In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHARLES HENRY RUDD,

Defendant and Appellant.

Case No. S250108

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

The People agree with Amici—the Innocence Project, et al., and the State Public Defender—that preventing innocent people from being convicted of crime is of the highest priority for the State and the criminal justice system. And the People agree that that objective is served by improving the reliability of the identification procedures used in criminal investigations, and by improving the judicial procedures through which finders of fact evaluate identification evidence. Amici's briefs recount some of the research in this area, and make a number of policy points that may inform such improvements. Their arguments should not, however, change the outcome in this case.

The only issue before this Court is whether CALCRIM No. 315's inclusion of the witness's level of certainty in a list of many factors for a jury to consider in evaluating a witness's statement of identification violates due process. It does not. Amici gloss over a vital distinction. It is true that the reliability of certainty evidence depends on the context in which a witness's certainty was expressed. It may also be true that ordinary people—including those chosen to serve on juries—are prone to overvalue certainty statements in certain contexts. But Amici provide no evidence that the single line regarding witness certainty in CALCRIM No. 315 affects that tendency at all, let alone to the extent that would cause a constitutional violation.

Even without a due process violation, the State Public Defender proposes that this Court should exercise its supervisory power to order that the certainty factor be omitted in California trials. But no party has argued for the use of the supervisory power. Nor is the question fairly included in the Issue Presented, which asks only whether the instructions at issue are unconstitutional. In this context, the better method for addressing potential problems that do not constitute actual constitutional violations would be—

as we have previously suggested—the method envisioned by the rules of court: The Advisory Committee on Criminal Jury Instructions should gather a range of evidence and comments from practitioners and jurists across the State, then submit a recommendation for public comment so that the Judicial Council can make an informed decision about whether a revised instruction would better assist California juries and courts.

The Innocence Project proposes additionally that a witness's statement of confidence in an identification should be categorically inadmissible when the identification resulted from "non-pristine" procedures. And the State Public Defender, going further, urges this Court to prohibit the admission not only of statements about a witness's confidence but of all evidence concerning any identification that did not meet the standards that Penal Code section 859.7 requires law enforcement agency policies to promote. Those arguments, too, go beyond any argument of Rudd's and are not properly before the Court. They are also without merit. There may be many cases where an appropriate motion by the defendant should result in the exclusion of a particular witness's statement of confidence under Evidence Code section 352, which excludes evidence whose probative value is substantially outweighed by a substantial danger of misleading the jury or creating unfair prejudice. But that does not make the Innocence Project's categorical rule appropriate. Some non-pristine identifications may include statements of confidence that are highly reliable—such as where a non-blinded photo-identification procedure is used for police to confirm the identity of a person who is well-known to the witness. And the suggestion to categorically exclude evidence that does not meet the standards of section 859.7 would contradict the Legislature's express decision in that statute to require development of police agency *policies* rather than create a substantive rule of admissibility.

Finally, the State Public Defender requests more pervasive changes to suppression hearing procedures and jury instructions involving identification evidence. The evaluation of such changes is extremely complex, and should await a case in which the issue was properly raised by a party at the trial and appellate phases of the case. That has not happened here. In the meantime the best bodies to address the State Public Defender's proposals would be rulemaking and legislative authorities, who can appropriately evaluate all of the factors that go into improving the criminal justice system's ability to achieve the vital goals of procedural fairness and substantive accuracy.

ARGUMENT

I. CALCRIM NO. 315'S REFERENCE TO WITNESS CERTAINTY DOES NOT VIOLATE THE CONSTITUTION

Only one of Amici's arguments addresses an issue on which the Court has granted review and that Rudd has argued: that the "certainty" line in CALCRIM No. 315 violates due process. (See Innocence Project Br. 34-36; State Public Defender Br. 9.)

With respect to that argument, the People have explained that CALCRIM No. 315 includes witness certainty as only one of a long list of potentially relevant factors for jurors to consider; that the instruction neither tells jurors to weigh certainty evidence strongly nor tells them to draw particular conclusions from it; and that the instruction's overall effect is to reinforce what the instruction states at the end: the requirement that conviction cannot occur unless the People have proven the perpetrator's identity beyond a reasonable doubt. (ABM 22-36.) As a result of these features, the instruction does not violate any of the well-established due process rules applying to jury instructions: It does not remove or alter the prosecution's burden of proof on the issue of identity, does not prevent any defendant (including Rudd) from presenting a complete defense, and does

not mislead the jury as to the applicable law. (ABM 29-36.) As this case illustrates, jurors are further told not to consider CALCRIM No. 315 in isolation but rather to consider it together with additional instructions—instructions that reiterate the prosecution's burden of proof and direct jurors to consider any testimony that a defense expert witness gives on the shortfalls of witness identification. (ABM 19-20, 28.) Finally, according to decisions of this Court and the U.S. Supreme Court, due process *requires* judges to consider witness certainty when evaluating whether an identification from a flawed identification procedure is too unreliable for jurors to hear about under the Due Process Clause—and it is highly unlikely that the same constitutional provision would be violated by instructing jurors that they may consider the same factor for evidence that has been properly admitted. (ABM 40.)

Amici do not contest these points. And the arguments that they do raise fail to establish any due process violation.

A. Amici Have Not Established that CALCRIM No. 315 Causes Unconstitutionally Unreliable Jury Verdicts

Amici's overarching contention is that the challenged instruction violates due process by decreasing the reliability of jury verdicts. (See Innocence Project Br. 16-36.) Due process is indeed violated if factual determinations that cause a person to be deprived of liberty are made through processes that are not adequately reliable. (See, e.g., *Manson v. Brathwaite* (1977) 432 U.S. 98, 116 [applying rule that forbids admission of a suggestive identification if, "under all the circumstances of [the] case there is 'a very substantial likelihood of irreparable misidentification.' [Citation.]"].) Amici's reasoning lacks a crucial step, however: They provide no support for the assertion that CALCRIM No. 315 causes or contributes to the problems they identify with how juries treat identification evidence.

Amici cite various studies for the proposition that "[a] witness's self-reported statement of high confidence does not correlate well with accuracy" when the statement was obtained through an identification process that is not "'pristine.'" (Innocence Project Br. 17.) The People generally do not take issue with that proposition, which was in fact presented by Rudd's expert to the jury that decided Rudd's case. (See ABM 16.) Accordingly, the People strongly support efforts to improve identification processes, so that certainty statements and other evidence will be of maximal usefulness and reliability both to police trying to solve crimes and to jurors assessing a defendant's guilt. (See, e.g., Pen. Code, § 859.7.)

Amici next assert that "[j]urors tend to overvalue identification testimony, influenced by what is typically a witness's good faith belief in the accuracy of the identification." (Innocence Project Br. 28.). That assertion reflects real concerns, but seems of limited relevance to this case: Rudd's primary theory was not that the victim was innocently mistaken but rather that she was intentionally lying throughout her testimony. (See p. 14, *infra*.) And Amici's evidence for this part of their argument seems less certain. Studies that rely on "mock jurors" (e.g., Innocence Project Br. 28) generally ask only for individual mock-jurors' reactions, without attempting to replicate the deliberation process by which juries discuss evidence and reach a collective judgment. (Nunez, McCrea & Culhane, *Jury Decision Making Research: Are Researchers Focusing on the Mouse and not the Elephant in the Room?* (2011) 29 Behavioral Sciences & Law 439, 440.) And mock jurors, who know that they are participating in a simulation without real-life consequences, may evaluate evidence less carefully than real-life jurors who know that significant consequences will follow from their decisions. (See generally *Bornstein & McCabe, Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research*

(2005) Fla. State Univ. L. Rev. 443.)[1] These concerns do not mean that conclusions from mock-juror research should be entirely discounted. But they should cause substantial concern about inventing constitutional bars against long-established practices based on Amici's arguments.[2]

Moreover, even if both of Amici's underlying general propositions are accepted—that high witness confidence does not correlate well with accuracy, and that jurors overvalue statements of confidence—there is a missing link in Amici's argument for the instruction's unconstitutionality. Rudd does not argue that statements of certainty should have been excluded from evidence. (See p. 21, *infra.*) Nor does he argue that jurors should have been affirmatively barred from considering evidence of certainty.[3] For CALCRIM No. 315 to be responsible for unreliable verdicts, Amici would need evidence that the instruction exacerbates whatever tendency jurors may have to overvalue low-reliability identification evidence. Yet

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[1] In addition, evidence is often presented to mock-jurors differently than real-life jurors would encounter it at trial—for instance, by using written scripts or recorded videos rather than live in-person testimony. (Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?* (1999) Law & Hum. Behav. 23, 81-88.)

[2] That is particularly so to the extent that mock-jury research itself points in conflicting ways. (See, e.g., Jones et al., *Comparing the Effectiveness of Henderson Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence?* (2017) 13 J. of Experimental Criminology 29, 46 ["mock jurors, on their own, were able to align their verdict decisions with the quality of police practices by convicting more often when identification conditions were good and less often when conditions were poor"].)

[3] Cf., e.g., CALCRIM No. 356 [if non-Mirandized defendant's statement is admitted only for impeachment "[y]ou may not consider it as proof that the statement is true or for any other purpose"]; CALCRIM No. 362 [where one defendant's false statement is admitted to show consciousness of guilt "[y]ou may not consider the statement in deciding any other defendant's guilt"].

Amici present no evidence that this type of instruction changes how jurors view witness certainty. And without that, there is no basis to conclude that the instruction at issue here converts an otherwise constitutional trial into one that is fundamentally unfair.

B. CALCRIM No. 315 Satisfies the Purposes of a Pinpoint Instruction on Identification

The Innocence Project argues in addition that CALCRIM No. 315, by including the certainty factor, fails to achieve the purpose of an identification instruction because it does not "'direct the jury's attention to evidence from the consideration of which reasonable doubt of defendant's guilt might be engendered.'" (Innocence Project Br. 34 [quoting *People v. Guzman* (1975) 47 Cal.App.3d 380, 387, citing *United States v. Telfaire* (D.C. Cir. 1972) 469 F.2d 552]; see also *ibid.* ["'Under this rule defendant is entitled to an instruction relating identification to reasonable doubt.'"] The argument is incorrect, as this case well illustrates.

A defendant is entitled, upon request, to an instruction that "relate[s] particular facts to a legal issue in the case or 'pinpoint[s]' the crux of a defendant's case, such as mistaken identification." *People v. Saille* (1991) 54 Cal.3d 1103, 1119; see generally *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 99, as modified (Oct. 27, 2004) [pinpoint instruction relates the reasonable doubt standard of proof to particular elements of the crime charged].) Failure to give such an instruction is a state-law error that is "prejudicial only where there is a reasonable probability of a more favorable result." *People v. Sandoval* (2015) 62 Cal.4th 394, 422.

Here, one of Rudd's defenses—an alternative to his primary defense that Campusano was purposefully lying—was that Rudd had

unintentionally misidentified her attacker.[4] By charging the jury with CALCRIM No. 315, the court pinpointed that defense and directly related it to the reasonable doubt standard, reminding jurors that "[t]he People have the burden of proving beyond a reasonable doubt that it was the defendant[] who committed the crimes," and that "[i]f the People have not met this burden, you must find the defendant[] not guilty." (3CT 524.)

In addition, the instruction "'focus[ed] 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.'" (Innocence Project Br. 34-35 [quoting *People v. Johnson* (1992) Cal.4th 1183, 1230, citing *People v. Wright* (1988) 45 Cal.3d 1126, 1141-1143.) Among other things, jurors were instructed to consider "circumstances affecting the witness's ability to observe," such as "lighting" and "duration of observation"; whether the witness was "under stress when he or she made the observation"; whether the witness was "asked to pick the perpetrator out of a group"; whether the "witness and the defendants [are] of different races"; whether the witness gave "a description" and how that description "compare[s] to the defendants"; and whether there were "any other circumstances affecting the witness's ability to make an accurate identification." (3CT 521-524.) Those were the same points that Rudd's closing argument identified as arguments supporting reasonable doubt.[5] The purposes of a pinpoint instruction on identification were met.

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[4] See ABM 14-15, 43 [noting that Rudd's primary defense was that Ms. Campusano lied about practically every aspect of her attack in order to secure a visa, obtain reimbursement for medical bills, and cover up her prostitution activity].

[5] See 6RT 979-988 [arguing about inconsistencies in Campusano's description of her attacker]; 7RT 999-1000 [similar]; 6RT 989 [arguing that (continued...)

Nor is there a reasonable probability that the result would have been different had a different instruction been given. The Innocence Project argues that three "errors" made the jury's verdict unreliable: "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...." (Innocence Project Br. 33.) But Rudd has not asserted the first two points as errors at all. To the extent they influenced the verdict, that lessens the relative importance of the instruction he does challenge.[6] The instruction, moreover, did not tell jurors to "credit" the witness's expression of certainty (Innocence Project Br. 33); instead, it told jurors to "consider" it (3CT 521-524; cf. ABM 28 [noting that jury was also told to "consider" Rudd's expert's testimony on

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Campusano was "under anesthesia at the hospital" when she made the first identification]; 6RT 991 [arguing that Campusano's in-court identification was under circumstances where she could not even see Rudd]; 7RT 1002 [pointing out that one of the identifications involved a "single person show up" rather than choosing a picture from a group]. See also 7RT 1014 [arguing that Campusano did not have a good opportunity to see the perpetrator because she was "dizzy and couldn't see straight"]; *id.* at 1015 [arguing that Campusano had just three seconds to see her perpetrator before getting hit]; *id.* at 1015 [arguing that it was dusk and the attack was in the shade]; *id.* at 1015-16 [arguing that Campusano was not paying attention and was under stress]; *id.* at 1018 [observing that Campusano and her attacker are of different races].)

[6] The prosecution's case was obviously based on the victim's identifications of Rudd and Lemcke. But it is an overstretch to say that the prosecution "relied heavily" on the victim's statement of confidence. (Innocence Project Br. 29.) As Amicus notes (*id.* at p. 32), there was no statement of confidence during the victim's first identification of Rudd—which was the identification whose circumstances corresponded to what Rudd's expert identified as the most trustworthy. And Amicus (*id.* at 16) cites to only two points where the prosecutor mentioned certainty or confidence, out of 29 pages of closing argument and rebuttal (6RT 929-952; 7RT 1042-1048).

the limitations of identification evidence]). Whether to credit the victim's statement of confidence was left entirely to the jury. The instruction reminded jurors that "[a]s with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony." (3CT 521.) And another instruction told jurors that they "alone[] must judge the credibility or believability of the witnesses"; that they could "believe all, part, or none of any witness's testimony"; and that they could "consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony"—including that "[p]eople sometimes honestly ... make mistakes about what they remember." (*Id.* at 513-515.)

C. Sister-State Decisions Are Not Relevant to the Constitutional Issue Before This Court

The State Public Defender (at pp. 12-25) recites decisions from other States as support for eliminating the certainty factor. But the decisions that Amicus cites as disapproving of certainty instructions did not rest on due process grounds—something the People have already observed and that Amicus does not appear to contest.[7] And the cases Amicus cites as resting upon constitutional grounds do not concern jury instructions at all, let alone instructions on witness certainty. (ABM 39-40.)[8] In short, the State Public

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[7] Compare State Public Defender Br. 23-24 [discussing *Commonwealth v. Gomes* (Mass. 2015) 22 N.E.2d 897; *State v. Mitchell* (Kan. 2012) 275 P.3d 905; and *Brodes v. State* (Ga. 2005) 614 S.E.2d 766, with ABM 39-40 [observing that none of those cases was decided on constitutional grounds]. See also State Public Defender Br. 16 [noting that *State v. Ledbetter* (Conn. 2005) 881 A.2d 290 rested on court's "supervisory authority"].

[8] Amicus identifies the New Jersey Supreme Court's decision in *State v. Henderson* (N.J. 2011) 27 A.3d 872, as based on state constitutional grounds. (State Public Defender Br. 15.) But as Amicus's discussion appears to acknowledge, *Henderson*'s reference to the New Jersey Constitution occurs only in the part of the opinion that discussed the

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Defender appears to have no precedent for what it seeks: a constitutional holding that due process bars standard instructions acknowledging the jury's ability to consider witness confidence along with other factors.

D. There Is No Different Result Under the State Constitution

The State Public Defender also suggests that, regardless of the requirements of the federal constitution, this Court is required to revise CALCRIM No. 315 under the protections of California's due process clause. (State Public Defender Br. 26.)[9] But Amicus does not contest the People's explanation of why *People v. Ramos* (1984) 37 Cal.3d 136, which would be most relevant to such a claim, would not support such an argument with respect to the instruction at issue here. (See ABM 35-36.) Indeed, it is not clear that this Court would have come to the same result in *Ramos* itself if a formal Judicial Council instruction-revision process had been available then as it is now. (See pp. 20-21, *infra.*) And most importantly, the missing link of causation remains the same under either the federal or the state Constitution. Amici have provided no evidence that a

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New Jersey Supreme Court's ability to impose requirements for admissibility beyond those recognized by the U.S. Supreme Court. (27 A.3d at 919 & fn. 10.) There is no indication that the opinion's later resolution of instructional issues rested on state constitutional grounds. In any event, the *Henderson* court's reaction to its concern about jury instructions was to direct the State's "Criminal Practice Committee and Committee on Model Criminal Jury Charges to draft proposed revisions to the current model [jury] charge." (*Id.* at 878.) If anything, this aspect of *Henderson* supports the People's suggestion that the proper approach to resolve the instructional concerns in this case is through California's established judicial committees and processes. (See pp. 20-21, *infra.*)

[9] Rudd himself does not argue that the analysis of his claim under the federal and state due process clauses should differ. (OBM 30; see also ABM 29-30.)

single line from the instruction at issue in this case changes how jurors evaluate statements of certainty, let alone to a significant extent. Without such an effect, due process is not violated under any standard.

II. THIS CASE PROVIDES NO OPPORTUNITY TO ALTER CONSTITUTIONALLY PERMISSIBLE INSTRUCTIONS THROUGH THIS COURT'S SUPERVISORY POWER

The State Public Defender proposes that this Court should prohibit the use of the certainty line in CALCRIM No. 315 as an exercise of the Court's supervisory power, even if the instruction does not violate any constitutional command. (State Public Defender Br. 9-28.) But Rudd's Petition for Review identified the Issue Presented as follows:

> Does instructing a jury with CALCRIM No. 315, which directs the jury to consider an eyewitness's level of certainty when evaluating an identification, violate a defendant's federal and state due process rights? Are rules that assign the trial court a stronger gatekeeping role in the admission of eyewitness identification required or advisable?

(Petn. for Rev. 5.)

A question about whether an instruction violates due process does not "fairly include[]" the question of whether to bar the use of an instruction that does not violate due process. (Cal. R. Ct., rule 8.516(b)(1).)[10] As a result, consideration of whether to alter the instruction through the exercise of supervisory powers is not before this Court. (See *ibid.*; see also, e.g., *Ramirez v. City of Gardena* (2018) 5 Cal.5th 955, 1002 [refusing to answer questions that "fall outside the scope of the issue presented for our review"].)

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[10] Indeed, Rudd did not argue—or even allude to—any issue of supervisory powers anywhere in his petition.

Indeed, Rudd has never raised the exercise of supervisory powers as an issue for any court in this case. This Court does not "ordinarily consider questions not raised by the appellate record and put forward only by an amicus curiae." (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 82, fn.7.) Amici "must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered." (*San Franciscans for Reasonable Growth v. City & Cty. of San Francisco* (1989) 209 Cal.App.3d 1502, 1515, fn. 10, internal quotation marks and citation omitted; see, e.g., *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1046, fn. 12 [refusing to address amicus' arguments, because issue was not raised by the parties]; *East Bay Asian Local Dev. Corp. v. State of California* (2000) 24 Cal.4th 693, 700, fn. 4 [similar, and citing *San Franciscans for Responsible Growth*].)

Adherence to these principles is particularly important here, since the question of when to exercise supervisory power is far from easy. This Court does have general supervisory authority over procedures in California courts. On rare occasions, it has exercised that power to forbid the inclusion of a particular jury instruction. The State Public Defender cites two such cases in support of its request: *People v. Engelman* (2002) 28 Cal.4th 436, and *People v. Gainer* (1977) 19 Cal.3d 835. But a witness's level of certainty is not categorically irrelevant. As Amici recognize, there are circumstances in which a statement that she is highly certain can be highly relevant. There are also circumstances in which evidence of a low level of certainty can be relevant. Addressing Amici's concerns thus could require not the simple deletion of an instruction, but retention of parts and a nuanced rewording of the rest. In *Engelman* and *Gainer* there was no other official process within the Judicial Branch by which to reform, on a statewide basis, jury instructions that did not violate any law but

nonetheless posed risks to the process. Now, however, the Judicial Branch has a method for fine-tuning jury instructions. (See Cal. Rules of Court, rule 2.1050(d) [Judicial Council's authority over "improving or modifying" jury instructions "through its advisory committees"]; *id.*, rule 10.59(a) [Advisory Committee on Criminal Jury Instructions "makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's criminal jury instructions"]; *id.*, rule 2.1050(d) [judges and attorneys may "submit for the advisory committee's consideration suggestions for improving or modifying the[] instructions"]; *id.*, rule 10.34(f) [Judicial Council may direct committee to add consideration of particular issue to its annual agenda]; *id.*, rule 10.30(b)(1), (5) [Advisory Committee is tasked with "gather[ing] stakeholder perspectives" and using "the individual and collective experience, opinions, and wisdom of [its] members" to consider various alternatives and "propose necessary changes"].)

Because the Advisory Committee's review of instructions is ongoing, it is able at any point to reconsider a previously established instruction when scientific evidence or practitioner experience casts doubt on the instruction's appropriateness. In contrast, once this Court establishes a supervisory rule concerning jury instructions, it is not clear how that rule could be effectively reconsidered should future evidence change, unless a lower court consciously or negligently disregarded this Court's instructions. (Compare, e.g., *People v. Putnam* (1942) 20 Cal.2d 885, 888, and *People v. Nye* (1951) 38 Cal.2d 34 [requiring instruction to view with special caution a witness's testimony that she had been raped], with *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 871-872 [overruling that requirement, in a case that reached this Court only because a trial judge purposefully refused to follow this Court's rulings].) For the issue in this case, the Judicial Council process would be far superior to the use of the supervisory power,

given the complexity of the scientific evidence and the lack of any request by Rudd for supervisory powers to be exercised.

III. AMICI'S ARGUMENTS FOR NEW RULES OF ADMISSIBILITY SHOULD BE REJECTED

Amici also argue for changes to the legal standards governing admissibility of evidence concerning identification. (Innocence Project Br. 36-40; State Public Defender Br. 29-30.) Once again, what Amici ask for is beyond the issues before this Court. The Petition for Review did include questions of admissibility in its statement of the issues presented for review. (Petn. for Rev. 5 ["Are rules that assign the trial court a stronger gatekeeping role in the admission of eyewitness identification required or advisable?"].)[11] But Rudd has expressly declined to press those issues in his merits briefs. (See Reply Br. 8, fn. 1.) Amici cannot expand the issues in this case beyond those that Rudd himself has chosen to argue. (See p. 19, *supra*.)[12]

In any event, Amici's arguments fail on the merits, as explained below.

A. The Admissibility of Statements of Certainty Requires Case-by-Case Evaluation Under Evidence Code 352

The Innocence Project proposes that, after dealing with the instructional issues in the case, "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

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[11] The body of Rudd's petition likewise made reference to such issues. (See *id.* at 12 [asking to "remand the case for a new trial with the proper evidentiary safeguards in place"].)

[12] Nor did Rudd raise questions of admissibility in the trial court.

resulted from pristine identification procedures." (Innocence Project Br. 36.) But the Innocence Project fails to explain why such exclusions would be justified categorically, or how its rule would be superior what the Evidence Code already provides.

Evidence Code section 352 provides that:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

As the text indicates, exclusion under section 352 requires a showing of a "substantial danger" that the evidence will cause particular harm, and requires that the probability of that danger "substantially outweigh[]" the evidence's probative value. An identification witness's statements of certainty should be scrutinized under this test where an appropriate objection is made. And exclusion of particular statements may often be appropriate, depending on the facts of the particular case. But a case-specific examination is needed—not a blanket rule.

Amici argue that *any* statement of certainty gathered during a procedure that does not follow all of the Penal Code section 859.7 policies should be excluded under this test.[13] But that goes too far. In many cases, for instance, the assailants are well known to the witness—such as in domestic violence cases, or where a witness sees his friends or relatives commit a crime. As part of establishing probable cause for an arrest or search in such cases, police may use photo identification procedures to confirm that the people they have in mind are the same people the witness

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[13] Penal Code section 859.7 requires law enforcement agencies to adopt regulations featuring certain best-practices for identification procedures—such as the use of blind administration, inclusion of only one suspect in a lineup, and the videorecording of the procedure.

is talking about. Police may also use photo arrays "to clarify the legal identity (birth name/government name) of an individual who is well known to a witness, but only by a street name." (National Research Council, Identifying the Culprit: Assessing Eyewitness Identification (2014) 22.) Failure to follow the standards of section 859.7 would have little effect on the identification's underlying reliability. And the witness's contemporaneous statement of confidence may be highly relevant and important—particularly if the witness's story later changes in response to threats, concerns about testifying against friends and family members, or the passage of time. Amici's blanket rule would result in the exclusion of reliable and unreliable statements of certainty alike. Courts have ample experience in applying the requirements of section 352 on a case-by-case basis. There is no reason to think they cannot do so in this context as well.

The Innocence Project also argues more broadly that *no* "[e]vidence that results from procedures that fail to meet the requirements" of section 859.7 should be "put before the jury." (Innocence Project Br. 36-37.) But that would contradict the express intent of the Legislature. Section 859.7, subdivision (d) provides that "[n]othing in this section is intended to preclude the admissibility of any relevant evidence or to affect the standards governing the admissibility of evidence under the United States Constitution." This provision, which was not in prior versions of the bill, was specifically added before its enactment, and is specifically noted in the legislative history.[14] Amicus provides no authority under which this clear

[14] Compare Aug. 20, 2018 version, with Aug. 23, 2018 version; see also Assem. Floor Analysis, Aug. 23, 2018, at 3 [the bill "[s]tates that nothing in these provisions is intended to preclude the admissibility of any relevant evidence or to affect the standards governing the admissibility of evidence under the United States Constitution"].

legislative intent should be disregarded—and indeed, such a ruling has not been requested by any party to this case.

B. Reforms in This Area Are Best Considered by Legislative and Rulemaking Bodies

The State Public Defender, finally, asks this Court to "delineat[e] a procedural framework for trial courts to follow that comports with best practices," as set forth in *State v. Henderson* (N.J. 2011) 27 A.3d 872, with respect to admissibility and "an enhanced jury charge." (State Public Defender Br. 29-30.) Rudd did not ask for anything similar in the trial court, Court of Appeal, or his Petition for Review. (See ABM 41, fn. 10). It is unlikely that such sweeping reforms could be appropriately evaluated based on a brief discussion by an amicus.

Henderson was a murder case in which the defendant claimed that an eyewitness's identification of him should have been suppressed as the result of a suggestive and unreliable identification procedure. (*Henderson*, 27 A.3d at p. 877.) The New Jersey Supreme Court, after hearing oral argument, appointed a special master, who considered 2,000 pages of testimony from seven expert witnesses. (*Ibid.*) Based on that record, the New Jersey Supreme Court did two things: It created a new test for the admissibility of identification evidence, and it asked existing court committees on jury instructions and criminal practice to propose revised jury instructions so there would be "less need to call expert witnesses at trial." (*Id.* at 878.).

Although the New Jersey Supreme Court was reacting to real concerns, the effectiveness of the resulting *Henderson* instructions has been called into question. (See generally Dillon, Jones, Bergold, Hui & Penrod, *Henderson Instructions: Do They Enhance Evidence Evaluation?* (2017) 17 J. of Forensic Psychological Research and Practice 1 [concluding that *Henderson* instructions do not induce sensitivity to factors affecting

reliability, but rather induce general skepticism towards eyewitness identification as a whole]; Jones et al., *Comparing the Effectiveness of Henderson Instructions and Expert Testimony: Which Safeguard Improves Jurors' Evaluations of Eyewitness Evidence?* (2017) 13 J. of Experimental Criminology 29, 46 ["it appears that the *Henderson* Court overestimated the ability of these case-specific eyewitness instructions to assist jurors to better evaluate eyewitness evidence or to lessen the need for expert testimony"].)

Given that, and the fact that such broad proposals have not been properly raised in this case, it would be unwise for the Court to take quick and unilateral action in this area, when a thorough, transparent, and informed public process is available. The Advisory Committee and Judicial Council are well-situated to consider aspects of the *Henderson* opinion, along with all other views, when determining whether and how California's pattern instructions should be altered to best assist jurors in reaching accurate verdicts.

CONCLUSION

The judgment should be affirmed.

Dated: December 6, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Answer To Amicus Briefs uses a 13 point Times New Roman font and contains 5,660 words.

Dated: December 6, 2019

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/s/ Joshua A. Klein

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Rudd**
Case No.: **S250108**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 6, 2019, I served the attached Respondent's Answer to Amicus Briefs by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 6, 2019, at San Francisco, California.

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