IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–0002

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EARL BOOTH-HARRIS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DES MOINES COUNTY
THE HONORABLE JOHN G. LINN, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

Booth-Harris requests retention and "urges this Court to reevaluate its approach to the analysis of eyewitness identification procedures and diverge from the federal standard enunciated in [*Manson*] under the Iowa Constitution." *See* Def's Br. at 13 (citing *Manson v. Braithwaite*, 432 U.S. 98 (1977)). Error was not preserved for any argument that urges changing Iowa's approach to eyewitness identification testimony. *See* MTS (6/1/17); App. 7; MTS Tr. 11:9–13:23; MTS Tr. 18:6–20:1; MTS Ruling (10/3/17); App. 11. Even if they were preserved, those arguments could be resolved through the application of settled legal principles. *See*, *e.g.*, *State v. Folkerts*, 703 N.W.2d 761 (Iowa 2005); *State v. Webb*, 516 N.W.2d 824 (Iowa 1994); *State v. Taft*, 506 N.W.2d 757 (Iowa 1993). Moreover, Booth-Harris is attacking identification procedures that reflect contemporary research and academic/scientific consensus on best practices for minimizing suggestiveness in eyewitness identifications. There is no need for constitutional innovation in this area—if anything, retention in this case would give this Court an opportunity to hold up these procedures as shining exemplars. In all other regards, this case meets the criteria for transfer to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Earl Booth-Harris shot and killed Deonte Raynell Carter. Booth-Harris was charged with first-degree murder. Before trial, he moved to suppress an eyewitness identification from Donell Watson, arguing that pretrial identification procedures were unduly suggestive. The trial court declined to exclude the evidence. Evidence of Watson's out-of-court identification was introduced at Booth-Harris's jury trial, and Watson identified Booth-Harris as the shooter in his testimony. Booth-Harris was convicted of first-degree murder, a Class A felony, in violation of Iowa Code sections 707.1 and 707.2.

In this direct appeal, Booth-Harris argues: (1) the court erred in declining to exclude Watson's eyewitness identification testimony; and (2) his trial counsel was ineffective for failing to request a more elaborate jury instruction on eyewitness identification testimony.

Course of Proceedings

The State generally accepts Booth-Harris's description of the course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 14–16.

Facts

On February 16, 2015, a fight over a pair of sneakers turned fatal when Booth-Harris shot and killed Deonte Raynell Carter.

Donnell Watson was Carter's cousin. Watson knew Carter well, and said that Carter's nickname was Tae-Tae. *See* TrialTr.V2 19:20–21:14. Watson lived in Chicago, IL, and Carter lived in Burlington, IA. On February 16, 2015, Watson was in town to visit Carter and other family, and he was staying at a nearby hotel. *See* TrialTr.V2 21:12–25.

Earlier that day, Carter had picked up Watson from his hotel in his black GMC Yukon. *See* TrialTr.V3 22:15–23:4. They picked up James Miles, and then went to Rita Lewis's house, on 8th and Elm. Everybody knew her as Miss Rita. *See* TrialTr.V2 28:24–33:2. Watson was waiting in the car, parked behind the house, because the plan was just to drop Miles off—but he "heard commotion," so Watson got out of the car and went around to the front of the house. *See* TrialTr.V2 33:1–34:12. Watson saw Carter standing on the porch, and "Lil T" (Terrance Polk) was standing in the middle of the street with a group of "five or six" people—and Carter and Polk were yelling at each other. *See* TrialTr.V2 34:9–36:21. Before Watson could figure out what they were yelling about, Miss Rita came out to the porch and told them all to "move shit on" and "get the fuck off." *See* TrialTr.V2 34:19–37:5. Everybody dispersed and "split ways." Carter and Watson returned to Carter's car and went to Watson's hotel. *See* TrialTr.V2 36:22–38:3.

After watching some TV, Carter and Watson left the hotel to pick up Carter's girlfriend, drive her to work, and drop her off. *See* TrialTr.V2 22:15–25:6; TrialTr.V2 38:4–11. At that point, Watson noticed Carter reading messages on his phone and reacting to them:

> Like, he was just looking through his phone, like, messages, dinging back and forth, and he like this bitch want to fight, and I'm like, you know, what bitch want to fight? And he's like Lil T.

See TrialTr.V2 26:12–27:8; TrialTr.V2 38:12–17. Watson knew Lil T was Terrance Polk—they used to be friends. *See* TrialTr.V2 27:9–22. But Carter told Watson about "the situation," and they started driving towards a park at 7th and Elm, "to fight" with Polk. They saw Edward DeWitt and picked him up, too. *See* TrialTr.V2 25:7–26:11; TrialTr.V2 27:16–28:8; TrialTr.V2 38:4–19; TrialTr.V2 60:22–61:14.

> [W]e came from — down this way, because that's 6th Street right there, so rode up this hill. It was like a picnic table right up in this area or whatever the case may be, and that's when we seen Terrance Polk standing there with his arms folded, a little group around him, and stuff like that.

See TrialTr.V2 38:20–39:10. Watson said it was the same group of five or six people that he saw Polk with, earlier that day. *See* TrialTr.V2 39:11–16. Carter drove past, then turned around and parked at the southwest corner of the park at 7th and Elm. *See* TrialTr.V2 39:17–41:14. Carter, Watson, and DeWitt got out and approached on foot.

Then, Watson said, they "get approached by Booth-Harris with a gun." *See* TrialTr.V2 41:15–42:16. Watson knew they were there to fight, but he thought it would be a fistfight—Watson did not have a weapon, and he had no reason to believe that Carter or DeWitt were armed. *See* TrialTr.V2 42:17–43:1; TrialTr.V2 45:4–12; TrialTr.V2 62:10–15.

Booth-Harris pointed the gun at Carter and said, "what's all that bitch ass shit you was talking?" *See* TrialTr.V2 43:2–11.

> [Booth-Harris], like, aimed the gun, like, semi like towards his body or whatever, like he kind of lowered it, but then, like, Deonte Carter said you going to have to do what you're going to have to do with it, and that's when he shot.
>
> [. . .]
>
> [W]hen he walked up, he only thing I seen was him, him having a gun, so me being me, I tried to diffuse the situation or whatever, like, you know, this is over some shoes or whatever the case may be, leave the situation alone. He ain't focused on me. He wasn't looking at me or nothing. He was focused on Deonte Carter, so, like I say, after Deonte Carter said what he said, that's when he raised the gun up; that's when he shot the first bullet. I seen the first bullet, like, fly out. Like, where I'm from, witnesses don't be alone, so I took dead off, like, straight off.

See TrialTr.V2 43:2–44:5. Watson continued to hear more gunshots after he turned his back and as he ran. Then, when the sound of shots died down, Watson ran back. He saw Dewitt "bawling" over Carter, who was "on his stomach" on the ground and had clearly been shot. *See* TrialTr.V2 45:13–46:7.

Watson tried to call 911, but his phone would not work. DeWitt called 911. *See* TrialTr.V2 47:14–21. DeWitt's 911 call was admitted into evidence. *See* TrialTr.V2 108:2–109:8; State's Ex. 9. DeWitt was very emotional, and told the dispatcher that Carter was "shot at close range" and "directly in the fucking chest." *See* State's Ex. 9. DeWitt said he did not know who the actual shooter was, but he identified Polk ("Lil T") as "the dude." *See* State's Ex. 9 at 1:36–2:03; State's Ex. 9 at 2:54–3:01. DeWitt said that "after they shot, they went running" on Elm towards 8th Street—and he said they still had the gun and did not abandon it at the scene. *See* State's Ex. 9 at 2:04–2:53. When the dispatcher asked for his name, DeWitt hung up. *See* State's Ex. 9, 3:09–3:29. Earlier in the call, DeWitt was talking to someone and said: "I don't even know if I hit that nigga." *See* State's Ex. 9 at 1:18.

Watson saw a gun on the ground, near Carter's foot. *See* TrialTr.V2 46:13–47:13. While DeWitt called 911, Watson picked up the gun and took it to Miss Rita's house, because he "was scared" and she "was the only person in the area that we knew of, that [he] knew [he] could go to for help." *See* TrialTr.V2 47:14–48:8. Watson left the gun at Miss Rita's house and returned to the scene, just as police were arriving in response to DeWitt's call. *See* TrialTr.V2 49:4–21.

Officers attempted to help Carter, but his wounds were fatal. *See* TrialTr.V2 113:17–118:2. Carter died from gunshot wounds to his "chest, abdomen, and back." *See* TrialTr.V2 212:7–224:15. One bullet was recovered from Carter's body during his autopsy. *See* TrialTr.V2 216:3–218:4; TrialTr.V2 221:11–25.

Rita remembered seeing Carter and Polk yelling at each other earlier that day. She had heard Carter yell, "I'm talking about them mother fucking shoes on your feet." *See* TrialTr.V2 98:4–99:23. At that point, Rita stepped out and told them to take it somewhere else. *See* TrialTr.V2 99:24–100:22. Polk had told Rita "you're right," and they all dispersed. *See* TrialTr.V2 101:3–16.

Rita heard the gunfire associated with the shooting, and was about to call 911—but she saw a neighbor with his phone in his hand, and assumed he was already calling 911. *See* TrialTr.V2 102:6–103:1. She saw some people running away from the scene, west on Elm, but she did not see anybody she knew. *See* TrialTr.V2 103:2–24. Rita did not know Booth-Harris. *See* TrialTr.V2 105:16–22.

Later that same afternoon, Burlington Police Department Detective Josh Tripp went to the hospital in Monmouth and found Booth-Harris there, "being treated for a gunshot wound to his left leg."

See TrialTr.V2 181:9–183:4. When Detective Tripp arrived and took photos of Booth-Harris's injury, it was still fresh—and still bleeding. *See* TrialTr.V2 182:4–186:4. Detective Tripp asked Booth-Harris how he sustained that injury, and Booth-Harris gave this explanation:

> He told me that he had been down in the Maple Hills Apartments area with some friends and had left that apartment complex and was walking westbound up Elm Street when he got to the area of 7th and Elm.
>
> [. . .]
>
> He stated that when they neared the intersection of 7th and Elm, he had noticed a black Yukon pull into the area and I believe he approximated five subjects — five black males exit the vehicle, an argument ensued.
>
> He stated then that he was continuing westbound with his friends and started hearing multiple gunshots. He stated that he took off running from the scene and when he suffered the gunshot wound to his leg, and then ran — continued running until he went home to his house.

See TrialTr.V2 186:7–188:14. Booth-Harris never mentioned being part of that argument in any capacity. *See* TrialTr.V2 188:15–17.

Booth-Harris told Detective Tripp that, when he was shot, he had been hanging out with both Terrance Polk and A.J. Smith. *See* TrialTr.V2 187:9–20. A.J. Smith was "[i]ncarcerated in the Illinois Department of Corrections" at the time. *See* TrialTr.V2 187:21–188:1.

Booth-Harris's father drove him to the Monmouth hospital, instead of the Great River hospital (which was much closer to home).

Booth-Harris told Detective Tripp "he asked his father to take him to a hospital outside of town because of the things that had just happened, and he was in fear that it could continue at our local hospital if he stayed here close." *See* TrialTr.V2 189:17–190:5; *see also* TrialTr.V2 203:13–22 (noting that Carter was taken to Great River hospital).

Chandra McCampbell knew Polk. *See* TrialTr.V2 125:12–127:3. She learned about a dispute between Carter and Polk on the weekend before the shooting, and she remembered it was "about some shoes." *See* TrialTr.V2 127:5–129:18. On the day of the shooting, McCampbell was at a softball game—she learned about the shooting from a friend who called her and told her Carter was dead. *See* TrialTr.V2 129:19–132:8. She was in the car with Polk later that day, when he gave her a ride to another softball game. She heard a speakerphone conversation between Polk and Rita Lewis. *See* TrialTr.V2 135:11–136:2.

At trial, Polk was a very reluctant witness. Polk admitted that he had been arguing with Carter, arising out of Carter's accusation that Polk had robbed his house. *See* TrialTr.V2 159:19–161:10.

> I seen him. I asked him what he — he was accusing me for. He said I robbed his house and he was going to whoop me, and I told him — I asked him did he want to fight, and then Miss Rita came outside, she told us that we wasn't going to fight, and she told me to leave, so I left.

See TrialTr.V2 161:11–165:16. Polk said he had been alone during that argument and he denied Booth-Harris was with him. *See* TrialTr.V2 163:19–165:25. Polk remembered exchanging Facebook messages with Carter but did not remember their contents. Those messages showed both Carter and Polk were spoiling for a fight. *See* TrialTr.V2 166:21–171:21; State's Ex. 7; C-App. 13. Polk claimed that he was at Chandra's softball practice that afternoon, and was not present for the shooting. *See* TrialTr.V2 174:6–177:12. But Watson knew Polk, and he saw Polk at the scene, "down the street" from the shooter. *See* TrialTr.V2 86:20–87:10.

DCI criminalist Michael Halverson and his team collected nine bullet casings from the scene of the shooting. All were .45 caliber. *See* TrialTr.V3 32:1–10; State's Ex. 31; ExApp. 14; TrialTr.V3 34:21–38:18. They also found two bullet fragments. One of them was found under Carter's body. *See* TrialTr.V3 33:23–34:15; TrialTr.V3 71:6–73:8. The other bullet fragment was on the ground, north of Carter's body. *See* TrialTr.V3 38:15–23.

Burlington Police Department Detective Melissa Moret led a team that obtained a warrant to search Booth-Harris's house. *See* TrialTr.V3 75:10–76:20. She described what they discovered:

> Prior to going in, there are three or four concrete steps that lead up to the landing where the enclosed porch is. We noticed blood drops on those steps on the landing at the top of those steps and then blood in the enclosed porch area. All of that, of that blood, was photographed. It was more droplets than — than pools, so it wasn't a very significant amount of blood, but it was blood, and then into the porch, and then into the living room area.
>
> [. . .]
>
> Going into the living room area — there were basically five rooms in the apartment: Two bedrooms, a bathroom, the living room, and kitchen. Going in from the front is the living room. There was blood on the floor there, and there was a tissue there that looked like somebody had applied or wiped up blood. There was a garbage bag, not in any container but just kind of set like maybe to take outside in the living room on the floor, and in that, there was a bloody T-shirt that was photographed and seized, along with the tissue.

TrialTr.V3 75:10–80:15; State's Ex. 23–27; ExApp. 8–11, C-App. 17. Detective Moret also found .45 caliber ammunition in Booth-Harris's closet. *See* TrialTr.V3 79:6–81:17; State's Ex. 28; ExApp. 12.

At a briefing the next morning, Detective Moret had heard that the shooter wore "a mask covering part of his face." *See* TrialTr.V3 82:9–25. Detective Moret remembered seeing a "cold-weather-type" mask that "covered the face from about the mid nose down around the chin" during her search of Booth-Harris's bedroom, so she got another search warrant and went back to look for it. *See* TrialTr.V3 82:4–83:20. But the mask was no longer there—sometime between

the first search on February 16 and the second search on February 18, "somebody had been in the house" and removed furniture, along with the face mask that Detective Moret had noticed before. *See* TrialTr.V3 83:21–84:1. Still, Detective Moret found two other relevant items. First, she found "a black stocking cap," which was important because the shooter had reportedly worn both a mask and a stocking cap. *See* TrialTr.V3 84:2–17. And her team "found a .45 caliber casing that was also Winchester auto right on the ground right outside that back door." *See* TrialTr.V3 84:2–85:2; State's Ex. 29; ExApp. 13. Forensic analysis showed that all of the .45 caliber casings—including all nine casings from the scene of the shooting and a spent .45 caliber casing found during the search of Booth-Harris's residence—"were identified as having been fired in the same firearm" based on the "unique pattern of markings that came from the firing pin." *See* TrialTr.V3 132:15–143:8; State's Ex. 34; ExApp. 15; *see also* TrialTr.V3 151:9–156:23; State's Ex. 40–41; ExApp. 18–19. The bullet recovered from Carter's body and the bullets recovered from the crime scene matched the ammunition that had been found in Booth-Harris's bedroom— they were all .45 caliber bullets with similar markings and stampings. *See* TrialTr.V3 143:9–146:14; State's Ex. 35–36; ExApp. 16–17; TrialTr.V3 161:6–20.

In Watson's first interview with police, he denied possessing a gun that day. *See* TrialTr.V2 71:8–73:25. During his next interview, he admitted to leaving the scene with a gun. After that admission, Watson led police to Miss Rita's house and directed them to the gun, which they recovered. *See* TrialTr.V2 51:19–54:1; TrialTr.V2 81:4–12; TrialTr.V3 107:3–110:16. It was a .40 caliber Ruger. *See* TrialTr.V3 146:15–147:9. Examination of the crime scene uncovered a number of .40 caliber shell casings, in a front yard area that did not overlap with the park area where the .45 caliber casings were found. *See* TrialTr.V3 8:11–13:5; State's Ex. 17–19; ExApp. 5–7. All of the .40 caliber casings that were found at the scene were fired from this .40 caliber Ruger that Watson had turned over. *See* TrialTr.V3 148:15–151:8.

Watson had no idea whether the .40 Ruger had belonged to Carter, to DeWitt, or to someone else—Watson "didn't see nobody shoot no gun beside the shooter that shot [Carter]." *See* TrialTr.V2 64:11–65:6. Watson had started running as soon as Booth-Harris started shooting, so his back was turned before anyone returned fire. *See* TrialTr.V2 65:21–66:7. Watson did not know Booth-Harris before the shooting. *See* TrialTr.V2 54:20–55:2. But Watson did positively identify Booth-Harris as the shooter during his trial testimony. *See*

TrialTr.V2 48:12–49:2. He had also identified Booth-Harris in two photo lineups that were administered on February 18, 2015, two days after the shooting. *See* TrialTr.V2 54:2–19. Detective Tripp generated those two photo lineups. Because he was involved in the investigation, Detective Tripp had them administered by another officer who would "have no idea who the suspect is in any of the photos," which was their standard photo lineup procedure. *See* TrialTr.V2 190:9–194:4.

Watson pointed out Booth-Harris's photo in the first lineup:

> [H]e said that it looked a lot like the subject, but in this photo, the subject's eyes are somewhat squinted, so he asked if — I believe he asked if we had a second photo or a better photo possibly.

See TrialTr.V2 194:8–195:9; State's Ex. 11; SuppApp. 4. Police had another photo of Booth-Harris, and Detective Tripp used that photo to generate another photo lineup with six new photos. *See* TrialTr.V2 195:10–196:6; State's Ex. 12; SuppApp. 17. "[Watson] identified Earl Booth-Harris in the second photo lineup, stating that he was 100 percent sure." *See* TrialTr.V2 196:7–198:12; State's Ex. 46; ExApp. 20. Booth-Harris challenged the admissibility of these identifications in his motion to suppress, which was denied. *See* MTS Ruling (10/3/17); App. 11. Facts surrounding those identification procedures will be discussed extensively in response to his challenge to that ruling.

DCI special agent Ryan Kedley interviewed Booth-Harris on March 14, 2015. Detective Tripp was present for that interview too. *See* TrialTr.V3 98:18–104:14; State's Ex. 30. Booth-Harris denied ever possessing a weapon or ammunition in the State of Iowa—and he had no explanation for the ammunition found in his bedroom. *See* State's Ex. 30 at 26:51–29:34. Booth-Harris said he did not know why Carter was shot, but he said that he expected people would blame him. *See* State's Ex. 29:57–32:09.

Additional facts will be discussed when relevant.

ARGUMENT

I. The Court Did Not Err in Overruling Booth-Harris's Motion to Suppress Evidence of Watson's Out-of-Court Eyewitness Identification. The Procedure Was Not Impermissibly Suggestive, and His Identification Was Ultimately Reliable.

Preservation of Error

Error was preserved for the actual challenge to the admissibility of Watson's out-of-court eyewitness identification. It was raised in Booth-Harris's motion to suppress and rejected by the trial court in its ruling. *See* MTS (6/1/17); App. 7; MTS Ruling (10/3/17) at 4–6; App. 14–16; *Lamasters v. State*, 821 N.W.2d 856, 862–65 (Iowa 2012).

Error was not preserved for any claim that the court should have applied a different analysis under the Iowa Constitution—such a claim was neither raised nor ruled upon below. *See* MTS (6/1/17); App. 7; MTS Tr. 11:9–13:23; MTS Tr. 18:6–20:1; MTS Ruling (10/3/17); App. 11. Booth-Harris argues any unpreserved claims are reviewable as ineffective-assistance-of-counsel claims, and argues "[t]he traditional rules of preservation of error do not apply to claims of ineffective assistance of counsel." *See* Def's Br. at 29. But that variety of claim (those alleging ineffective failure to preserve error as the breach that would allow the claims to bypass normal error preservation rules) are only addressed on direct appeal at the appellate court's discretion,

and only "if the record is adequate to decide the claim." *See State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). Addressing such claims on direct appeal is rare, not typical. "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *See State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (citing *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006)). This Court should not consider Booth-Harris's unpreserved arguments about the Iowa Constitution under this ineffective-assistance rubric, for three reasons.

First, this disincentivizes Iowa trial attorneys from developing a factual record to give this constitutional litigation some basis in reality. *See State v. Ambrose*, 861 N.W.2d 550, 555 (Iowa 2015) (quoting *State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003)) (observing that error preservation is essential to "providing the appellate court with an adequate record in reviewing errors purportedly committed by the district court"). If science has developed in ways that obviate doctrine and justify departure from precedent, or if these facts demonstrated the unreliability of the eyewitness identification procedures that were previously thought to be more reliable, that should be shown "based on the evidence in the record" as established at "an evidentiary hearing"—after all, the evidence may not show what lawyers or judges expect.

E.g., *State v. Storm*, 898 N.W.2d 140, 141–44 (Iowa 2017). Analyzing novel challenges under the Iowa Constitution through claims of what such evidence *could have shown* leads to rulings that are disconnected from reality. Moreover, it incentivizes Iowa trial lawyers to surrender the Iowa Constitution to appellate specialists—who can choose from a wide variety of novel constitutional attacks after retrospective review of the prosecution (without being constrained by error preservation) and attack trial counsel as ineffective for "not considering" a claim, even if their analysis led them to believe that available evidence would *undermine* the claim. This perverse incentive structure guarantees that factual records on new constitutional claims will rarely be assembled and the resultant jurisprudence will rely on conjecture and assertions, rather than data and facts developed at trial. *See State v. Coleman*, 890 N.W.2d 284, 303–05 (Iowa 2017) (Waterman, J., dissenting) ("Constitutional jurisprudence should not be a race to the bottom."); *State v. Herrera*, 902 A.2d 177, 181 (N.J. 2006) (refusing to consider unpreserved claim because "if defendant had raised these arguments before the trial court and submitted the current research in support of his request for a new standard for determining the admissibility of showup identification, a different record would have been made").

Second, this unfairly ambushes district courts on direct appeal with constitutional issues they never considered. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) ("Ordinarily, we attempt to protect the district court from being ambushed by parties raising issues on appeal that were not raised in the district court."). The trial court in this case had no reason to reconsider the validity of *State v. Folkerts* under the Iowa Constitution—Booth-Harris specifically argued that the trial court should apply the analytical framework described in *Folkerts*. *See* MTS Tr. 18:11–19:21 (citing *State v. Folkerts*, 703 N.W.2d 761 (Iowa 2005)). If Booth-Harris had proposed a new framework, the trial court may have offered unique perspectives—perhaps including comments assessing these identification procedures in comparison to procedures used by other local law enforcement agencies or used in other recent cases where eyewitness identifications were challenged. Raising novel constitutional challenges as ineffective-assistance claims cuts Iowa's district court judges out of the constitutional conversation and limits constitutional discourse to perspectives available on appeal. *See*, *e.g.*, Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 NOTRE DAME L. REV. 97, 98, 146 (2006) (arguing that "we ought to promote increased appellate exposure to

district court perspectives" in order to "prevent further deterioration in the functioning of district courts," and that "their immersion in the world of litigation gives trial court judges a greater appreciation of the costs and benefits of particular allocations of resources, and of the strengths and foibles of the lawyers who practice before them"). This is especially important for claims that ultimately seek to suppress evidence, because raising a new or interesting constitutional argument to argue for suppression will often prompt discussions and rulings on fallback grounds for admission, including arguments about facts that would show why an assessment of reliability is critical in determining whether an otherwise problematic eyewitness identification should be admissible at trial. This Court should think twice before considering a new constitutional claim where the trial court had no opportunity to consider the issue, explain its unique perspective, explain any relevant facts or experiences that impacted its evaluation of the claim, and take any necessary precautions that would have insulated the subsequent proceedings from error and minimize cumulative retrials. *See*, *e.g.*, *Ambrose*, 861 N.W.2d at 555 (quoting *Pickett*, 671 N.W.2d at 869) (explaining purpose of error preservation is to promote fairness by "affording the district court an opportunity to avoid or correct error").

Third, this redefines the standard of "reasonable competency" to exclude advocates whose interpretations of the Iowa Constitution are narrowly disfavored in close decisions of the Iowa Supreme Court. Iowa cases applying *Strickland* require that, to establish breach, the claimant "must demonstrate the attorney performed below the standard demanded of a reasonably competent attorney." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). But even exceedingly competent attorneys disagree on the merits of novel claims under the Iowa Constitution—especially those specifically foreclosed by prior decisions under those same constitutional provisions. *See State v. Effler*, 769 N.W.2d 880, 896 (Iowa 2009) (opinion of Appel, J.) (noting that six members of Iowa Supreme Court were split three-to-three on whether "counsel was ineffective for failing to challenge the continued vitality" of precedent foreclosing claim under Article I, Section 9 of the Iowa Constitution); *see also Ortiz v. State*, No. 16–1441, 2016 WL 6902817, at *3–4 (Iowa Ct. App. Nov. 23, 2016) ("[I]t is a step too far to find, as a matter of law, that defense counsel breached a constitutional duty owed his client and failed to perform competently by not filing a motion to suppress evidence contrary to ninety years of federal law and thirty-two years

of state law."). If a single justice on the Iowa Supreme Court would dissent on the merits, adhere to Iowa precedent, and reject a certain state constitutional claim if it had been properly preserved, then an Iowa attorney cannot fall short of "prevailing professional norms" by reaching the same conclusion in good faith and declining to litigate it. *See State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012); Iowa R. Prof'l Conduct 32:3.1 (attorneys have ethical duty not to raise/argue issues without a legal basis "that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law"); *accord Clay*, 824 N.W.2d at 502–03 (Appel, J., concurring specially) (noting "the use of ethical standards to illuminate whether a lawyer has provided ineffective assistance is not novel or overreaching, but well established"). Iowa attorneys must be able to exercise reasonable professional judgment when they determine that longshot attacks on settled precedent would be unproductive and unlikely to prevail—even if four justices eventually disagree and overturn that settled precedent, that does not render the attorney's decision objectively unreasonable and certainly does not establish that attorney "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" or by Article I, Section 10. *See State v. Palmer*, 791 N.W.2d 840, 850

(Iowa 2010) (quoting *Strickland*, 466 U.S. at 687); *see also Snethen v. State*, 308 N.W.2d 11, 16 (Iowa 1981) ("Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel."); *accord State v. Liddell*, 672 N.W.2d 805, 814 (Iowa 2003) ("[I]t would be patently unfair to adjudge Liddell's counsel ineffective for failing to foresee today's decision, which diverges from precedent."). Even if a claim like this succeeds at overturning *Folkerts*, trial counsel would not be ineffective for concluding, during the proceedings below, that it was wholly meritless. It follows that considering hypothetical merits of the unpreserved claim would decide (or re-decide) constitutional issues to assess prejudice on claims where there is no possibility of breach, which would eviscerate the practice of constitutional avoidance. *See Cmty. Lutheran Sch. v. Iowa Dep't of Job Serv.*, 326 N.W.2d 286, 291–92 (Iowa 1982) ("We avoid constitutional issues except when necessary for disposition of a controversy.").

For all of these reasons, this Court should refuse to consider this type of novel constitutional challenge to controlling precedent under an ineffective-assistance rubric, especially in this direct appeal. As such, review should be limited to Booth-Harris's preserved claim.

Standard of Review

"Constitutional issues are reviewed de novo, but when there is no factual dispute, review is for correction of errors at law." *See State v. Young*, 863 N.W.2d 249, 252 (Iowa 2015); *see also Folkerts*, 703 N.W.2d at 763; *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993).

Merits

Iowa courts use a two-pronged approach to these challenges. "First, we determine if the procedure used was impermissibly suggestive and second, if it was, we determine whether under the totality of circumstances the suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification." *See State v. Whetstine*, 315 N.W.2d 758, 764 (Iowa 1982) (citing *State v. Mark*, 286 N.W.2d 396, 403 (Iowa 1979)). "When unnecessarily suggestive pretrial out-of-court identification procedures conducive to mistaken identification that are incapable of repair are used, the Due Process Clause requires exclusion of the testimony of the identification." *See Folkerts*, 703 N.W.2d at 763–64. However, "[d]ue process is not violated 'so long as the identification possesses sufficient aspects of reliability.'" *State v. Webb*, 516 N.W.2d 824, 830 (Iowa 1994) (quoting *Manson*, 432 U.S. at 106).

Booth-Harris has the burden of proof on both prongs: he must prove the identification procedures were impermissibly suggestive, *and* that suggestiveness irreparably undermined the reliability of Watson's positive identification. *See State v. Neal*, 353 N.W.2d 83, 86 (Iowa 1984) ("To succeed on this claim, defendant must establish that the procedures were suggestive and the irregularities gave rise to a substantial likelihood of irreparable misidentification in the totality of the circumstances."). Booth-Harris cannot make either showing, and his unpreserved Iowa Constitution claim offers no persuasive reason to abandon established Iowa precedent.

A. The eyewitness identification procedure was not impermissibly suggestive.

Academics and researchers have recommended a wide range of safeguards that minimize suggestiveness in identification procedures. Booth-Harris criticizes the identification procedures on three grounds: (1) he argues they were suggestive "due to the sheer repetition of the defendant's photograph through multiple viewings"; (2) he complains that "Watson was encouraged to inflate his level of certainty on the identification"; and (3) he argues that "the single photograph display" on the day of the shooting "ma[de] him stand out even more when he was later included in photographic arrays" presented two days later.

See Def's Br. at 45–47 & n.2. But Booth-Harris ignores the fact that these identification procedures, on the whole, did an exemplary job of following recommendations from contemporary scientific research on how to minimize suggestiveness. Each photographic lineup included this advisory, which was read to Watson before he viewed the photos.

> You are about to view a photographic line-up. The person who committed the crime may or may not be included in it. While looking at the photographs, keep an open mind that the individuals may not appear exactly as they did on the date of the crime. Their hairstyles, facial hair, clothing, etc. may have changed. Also, photographs may not always depict the true complexion of a person, who may be lighter or darker than shown in the photo. The officer showing you the photographs has no knowledge of the incident. In the line-up process, the photographs will be shown to you one at a time and are not in any specific order. Take as much time as you need to look at each photograph. Even if you identify an individual, the officer will continue to show you all of the photographs. The officer is not allowed to tell you whether your choice, if you make one, is a suspect in the investigation. Do not tell other witnesses that you have or have not identified anyone.

See State's Ex. 11 at 1; SuppApp. 4; State's Ex. 12 at 1; SuppApp. 17.

Booth-Harris repeatedly cites to *State v. Lawson*, 291 P.3d 673 (Or. 2012), which exhaustively considered the contemporary research and outlined best practices for eyewitness identification procedures. Most of the recommendations from *Lawson* run parallel to what the investigating officers actually did in this case. These photo lineups

were conducted using a "blind" procedure—they were administered by "a person who does not know the identity of the suspect." *See Lawson*, 291 P.3d at 685–87; TrialTr.V2 193:5–194:4; *accord* State's Ex. 11 at 1; SuppApp. 4; State's Ex. 12 at 1; SuppApp. 17 ("The officer showing you the photographs has no knowledge of the incident."). Moreover, *Lawson* recommended that, in situations where a witness has not yet provided a description of the suspect's facial/physical features, "known-innocent subjects used as lineup fillers should be selected" for inclusion in their photo lineups "based on their similarity to the suspect." *See Lawson*, 291 P.3d at 686. Here, Detective Tripp did exactly that. *See* TrialTr.V2 191:5–192:25. *Lawson* also recommended "sequential lineups" as an alternative to procedures where "police display a number of persons or photographs simultaneously." *See Lawson*, 291 P.3d at 686. Here, Detective Tripp used that procedure. *See* State's Ex. 11; SuppApp. 4; State's Ex. 12; SuppApp. 17 ("In the line-up process, the photographs will be shown to you one at a time and are not in any specific order."). *Lawson* stated "[t]he likelihood of misidentification is significantly decreased when witnesses are instructed prior to an identification procedure that a suspect may or may not be in the lineup or photo array, and that it is permissible not to identify anyone." *See Lawson*,

291 P.3d at 686. Here, Watson was advised that "[t]he person who committed the crime may or may not be included" in each lineup. *See* State's Ex. 11; SuppApp. 4; State's Ex. 12; SuppApp. 17. Overall, the identification procedures conformed to the prevailing consensus about best practices for minimizing suggestiveness, and there are no grounds for his complaint that these identification procedures approach the level of unnecessary suggestiveness that would violate due process.

Booth-Harris argues that "[t]he identification procedures used in this case were impermissibly suggestive due to the sheer repetition of defendant's photograph through multiple viewings." Def's Br. at 45. But Detective Tripp used a *different photograph* of Booth-Harris on the second photo lineup, which helps negate any suggestiveness that would otherwise result from repetition of exposure to the same photo. *See* TrialTr.V2 195:10–196:6. If Watson were just reacting to repeated viewings of the same photograph, he would not identify Booth-Harris during the second photo lineup—but he identified Booth-Harris with *greater* certainty on that second photo lineup, which helps prove that Watson made "a rational inference of identification from the facts that the witness actually perceived," not from repetition of a specific photo. *See Lawson*, 291 P.3d at 754–55.

Booth-Harris also argues these identification procedures were impermissibly suggestive because "Watson was encouraged to inflate his level of certainty on his identification." *See* Def's Br. at 46–47. But that occurred *after* Watson had already identified Booth-Harris from two different photos, in two separate photo lineups. *See* State's Ex. 201 at 9:57–10:27. And the administering officer's statements were not quite "encouragement"—while it would have been preferable not to recast Watson's certainty from 70% to 100%, the officer prefaced that with an inquiry about what Watson's "70% certainty" really meant in concrete terms. And the officer only suggested that Watson may have understated his level of certainty upon hearing Watson's statements, in his own words, that the person's eyes matched the shooter's eyes and that Watson felt like this was the shooter. *See* State's Ex. 201 at 9:57–10:27. Most importantly, the administering officer *did not know* which photos were dummy/control photos added to fill the lineup and which photo was Booth-Harris—so this cannot be characterized as an underhanded attempt to push Watson towards a desired identification, nor could this be characterized as "confirmatory feedback" because it did not give Watson any indication that he selected the actual suspect. Booth-Harris relies on *State v. Henderson*, which put it like this:

> Confirmatory feedback can distort memory. As a result, to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness' own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record—written or otherwise—of the witness' statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided.

State v. Henderson, 27 A.3d 872, 900 (N.J. 2011). Here, Watson's statements *were* recorded in his own words before any feedback, and a full record of Watson's statements about his certainty was made and used to litigate the identification's admissibility (and could be used to cross-examine both Watson and Detective Tripp about the weight of that identification, which was initially made with 70% certainty).

Booth-Harris complains the identification was contaminated because police showed Watson a photo of Booth-Harris on the day of the shooting, upon learning that Watson went to Monmouth hospital for treatment for his gunshot wound. *See* Def's Br. at 45 n.2. This is similar to a "showup," where "police officers present an eyewitness with a single suspect for identification"—and even *Lawson* noted that "[a] showup is most likely to be reliable when it occurs immediately after the witness has observed a criminal perpetrator in action because the benefit of a fresh memory outweighs the inherent suggestiveness of the procedure." *See Lawson*, 291 P.3d at 686. Moreover, it was not

an in-person showup—it was a photo showup, which means that the inherent suggestiveness that results from viewing a person who has been detained/arrested and is being guarded by uniformed officers was absent here. *See*, *e.g.*, *State v. Dubose*, 699 N.W.2d 582, 594 (Wis. 2005) (adopting *per se* rule of exclusion for showups—but not for lineups or photo arrays—because "[s]howups conducted in police stations, squad cars, or with the suspect in handcuffs that are visible to any witness, all carry with them inferences of guilt," and explaining "[a] lineup or photo array is generally fairer than a showup, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification"). Booth-Harris claims "[t]here was no indication that Officer Schwandt had read the photographic identification admonition form to Watson before showing him [Booth-Harris]'s photograph." *See* Def's Br. at 41. But Officer Schwandt had read a full advisory before showing Watson the photo lineup that contained Terrence Polk, and he showed Watson the photo of Booth-Harris *after* that photo lineup—so Watson already knew that he would be shown photos of people who were not suspects. *See* Def's MTS Ex. A at 6–7; C-App. 9; TrialTr.V3 191:21–192:7. This was as non-suggestive as any showup identification can possibly be.

Note that Watson told Officer Schwandt that he "did not know who the person in the photograph was." *See* Def's Br. at 41 (citing Def's MTS Ex. A at 6–7; C-App. 9–10); TrialTr.V3 191:24–192:17. But when Watson was cross-examined and defense counsel attempted to get Watson to admit that he lied to police about the gun at his initial interview on February 16, 2015, this critical exchange occurred:

> **DEFENSE**: Well, isn't it a fact that you saw Derek Schwandt at the police station on February 16th?
>
> **WATSON**: I guess so.
>
> **DEFENSE**: Did you tell the truth to Derek Schwandt about what happened that afternoon?
>
> **WATSON**: No.
>
> **DEFENSE**: What did you not tell him the truth about?
>
> **WATSON**: The picture lineup.
>
> **DEFENSE**: I'm sorry?
>
> **WATSON**: The picture lineup.
>
> **DEFENSE**: What do you mean, the picture lineup?
>
> **WATSON**: Like, when they was showing me the pictures and stuff like that, I lied about the person who it was.
>
> **DEFENSE**: What lie did you tell?
>
> **WATSON**: That I didn't know who it was.

See TrialTr.V2 68:25–70:5. During subsequent questioning, Watson confused some details about what happened at his first interview and what happened two days later (when he had identified Booth-Harris in two photo lineups)—but then Watson clarified what he had meant:

> The first time, like, yeah, I think I lied or something like that. Like, yeah, I — I seen him, and then I went over the picture saying that I didn't see him.

See TrialTr.V2 70:6–71:7. Watson remembered being shown a picture of Booth-Harris on the day of the shooting, but he declined to identify him as the shooter because, at that point, he was afraid of the police and afraid to give them information. *See* TrialTr.V2 86:17–88:8. Indeed, Watson had known Polk for years, and Watson declined to identify *Polk's* photo when it was presented in the preceding lineup. *See* TrialTr.V2 27:9–22; TrialTr.V3 194:1–195:9. Note that the photo of Booth-Harris was not presented to Watson as a potential shooter—he was only asked if he had seen Booth-Harris or knew who he was, which minimizes any suggestiveness. *See* TrialTr.V3 197:8–198:1.

In short, this was not a perfect set of identification procedures, but it was far from impermissibly suggestive. The lengthy admonition, the sequential presentation, and the "blind" procedure implemented best practices recommended by contemporary scientific research and leading opinions on out-of-court identifications, which elevates this far above the level of suggestiveness where admitting identification evidence could violate due process. In that regard, this case resembles *Demorst v. State*, which Booth-Harris cites for some parallel facts:

> While we agree with Demorst that the presentation of a single photograph for identification is generally unduly suggestive, that is not what occurred here. Knox was shown the additional photograph only after picking Demorst from the second photo array. Knox admitted he was only seventy or eighty percent sure of the identification based on that photograph, and we are mindful that positive feedback from police officers can be suggestive in the sense that it may boost a witness's confidence in his identification. But we cannot say that what occurred here was so suggestive that it precluded Knox from identifying Demorst in court—that it "[gave] rise to a very substantial likelihood of irreparable misidentification."

Demorst v. State, 228 So.3d 323, 330 (Miss. Ct. App. 2017) (quoting *Stewart v. State*, 131 So.3d 569, 573 (Miss. 2014)); Def's Br. at 45 n.3. Safeguards and precautions were taken to minimize suggestiveness, and nothing about this procedure was suggestive enough to require suppression of the resulting identification. *E.g.*, *State v. Rawlings*, 402 N.W.2d 406, 408 (Iowa 1987) (holding that, despite the fact that Rawlings was "the only repeat" between two photo arrays, procedures were not impermissibly suggestive because "[a] reasonable effort to harmonize the lineup is normally all that is required"). On the whole, these identification procedures were minimally suggestive, if at all. Therefore, there is no need to proceed to an analysis of reliability.[1]

[1] Even if Booth-Harris's argument about the Iowa Constitution were preserved, this would moot it—his argument for a rule excluding impermissibly suggestive identifications would not impact this case.

B. Even if the identification procedure was suggestive, it would still be admissible because Watson's identification was sufficiently reliable to alleviate due process concerns.

Booth-Harris argues Watson's identification was not reliable. *See* Def's Br. at 48–53. The Iowa Supreme Court has endorsed the prevailing five-factor test for assessing reliability of out-of-court identification procedures, adapted from *Neil v. Biggers*:

> On the question of reliability, we give weight to five factors: (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Taft, 506 N.W.2d at 763 (citing *Whetstine*, 315 N.W.2d at 764–65); *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972).

In this stage of the analysis, "the main issue before the court is the reliability of the suggestive identification itself, not its relative reliability as compared to a lineup or other less suggestive type of identification." *See State v. Turner*, 561 A.2d 869, 871 (R.I. 1989) (citing *Biggers*, 409 U.S. at 199–200 & n.6). Here, those five factors weigh in favor of reliability. Watson was singularly focused on the person who was wielding the gun, before he turned and ran away. *See*

TrialTr.V2 41:15–44:5. Booth-Harris argues that Watson "did not get a good look at the shooter's face," but Watson clarified that he was identifying the shooter based on parts of his face that Watson *did* see, including the shooter's eyes and the parts of his face between his nose and his forehead. *See* State's Ex. 201 at 9:57–10:27; *see also* TrialTr.V2 89:10–90:19; TrialTr.V2 204:23–205:21. Although Watson did not confirm it during the first test, he still identified Booth-Harris as the shooter at three out of three encounters with Booth-Harris's photo, and he articulated the basis for the level of certainty that he described. *See* State's Ex. 201 at 9:57–10:27; TrialTr.V2 68:25–70:5; TrialTr.V2 89:10–90:19. Finally, the amount of time between the encounter and the subsequent identification was relatively short: a matter of hours for the first identification procedure, and two days for the subsequent photo lineups. *See Mark*, 286 N.W.2d at 406 (finding "lapse of time" of one week between incident and identification was not "sufficient to defeat the reliability of his identification"). While the interaction was admittedly brief, it was of great importance to Watson and the details would have naturally been seared into his long-term memory.

Booth-Harris argues that "Watson was no doubt traumatized by witnessing his cousin being murdered in cold blood," and "high levels

of stress can diminish an eyewitnesses' ability to recall and make an accurate identification." *See* Def's Br. at 48. But that logic would allow Booth-Harris to exclude *any* identification made by anyone who had witnessed the killing of a relative or friend, and it would grant killers undeserved advantages in proportion to the depravity of their acts. And Booth-Harris's argument that Watson's identification should be excluded because Watson had smoked marijuana earlier that day would incentivize criminals to target intoxicated victims, who would be barred from identifying their assailants. *See* Def's Br. at 51.

All of Booth-Harris's arguments about reliability should have been made to the jury, and many of them were. *See* TrialTr.V3 247:6–249:14; TrialTr.V3 267:14–268:18. All of his attacks go to the weight of Watson's identification, not to its admissibility—and Iowa courts have expressed a strong preference for admission of critical evidence of debatable weight, because juries are empowered to *weigh* evidence.

> We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Mark, 286 N.W.2d at 405 (quoting *Manson*, 432 U.S. at 116). There is nothing in this case that could justify deviation from that principle.

C. The Iowa Constitution does not demand a different result.

The Iowa Supreme Court has generally interpreted the parallel due process guarantees in the Iowa Constitution and U.S. Constitution as coextensive. *See Nguyen v. State*, 878 N.W.2d 744, 755 (Iowa 2016) (quoting *War Eagle Vill. Apartments v. Plummer*, 775 N.W.2d 714, 719 (Iowa 2009)) ("This court has generally considered the federal and state due process clauses to be 'identical in scope, import[,] and purpose.'"). Booth-Harris argues that the Iowa Constitution should require exclusion of all suggestive identifications, without assessing their reliability. *See* Def's Br. at 29–38. But Booth-Harris does not offer "a compelling reason to depart from the federal analysis." *See Nguyen*, 878 N.W.2d at 756. Almost every American jurisdiction follows *Manson* and *Biggers* in analyzing eyewitness identifications. *See State v. Hunt*, 69 P.3d 571, 575 (Kan. 2003) (collecting cases). Booth-Harris relies extensively on *State v. Henderson*, in which the New Jersey Supreme Court adopted a burden-shifting analysis. *See Henderson*, 27 A.3d at 919–22. But the Connecticut Supreme Court adopted a procedure that mirrored *Henderson* while also noting that "this framework does not differ significantly from [its prior] approach," and it reiterated that "evidence relating solely to estimator factors

that affect the reliability of the identification goes to the weight, not the admissibility, of the identification." *See State v. Harris*, 191 A.3d 119, 143 (Conn. 2018). *Henderson* and *Harris* implicitly recognize what other courts have said more explicitly: that a *per se* rule would "often frustrate rather than promote justice in situations wherein an identification is reliable despite its unnecessarily suggestive nature." *See State v. Washington*, 189 A.3d 43, 57 (R.I. 2018) (quoting *State v. Texter*, 923 A.2d 568, 574 (R.I. 2007)). This concern is magnified by Booth-Harris's arguments that *these* identification procedures, which incorporated almost every recommendation found recent cases and contemporary scientific research for reducing suggestiveness, were impermissibly suggestive—which means that, in practice, it would be nearly impossible to conduct out-of-court identification procedures that would clear Booth-Harris's "do-or-die" threshold for admission.

In *Perry v. New Hampshire*, the U.S. Supreme Court rejected a claim that trial courts must conduct pretrial reliability hearings for *all* eyewitness identification testimony, because the "deterrence rationale" at play in the Court's prior eyewitness-identification decisions was inapplicable where "the police engaged in no improper conduct." *See Perry v. New Hampshire*, 565 U.S. 228, 240–42 (2012). The Court

also noted that requirement "would open the door to judicial preview" of all eyewitness identification testimony to entertain attacks on its reliability for reasons other than suggestiveness, and "would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence." *See id.* at 243–44. The Court even addressed the same concerns that Booth-Harris raises about the potential risks associated with eyewitness identification testimony: it noted "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair," and the fact that eyewitnesses are imperfect humans does not "warrant a due process rule requiring the trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." *See id.* at 244–46. The same reasoning should lead this Court to reject Booth-Harris's demand for a rule excluding reliable identifications.

Booth-Harris relies on a series of three law review articles. *See* Def's Br. at 34–35. One of them asserts that, because of *Manson v. Braithwaite*, federal courts "regularly held clearly unnecessarily suggestive identification procedures to be acceptable or failed to make definitive determinations on whether such procedures were improper, and they often analyzed *Manson*'s reliability factors in a

manner that undermines the integrity of the inquiry." *See* Nicholas A. Kahn-Fogel, *Manson and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L. L. REV. 175, 176 (2012). But the dataset is flawed because it only included published opinions, and pre-trial suppression orders can result in dismissed prosecutions that produce no published opinions. *See id.* at 208. Additionally, the researcher is subjectively analyzing each case to determine whether the identification was "unnecessarily suggestive," which only provides a dataset showing how often the researcher disagrees with the court's suggestiveness analysis (which is not useful)[2]—and it also distorts the inquiry from *impermissible* suggestiveness into a question of whether police used procedures that this academic researcher happens to favor. *See id.* at 199–207. And the conclusion that federal courts were failing to vindicate due process rights by declining to find suggestiveness or

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[2] This makes the author's gratuitous swipe at state court judges even more jarring, because the author denigrates federal judges with a broad brush and then asserts that state courts are probably worse. *See id.* at 208–09 ("[T]here may be reason to believe the cases in the study, to the extent they might be unrepresentative, over-represent the quality of judicial decision-making in eyewitness cases; the jurisprudence of federal judges may be of greater quality than that of state judges because the higher prestige associated with federal judgeships and the rigors of Senate confirmation may lead to better qualified candidates for those positions.").

by declining to reverse and remand for retrial without the eyewitness identification testimony simply ignores the fact that reversal is never required for harmless error, and appellate courts routinely decline to reach issues that are mooted by overwhelming evidence of guilt or by facts showing challenged identifications were unassailably reliable, such as total agreement between multiple independent eyewitnesses. *Compare id.* at 212 (complaining that "in 221 of the cases" comprising 15% of the data set, "courts failed to decide definitively whether an indisputably unnecessarily suggestive procedure was improper"), *with Mark*, 286 N.W.2d at 405 (explaining the court did not need to determine "whether the procedure employed by the police was 'impermissible' or unnecessary" because it had found "all eight of the identifications to be reliable under the totality of the circumstances"). Labeling this article "empirical" would offend any serious scientist.

Booth-Harris's second law review article presents an argument for applying the exclusionary rule to all suggestive identifications, for the same reason it applies in Fourth Amendment contexts: to deter police misconduct. *See* Sarah Anne Mourer, *Reforming Eyewitness Identification Procedures Under the Fourth Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 49 (2008). *Manson* rejected that comparison:

> Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest. Thus, considerations urging the exclusion of evidence deriving from a constitutional violation do not bear on the instant problem.

See Manson, 432 U.S. at 113 n.13. Even if any Fourth Amendment argument were preserved (and it is wildly unpreserved), there would be no basis for labeling suggestive identifications a "search or seizure" within the meaning of the Fourth Amendment or Article I, Section 8. Moreover, the possibility of exclusion of evidence under the present *Manson*/*Biggers* framework is already deterring police misconduct and pushing police towards using standardized photo lineup protocols, like those employed here. Police and prosecutors will always seek to "avoid needlessly litigating a claim that an out-of-court identification was based on an impermissibly suggestive procedure, "and they are already motivated to "ensure the setting in which the identification takes place does not create the opportunity for an impermissibly suggestive procedure to occur." *See Folkerts*, 703 N.W.2d at 764.

Booth-Harris's string cite ends with a student comment that adds little to the discussion. *See* Suzannah B. Gambell, Comment, *The Need to Revisit the Neil v. Biggers Factors: Suppressing Unreliable Eyewitness Identifications*, 6 WYO. L. REV. 189 (2006).

As for the cases that Booth-Harris cites, they predominantly deal with prohibiting *in-person showups*—not photo lineups, which do not present the same level of suggestiveness nor the same danger of misidentification. *See*, *e.g.*, *People v. Adams*, 423 N.E.2d 379, 382 (N.Y. 1981); *Dubose*, 699 N.W.2d at 593–95. Those concerns are best addressed via reliability analysis, not an inflexible rule of exclusion.

If this Court wanted to update its five-factor test to reflect advancements in modern understandings of circumstances impacting reliability of identifications, it could follow the approach taken by Kansas and Utah, which adjusts the analytical framework like this:

> The Utah Supreme Court has enumerated the following five factors for evaluating the reliability of eyewitness identifications: (1) the opportunity of the witness to view the actor during the event; (2) the witness' degree of attention to the actor at the time of the event; (3) the witness' capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness' identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly. This last factor requires the consideration of whether the event was an ordinary one in the mind of the observer during the time it was observed and whether the race of the actor was the same as the race of the observer. The *Ramirez* court noted the similarity between its factors and the *Biggers* factors, but specifically noted that its factors "more precisely define the focus of the relevant inquiry" and include suggestibility, which has no comparable emphasis in the *Biggers* factors.

> [. . .]
>
> Though three of the factors differ somewhat from the *Biggers* factors, they present an approach to the identification issue which heightens, in our view, the reliability of such identification.
>
> We accept the *Ramirez* model; however, our acceptance should not be considered as a rejection of the *Biggers* model but, rather, as a refinement in the analysis.

Hunt, 69 P.3d at 576 (quoting *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991)). This formulation omits the "level of certainty" factor, which has been a frequent target of criticism. *See State v. Long*, 721 P.2d 483, 491 (Utah 1986); *accord State v. Discola*, 184 A.3d 1177, 1189 (Vt. 2018) (overruling Vermont precedent "insofar as it includes witness certainty as a factor in assessing the reliability of a witness identification made in suggestive circumstances," but retaining the underlying two-part framework for suggestiveness and reliability). This would give Iowa courts better guidance in assessing reliability of eyewitness identifications and prevent them from considering factors that would leave their rulings vulnerable to criticism, while leaving the established two-part analysis intact. Even so, it is dangerous to promulgate factors without an adversarial presentation of evidence and empirical support for each factor's inclusion or disinclusion, because studies often reach conflicting or conditional results. *See*, *e.g.*, *Henderson*, 27 A.3d at 901–02 (noting ongoing debate among

experts about comparative reliability of sequential presentation and simultaneous presentation, and stating that "[a]s research in this field continues to develop, a clearer answer may emerge"). In any event, it is difficult to envision any modified analytical framework that would satisfy Booth-Harris—his critique attacks *all* eyewitness identification testimony, regardless of the procedures that were used to obtain it. *See* Def's Br. at 29–37. That critique is out of step with Iowa courts' prevailing view that cross-examination is sufficient to expose problems with any flawed identification procedure and that juries are qualified to assess the weight of identification evidence (like all other evidence). *See Mark*, 286 N.W.2d at 405 (quoting *Manson*, 432 U.S. at 116).

D. Any error would be harmless.

Even if the trial court erred by admitting evidence of Watson's out-of-court identification, error was harmless because Booth-Harris had an injury that indicated that he was involved in the shooting. *See* TrialTr.V2 186:7–188:14. Booth-Harris had lied to police; he gave a version of events where he was with Terrance Polk at the time, but neither was involved in any argument. *See* TrialTr.V2 188:15–187:20. Terrance Polk was clearly involved, and he was positively identified by Watson—although not as the shooter. *See* TrialTr.V2 86:20–87:10.

Moreover, forensic evidence connected the gun that was used to kill Carter to specific ammunition found in Booth-Harris's bedroom—and Booth-Harris knew that ammunition would incriminate him, so he tried to conceal its existence by lying about it. *See* TrialTr.V3 79:6–81:17; TrialTr.V3 84:2–85:2; TrialTr.V3 132:15–146:14; TrialTr.V3 151:9–156:23; TrialTr.V3 161:6–20; State's Ex. 30 at 26:51–29:34. Booth-Harris's involvement as the triggerman is the only explanation for his connection to the gun that fired those fatal shots, his lies about Terrance Polk's involvement in the fight giving rise to the shooting, and his gunshot wound (together with DeWitt's recorded statement, which indicated that he had been firing at the shooter). Therefore, even without Watson's out-of-court identification, the evidence would have supported the same unavoidable conclusion.

Finally, consider the fact that Booth-Harris never proves that excluding Watson's *out-of-court* identification would automatically exclude his *in-court* identification as well. He asserts the procedures "tainted the in-court identification of defendant at trial," but does not explain how or why. *See* Def's Br. at 52–53. Watson viewed the face of the shooter at relatively close range, and was sufficiently confident in his identification that it would have been admissible, no matter what.

See, e.g., *State v. Wisniewski*, 171 N.W.2d 882, 885 (Iowa 1969) (rejecting challenge without determining if identification procedure was suggestive "because we find the in-court identification had an independent origin" and "their in-court identifications were based entirely on their observations at the scene of the robbery"). There was no record created to sustain any attempt to extend the claim of error to Watson's in-court identification—which means that Booth-Harris cannot prove that a finding of suggestiveness and unreliability on the out-of-court identification would have prevented Watson from making an in-court identification. As a result, even if Booth-Harris were right on the merits of his challenge, any error would be harmless because "substantially the same evidence" would still be in the record. *See State v. McGuire*, 572 N.W.2d 545, 547 (Iowa 1997) (citing *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992)). Thus, this claim fails.

II. The Defendant's Trial Counsel Was Not Ineffective.

Preservation of Error

Ineffective assistance of counsel represents "an exception to the general rules of error preservation" because failure to preserve error can form the basis for a claim. *State v. Stallings*, 658 N.W.2d 106, 108 (Iowa 2003) (citing *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa

1982)), *overruled on other grounds by State v. Feregrino*, 756 N.W.2d 700 (Iowa 2008). Iowa appellate courts are permitted to address these claims on direct appeal "when the record is sufficient to permit a ruling." *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). Here, the record is sufficient to resolve this claim because it shows Booth-Harris cannot possibly establish breach or prejudice.

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo* because they present constitutional issues. *See Liddell*, 672 N.W.2d at 809 (citing *Stallings*, 658 N.W.2d at 108).

Merits

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland*, 466 U.S. at 687). Absence of either element is fatal, and if Booth-Harris fails to prove either breach or prejudice, his ineffective assistance claim fails. *See State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997)).

The jury instructions included the ISBA model jury instruction on eyewitness identification testimony, which stated:

> The reliability of eyewitness identification has been raised as an issue. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to see the person at the time of the crime and to make a reliable identification later.
>
> In evaluating the identification testimony of a witness, you should consider the following:
>
> 1. If the witness had an adequate opportunity to see the person at the time of the crime. You may consider such matters as the length of time the witness had to observe the person, the conditions at that time in terms of visibility and distance, and whether the witness had known or seen the person in the past.
>
> 2. If an identification was made after the crime, you shall consider whether it was the result of the witness's own recollection. You may consider the way in which the defendant was presented to the witness for identification, and the length of time that passed between the crime and the witness's next opportunity to see the defendant.
>
> 3. An identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.
>
> 4. Any occasion in which the witness failed to identify the defendant or made an inconsistent identification.

See Jury Instr. 17; App. 25; IOWA STATE BAR ASS'N, IOWA CRIM. J. INSTR. 200.45. Booth-Harris argues this instruction is far too short, and he argues his counsel was ineffective for failing to request and instruction that he stitched together from parts of the New Jersey model jury instruction that he views as potentially favorable (but not

the segments about double-blind procedures and instructions, which are supposed to be included "in every case in which the police conduct an identification lineup procedure"), which spans three single-spaced pages of his brief and more than 5% of his maximum word count. *See* Def's Br. at 61–64; *cf.* New Jersey Criminal Model Jury Instructions, *Identification: In-Court and Out-of-Court Identifications* at 7–8, https://www.njcourts.gov/attorneys/criminalcharges.html.

"[N]ot every right to insist that a particular instruction be given need be availed of by counsel in order to satisfy the standard of normal competency." *See State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983). The New Jersey instruction takes far longer to express the same general ideas about eyewitness identification credibility, and the Iowa Supreme Court has held that it is not error to accept and use a jury instruction that reduces a complex idea to its simplest form. *See, e.g.*, *State v. Tipton*, 897 N.W.2d 653, 696 (Iowa 2017) (holding that "the jury instruction on attempt was adequate" because it expressed the concept of attempt "in plain language" with one short sentence). And, as Booth-Harris notes, Iowa courts reject identical claims that allege a duty to request more elaborate jury instructions on evaluating eyewitness identification testimony. *See State v. Collins*, No. 16–1094,

2017 WL 6027763, at *8 (Iowa Ct. App. Nov. 22, 2017) (rejecting identical claim because Iowa courts "have not adopted Collins's interpretation of eyewitness-identification instructions," and because "the jury was instructed pursuant to the standard Iowa Criminal Jury Instruction on eyewitness identification"). Because trial counsel had no duty to request any instruction that complicated the inquiry or delineated ideas that were already present in the model instruction, Booth-Harris cannot show that declining to request this instruction was a breach of duty. Therefore, his ineffective-assistance claim fails.

On prejudice, note that the Iowa Supreme Court has declined to find prejudice in cases that hinge on eyewitness testimony, even when counsel failed to request the model instruction that was given here. That was precisely what happened in *State v. Shorter*:

> [T]he State argues that Shorter has failed to show prejudice. The State points out that the jury was generally instructed in determining credibility of witnesses to consider whether a witness had made inconsistent statements. [*State v. Tobin*, 338 N.W.2d 879, 881 (Iowa 1983)] (citing jury instruction regarding credibility of witnesses as mitigating factor in case involving failure to instruct on eyewitness identification). In addition, the State suggests that absence of any specific eyewitness instruction did not prevent Shorter from making his arguments regarding the reliability of identification in closing arguments to the jury.
>
> [. . .]

> On the record before us, we conclude that Shorter simply cannot show a reasonable probability that the result at trial would have been different if the trial court had provided the jury with the ISBA Model Instruction on eyewitness identification. As the State suggests, it is debatable which party would have benefitted the most from the instruction. Further, the general instructions given to the jury gave Shorter's counsel a clear avenue to attack the inconsistencies in Perkins's eyewitness identification testimony. *See id.* And, much of the eyewitness identification instruction embraces commonsense notions that would not likely have escaped a conscientious jury unaided by the ISBA instruction. As a result, although we certainly do not discourage the use of the ISBA eyewitness identification instruction, we conclude that Shorter is not entitled to a new trial based on the failure of his counsel to request the eyewitness instruction.

State v. Shorter, 893 N.W.2d 65, 86 (Iowa 2017). Here, as in *Tobin* and *Shorter*, "the court included an instruction pertaining to the credibility of witnesses, which would include the State's eyewitness identifications." *See Tobin*, 338 N.W.2d at 881; *see also State v. Hohle*, 510 N.W.2d 847, 849 (Iowa 1996) ("To the degree any uncertainty could be said to exist, the district court's instruction to the jury on the credibility of witnesses was adequate."). Instructions empowered the jury to consider any facts that it found relevant to Watson's credibility. *See* Jury Instr. 10–11; App. 23–24. Booth-Harris cannot show a reasonable probability of a different result with the New Jersey model instruction, so he cannot prove prejudice.

CONCLUSION

The State respectfully requests that this Court reject Booth-Harris's challenge and affirm his conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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