IN THE SUPREME COURT OF THE STATE OF MISSOURI
No. SC98088

STATE OF MISSOURI, Respondent, v. KANE CARPENTER, Appellant	Appeal from the Circuit Court of Cole. Co. No 16AC-CR02733-01 On transfer from the Missouri Court of Appeals, Western District Case No. WD81702

BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT, INC. AND THE MIDWEST INNOCENCE PROJECT IN SUPPORT OF APPELLANT KANE CARPENTER FILED WITH CONSENT

Tricia J. Bushnell, #66818
MIDWEST INNOCENCE PROJECT
3619 Broadway Blvd., Suite 2
Kansas City, MO 64111
Telephone: (816) 221-2166
Facsimile: (888) 446-3287
tbushnell@themip.org

Alexis Agathocleous
THE INNOCENCE PROJECT, INC.
40 Worth St.
New York, NY 10013
Telephone: (212) 364-5340
aagathocleous@innocenceproject.org

David S. Frankel
John M. McNulty
Aaron L. Webman
Rachel L. Goot (NY admission pending)
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8470
dfrankel@kramerlevin.com
jmcnulty@kramerlevin.com
awebman@kramerlevin.com
rgoot@kramerlevin.com

Attorneys for Amici Curiae *The Innocence Project, Inc. and The Midwest Innocence Project*

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JURISDICTIONAL STATEMENT

Amici adopt the jurisdictional statement set forth in Appellant's Brief.

AUTHORITY TO FILE

This brief is filed pursuant to Rule 94.05(f) with consent of the parties.

INTEREST OF *AMICI CURIAE*

The Innocence Project, Inc. and the Midwest Innocence Project are non-profit organizations dedicated to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA testing and other evidence. To date, the work of *amici* and their affiliated organizations has led to the exoneration, by post-conviction DNA testing, of 367 individuals.

Amici thus have long worked to ensure that criminal trials reach accurate determinations of guilt and promote justice. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, *amici*'s objectives help to ensure a safer and more just society. Indeed, in 51 percent of the wrongful convictions exposed by post-conviction DNA testing, the work of *amici* and affiliated organizations has also helped to identify the real perpetrators of those crimes.

Eyewitness misidentification is a contributing factor in 252 of the 367 wrongful convictions identified through post-conviction DNA testing, making it the leading cause of wrongful conviction in those cases. Accordingly, *amici* have a compelling interest in seeking to ensure that juries are properly assisted in evaluating the reliability of eyewitness identification evidence, including, in appropriate cases, through expert testimony on eyewitness evidence, which substantially aids jurors and protects against the risk of misidentification.

PRELIMINARY STATEMENT

It is well-settled that an eyewitness identification is among the most persuasive forms of evidence that can be presented at a criminal trial. As U.S. Supreme Court Justice Brennan observed: "[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting). Troublingly, the persuasiveness of eyewitness identifications is frequently accompanied by a significant risk of unreliability; eyewitness identifications are now understood to be "among *the least reliable* forms of evidence." *See United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) (citation omitted). Indeed, eyewitness identification evidence plays a significant role in a strikingly high percentage of wrongful convictions exposed by post-conviction DNA testing nationwide; it is in fact the *leading* cause of wrongful conviction in those cases.

As set forth below, extensive scientific research demonstrates not only that eyewitness identifications are inherently fallible, but also that certain law enforcement practices and procedures can amplify the risk of misidentification. Many of the factors that contribute to the vulnerability of eyewitness identification evidence are not well understood by lay jurors, and in some cases are counterintuitive, often directly contradicting supposedly "common sense" beliefs. Accordingly, it is critical that this Court make clear that trial courts should permit expert testimony addressing these factors

in appropriate cases. Without such testimony as background, juries are frequently unable to appropriately and fully evaluate eyewitness evidence.

This Court's governing opinions on the admissibility of expert testimony relating to eyewitness evidence were decided more than thirty years ago. *State v. Lawhorn*, 762 S.W.2d 820 (Mo. 1988); *State v. Whitmill*, 780 S.W.2d 45 (Mo. 1989). Although *Lawhorn* and *Whitmill* did not impose a *per se* rule excluding expert testimony on eyewitness identification, Missouri's trial courts often treat them as having done so. Consequently, jurors in this state routinely are denied the guidance necessary to evaluate properly the reliability of eyewitness identification testimony.

Based on the extensive body of scientific evidence on the factors that contribute to the frequent unreliability of eyewitness identification testimony—much of it developed in the thirty years since this Court last addressed the issue—courts across the country now regularly allow expert testimony explaining the reasons for that unreliability. These courts recognize that experts can equip jurors to evaluate the reliability of eyewitness testimony without invading the province of the jury, as expert testimony properly concerns the reliability of eyewitness identifications generally, *not* the credibility of the specific eyewitness in the case. That distinction is critical in the context of eyewitness testimony, where traditional protections like cross-examination are ineffective when an eyewitness is sincere and testifies honestly, but is simply mistaken.

Missouri law permits the admission of such expert testimony pursuant to Mo. Rev. Stat. § 490.065, the state's recently-amended statute governing the admissibility of expert testimony. In light of the scientific research and with that statute's provisions in mind, *amici* respectfully ask this Court to clarify that trial courts should generally admit expert testimony on factors that affect the reliability of eyewitness identifications in cases where that is at issue.

ARGUMENT

I. In the last thirty years, a scientific and legal consensus has emerged that favors permitting expert testimony on the factors affecting the reliability of eyewitness identifications.

In the three decades since this Court decided *State v. Lawhorn*, a scientific consensus has emerged that eyewitness identifications are often unreliable and that an array of variables can affect memory and lead to misidentifications. *See, e.g.*, National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 1 (2014) (observing that several decades of scientific research have "given us an increasingly clear picture of how eyewitness identifications are made" and "an improved understanding of the principled limits on vision and memory that may lead to failures of identification"); *State v. Henderson*, 27 A.3d 872, 916 (N.J. 2011) (observing that research on eyewitness identification represents the "gold standard in terms of the applicability of social science research to the law" and has been "tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and

replicated at times in real-world settings"). This scientific evidence helps explain why many wrongful convictions result, at least in part, from mistaken eyewitness identification. Many state courts have embraced this consensus and updated their approach to eyewitness testimony accordingly.

A. Eyewitness misidentification is the leading cause of wrongful conviction in DNA exoneration cases; scientific research explains why.

Juror research has made it clear that eyewitness identification is among the most persuasive forms of evidence that can be presented at a criminal trial. One seminal study, for example, found that while only 18 percent of jurors would vote to convict based on a chain of circumstantial evidence, the addition of a single eyewitness identification raised the percentage of those who would convict to 72 percent. Elizabeth F. Loftus et al., *Eyewitness Testimony: Civil and Criminal* § 12-1 (5th ed. 2013). This evidence, in other words, holds powerful sway over jurors.

However, the persuasiveness of an eyewitness identification is matched by its frequent lack of reliability. Research shows that eyewitness testimony "is highly persuasive but, at the same time, is among the least reliable forms of evidence" and that "mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined." A. Daniel Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?*, 42 Can. Psychol. 92, 93 (2001). DNA exonerations have brought into stark relief the risks of erroneous eyewitness

identifications. The first DNA exoneration in the United States took place in 1989—the year after *Lawhorn* was decided. Since then, in Missouri alone, nine wrongful convictions have been overturned based on DNA evidence.[1] Eight of those nine wrongfully convicted Missouri defendants—who spent a combined 147 years in prison for crimes they did not commit—were victims of eyewitness misidentification.[2]

These statistics from Missouri are reflected nationwide. Eyewitness misidentification played a role in approximately 71 percent of convictions nationwide that have been overturned through DNA testing, making it the leading cause of wrongful conviction in these cases. The Innocence Project, *Eyewitness Identification Reform*, https://www.innocenceproject.org/causes/eyewitness-misidentification/ (last visited Dec. 12, 2019); *see also* Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 52 (2011) (finding eyewitness misidentification to be the leading cause of wrongful convictions in the first 250 DNA exoneration cases). Meanwhile, the National Registry of Exonerations has identified 441 non-DNA-based exonerations across the country since 1989 involving eyewitness misidentification. National Registry

[1] The Innocence Project, *All Cases*, https://www.innocenceproject.org/all-cases/#missouri,exonerated-by-dna (last visited Dec. 12, 2019).

[2] The Innocence Project, *All Cases*, https://www.innocenceproject.org/all-cases/#eyewitness-misidentification,missouri,exonerated-by-dna (last visited Dec. 12, 2019).

of Exonerations, *Exoneration Detail List*, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Dec. 12, 2019).

The risk of eyewitness misidentification and resultant wrongful conviction has prompted a number of state high courts to discard longstanding precedent prohibiting expert testimony on eyewitness evidence. For example, the Connecticut Supreme Court noted that such a prohibition was "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror." *State v. Guilbert*, 49 A.3d 705, 720-21 (Conn. 2012) (collecting state and federal cases adopting reforms to jurisprudence relating to eyewitness testimony). As the *Guilbert* Court recognized, this judicial trend "tracks a near perfect scientific consensus" on the factors that contribute to misidentifications. *Id.* (collecting studies demonstrating the potential unreliability of eyewitness identifications).

B. Researchers have identified specific variables that affect the reliability of eyewitness identifications

Extensive scientific research helps explain why eyewitnesses—even when testifying honestly and in good faith—are capable of misidentifying a defendant as the perpetrator. The research demonstrates both (i) that eyewitnesses are prone to specific, predictable errors, and (ii) that suggestive law enforcement practices and procedures can increase the likelihood that a witness will misidentify the perpetrator of a crime.

Researchers divide the factors that affect the reliability of eyewitness identifications into two broad categories: "estimator variables" and "system variables." Estimator variables are inherent in the event itself, and include factors like lighting, distance, the presence of a weapon, and the degree of stress the witness experiences. System variables are factors that affect the reliability of identification procedures. Examples include the composition of a lineup, blind administration of the lineup procedure, and whether or not pre-lineup instructions were given to warn the witness that the perpetrator may or may not be present. Courts across the country have recognized the scientific consensus identifying how both estimator and system variables bear on the likelihood that an eyewitness will misidentify the perpetrator and therefore speak to the reliability of eyewitness identification evidence.[3]

Expert testimony is particularly useful to jurors when it corrects common misconceptions about eyewitness identifications or provides information not generally known to laypeople. The New Jersey Supreme Court found that studies of these juror misconceptions "reveal generally that people do not intuitively understand all of the relevant scientific findings" and concluded that "there is a need to promote greater juror

[3] *See, e.g.*, *State v. Henderson*, 27 A.3d 872, 896-910 (N.J. 2011) (identifying eight system variables and ten estimator variables and describing their effect on the reliability of eyewitness identification evidence); *State v. Lawson*, 291 P.3d 673, 686-88, 700-11 (Or. 2012) (same).

understanding of those issues." *Henderson*, 27 A.3d at 911. Indeed, courts around the country have recognized that expert testimony is warranted on a wide array of factors that influence the reliability of eyewitness identification. *See* Section II (a), below.

A brief explanation of the actual operation of a few representative estimator and system variables that are relevant to this case demonstrates why expert testimony can be necessary to help jurors evaluate the reliability of eyewitness testimony. *Amici* stress that this sampling of variables about which expert testimony would be appropriate is not exhaustive. Rather, it serves to illustrate the gap between scientific findings and lay understanding.

Example 1. High stress situations compromise the quality of a witness's memory.

One of the areas about which Defendant sought expert testimony in this case was the effect of stress on eyewitness memory. This is a prime example of a frequently misunderstood estimator variable that affects eyewitness reliability.

A meta-analysis of thirty years of research on the effect of stress on eyewitness memory concluded that "high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details." Kenneth A. Deffenbacher et al., *A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687, 699 (2004). More recent studies further support the finding that "stress greatly impairs an eyewitness's ability to

recognize the perpetrator." Kate A. Houston et al., *The Emotional Eyewitness: The Effects of Emotion on Specific Aspects of Eyewitness Recall and Recognition Performance*, 13 Emotion 118, 125 (2012). Based on this research, the New Jersey Supreme Court found that "high levels of stress are likely to affect the reliability of eyewitness identifications." *Henderson*, 27 A.3d at 904.

The *Henderson* court cited witness stress as its first example of the disconnect between scientific knowledge and juror understanding. *Id.* at 910 ("Although many may believe that witnesses to a highly stressful, threatening event will 'never forget a face' because of their intense focus at the time, the research suggests that is not necessarily so."). The Connecticut Supreme Court followed suit, holding that because the expert's proposed testimony was outside of "common knowledge" and "would have been helpful to the jury," it was error for a trial court to exclude expert testimony on the effect of stress on eyewitness identification. *Guilbert*, 49 A.3d at 737. Expert testimony is the best mechanism to address this gap in lay understanding.

Example 2. The manner in which an identification procedure is conducted affects the reliability of an identification.

As the National Academy of Science has recognized, extensive scientific research has helped law enforcement agencies and courts around the country identify practices that minimize the suggestiveness of an identification procedure and enhance the

reliability of eyewitness evidence. *See* National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 104 (2014).

Several decades of scientific research have demonstrated that five straightforward and easily implemented components of an identification procedure will serve to make the resulting identification more reliable. *See* John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. in the Pub. Int. 10, 50 (2017) ("*New Synthesis*"). A procedure is non-suggestive, or "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 culprit); (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 20.[4] Stated differently, the failure to implement any of these procedural safeguards makes an identification less reliable.

[4] The International Association of Chiefs of Police, the United States Department of Justice, and jurisdictions across the country have embraced these scientifically-sound procedures in order to avoid compromising the reliability of eyewitness evidence. *See, e.g.*, Int'l Ass'n of Chiefs of Police, *Training Key No. 600, Eyewitness Identification* 5 (2006); Memorandum from Deputy Attorney Gen. Sally Q. Yates to Heads of Dep't Law Enforcement Components All Dep't Prosecutors (Jan. 6, 2017).

The need for a double-blind administrator—i.e., a law enforcement officer who does not know who the suspect is in the line-up she is administering—illustrates this point. Research demonstrates a significant risk that a non-blind administrator (i.e., an administrator who knows the identity of the suspect and the suspect's position in the lineup) "may leak that information 'by consciously or unconsciously communicating to witnesses which lineup member is the suspect.'" *Henderson*, 27 A.3d at 896 (quoting Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 Law & Hum. Behav. 70, 71 (2009)). The non-blind administrator can influence the witness's choice even through "seemingly innocuous words and subtle cues—pauses, gestures, hesitations, or smiles." *Id.* (citing Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator–Witness Contact on Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1107 (2004) and Steven E. Clark et al., *Lineup Administrator Influences on Eyewitness Identification Decisions,* 15 J. Experimental Psychol.: Applied 63, 66–73 (2009)).

The effect of such subtle suggestion is particularly dangerous because it can take effect without either the eyewitness or the officer noticing. *State v. Lawson*, 291 P.3d 673, 706 (Or. 2012) (en banc) ("Indeed, studies show that both witnesses and administrators are generally unconscious of the influence that the lineup administrator's

behavior has on identification process.") (citing Ryann M. Haw & Ronald P. Fisher, *Effects of Administrator–Witness Contact on Eyewitness Identification Accuracy*, 89 J. Applied Psychol. 1106, 1110 (2004)). A defense attorney may be able to question an eyewitness or a police witness about intentional, overt, or conscious suggestive conduct and can make arguments to the jury about it, but an expert witness is necessary to bring the risk of less obvious suggestiveness to light. And there is, of course, no reason the average juror already would be aware of the effects of non-blind administration on the reliability of identification procedures.

Similarly, single-suspect procedures (such as the showup used in this case) are widely understood by scientific researchers—and courts—to be particularly unreliable. *See, e.g.*, Jeffrey S. Neuschatz et al., *A Comprehensive Evaluation of Showups*, *in* 1 Advances in Psychol. & Law 43, 65 (M.K. Miller & B.H. Bornstein eds., 2016) (conducting a meta-analysis of single-suspect showup research and concluding that such procedures consistently lead to more false identifications than lineups do); *see also Stovall v. Denno*, 388 U.S. 293, 302 (1967) (finding that the "practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned"); *Graham v. Solem*, 728 F.2d 1533, 1542 (8th Cir. 1984) (reiterating that a showup is "the most suggestive, and therefore the most objectionable method of pre-trial identification") (citations omitted); *Lawson*, 291 P.3d at 686 ("Police

showups are generally regarded as inherently suggestive—and therefore less reliable than properly administered lineup identifications . . .").

Although researchers and courts agree that the use of showups makes misidentification significantly more likely, only approximately half of jurors are aware of the procedure's shortcomings. Tanja R. Benton et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 Applied Cognitive Psychol. 115, 120 (2006) ("*Benton Study*"). A juror who is made aware of this phenomenon will make better judgments than one who is left ignorant.

Example 3. Except under carefully controlled conditions, witness certainty is not directly related to identification accuracy.

Confidence statements—that is, the eyewitness's expression of high confidence (or even certainty) in the accuracy of her identification—have a dramatic effect on jurors' assessments of the accuracy of the identification. Gary L. Wells & Amy L. Bradfield, "*Good You've Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 361 (1998) (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."). It may seem reasonable to jurors that an eyewitness identification accompanied by an assertion of high confidence is more

likely, in fact, to be accurate. But the true relationship between confidence and accuracy is far more complicated. Research has demonstrated that a witness's self-reported statement of high confidence does not in fact correlate well with accuracy, unless that statement is recorded as part of a "pristine" identification procedure. *New Synthesis* at 20, 50 ("Scientific research has clearly established that certain non-pristine testing conditions severely compromise the information value of eyewitness confidence."). This is because witness confidence is susceptible to significant inflation by suggestive identification procedures and post-confirmation feedback. *See* Gary L. Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. Applied Psychol. 688, 694 (1981) ("confidence in a false memory can be enhanced," which "requires nothing on the order of high-powered persuasion techniques"); *see also* Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, *Report and Recommendations to the Justices* 69-70 (2013) ("Massachusetts Study Group Report") (explaining that witness confidence is susceptible to "manipulation by suggestive procedures or confirming feedback."). [5]

Researchers have established that failure to use blind administration, pre-procedure instructions, a fair lineup, or providing post-identification feedback, can all

[5] Available at https://www.mass.gov/files/documents/2016/08/ql/eyewitness-evidence-report-2013.pdf.

profoundly but artificially inflate eyewitness confidence. *See New Synthesis* at 15-20 (observing that the failure to use the each of elements of a "pristine procedure" exerts similar effects on witness confidence). Research has shown, for example, that non-blind administrators tend to exert "social influence" on the witness, and artificially increase the witness's confidence "through their intonation and nonverbal behavior." Lynn Garrioch & C. A. Elizabeth Brimacombe, *Lineup Administrators' Expectations: Their Impact on Eyewitness Confidence*, 25 Law & Hum. Behav. 299, 306 (2001). Witnesses attempting to "reduce the uncertainty surrounding the choosing of a lineup member" may subconsciously "look[] to their interviewer" and "use[] the interviewer's reaction to their lineup choice to gauge their identification confidence." *Id*

Similarly, inherently-suggestive showup procedures, such as the one used in this case, are not only less reliable than lineup identifications, but are also more likely to produce highly confident, but inaccurate identifications. *See* Jeffrey S. Neuschatz et al., *A Comprehensive Evaluation of Showups*, *in* 1 Advances in Psychol. & Law 43, 60, 63 (M.K. Miller & B.H. Bornstein eds., 2016) (finding that showup participants exhibited significant overconfidence in their identifications and that the confidence-accuracy correlation was much weaker in showups than in lineups).

Wrongful convictions based on erroneous eyewitness identifications are typically accompanied by statements from eyewitnesses that they are extremely confident

in the accuracy of their identification of the defendant. Gary L. Wells et al., *The Confidence of Eyewitnesses in Their Identifications from Lineups*, 11 Current Directions in Psychol. Sci. 151, 153 (2002); *see also* Michael R. Leippe et al., *Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre–Identification Memory Feedback Under Varying Lineup Conditions*, 33 Law & Hum. Behav. 194, 194 (2009). Jurors who have been put on notice of these risks are better positioned to evaluate a confident eyewitness's testimony because they will know how to take the circumstances of the identification procedure into account.

* * *

These are only a few examples among the many factors that might be relevant in any particular case. As this subset illustrates, each factor presents complex challenges to assessing eyewitness reliability and each is an appropriate area for expert testimony.

II. The scientific research on eyewitness identification should cause this Court to reconsider its *Lawhorn* reasoning and, following the nationwide trend, allow expert testimony to aid the jury in evaluating eyewitness identification evidence.

The *Lawhorn* Court identified three factors to determine the admissibility of proffered testimony: (1) whether expert testimony assists the jury; (2) whether it distracts the jury from relevant issues; and (3) whether it relates to the credibility of witnesses. *State v. Lawhorn*, 762 S.W.2d 820, 822–23 (Mo. 1988) (citing *State v. Taylor*,

663 S.W.2d 235, 239 (Mo. 1984) (en banc)). Expert testimony that does not assist the jury, distracts from the relevant issues, and relates to the credibility of witnesses should be excluded. *Id.* Applying these factors to the case before it, the *Lawhorn* Court affirmed the exclusion of defendant's eyewitness identification expert, finding that the expert's testimony would not have aided jurors and would have infringed on their role to assess the credibility of the eyewitness. *Id.*

By its terms, *Lawhorn* left it to trial judges to employ their discretion in evaluating these admissibility factors and thereby to decide, on a case-by-case basis, whether to allow expert testimony. *Id*. As a practical matter, however, courts in this state, relying on *Lawhorn* and *Whitmill*, often do not conduct an admissibility inquiry and rarely admit expert testimony on eyewitness identifications. In this case, for example, the Western District Court of Appeals analyzed none of the *Lawhorn* factors or relevant social science and instead simply affirmed the trial court's discretion to exclude Carpenter's eyewitness identification expert solely based on its "obligation to follow" *Lawhorn*. *See also State v. Naylor*, 505 S.W.3d 290, 298 (Mo. Ct. App. 2016) (affirming trial court's exclusion of defendant's eyewitness identification expert without analyzing *Lawhorn* admissibility factors and noting the constitutional requirement to follow *Lawhorn* "regardless of how many years have passed since that decision was rendered"); *State v. Ware*, 326 S.W.3d 512, 528 (Mo. Ct. App. 2010) (relying on *Lawhorn* and

Whitmill to affirm trial court's ruling that expert eyewitness testimony would not aid the jury).

Thirty years after *Lawhorn*, a re-examination of this Court's rationale for upholding the exclusion of expert testimony on eyewitness identification is warranted, as is a clarification that such testimony should be admitted in appropriate cases.

A. Expert testimony can provide jurors with scientifically-accurate information that is beyond the ken of the average juror to assist in evaluating whether or not the identification is reliable

1. The clear trend, embraced by virtually all state courts, is to permit expert testimony to assist jurors in understanding the characteristics and risks of eyewitness identifications.

Because jurors are generally unaware of "deficiencies in human perception and memory and thus give great weight to eyewitness identifications," expert testimony is necessary for juries to understand how such factors can affect the eyewitness evidence presented to them. *State v. Clopten*, 223 P.3d 1103, 1108 (Utah 2009); *see also Brownlee*, 454 F.3d at 142 (recognizing that "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable" and, therefore, "while science has firmly established the inherent unreliability of human perception and memory, this reality is outside the jury's common knowledge and often contradicts jurors' commonsense understandings") (citation omitted).

Courts across the country have recognized and held that expert testimony regarding the ability of eyewitnesses to perceive, remember, and recall the appearance of

an alleged perpetrator of a crime aids the jury in evaluating eyewitness identification evidence. *See, e.g.*, *People v. Lerma*, 47 N.E.3d 985, 992-93 (Ill. 2016) (noting the "clear trend" toward the admission of expert testimony "for the purpose of aiding the trier of fact in understanding the characteristics of eyewitness identification"); *Commonwealth v. Walker*, 92 A.3d 766, 782 (Pa. 2014) (observing that courts in 44 states, the District of Columbia, and all federal circuit courts that have ruled on the issue, permit expert testimony on eyewitness identifications "for the purpose of aiding the trier of fact in understanding the characteristics of eyewitness identification").

These courts have recognized the scientific consensus identifying a number of factors bearing on the likelihood that an eyewitness will misidentify the perpetrator, including, but not limited to, factors inherent in the event itself and factors that affect the reliability of identification procedures (i.e., the "estimator variables" and "system variables" discussed above). *See e.g.*, *Henderson*, 27 A.3d at 895-908 (recognizing that "[s]cience has proven that memory is malleable [and that] [t]he body of eyewitness identification research … reveals that an array of variables can affect and dilute memory and lead to misidentifications"); *see also* Massachusetts Study Group Report at 17-32 (noting "scientific studies have produced a consensus among experts about the system and estimator variables that have been shown to affect the reliability of eyewitness identification," including multiple identification procedures, blind administration, the

condition and characteristics of the witness, stress, cross-racial or cross-ethnic identification, and memory decay).

2. Missouri's recent adoption of an expert evidence rule tracking Federal Rule of Evidence 702 further supports admission of expert testimony on eyewitness identifications in appropriate cases.

In August of 2017, the Missouri legislature amended the State's law regarding the admissibility of expert testimony to track Rule 702 of the Federal Rules of Evidence, which governs the use of expert testimony in cases pending in federal court. Accordingly, Missouri law now provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) The testimony is based on sufficient facts or data;
>
> (c) The testimony is the product of reliable principles and methods; and
>
> (d) The expert has reliably applied the principles and methods to the facts of the case.

Mo. Rev. Stat. § 490.065(2) ("Section 490.065").

Because Section 490.065 adopted Rule 702 verbatim, Missouri courts have looked to federal case law when interpreting Missouri's new standard. *See State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 317 (Mo. Ct. App. 2018) ("Section 490.065.2 adopts the Federal Rules of Evidence word-for-word, and therefore federal precedent construing those rules is strong persuasive authority for how we should view admissibility under our statute."). In applying Rule 702, federal courts apply the familiar guidelines articulated by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), which interpreted Rule 702 to adopt a flexible reliability standard to the question of whether to admit scientific expert testimony.

Federal courts have consistently concluded, under a *Daubert*/Rule 702 analysis, that eyewitness identifications are a proper subject for the testimony of a qualified expert. *See, e.g., United States v. Smith*, 156 F.3d 1046, 1053-54 (10th Cir. 1998) (determining admissibility of expert testimony on eyewitness identification under *Daubert* and noting that "expert testimony on eyewitness identification may properly be admitted under *Daubert* in certain circumstances"); *see also Brownlee*, 454 F.3d at 144 (finding the lower court erred in excluding expert testimony concerning the "confidence-accuracy correlation" with respect to eyewitness identifications following a *Daubert* hearing); *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993) (setting forth factors that favor the admission of expert testimony regarding eyewitness identifications under

Rule 702, including "cross-racial identification, identification after a long delay, identification after observation under stress, and psychological phenomena as the feedback factor and unconscious transference"); *accord Clopten*, 223 P.3d at 1112, 1114 ("[T]he testimony of a qualified expert regarding factors that have been shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of Rule 702 of the Utah Rules of Evidence," and "should not be excluded as intruding on the province of the jury.").

Missouri's new expert evidence standard thus provides further support for admitting expert testimony on eyewitness identifications in appropriate cases.

B. Expert testimony on eyewitness identifications does not distract jurors from the relevant issues.

Establishing, beyond a reasonable doubt, that the person charged with a crime is the person who actually committed that crime is of course the critical, uniquely relevant issue in any criminal case. *See, e.g.*, *State v. Murphy*, 415 S.W.2d 758, 760 (Mo. 1967) (en banc) ("Proof of the criminal [culpability] of a defendant is an element essential to his conviction."). Yet, as explained above, eyewitness misidentification is the leading contributing cause of wrongful convictions proven by DNA in the United States.

Expert testimony on reliability issues relating to eyewitness identifications aids this search for truth—determining whether the defendant actually committed the charged offense—and it is a check against wrongful convictions based on commonplace

misapprehensions of how identifications and memory actually work. Far from distracting the jury from relevant issues, expert testimony "enables jurors to avoid certain common pitfalls, such as believing that a witness's statement of certainty is a reliable indicator of accuracy," and serves as a means to educate jurors about certain key factors, such as "the weak correlation between confidence and accuracy—that have a strong but counterintuitive impact on the reliability of an eyewitness." *Clopten*, 223 P.3d at 1109 (citation omitted) (holding that in cases where eyewitnesses are identifying a stranger and where one or more established factors potentially affecting accuracy are present, the testimony of an eyewitness expert will meet the requirement to "assist the trier of fact"); *see also Walker*, 92 A.3d at 788 (recognizing that the potential fallibility of eyewitness identification is "beyond [the knowledge] possessed by the average layperson"); *Lawson*, 291 P.3d at 705 (citing *Benton Study* at 120 and discussing survey showing that only 38 percent of jurors surveyed correctly understood the relationship between accuracy and confidence and only 50 percent of jurors recognized that witnesses' confidence can be manipulated); *Henderson*, 27 A.3d at 910-11 (citing *Benton Study* and describing survey showing that despite agreement from nine out of ten experts, only 41 percent of jurors agreed on the importance of pre-lineup instructions, and only 38 percent to 47 percent agreed on the effects of the accuracy-confidence relationship, weapon focus, and cross-race bias).

Accordingly, expert identification testimony should be admitted in the many cases where proper evaluation of eyewitness perception and memory goes to the heart of the matter: whether the eyewitness correctly identified the defendant as the perpetrator.

C. Eyewitness expert testimony addresses the reliability of eyewitness testimony, *not* the credibility of the eyewitness, and so does not invade the province of the jury.

The *Lawhorn* Court expressed concern that expert testimony on eyewitness identification could infringe on the jury's role in assessing witness credibility. 762 S.W.2d at 823 ("Expert testimony is also inadmissible if it relates to the credibility of witnesses, for this constitutes an invasion of the province of the jury."). This concern is misplaced because expert testimony properly addresses the factors that affect the *reliability* of eyewitness identifications without opining on whether the specific identification at issue in the case is accurate and without commenting on the witness's credibility. The jury is free to use that information in making the ultimate assessment of whether or not the evidence is reliable, and therefore whether the identification is accurate or not. All determinations regarding the credibility of witnesses continue to be entrusted to the jury.

Missouri courts routinely permit experts to testify in criminal matters where the expert provides generalized testimony—in other words, testimony that does not concern "a specific [witness's] credibility." *State v. Churchill*, 98 S.W.3d 536, 539 (Mo.

2003) (en banc). For instance, in *Gardner*, the Court of Appeals permitted expert testimony regarding delayed disclosures in child sex abuse cases. *Gardner*, 562 S.W.3d at 322. It noted that concerns about an expert's testimony touching on the issue of credibility "only exist[] if the testimony comments explicitly or implicitly on the particular victim's credibility." *Id.* While testimony regarding whether a specific witness was lying is not admissible, the court explained, generalized testimony about common behavior is proper. *Id*. Similarly, in *State v. Walker*, this Court found that testimony about behaviors commonly exhibited by sexually abused children was generalized and, therefore, properly admitted by the trial court. 549 S.W.3d 7, 14 (Mo. Ct. App. 2018). The same is true of generalized expert testimony about the factors that commonly affect eyewitness reliability.

Moreover, this Court has recognized the danger of allowing unreliable testimony where the witness retains "subjective conviction in the truth of the memory . . . regardless of the objective accuracy of his perceptions." *Alsbach v. Bader*, 700 S.W.2d 823, 829 (Mo. 1985) (en banc) (precluding hypnotically-induced testimony for failing to meet standards of reliability and accuracy). This danger is particularly applicable to eyewitness testimony. Mistaken eyewitnesses typically—and in good faith—believe in the accuracy of their testimony. That is true even before taking into consideration the added problem that eyewitness confidence may have been artificially inflated by

suggestive procedures or post-identification feedback from law enforcement. *See* section I (B), above.

In short, a witness making a mistaken identification honestly believes he or she is correct. A witness who testifies honestly and in good faith tends to appear credible to juries, even when their sincere belief is erroneous. *See* Laura Smalarz & Gary L. Wells, *Post-Identification Feedback to Eyewitnesses Impairs Evaluators' Abilities to Discriminate Between Accurate and Mistaken Testimony*, 38 Law & Hum. Behav. 194, 200 (2013) ("Mistaken eyewitnesses who had received feedback ultimately delivered testimony that was just as credible as the testimony of accurate eyewitnesses."); *Henderson*, 27 A.3d at 889 ("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.").

An expert can explain the well-established reasons why the jury should carefully consider the accuracy of the eyewitness testimony, without offering any opinions regarding the purported eyewitness' subjective belief in his or her truthfulness. Thus, an expert's testimony can be limited to opinions regarding the factors that affect the accuracy and reliability of eyewitness identification generally, including factors such as lighting, distance, stress, the use of suggestive identification procedures—any of which can detrimentally affect the accuracy of eyewitness identification—and the potential

impact these factors could have on an individual's ability to reliably identify the perpetrator of a crime.

III. The trial procedures discussed in *State v. Lawhorn* and *State v. Whitmill* are ineffective when used to protect against mistaken eyewitness identification testimony.

A. Cross-examination is not an effective safeguard against mistaken identification testimony.

In *Lawhorn*, this Court held it was not an abuse of discretion to exclude expert testimony on eyewitness identification because, in part, the defendant had the "opportunity to cross-examine the eyewitness and to challenge his reliability in closing argument." 762 S.W.2d at 823. The *Whitmill* Court reached a similar conclusion, adding jury instructions to the list of tools available to "ensure[] that the defendant ha[s] an adequate opportunity to apprise the jury of the difficulties inherent in an eyewitness identification." *Id.* at 47.

Yet cross-examination, a powerful tool for exposing lies, is ineffective when used to challenge the accuracy of an honest but mistaken eyewitness identification. Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 Am. Crim. L. Rev. 1271, 1277 (2005) ("*The Role of Social Sciences*") ("[Cross-examination] is not particularly effective when used against eyewitnesses who believe they are telling the truth.").

For example, a witness who has identified a suspect in a suggestive procedure may be extremely confident in an identification notwithstanding the substantial risk of misidentification. Because such a witness will likely be unaware of the variables that have influenced the identification—infirmities like "weapons focus, distortion caused by stress, or post event information," it is unlikely that these shortcomings will be exposed on cross-examination. Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk"*, 14 Widener L. Rev. 429, 441 (2009); s*ee also* Steve D. Charman & Gary L. Wells, *Can Eyewitnesses Correct for External Influences on Their Lineup Identifications? The Actual/Counterfactual Assessment Paradigm,* 14 J. Experimental Psychol. Applied 5, 5 (2008) (finding that eyewitnesses are unable to accurately detect the existence of external influences on their identifications).

Several state high courts have recognized the limitations of cross-examination when a mistaken witness expresses high levels of confidence. *See, e.g.*, *People v. Boone*, 30 N.Y.3d 521, 531 (2017) (finding that an eyewitness who is "utterly confident about an identification, expressing the identification or recollection of identification with subjective certainty," will be "entirely unshakable on cross-examination" even if he is mistaken); *Commonwealth v. Crayton*, 21 N.E.3d 157, 169 (Mass. 2014) ("[W]e have previously recognized how difficult it is for a defense attorney

to convince a jury that an eyewitness's confident identification might be attributable to the suggestive influence of the circumstances surrounding the identification"); *Clopten*, 223 P.3d at 1110 ("Because it is unlikely that witnesses will be aware [of the influence of suggestion], they may express far more confidence in the identification than is warranted."); *Perry v. New Hampshire*, 132 S. Ct. 716, 732 (2012) (Sotomayor, J., dissenting) (citations omitted) ("At trial, an eyewitness' artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability. It also impairs the defendant's . . . basic right to subject his accuser to meaningful cross-examination.").

This Court's *Lawhorn* decision cited a decision from the Connecticut Supreme Court for the proposition that expert testimony on eyewitness identification is "superfluous" because "the weaknesses of identifications can be explored on cross-examination and during counsel's final arguments to the jury." *Lawhorn*, 762 S.W.2d at 823 (quoting *State v. Kemp*, 507 A.2d 1387, 1390 (Conn. 1986)). The Connecticut Supreme Court has since abrogated its decision in *Kemp* and acknowledged that cross-examination is inadequate to properly assess the reliability of an eyewitness identification. *Guilbert*, 49 A.3d at 725-26. Explaining the reasoning for its reversal, the *Guilbert* Court wrote:

> Cross-examination, the most common method, often is not as effective as expert testimony at identifying the weaknesses of

> eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs. An eyewitness who expresses confidence in the accuracy of his or her identification may of course believe sincerely that the identification is accurate. Furthermore, although cross-examination may expose the *existence* of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the *import* of these factors.

Id. (citations omitted).

Missouri courts have similarly concluded that cross-examination is inadequate in situations where the witness believes he or she is testifying accurately. *See Alsbach*, 700 S.W.2d at 829 (finding, in the context of post-hypnotic testimony, that "[e]ffective cross examination would be seriously impeded by the witness's confidence in the accuracy of his recall"). This reasoning is equally applicable in the context of eyewitness testimony.

B. Without expert testimony as evidentiary support, opening statements and closing arguments are insufficient to protect against unreliable identification testimony.

Defense counsel's opening statement or closing argument to the jury about the reliability of an identification is also an inadequate substitute for expert testimony. Attorneys can only make arguments based on the facts in the record. In the absence of expert testimony, attorneys do not have any evidentiary basis to address the factors that make a particular eyewitness identification unreliable. Without sufficient evidentiary support for the attorney's statements, these arguments will be viewed as little more than

"partisan rhetoric." *Guilbert*, 49 A.3d at 726; *see also Ferensic v. Birkett*, 501 F.3d 469, 482 (6th Cir. 2007) ("The significance of [the proffered expert] testimony cannot be overstated. Without it, the jury ha[s] no basis beyond defense counsel's word to suspect the inherent unreliability of the [eyewitnesses'] identifications."). In the absence of expert testimony, attorney arguments about counterintuitive factors that render eyewitness identifications unreliable—like the effect of stress—are especially likely to invite juror skepticism. *Guilbert*, 49 A.3d at 726.

C. Jury instructions that fail to adequately address the complexity of perception and memory are an inadequate substitute for expert testimony

Jury instructions are not a substitute for an expert who is able to educate jurors about variables that affect the reliability of eyewitness identifications. Most jury instructions touch only generally on the empirical evidence underlying the reliability of eyewitness identifications and do not explain how a given factor affects reliability. Even detailed jury instructions that alert the jury to factors that contribute to misidentification generally do not explain how misidentification occurs or to what extent these factors affect memory accuracy. *See* Peter J. Cohen, *How Shall They Be Known? Daubert v. Merrell Dow Pharmaceutical and Eyewitness Identification*, 16 Pace L. Rev. 237, 273 (1996) ("*How Shall They Be Known?*") (finding that detailed jury instructions "list the factors that might contribute to misidentification but do not explain the impact these factors can have on memory accuracy…they [also do not] instruct [the jury] on the

physiology and psychology of the memory process"). Jury instructions also come too late in the trial, long after jurors' views on the reliability of an eyewitness's testimony have hardened.

Because "jury instructions lack the flexibility and specificity of expert testimony," researchers have concluded that, standing alone, they "do not serve as an effective safeguard against mistaken identifications and convictions." Richard A. Wise et al., *A Tripartite Solution to Eyewitness Error*, 97 J. Crim. L. & Criminology 807, 833 (2007) ("*A Tripartite Solution*"). Research shows that expert testimony is a more effective aid to jurors than instructions that warn jurors broadly about the potential unreliability of eyewitness identifications. A properly qualified expert can explain the complexities of perception and memory, and apply scientific research with specificity to the case in a way that jury instructions cannot. *See* Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 Fed. Cts. L. Rev. 1, 25 (2007) ("*Why Judges Should Admit Expert Testimony*") ("Jury instructions do not explain the complexities about perception and memory in a way a properly qualified person can.").

The Missouri Approved Instructions (MAI) on eyewitness testimony instructs jurors to consider, for example, "whether the witness was affected by any stress or other distraction or event, such as the presence of a weapon, at the time the witness

viewed the person in question[.]" MAI 310.02 Eyewitness Identification Testimony (2016). These are, of course, appropriate considerations. But instructing jurors to be aware of whether the event was stressful or whether a gun was present does not assist them in evaluating the testimony unless an expert explains *how* these variables are likely to influence the reliability of eyewitness identification.

But even if jury instructions explained how factors bearing on the likelihood of misidentification affect reliability, they are often delivered too late in the trial to help the jury assess eyewitness testimony. Judges typically charge the jury after the defendant has rested his case and after the parties have had the opportunity to make their arguments to the jury. By that point, jurors have likely already formed an opinion about the reliability of a witness's testimony that will be difficult to dislodge. *See How Shall They Be Known?* at 272-73 ("A powerful eyewitness' testimony may be so firmly embedded in the jurors' minds that the court's instructions days or weeks later may be unable to undo potential prejudice…there is no guarantee that trial court instructions at a later time will change his or her mind."); *see also Why Judges Should Admit Expert Testimony* at 25 (finding that jury instructions are given "far too late in a trial to help jurors evaluate relevant eyewitness testimony with information beyond their common knowledge").

Recognizing these shortcomings, other courts have rejected the use of jury instructions in the place of expert testimony. *See, e.g., Clopten,* 223 P.3d at 1110 (finding that social scientists have determined that cautionary instructions are not effective in helping jurors spot mistaken identifications); *Guilbert*, 49 A.3d at 726 ["[R]esearch has revealed that jury instructions that direct jurors in broad terms to exercise caution in evaluating eyewitness identifications are less effective than expert testimony in apprising the jury of the potential unreliability of eyewitness identification testimony."].

* * *

In sum, the empirical evidence shows that these trial procedures—cross-examination, attorney argument, and jury instructions—are inadequate protections against unreliable eyewitness identification testimony. Research has confirmed that expert testimony is a critical legal safeguard that is effective in fully educating jurors about the unreliability of eyewitness identifications. *See The Role of Social Sciences* at 1276; *see also A Tripartite Solution* at 819 ("expert eyewitness testimony . . . is the only traditional legal safeguard that has shown any efficacy in mitigating eyewitness error"). As a result, multiple states have rejected the argument that all of the dangers associated with eyewitness identifications can be remedied through standard trial tools like cross-examination or closing arguments. *See, e.g., Lawson*, 291 P.3d at 695 (collecting cases) ("[C]ourts around the country have recognized that traditional methods of informing

factfinders of the pitfalls of eyewitness identification—cross-examination, closing argument, and generalized jury instructions—frequently are not adequate to inform factfinders of the factors affecting the reliability of such identifications."); *Walker*, 92 A.3d at 786 ("[W]e reject reliance upon cross-examination and closing arguments as sufficient to convey to the jury the possible factors impacting eyewitness identification and as justification for an absolute bar of such expert testimony."); *Clopten*, 223 P.3d at 1110 ("[W]e cannot rely on cross-examination as a surefire way to uncover the possibility of mistaken identification."); *State v. Copeland*, 226 S.W.3d 287, 300 (Tenn. 2007) ("[T]he research also indicates that neither cross-examination nor jury instructions on the issue are sufficient to educate the jury on the problems with eyewitness identification.").

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to clarify that trial courts should generally admit expert testimony on factors that affect the reliability of eyewitness identifications in cases where that is at issue.

Respectfully Submitted,

/s/ Tricia J. Bushnell

Tricia J. Bushnell, #66818
MIDWEST INNOCENCE PROJECT
3619 Broadway Blvd., Suite 2
Kansas City, MO 64111
Telephone: (816) 221-2166
Facsimile: (888) 446-3287
Email: tbushnell@themip.org

David S. Frankel
John M. McNulty
Aaron L. Webman
Rachel L. Goot (NY admission pending)
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100
dfrankel@kramerlevin.com
jmcnulty@kramerlevin.com
awebman@kramerlevin.com
rgoot@kramerlevin.com

Alexis Agathocleous
THE INNOCENCE PROJECT, INC.
40 Worth St.
New York, NY 10013
Telephone: (212) 364-5340
aagathocleous@innocenceproject.org

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Attorneys for Amici Curiae
The Innocence Project, Inc.
Midwest Innocence Project

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief complies with Rule 84.06(b) and contains 9,293 words as counted by Microsoft Word, excluding the cover page, the signature block, and this certificate of compliance. I further certify that this brief has been electronically filed and served on both parties pursuant to Rule 103.08.

/s/ Tricia J. Bushnell
Tricia J. Bushnell, #66818