IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

v.

Case No. S250108

DESIRE LEE LEMCKE and CHARLES HENRY RUDD, Defendants and Appellants

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, CASE NO. G054241

BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT, THE CALIFORNIA INNOCENCE PROJECT, THE PROJECT FOR THE INNOCENT AT LOYOLA LAW SCHOOL, AND THE NORTHERN CALIFORNIA INNOCENCE PROJECT IN SUPPORT OF DEFENDANT AND APPELLANT CHARLES HENRY RUDD

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Appellate Rules 8.208 and 8.488, this form is being submitted on behalf of The Innocence Project, The California Innocence Project, The Project for the Innocent at Loyola Law School, and the Northern California Innocence Project.

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Respectfully submitted,

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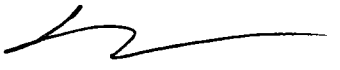
Dated: August 29, 2019



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PRELIMINARY STATEMENT

A substantial body of research has established that jurors find highly persuasive an eyewitness's testimony that she is certain about the accuracy of her identification.[1] Indeed, studies show that eyewitness confidence is the single most influential factor for jurors weighing identification testimony.[2] Yet decades of accumulated social science research has demonstrated that eyewitness confidence and accuracy are not well correlated.

Further, the latest research has identified way to conduct identification procedures that enhance the reliability of both identifications and associated statements of confidence. Such statements tend to signal accuracy only when memory is first tested, "before there is much opportunity for memory contamination to occur," and only when the statement is obtained from the witness at the conclusion of a "pristine" eyewitness-identification testing procedure.[3] A lineup or photo array is

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[1] *See, e.g.*, Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification* (1979) 64 J. Applied Psychol. 440, 446.

[2] *See* Wells & Bradfield, *"Good You've Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience* (1998) 83 J. Applied Psychol. 360, 361, citing several studies ["There is good empirical evidence to indicate that the confidence with which eyewitnesses give identification testimony is the most important single quality of testimony in terms of whether participant-jurors will believe that the eyewitness correctly identified the actual perpetrator."].

[3] *See* Wixted & Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis* (2017) 18 Psychol. Sci. in the Pub. Int. 10, 13 ("*New Synthesis*").

"pristine" if there is only one suspect, the suspect does not stand out, the witness is told the offender may not be present, the administrator does not know who the suspect is, and the statement of confidence is recorded immediately and before any feedback is given to the witness.[4] Notably, even just the passage of time, without any overt contamination by a lineup administrator or otherwise, can increase a witness's self-assessment of confidence.[5] In passing SB-923, California's recently-enacted eyewitness identification statute, the legislature recognized the validity and consequence of this research and has embraced scientifically-sound identification procedures.[6]

Nevertheless, CALCRIM No. 315 allows jurors to consider *any* witness certainty statement – including where the identification resulted

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[4] *Id.* at p. 19-20.

[5] See, e.g., Wixted et al., *The Effect of Retention Interval on the Eyewitness Identification Confidence-Accuracy Relationship* (2016) 5 J. Applied Res. in Memory & Cognition 192, 193.

[6] *See* SB-923(1)(d) ["Over the past 30 years, a large body of peer-reviewed research has demonstrated that simple systematic changes in the administration of eyewitness identification procedures by law enforcement agencies can greatly improve the accuracy of identifications. These evidence-based practices include blind or blinded administration of identification; instructing the eyewitness that the perpetrator may or may not be present in the procedure; selecting fillers that match the eyewitness' description of the perpetrator and do not make the suspect noticeably stand out; eliciting a statement of confidence from the eyewitness, in his or her own words, immediately after an identification is made; and recording the eyewitness identification procedure."].

from non-pristine, and even suggestive procedures – as bearing on accuracy. CALCRIM No. 315 instructs, in relevant part:

> You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. In evaluating identification testimony, consider the following questions: . . . How certain was the witness when he or she made an identification?

By instructing jurors that they may rely upon the witness's confidence in her identification, courts risk endorsing the flawed notion that confidence is always probative of accuracy.

In light of the scientific research showing that eyewitnesses are often mistaken, that even highly confident witnesses are often mistaken, and that jurors are likely to rely heavily on such confidence testimony, CALCRIM No. 315 violates a defendant's due process right to a fair jury instruction.

For the same reasons that the instruction should not be given, *amici* respectfully submit that an eyewitness confidence statement resulting from a non-pristine identification procedure should not be allowed in evidence, as it lacks sufficient probative value and reliability to satisfy a defendant's due process rights. Only where the confidence statement was recorded as part of a pristine identification procedure – that is, one that comports with the provisions of SB-923 – should the statement potentially be admissible.

FACTS

On July 13, 2014, Ricardo Velasquez, a patrol officer with the Santa Ana Police Department, was the first officer to respond to an assault and robbery call at the Royal Roman Hotel. (4RT 588-589.) He spoke with the victim, Monica Campusano, who described her two assailants as a "big guy, male black, approximately six three to six five, anywhere from 260 to 300 pounds, balding with a goatee" and a "heavyset white female, maybe around five six, over 200 pounds, had tattoo around the neck area." (4RT 590.) While investigating at the scene, Officer Velasquez determined that the hotel room where the assault occurred was registered to Desirae Lemcke. (4RT 591.) In reviewing police records, Officer Velasquez found a court order linking Ms. Lemke to Charles Rudd. (1RT 27.) The physical description of Mr. Rudd in that order generally matched the description the victim had given of her attacker. (4RT 591-593.)

Having determined Mr. Rudd should be considered a suspect, Officer Velasquez prepared a photo array that included him, brought it to the hospital where Ms. Campusano was being treated, and showed her the array. (2RT 180-181; 4RT 593.) Officer Velasquez testified that in showing Ms. Campusano the photos, he read to her from a form that, according to Officer Velasquez, stated, "to the best of their knowledge if they could identify a suspect or suspects who committed the crime, and they could circle the picture and initial it." (4RT 595.) Ms. Campusano

picked Mr. Rudd's photo and, according to Officer Velasquez, said she "recognized the nose, mouth, and jaw area." (4RT 595-596.) There is no record evidence that Officer Velasquez admonished Ms. Campusano that the suspect might not be present in the lineup or obtained a statement of Ms. Campusano's confidence in the accuracy of the identification.

In the days following the crime, Detective Corporal Adrian Silva was assigned to continue the investigation. (3RT 405.) At some point during Detective Silva's investigation, Ms. Campusano stated, for the first time, that the male suspect had a tattoo on his neck. (3RT 415, 434.) On October 21, 2014, nearly three months after the crime, Detective Silva conducted a second photo identification procedure. He showed Ms. Campusano two photographs – one of a tattoo on Mr. Rudd's neck and one of a tattoo on the neck of a second suspect, Marcus Horn. (3RT 416, 433.) Detective Silva testified that, after giving Mr. Campusano an admonishment, "stressing for her to not feel compelled to identify somebody from these tattoos," he asked her if she recognized either of the two tattoos. (3RT 418.) Ms. Campusano picked the photograph of Mr. Rudd's tattoo and said, according to Detective Silva's testimony, that "the tattoo in this photo was more like the one that she remembered on the person that assaulted her." (3RT 419.)

After Detective Silva showed Ms. Campusano the two neck tattoo photographs, and after she had chosen Mr. Rudd's tattoo as "more like the

one she remembered," Detective Silva showed her a single photograph of Mr. Rudd and asked "if she remembered that this was a specific photograph within the lineup that she had already identified." (3RT 419-421.) Ms. Campusano agreed that it was. (3RT 420.) There is no evidence that Detective Silva obtained a confidence statement at that time.

Next, Detective Silva presented Ms. Campusano with a new photo array that included Mr. Horn (the alternate suspect) but not Mr. Rudd. (3RT 421-422, 432-433.) Ms. Campusano said she did not recognize anyone in that photo array, but she pointed to the single photograph of Mr. Rudd (that was not part of the photo array) and "she said for sure it was Mr. Rudd." (3RT 422.)

Mr. Rudd and Ms. Lemcke were tried in September 2016, nearly two years after the identification procedures administered by Detective Silva, and more than two years after the crime and first photo array conducted by Officer Velasquez. At trial, Ms. Campusano identified Mr. Rudd as her attacker (2RT 171) and Detective Silva testified that Ms. Campusano told him that Mr. Rudd was her assailant "for sure." (3RT 422.) Other than the identification testimony and the court order against him, the government offered no evidence to show that Mr. Rudd was responsible for the crime.

An expert in psychology and memory testified at trial about scientific research on the reliability of eyewitness identification testimony. (5RT 714-797.) The expert, Mitchel Eisen, told the jury that "confidence is

useful" for determining whether an identification is accurate, "if you have a good, fair lineup" that occurs "soon after the event" and the eyewitness has "a strong recognition." (5RT 759.) Absent those conditions, he testified, "confidence is not related to accuracy in any regard." (5RT 759.)

The prosecution repeatedly emphasized Ms. Campusano's purported high confidence in the accuracy of her identification during summation. At the outset, the prosecutor said that Ms. Campusano's "ID has been confident the entire time." (6RT 943). The prosecutor later returned to this theme and asked rhetorically: "How certain was the witness when she made the ID? She was certain the entire time. And she came in here and saw Mr. Rudd when she walked into court, and said, 'that's him.' And she ID'ed him every time before." (6RT 949.)

Pursuant to CALCRIM No. 315, and over defense counsel's objection, the trial judge instructed the jury to consider the question, "How certain was the witness when he or she made an identification?" (6RT 889-892; 7RT 1063-1064.) The jury voted to convict. (7RT 1103-1106.)

ARGUMENT

I. Except in Limited Circumstances, Eyewitness Confidence Statements Do Not Correlate Well With Accuracy

A. Research has shown that only pristine procedures produce reliable confidence statements

Although eyewitnesses often express a high level of confidence in the accuracy of their identifications, empirical evidence has established that

this confidence is often misplaced and the identifications erroneous. (*See, e.g.*, Wells et al., *The Confidence of Eyewitnesses in Their Identifications from Lineups* (2002) 11 Current Directions in Psychol. Sci. 151, 153 [discussing a mid-1990s DOJ study of DNA exoneration cases, and noting that in "three fourths of these convictions of innocent persons involved mistaken eyewitness identifications, and, in every case, the mistaken eyewitnesses were extremely confident, and, therefore, persuasive at trial"].)

A witness's self-reported statement of high confidence does not correlate well with accuracy except when that statement is recorded as part of a "pristine" identification procedure. (*See* Wixted & Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis* (2017) 18 Psychol. Sci. in the Pub. Int. 10, 50 ("*New Synthesis*") ["Scientific evidence has clearly established that certain non-pristine testing conditions severely compromise the information value of eyewitness confidence."].) Several decades of scientific research has demonstrated that five straightforward and easily implemented components of an identification procedure will serve to make the resulting identification (and any accompanying confidence statement) more reliable. A procedure is "pristine" if: (1) only one suspect is included in the lineup; (2) the suspect does not stand out (i.e. the lineup includes fillers who match the general description of the suspect); (3) the administrator instructs the

witness that the offender may not be present in the lineup; (4) the administrator does not know which lineup member is the suspect; and (5) following a positive identification, the administrator promptly obtains the witness's statement of his or her degree of confidence in the result. (*Id.* at p. 20.)

A pristine procedure that meets these five conditions is more likely to yield accurate identifications and reliable confidence statements. In turn, a witness's confidence statement has meaningful evidentiary value when the officer employs these procedures. (*See New Synthesis* at p. 50 ["Under pristine testing conditions, a high-confidence suspect ID appears to be highly probative of guilt."].) As explained in further detail below, the California legislature recently enacted an eyewitness identification statute that embraces this research, by requiring law enforcement officials to use procedures designed "to ensure reliable and accurate suspect identifications." (SB-923(2)(a).)[7]

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[7] Over the past several years, a number of state high courts have similarly accepted this research on eyewitness perception and memory by incorporating it into public policy. (*See, e.g., State v. Henderson* (N.J. 2011) 27 A.3d 872, 900, 919-22 [revising the due process framework for evaluating eyewitness identification in light of an extensive report issued by a special master who reviewed "hundreds of scientific studies" and requiring, pursuant to the New Jersey Supreme Court's supervisory powers, that law enforcement officers make a record of a witness's confidence statement at the time an identification is made]; *State v. Lawson* (Or. 2012) 291 P.3d 673, 690-91 [revising the framework for admitting eyewitness identification under Oregon's evidence laws, in light of scientific research]; *Com. v. Gomes* (Mass. 2015) 22 N.E.3d 897, 913 [holding "it is necessary

B. Because non-pristine procedures do not correlate well with accurate identifications, any confidence statement following such procedures is unreliable and thus has little or no evidentiary value

Because confidence does not correlate well with accuracy when investigators use non-pristine procedures, a witness's purported certainty in the accuracy of her identification under these circumstances has little or no evidentiary value. (*New Synthesis* at p. 50.) Confidence statements from non-pristine procedures are less predictive of guilt because the investigative missteps that taint an identification tend to increase confidence without increasing accuracy.

Researchers have found, for example, that witnesses make identifications that are more confident, but not more accurate, if the lineup contains "dud-alternatives" – *i.e.*, "fillers [who] are not plausible lineup members because they fail to fit the general description of the perpetrator." (Charman et al., *The Dud Effect: Adding Highly Dissimilar Fillers Increases Confidence in Lineup Identifications* (2011) 35 Law & Hum. Behav. 479, 479-80, 482.) The presence of duds "makes the similar-

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to inform the jury that an eyewitness's expressed certainty in an identification, standing alone, may not indicate the accuracy of an identification, and that this is especially true where the witness did not describe that level of certainty when the witness first made an identification"]; *State v. Harris* (Conn. 2018) 191 A.3d 119, 144 [holding that courts must evaluate the reliability of eyewitness identifications in light of eight variables social scientists have identified as bearing on reliability].)

looking lineup members appear even more similar to the criminal," which "in turn, increases the confidence with which witnesses identify one of these similar-looking, but innocent, lineup members." (*Id.* at p. 494.)

Similarly, research has shown that biased instructions – those that fail to warn the witness that the offender may not be present in the lineup – put pressure on the witness that "may serve to ease acceptance of a face with familiar features," even if that face belongs to someone other than the actual offender. (Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects* (1997) 21 Law & Hum. Behav. 283, 284.) Studies have shown that biased instructions "produc[e] more confidence than unbiased instructions." (*Id.* at p. 293.)

The risk of a faulty expression of confidence is similarly enhanced by having the identification procedure conducted by a non-blind administrator, that is, one who knows the position of the police suspect in the lineup. Research has shown that non-blind administrators tend to exert "social influence" on the witness, and artificially increase the witness's confidence "through their intonation and non-verbal behavior." (Garrioch & Brimacombe, *Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence* (2001) 25 Law & Hum. Behav. 299, 306.) Witnesses attempting to "reduce the uncertainty surrounding the choosing of a lineup member" may "look[] to their interviewer" and "use[] the

interviewer's reaction to their lineup choice to gauge their identification confidence." (*Ibid.*)

All of these aspects of a non-pristine identification procedure tend to artificially inflate the witness's confidence in the accuracy of the resulting identification. Even worse, the corrupting factors contributing to the witness's confidence – the suggestive array, the biased instruction, or the non-blind administrator – actually make an *unfounded and erroneous* confidence statement more likely. (Eisenstadt & Leippe, *Social Influences on Eyewitness Confidence: The Social Psychology of Memory Self-Certainty, in* Handbook of the Uncertain Self (2009) pp. 36, 40 ["Memory retrieval that is experienced as faster, easier, or richer is assumed to be more accurate, and confidence is accordingly heightened."].) The legal system has long regarded suggestive procedures as unfair because they suggest to the witness which individual the police suspect is guilty of the crime. (*See, e.g., Stovall v. Denno* (1967) 388 U.S. 293, 301-302 [observing that show-up identifications have "been widely condemned" and holding that, depending on the "totality of the circumstances," such a procedure may constitute a denial of due process if it was sufficiently "unnecessarily suggestive and conducive to irreparable mistaken identification."].) The research on confidence inflation shows that there is another layer to the unfairness of suggestive procedures: at the same time

that they produce inaccurate identifications, they also tend to produce unduly confident, and thus unduly persuasive, testimony.

C. Later statements of eyewitness confidence are unreliable

Among other things, a pristine procedure requires the administrator to promptly collect a confidence statement following a positive identification. That is because the risk of an erroneous assertion of eyewitness confidence is compounded by the passage of time between the initial identification procedure and the confidence statement. In this case, for example, Ms. Campusano's first confidence statement came three months after her initial identification of the defendant.

Eyewitness confidence is highly malleable, and eyewitnesses often become more confident in the accuracy of their identifications over time – i.e., in the period between the initial identification and trial – even though nothing has occurred to justify any such enhanced confidence, or to make the identification any more accurate. (*See* Nat. Res. Council, *Identifying the Culprit: Assessing Eyewitness Identification* (2014) p. 108 ["Expressions of confidence in the courtroom often deviate substantially from a witness' initial confidence judgment, and confidence levels reported long after the initial identification can be inflated by factors other than the memory of the suspect."].)

High confidence statements – including testimony at trial – made subsequent to the initial identification procedure are not probative of either

guilt or innocence. Such statements are often tainted by confirmatory feedback from the administrator. For example, witnesses often report a higher level of confidence at trial than they had at the initial identification because they hear confirmatory feedback from law enforcement, including in trial preparation when they "rehearse the event." (*New Synthesis* at p. 18.) Exposure to such confirmatory feedback need not result from bad faith. It is bound up with the investigative and trial preparation processes, and thus likely unavoidable in the time between the identification procedure and trial.

Research has shown that confirmatory feedback, such as the statement "good, you have identified the suspect," has a dramatic effect on eyewitness confidence even when the identification is mistaken. (Wells & Bradfield, *"Good You've Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience* (1998) 83 J. of Applied Psychol. 360, 367.) One study showed that confirming feedback has a "large or very large" effect not only on "the eyewitnesses' reports of certainty," but also on self-reported evaluations of "view, ability to make out features of the face, attention, basis for making an identification, ease of making an identification, the amount of time taken to make an identification, willingness to testify, and trust of an identification made under these conditions." (*Ibid.*) In other words, confirmatory feedback influences affect both a witness's current level of confidence in an

in court identification at trial *and* her present expression of her level of confidence at the time of the identification. (*See New Synthesis* at p. 18.)

Critically, this confidence inflation works to impair, and perhaps eliminate, jurors' ability to distinguish between accurate and mistaken identifications. That is because witnesses who testify sincerely and in good faith tend to appear credible to juries, even as their sincerely held belief is erroneous. (*See* Smalarz & Wells, *Post-Identification Feedback to Eyewitnesses Impairs Evaluators' Abilities to Discriminate Between Accurate and Mistaken Testimony* (2013) 38 Law & Hum. Behav. 194, 200 ["Mistaken eyewitnesses who had received feedback ultimately delivered testimony that was just as credible as the testimony of accurate eyewitnesses."].)[8]

[8] Although not at issue in this case, research has shown that an initial statement of *low* confidence "signals low accuracy whether or not pristine testing procedures are used." (*New Synthesis* at p. 49.) In-court identifications following low-confidence initial identifications lead to wrongful convictions because when a witness initially reports a low level of confidence in an identification, the likelihood that the identification is inaccurate is especially high regardless of a later statement of certainty. (*Ibid.* ["[A] low-confidence initial ID of a suspect from a lineup (or worse) corresponds to an uncomfortably high probability that the suspect is innocent."].)

II. The Legislature Recently Passed, and the Governor Approved, a Law Requiring Law Enforcement Agencies to Adopt Policies Consistent with the Social Science Research on Eyewitness Identification Procedures, Including the Proper Gathering of Confidence Statements

Motivated by the empirical evidence on confidence statements and factual findings that eyewitness misidentification is the leading cause of wrongful convictions, the California legislature recently passed, and the governor approved, SB-923, a statute designed to improve accuracy and ensure that law enforcement agencies will employ pristine identification procedures. The measure requires all California law enforcement and prosecutorial entities to adopt regulations for conducting photo lineups and live lineups with eyewitnesses "to ensure reliable and accurate suspect identifications." (SB-923(2)(a).)

In enacting this law, the Legislature found that "[e]yewitness misidentification is the leading contributor to wrongful convictions proven with DNA evidence nationally" and that "[i]n California, eyewitness misidentification played a role in 12 out of 13 DNA-based exonerations in the state." (SB-923(1)(b).) The Legislature made further findings affirming the validity of the body of scientific research that underlies this brief.

> Over the past 30 years, a large body of peer-reviewed research has demonstrated that simple systematic changes in the administration of eyewitness identification procedures by law enforcement agencies can greatly improve the

> accuracy of identifications. These evidence-based practices include blind or blinded administration of identification; instructing the eyewitness that the perpetrator may or may not be present in the procedure; selecting fillers that match the eyewitness' description of the perpetrator and do not make the suspect noticeably stand out; eliciting a statement of confidence from the eyewitness, in his or her own words, immediately after an identification is made; and recording the eyewitness identification procedure.

(SB-923(1)(d).)

The statute goes into effect on January 1, 2020 as Penal Code Section 859.7. It requires law enforcement agencies and prosecutors to adopt regulations that are consistent with the scientific research, including the practices that constitute a "pristine" identification procedure. The new regulations must require law enforcement to: (1) include only one suspect per lineup. (Penal Code, § 859.7(7).); (2) compose lineups such that suspect does not stand out. (Penal Code, § 859.7(5).); (3) give unbiased instructions. (Penal Code, § 859.7(4).); (4) use blind or blinded administration. (Penal Code, § 859.7(2).); and (5) record the confidence statement immediately and verbatim. (Penal Code, § 859.7(10)(A).)

California has thus embraced scientifically-sound identification procedures which, if properly followed, would yield relevant and reliable evidence of eyewitness confidence. By requiring the use of pristine arrays, and the contemporaneous collection of a confidence statement, the

legislature has aligned public policy with the science. The CALCRIM No. 315 instruction, by contrast, is based on the erroneous premise that confidence is always relevant in assessing eyewitness reliability.[9] It is thus inconsistent with the principles animating SB-923. The remedies offered below would bring CALCRIM No. 315 in line with California's current public policy and decades of social science research.

As explained below, *amici* also respectfully submit that the Court should ensure that the rules pursuant to which trial courts assess whether to admit certainty statements and instruct jurors to consider them are consistent with California's public policy as articulated in SB-923. (*Cf. In re Garcia* (2014) 58 Cal.4th 440 [holding that an undocumented immigrant could be admitted to the State Bar after concluding "[i]n light of [] recently enacted state legislation" that such admission "is fully consistent with this state's public policy"]; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 830 [stating that in light of a "detailed statutory scheme" that "expressed a strong public policy in favor of arbitration . . . courts will indulge every intendment to give effect to such proceedings"].)

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[9] The People assert that CALCRIM No. 315 "refers to witness certainty in neutral terms." (Resp. Br. at 9.) The instruction is only "neutral" in the sense that it does not require jurors to consider witness certainty. But it (1) prompts an inference that witness certainty always corresponds to accuracy, and (2) permits jurors to rely on unreliable statements of high confidence that are not probative of guilt, neither of which is neutral.

III. Jurors Tend to Give Undue Weight to Eyewitness Identification Testimony, a Danger That is Exacerbated When the Witness Also Expresses Confidence in the Accuracy of the Identification

A. Research has shown the danger inherent in allowing witnesses to give certainty testimony following non-pristine procedures

Jurors tend to overvalue eyewitness identification testimony, influenced by what is typically a witness's good faith belief in the accuracy of the identification. When, in one study, researchers presented mock jurors a "chain of circumstantial evidence" only 18% voted to convict; when they presented the same panel "a single eyewitness identification" that number rose to 72%. (Loftus et al., *Eyewitness Testimony: Civil and Criminal* (5th ed. 2013) §12-1.) This tendency holds true even when the witness is mistaken because, researchers explain, "the eyewitness is testifying honestly (i.e., sincerely)" and so "will not display the demeanor of the dishonest or biased witness." (*State v. Henderson* (N.J. 2011) 27 A.3d 872, 889, quoting Epstein, *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross–Examination* (2007) 36 Stetson L.Rev. 727, 772 ["We presume that jurors are able to detect liars from truth tellers. But as scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate"].)

Jurors tend, in particular, to overvalue confidence statements. Researchers have developed "good empirical evidence" that the witness's confidence "is the most important single quality" affecting the juror's

determination of the identification's reliability. (Wells & Bradfield, *"Good You've Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience* (1998) 83 J. of Applied Psychol. 360, 361, citing several studies.) It is therefore not surprising that wrongful convictions based on erroneous eyewitness identifications are typically accompanied by the witness's further testimony that she is extremely confident in the accuracy of her identification of the defendant. (*See* Wells et al., *The Confidence of Eyewitnesses in Their Identifications from Lineups* (2002) 11 Current Directions in Psychol. Sci. 151, 153; *see also* Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre–Identification Memory Feedback Under Varying Lineup Conditions* (2009) 33 Law & Hum. Behav. 194, 194.)

B. The prosecution's case relied heavily on Ms. Campusano's unreliable statement of confidence in her identification of Mr. Rudd

All of the ills exposed by the extensive social science research on confidence statements made following suggestive or otherwise tainted identification procedures were present in this case. Indeed, at every step, Officer Velasquez and Detective Silva engaged in procedures that would have been prohibited under California's current eyewitness identification statute. Ms. Campusano's confidence statement was unreliable because it resulted from an identification procedure that was not pristine: It was not blind, the photo arrays were not properly constituted, the instructions failed

to inform the witness that the suspect potentially was not present in the lineup, and the statement of confidence was not recorded until months after initial identification. These failures were significant because, other than the eyewitness identification and accompanying confidence statement, the prosecution presented no evidence of Mr. Rudd's guilt of the assault. Indeed, the only evidence even potentially linking him to the case at all was Ms. Lemcke's restraining order against him.

The identification procedures used in this case were flawed from the outset. Each identification procedure, beginning with the photo-array procedure in the hospital, was administered by an officer who was actively investigating the crime, knew the identity of the suspect, and knew the location of the suspect's photo in the array. The failure to use a blind administrator carried the dual risk that the investigating officer would signal to Ms. Campusano which lineup member to pick and that the officer would give confirmatory feedback and artificially boost her confidence. These influences may have been present even if everyone acted in good faith and even if no one was aware of them at the time.

There is no record evidence about the composition of the photo arrays, but the procedures that ultimately yielded the first confidence statements involved inappropriate presentations of photographs. Neither the neck tattoo comparison nor the single-photo showup was properly composed. Reliable identification procedures should consist of lineups that

include only one suspect and the fillers should match the witness's description of the assailant so the suspect does not stand out; the neck tattoo comparison included two suspects and neither of these identification procedures utilized any fillers.

According to the officers' testimony, they never informed Ms. Campusano that the person who attacked her might not appear in the lineups. As explained above, the failure to give a witness the proper instruction can put pressure on the witness to make an identification and help the witness overcome a feeling of uncertainty about an identification.

Any one of these flaws would suffice to render the procedure non-pristine and the confidence statement unreliable. But the procedure was further tainted by Officer Velazquez's failure to record a statement articulating Ms. Campusano's level of confidence in her initial identification of Mr. Rudd. The final criterion for a pristine procedure – one that the authors of the leading meta-analytic study on confidence statements "emphasize" several times in their paper – requires the administrator to immediately record the witness's confidence statement following a positive identification. (*New Synthesis* at p. 13, *see also id.* at pp. 14, 17-19, 47, 49-51, 54-55. Researchers have concluded that only a confidence statement recorded at the time of the initial identification procedure "provides reliable information" because subsequent expressions

of confidence may reflect "a variety of factors (e.g. post-ID feedback) [that] can inflate confidence without increasing accuracy." (*Id.* at pp. 50-51.)

Here, the law enforcement officers' conduct demonstrates why it is important to record a confidence statement immediately following the initial identification. There is no record evidence that any confidence statement was made at the time of the first identification procedure. The first confidence statement occurred months later – following the highly suggestive, two-photo neck tattoo comparison – and was equivocal. During that procedure, Ms. Campusano said that the photograph of Mr. Rudd's neck tattoo "was more like the one that she remembered on the person that assaulted her" than the photograph of Mr. Horn's neck tattoo. (3RT 419.) Ms. Campusano gave her first statement of high confidence only after an even more suggestive procedure during which the detective showed her a single photograph of the defendant, asked if she recognized him from the first lineup (not whether she recognized him from the attack), and then left the photograph in sight while administering the final photo array.[10]

Notwithstanding these many infirmities – and in a case where the eyewitness identification was the only direct evidence of the defendant's

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[10] As this Court has recognized, a "single-photograph showup is inherently suggestive, at least to some extent" and "has been widely condemned." (*People v. Sanchez* (2019) 7 Cal.5th 14, 36, citing *Manson v. Braithwaite* (1977) 432 U.S. 98, 109; *People v. Nation* (1980) 26 Cal.3d 169, 180, citing *Stovall v. Denno*, 388 U.S. at p. 302; *Foster v. California* (1969) 394 U.S. 440, 443.)

involvement in the crime – Ms. Campusano's unreliable confidence statement featured prominently at trial.[11] The judge permitted the jury to hear the confidence statement, the prosecutor bolstered the confidence statement in summation, and the judge's instruction invited the jury to credit the confidence statement (over the objection of Mr. Rudd's counsel).[12] Each of these errors weighed heavily in favor of the prosecution's case, and Mr. Rudd was convicted.[13]

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[11] The only other evidence was the court order against Mr. Rudd, described *supra* at 4.

[12] In denying the objection, the trial court reasoned that permitting the jury to consider eyewitness certainty as a factor was "consistent with" the testimony of Dr. Eisen, the defense's expert witness. (6RT 892.) But Dr. Eisen's testimony provided jurors no basis to determine whether Ms. Campusano's confidence was predictive of accuracy. He testified that confidence is useful when there is a "fair and unbiased lineup identification test," where the lineup "is done soon after the events," and where there is "a strong recognition." (5RT 759.) Dr. Eisen's testimony did not give the jury a proper basis to determine whether the confidence statements in this case were reliable because it did not explain what "fair and unbiased" procedures are necessary to ensure a meaningful confidence statement.

[13] In summation, the prosecution went beyond just relying on the witness's confidence statement. Even though there was no confidence statement made by the witness until months after the initial identification procedure, the prosecutor told the jury that Ms. Campusano's "ID has been confident the entire time" and when Ms. Campusano made the identification she "was certain the entire time." (6RT 943, 949.)

IV. In a Case in Which Law Enforcement Has Not Employed the Identification Procedures Set Forth in the Statute, Instructing a Jury that an Eyewitness's Level of Certainty May Be Considered In Evaluating the Reliability of the Identification (CALCRIM No. 315) Violates a Defendant's Due Process Rights

Due process requires proof of each element of the charged crime beyond a reasonable doubt. This includes identification of the defendant as the perpetrator. (*See e.g., United States v. Telfaire* (D.C. Cir. 1972) 469 F.2d 552, 555 ["The presumption of innocence that safeguards the common law system must be a premise that is realized in instruction and not merely a promise. In pursuance of that objective, we have pointed out the importance of and need for a special instruction on the key issue of identification, which emphasizes to the jury the need for finding that the circumstances of the identification are convincing beyond a reasonable doubt."]; *People v. Guzman* (1975) 47 Cal.App.3d 380, 387, citing, among other authorities, *Telfaire* ["a defendant is entitled to an instruction directing the jury's attention to evidence from the consideration of which reasonable doubt of defendant's guilt might be engendered. Under this rule defendant is entitled to an instruction relating identification to reasonable doubt."].)

Recognizing the special difficulties presented by eyewitness identification, this Court has held that a defendant "is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification,

by listing, in a neutral manner, the relevant factors supported by the evidence." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230, citing *People v. Wright* (1988) 45 Cal.3d 1126, 1141-43.)

Although CALCRIM No. 315 is intended to "focus the jury's attention" on a relevant factor (eyewitness certainty), in all cases except those in which pristine identification procedures were used, the instruction focuses the jury's attention on testimony so unreliable that it is irrelevant and potentially misleading. The instruction permits the trial court to advise the jury that in assessing the eyewitness identification, it may "consider . . . [h]ow certain was the witness when he or she made [that] identification." Because an eyewitness's asserted high level of confidence in a non-pristine identification procedure does not, in fact, correlate with accuracy, such testimony has little to no probative value. Stated differently, it is likely *irrelevant* in the due process/reasonable doubt framework (*i.e.*, it is not a "fact[ ] relevant to [the jury's] determination of the existence of reasonable doubt regarding identification").[14]

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[14] However, as noted above, a witness statement of low confidence in an identification is strongly correlated with low accuracy, regardless of whether the testing procedures were pristine. (*New Synthesis* at p. 49.) An instruction that fails to distinguish between statements of high confidence, which are only probative when the product of pristine procedures, and statements of low confidence, which are always probative of accuracy, is misleading to the jury.

Moreover, such testimony is not merely without substantial probative value. It is prejudicial to the defendant, given the substantial data establishing that eyewitness confidence is the single most influential factor for jurors considering identification testimony. (*People v. Sanchez* (2016) 63 Cal.4th 411, 495-498 (Liu, J., concurring), citing Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification* (1979) 64 J. Applied Psychol. 440, 446.)

Accordingly, CALCRIM No. 315 violates due process because it permits jurors to convict based upon unreliable, irrelevant, and misleadingly prejudicial evidence. Consistent with the scientific evidence and the judgment of the legislature, the Court should hold that trial courts must instruct jurors that high confidence witness statements are only relevant when recorded as part of a pristine identification procedure.

V. The Court Should Establish a Rule Precluding Admission of a Witness Confidence Statement Made With Respect to an Identification Resulting From a Non-Pristine Identification Procedure Pursuant to the Rules of Evidence or, Alternatively, the Due Process Clause

Amici respectfully submit the Court should take the further step of establishing an evidentiary rule: A court may not allow the admission of testimony about an eyewitness's level of certainty unless the identification resulted from pristine identification procedures. Evidence that results from procedures that fail to meet the requirements the legislature set forth in SB-

923 – evidence that research has shown to be unreliable and to have an outsized effect on jurors — should not be put before the jury.

The Court should find that, under Cal. Evid. Code, § 352, certainty evidence should always be excluded in the case of an identification that follows a non-pristine procedure because the probative value of such evidence, which is minimal at best, is substantially outweighed by the "substantial danger of undue prejudice."[15]

A confidence statement following a non-pristine procedure has little probative value because, as discussed above, it can be compromised by the procedural errors and contaminated by post-identification feedback. *See* Section I, *supra* at 7-11. This is especially true of confidence statements that a witness makes at trial, which often occur months or even years following the incident and initial identification procedure. *See* Section I, *supra* at 11-14.

At the same time, the scientific research shows that confidence statements can be highly prejudicial because juries tend to find them especially compelling, too often failing to distinguish between accurate and sincere-but-mistaken testimony. *See* Sections II and III, *supra* at 14, 17-19. The large number of wrongful convictions following high-confidence

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[15] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Cal. Evid. Code, § 352(b).)

eyewitness testimony, including 12 of the 13 convictions overturned in California based on DNA evidence, confirms this substantial prejudice.

A rule excluding confidence statements that did not result from pristine procedures is also consistent with the federal due process analysis established by the U.S. Supreme Court for assessing the admissibility of allegedly tainted eyewitness identification testimony. Under that framework, the trial court first must determine whether the eyewitness testimony is the product of an unduly suggestive identification procedure. If it is, the prosecution must show that the identification is reliable notwithstanding the suggestiveness. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, citing *Manson v. Braithwaite* (1977) 432 U.S. 98, 104-107, 109-114.) The Court recently explained the due process considerations underpinning the *Mason* analysis:

> the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood' of misidentification. Reliability of the eyewitness identification is the linchpin of that evaluation, the Court stated in [*Manson v.*] *Brathwaite*. Where the indicators of a witness' ability to make an accurate identification are outweighed by the corrupting effect of law enforcement suggestion, the identification should be suppressed.

(*Perry v. New Hampshire* (2012) 565 U.S. 228.)

Just as reliability is the linchpin for assessing the admissibility of an otherwise problematic identification, reliability should the linchpin for the

analogous issue of assessing the admissibility of a confidence statement. An application of the *Manson* two-step framework, in light of the science, logically leads to the conclusion that admitting confidence statements resulting from a non-pristine identification procedure violates due process. First, an identification procedure that does not follow the requirements set forth in SB-923 (*i.e.*, one that is non-pristine) is always unduly suggestive because – as reflected in the social science research – the procedures set forth in SB-923 are a necessary safeguard against unfair and inaccurate identifications. Second, and again by reference to *Manson*, the scientific research makes clear that a confidence statement following such a non-pristine (or, "suggestive") identification procedure is not a reliable basis for evaluating the accuracy of the identification. That is the case even if, under the *Manson* two-step analysis, the identification itself is deemed sufficiently reliable and, therefore, admissible.

Such a rule also comports with the U.S. Supreme Court's other rationale for suppression, deterrence. (*See Perry v. New Hampshire* (2012) 565 U.S. 228, 241 [holding that a "primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, ... is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. Alerted to the prospect that identification evidence improperly obtained may be excluded, ... police officers will 'guard against unnecessarily suggestive procedures.'"].) Excluding confidence testimony

where law enforcement has failed to conduct a pristine identification procedure would, consistent with *Perry*, deter law enforcement from using improper procedures in the first place.

A rule limiting the admission of certainty statements to statements recorded as part of pristine identification procedures would also simplify the approach to jury instructions on eyewitness confidence. If the procedure is pristine, the confidence statement may be admissible and a jury instruction that allows jurors to consider eyewitness confidence is appropriate. If the procedure is not pristine, evidence or testimony about the witness's level of confidence should be barred and no instruction on eyewitness confidence would be appropriate.

CONCLUSION

For these reasons, *amici* respectfully submit that the Court should rule that trial judges may only admit confidence statements that were recorded as part of a pristine eyewitness identification procedures and may only read CALCRIM No. 315 to the jury in such cases.

Respectfully submitted,

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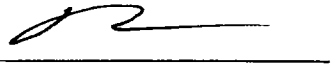
Dated: August 29, 2019



Hannah Y. Lee

CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court 8.204(c)(1) and 8.486(a)(6), counsel for *amici* hereby certifies that the number of words contained in this APPLICATION FOR LEAVE TO FILE *AMICI* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 7,121 words as calculated using the word count feature of the computer program used to prepare the brief.

Respectfully submitted,

Dated: August 29, 2019

Hannah Y. Lee

DECLARATION OF SERVICE

I, Sarah Ackard, am employed in the City of Menlo Park, San Mateo County, California. I am over the age of eighteen (18) years and am not a party to this action. My business address is 990 Marsh Road, Menlo Park, CA 94025.

On August 29, 2019, I served the within documents: APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED BRIEF OF *AMICI CURIAE* by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

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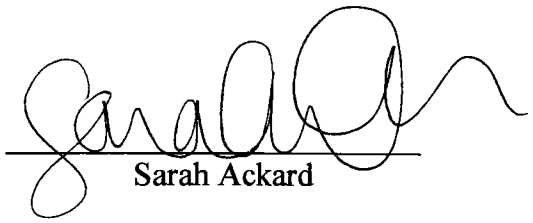
California Court of Appeal Attn: Clerk of the Court Fourth District, Division Three 601 W. Santa Ana Blvd. Santa Ana, California 92701	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed on August 29, 2019, at Menlo Park, California.



Sarah Ackard