening brief before this Court, the State reiterated many of the same issues it raised in its petition. Specifically, the State noted that “[b]oth the majority and the dissent urged review of the *Ramirez* standard for the admissibility of eyewitness identification testimony, citing its age, the continuing legal and scientific concerns about the reliability of eyewitness identifications, and the outcome in this case.” (Br. of Pet’r at 19.) And once again, the State implored this Court to “clarify the state due process standard announced in *Ramirez* and reverse the court of appeals.” (*Id.*; see *id.* at 16–17 (asking the Court to “clarify its state due process model governing the admissibility of

eyewitness identifications”); 29 (asking the Court to “clarify *Ramirez* to prevent further confusion about and misapplication of the state due process analysis”).¹⁰

Similarly, in his merits brief, the defendant raises concerns about *Ramirez* and responds directly to the State’s complaints. (*See, e.g.*, Br. of Resp’t at 25–31.) Because both parties have made arguments concerning the Court of Appeals’ recommendation that this Court revisit the *Ramirez* test, the Innocence Project’s brief does not extend or enlarge the issues on appeal.

Accordingly, the Innocence Project respectfully requests that this Court consider the present brief in its entirety and reject any attempt by the State to strike any portion of it. To the extent the Court agrees with the State that portions of this brief extend or enlarge the issues on appeal, the Innocence Project respectfully requests that the court deny the motion to strike in part and consider the portions of the brief that “bear on the issues pursued by the parties to this appeal.” *Madsen*, 658 P.2d at 629 n.3.

B. This Court Can Consider Social Science Research in Deciding to Affirm the Court of Appeals’ Decision

Even if the Court disagrees with the Innocence Project and finds that the issue of the sufficiency of the *Ramirez* test was not raised before by the parties,¹¹ the Court may still consider the social science literature cited in this brief.

¹⁰ In addition, the State cites various studies regarding eyewitness testimony and appends them to its opening brief. (*See id.* at 39–40, 43–44, 45, 47, Addendum D.)

¹¹ Counsel for Mr. Lujan, in its brief before the Court of Appeals, noted this Court’s review of the relevant scientific literature, which it described as “replete with empirical studies documenting the unreliability of eyewitness identification.” (Br. of Appellant at 7–8 (citing *Ramirez* and *Long*).) Similarly, the State cited various studies regarding

The State has suggested that consideration of such literature would result in an enlargement of the evidence. As discussed above, however, this Court has long considered social science research to be a valuable resource, particularly in the context of eyewitness identification evidence. *See, e.g., Clopten*, 2009 UT 84, ¶¶ 8, 15–38 (discussing at length the social science research surrounding “eyewitness fallibility and the resulting possibility of mistaken identifications”); *Long*, 721 P.2d at 492 (Utah 1986) (considering the Court to be “compelled by the overwhelming weight of the empirical research to take steps to alleviate the difficulties inherent in any use of eyewitness identification testimony”). Other state supreme courts agree. *See, e.g., Lawson*, 291 P.3d at 685–86 (noting that “it is imperative that law enforcement, the bench, and the bar be informed of the existence of current scientific research and literature regarding the reliability of eyewitness identification”); *Guilbert*, 49 A.3d at 720 (holding that experts may testify about the reliability of eyewitness identifications due to the “near perfect scientific consensus” and “broad based judicial recognition” that “eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror,” as evidenced by scientific research on the topic); *Henderson*, 27 A.3d at 877 (adopting findings of court-appointed special master and finding that scientific evidence presented “convincing proof that the current test for evaluating the trustworthiness of eyewitness identifications should be revised,” and noting that “[s]tudy after study revealed a troubling lack of reliability in eyewitness identifications”).

eyewitness testimony and appends them to its opening brief. (*See* Br. of Pet’r at 39–40, 43–44, 45, 47, Addendum D.)

The social science research cited by the Innocence Project is analogous to “legislative facts,” which are those that “inform policy-making decisions, as opposed to adjudicative facts which are facts distinctive to a particular case.” *Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1259 n.1 (Utah 1996) (Zimmerman, J., concurring) (citing Robert E. Keeton, *Judging* 38–39 (1990); Utah R. Evid. 201 advisory committee’s note). Justice Zimmerman, in explaining “[t]he propriety of considering legislative facts in making policy decisions” cited a decision by the United States District Court for the Eastern District of New York, which held that:

A court’s power to resort to less well known and accepted sources of data to fill in the gaps of its knowledge for legislative and general evidential hypothesis purposes must be accepted because it is essential to the judicial process.

Id. (quoting *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981)); *accord State v. Santiago*, 122 A.3d 1, 129 n.114 (Conn. 2015) (“To turn a blind eye to relevant and well established scientific or sociological knowledge that the parties may have overlooked or decided to leave unearthed, whether for strategic or financial reasons, would unjustly and unwisely subject the public at large to the results of an ill-informed decision.”); *Dean v. District of Columbia*, 653 A.2d 307, 323 (D.C. 1995) (“[C]ourts traditionally answer questions of legislative fact, and thus questions of law, not only by referring to evidence of record but also by considering non-record sources such as scientific and social science studies found in law reviews and other journals.”).

A recent case before the United States Court of Appeals for the Second Circuit is instructive on the issue of the applicability of social science research. In *Young v.*

Conway, Amicus Curiae the Innocence Project presented the court with a “robust and growing body of high-quality scientific studies addressing problems surrounding eyewitness identifications.” *Young v. Conway*, 715 F.3d 79, 81 (2d Cir. 2013). The Second Circuit ultimately decided to reference the studies in its opinion, “conclud[ing] that it was a good idea to make trial judges aware of the existence of this information, in effect, as additional tools to help them with their work.” *Id.* In so doing, the court made clear that it merely “aims to point the bench and bar to the existence of the studies and to go no further.” *Id.* In fact, the opinion itself is explicit that the court’s conclusion was not “compelled or controlled” by the literature it cited; rather, they merely reinforced the conclusion the court reached. *Young v. Conway*, 698 F.3d 69, 79 n.8 (2d Cir. 2012).

This Court should continue to consider social science literature as an important tool in ensuring that it takes all appropriate steps to alleviate the difficulties inherent in the use of eyewitness identification testimony.

III. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD WHEN IT REQUIRED THE STATE TO DEMONSTRATE THAT ANY ERROR IN ADMISSION OF EYEWITNESS IDENTIFICATION WAS HARMLESS BEYOND A REASONABLE DOUBT

Under Utah law, the introduction of an unreliable eyewitness identification is a constitutional violation. *See Ramirez*, 817 P.2d at 779–81. Because the introduction of the tainted identification testimony in this case violated Defendant-Respondent’s constitutional right to due process, the Court of Appeals held that the State had the burden of showing that the eyewitness identification testimony was harmless beyond a reasonable doubt. *Lujan*, 2015 UT App 199, ¶ 16. This conclusion was a straightforward

application of this Court's precedent. Where the error in question amounts to a violation of a defendant's constitutional rights, its "harmlessness is to be judged by a higher standard, i.e., reversal is required unless the error is harmless beyond a reasonable doubt." *State v. Villarreal*, 889 P.2d 419,425 (Utah 1995).

This Court's approach to harmless error analysis is based on the U.S. Supreme Court's decision in *Chapman v. California*, 386 U.S. 18 (1967). That decision, in turn, is based on the simple principle that the courts are responsible for protecting constitutional rights. In establishing the "harmless beyond a reasonable doubt" standard, the *Chapman* Court recognized that courts possessed the "responsibility to protect" federal constitutional rights so that "[p]etitioners are entitled to a trial free from the pressure of unconstitutional inferences." *Id.* at 21, 26. The Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error" and that an infringement of those rights would render the trial unconstitutional. *Id.* at 23. The same considerations apply here. Defendant-Respondent is entitled to a trial free from the pressure of unconstitutional inferences from eyewitness testimony fraught with issues of unreliability.

Social science research on the extent to which jurors rely on eyewitness testimony underscores how critical the harmless error standard is. Because jurors tend to "overbelieve" eyewitness testimony to an extent that is not warranted by the facts, the admission of eyewitness testimony that is unreliable can be extraordinarily harmful. *See, e.g., Jennifer N. Sigler & James V. Couch, Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002) (finding that the conviction rate by mock juries

increased from 49% to 68% when a single, vague eyewitness account was added to circumstantial evidence). In addition, a study of the first 250 DNA exonerations concluded that over 75 percent of those wrongful convictions involved mistaken eyewitness identification. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 8–9 (2011). The fact that 75 percent of wrongful convictions involve mistaken eyewitness identifications counsels in favor of courts adhering to their “responsibility to protect” defendants and their right to a trial free of tainted eyewitness identification testimony.

The fact that the error identified by the Court of Appeals may have been solely a violation of the Utah Constitution does not change this analysis. Just as federal courts have the responsibility to safeguard defendants’ federal constitutional rights, so too do the courts of this state have the parallel responsibility to safeguard defendants’ rights under the state constitution. *See, e.g., State v. Thompson*, 810 P.2d 415, 421 (Utah 1991) (Zimmerman, J., concurring). A violation of a defendant’s state constitutional rights is no less serious than a violation of his rights under the U.S. Constitution. Even if federal constitutional rights are not implicated, the State has the burden of proving that an error resulting in a Utah state constitutional violation was harmless beyond a reasonable doubt. This Court has held that Utah’s inquiry into due process is “as stringent as, if not more stringent than, the federal analysis.” *Ramirez*, 817 P.2d at 784. There is no reason to relax that level of concern for defendants’ constitutional rights in the context of adopting an appropriate standard of review. Insisting that the State demonstrate that the introduction of tainted eyewitness identification testimony was harmless beyond a

reasonable doubt ensures that this Court can uphold its responsibility to protect defendants. *See State v. Anderson*, 910 P.2d 1229, 1240 (Utah 1996) (Stewart, J., concurring) (“The framers of the Utah Constitution necessarily intended that this Court should be . . . the primary protector of individual liberties.”)

This approach is consistent with the law of other states. A number have adopted the *Chapman* standard for violations under their respective state constitutions. *See Van Arsdall v. State*, 524 A.2d 3, 11 (Del. 1987) (“[R]eversal is required whenever the reviewing court cannot say that the error was beyond a reasonable doubt.”); *State v. Perry*, 245 P.3d 961, 974 (Idaho 2010) (“Idaho shall from this point forward employ the *Chapman* harmless error test for all objected-to error.”); *State v. Bunch*, 689 S.E.2d 866, 868 (N.C. 2010) (applying *Chapman* for jury-instruction error violating state constitution). Similarly, a number of states require the prosecution to bear the burden of proving that the error was harmless, although the standard is lower than beyond a reasonable doubt. The Supreme Court of Montana, for example, has held that “the state will carry the burden of persuading the Court . . . that the violation was harmless.” *State v. Charlie*, 239 P.3d 934, 945 (Mont. 2010) (emphasis removed). Similarly, the Supreme Court of Alaska held that the prosecution must assume the burden of proving that the error was harmless. *Bostic v. State*, 805 P.2d 344, 347 (Alaska 1991) (noting that the defendant is the “non-offending party” and that placing the burden on him would be “manifestly unjust”).

Moreover, Connecticut and the District of Columbia have extended the *Chapman* standard to violations of state law. *See State v. Artis*, 101 A.3d 915, 928 (Conn. 2014)

(holding that state had burden of proving that admission of identification testimony was harmless beyond a reasonable doubt); *Baker v. United States*, 867 A.2d 988, 1004 (D.C. 2005) (applying *Chapman* to statement admitted in violation of court’s precedent).

This Court should make clear that the State has the burden of proving that errors infringing upon state constitutional rights are harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Amicus Curiae the Innocence Project respectfully requests that, in light of current social science research, this Court revise the framework it set out in *Ramirez*, issue guidance on the importance of the “totality of the circumstances” approach, and instruct the lower courts on intermediate remedies, in accordance with the principles articulated above.

DATED this 29th day of July, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(F)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 7,371 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman.

DATED this 29th day of July, 2016.

/s/ Troy L. Booher

CERTIFICATE OF SERVICE

This is to certify that on the 29th day of July, 2016, I caused two true and correct copies of the Brief of Amicus Curiae the Innocence Project, Inc. in Support of Appellee Manual Antonio Lujan to be served on the following via first-class mail, postage prepaid:

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