No. 10-8974

IN THE

Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Do the due process safeguards against the State's use of unreliable eyewitness identification evidence at trial apply to all identifications which arise from impermissibly suggestive circumstances and which are very substantially likely to lead to misidentification, or only to those identifications which are also the product of "improper state action"?

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STATEMENT OF JURISDICTION

The New Hampshire Supreme Court affirmed the New Hampshire Superior Court order on November 18, 2010. The petition for a writ of certiorari was filed with this Court on February 11, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Facts Underlying The Motion To Suppress

The ruling to which Mr. Perry objects was made on the basis of evidence received at a pretrial hearing on his motion to suppress. At the hearing, Nashua Police Officer Nicole Clay was the only witness who testified. She stated that on August 15, 2008, at 2:53 a.m., the Nashua Police Department received a report that "a black male was trying to gain entry into vehicles located in the back parking lot of an apartment building." JA 36a-37a, 82a-83a. Officer Clay was in uniform and traveled to the parking lot in a marked police cruiser. JA 38a, 58a-59a. After arriving at the parking lot and exiting her cruiser, she heard a "metal clang" and then saw "a black man standing between two vehicles." JA 37a, 83a. The man was holding two sound system amplifiers. JA 37a. Officer Clay asked the man to put the amplifiers down and to come speak to her. JA 83a.

The man was Petitioner, Barion Perry. As instructed, Mr. Perry put the amplifiers down and walked over to Officer Clay. JA 37a-38a, 83a. Mr. Perry identified himself and spoke to the officer. JA 38a. Officer Clay did not find it necessary to handcuff or physically restrain Mr. Perry. JA 40a. Mr. Perry attempted to explain to Officer Clay that he had found the amplifiers on the ground and was "just moving them." JA 39a, 83a. Mr. Perry said he had seen two people in the parking lot. JA 39a, 83a. He described one as wearing a white t-shirt and said the other was across the street. JA 40a. Mr. Perry accompanied Officer Clay across the street to speak to the other person but that individual denied any involvement. JA 40a-41a.

As Officer Clay and Mr. Perry returned to the parking lot, they were approached by a man who said his car had been broken into. JA 42a. He identified his car, JA 42a, and later identified the items taken from his car. JA 70a. The car owner said he did not see the break-in, but his neighbor told him about it. JA 42a. Officer Clay asked another uniformed officer to stay with Mr. Perry. She left the two of them standing in the middle of the parking lot. JA 43a, 58a, 65a. The owner of the car then brought Officer Clay upstairs to the neighbor, Nubia Blandon. JA 44a.

Officer Clay spoke to Ms. Blandon at her apartment door in a hallway within the building. JA 44a, 48a. Officer Clay said the apartment was on the second or third floor. JA 43a, 49a.[1] She spoke to Ms. Blandon in the open doorway of the apartment and was not able to see out of the apartment window down to the parking lot where Mr. Perry was standing. JA 44a, 49a.

Ms. Blandon did not speak English, so the car owner translated. When questioned by Officer Clay, Ms. Blandon said she had seen someone walking in the parking lot and looking in cars. JA 48a, 55a. She was at her apartment window looking down into the parking lot when she saw the person. JA 48a-49a. She said the person circled her neighbor's car, opened the trunk, and removed a large item from the trunk. JA 55a.[2] Ms. Blandon also said the person was carrying a bat. JA 55a.

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1. At trial Ms. Blandon said her apartment was on the fourth floor, JA 226a, but that information was not before the trial judge when he ruled on the suppression motion.

2. Officer Clay later determined that the items taken from the neighbor's car included a large pine box containing speakers and the two amplifiers. JA 70a-71a.

When asked to describe the person, Ms. Blandon said only that the perpetrator was a "tall black man." JA 48a, 61a. Although Officer Clay sought detail beyond the description of "tall black man," Ms. Blandon did not offer any other details. JA 48a, 61a-62a. Officer Clay testified at the suppression hearing that Ms. Blandon did not provide any details as to the suspect's facial features, clothing, facial hair, or any other identifying characteristics. JA 61a-62a.

Although Officer Clay did not ask Ms. Blandon to attempt to identify Mr. Perry, when the officer asked for a further description, Ms. Blandon pointed back to the window "to show that she had already looked," and said "it was the man that was in the back parking lot standing with the police officer." JA 48a-49a. Officer Clay did not "take Ms. Blandon and point out" Mr. Perry. JA 44a. In addition, Officer Clay said that she did not ask Ms. Blandon whether she had continually watched the man from the time of the theft to the time the police arrived or if she had left the window at any point. JA 62a.

Regarding the lighting conditions, though it was approximately 2:30 a.m., JA 36a, Officer Clay said the parking lot was "fairly well lit" and that the lighting was "excellent." JA 56a-58a. She said there were some lights on the building next to the parking lot and some streetlights on a nearby street, the latter being partially blocked by trees and leaves. JA 56a. However, Officer Clay acknowledged that the parking lot was large, JA 42a, that there were at least 12-15 cars in it, JA 56a, and that some parts of the lot were dark. JA 57a. Officer Clay's testimony did not describe the location of the neighbor's car in the parking lot.

After Ms. Blandon claimed to identify Mr. Perry as the perpetrator, the police arrested him. JA 84a. At a later date, the police interviewed Ms. Blandon at the police station and presented her with a photographic array containing Mr. Perry's picture. Ms. Blandon was unable to identify anyone in the photographic array. JA 59a-60a, 84a.

II. The Motion To Suppress, The Trial Court Ruling, And The Trial

Mr. Perry was charged with theft by unauthorized taking[3] (taking the items from the car) and criminal mischief[4] (damaging the car in the break-in). JA 82a. Prior to trial, he moved to suppress the evidence that Ms. Blandon had identified him to Officer Clay on the grounds that admission of the evidence at trial would violate his right to due process of law. JA 12a-17a, 82a-87a.

After hearing the testimony of Officer Clay, and considering the facts described above, the trial court found that Ms. Blandon's identification at the scene was "spontaneously given" and "without any inducement" from the police. JA 85a-86a. The court found that "Officer Clay did not manufacture the situation in order to secure an identification." JA 86a. Nor was the identification "derived from any suggestive technique employed by the police." JA 86a. The trial court recognized that the reliability of the identification was subject to question because "the parking lot was dark," Mr. Perry "was standing with a uniformed police officer in the parking lot where the crime

3. N.H. Rev. St. Ann. 637:3 (2011).

4. N.H. Rev. St. Ann. 634:2 (2009).

occurred," Mr. Perry was "the only black male in the vicinity," and Ms. Blandon was unable to pick Mr. Perry from a photographic array constructed by the police at a later time. JA 86a. Nevertheless, the trial court ruled that "because the police procedures were not unnecessarily suggestive, the identification is admissible, and the Court need not consider whether the identification was otherwise reliable." JA 87a. Thus, while Mr. Perry could attack the reliability of the identification in front of the jury, the trial court would not consider excluding the identification as unreliable where "the police procedures were not unnecessarily suggestive." JA 87a. In light of its analysis, the trial court did not make its own factual determination of the reliability of Ms. Blandon's identification of Mr. Perry. JA 82a-87a.

Mr. Perry was subsequently tried before a jury. JA 89a. Both Officer Clay and Ms. Blandon testified that on the night of the crime Ms. Blandon identified Mr. Perry as the thief. JA 173a, 219a-225a. However, Ms. Blandon did not identify Mr. Perry in court and she acknowledged that she was unable to identify Mr. Perry in the photo lineup because she "did not clearly perceive the details of his face." JA 235a. Ms. Blandon's husband and the neighbor who was the victim of the theft both testified to having seen Mr. Perry in the parking lot on the night of the crime, but neither claimed to have actually witnessed Mr. Perry take the items from the car. JA 145a-146a, 243a-244a. Mr. Perry testified on his own behalf, telling the jury, as he had Officer Clay, that he found the stolen items in the parking lot and was moving them. JA 305a-369a. At the conclusion of the trial, Mr. Perry was acquitted of the criminal mischief charge but found guilty of theft. JA 408a-409a.

III. The New Hampshire Supreme Court Order

Mr. Perry appealed his conviction to the New Hampshire Supreme Court on the grounds that the trial court wrongly denied his pretrial motion to suppress. JA 9a. He filed a brief arguing that the trial court should have found the Due Process Clause of the Fourteenth Amendment applicable to unreliable eyewitness identifications regardless of whether the identification was orchestrated by the police. JA 414a-437a. After briefs were filed by Mr. Perry and the State, the court issued an order stating that oral argument was unnecessary and affirming the trial court's denial of the motion to suppress. JA 9a-11a.

The New Hampshire Supreme Court's order noted that Mr. Perry raised the same argument that had been made in *State v. Addison*, 160 N.H. 792, 799-804 (2010), JA 10a, and that Mr. Perry relied on the same First Circuit cases cited by Addison, *United States v. Bouthot*, 878 F.2d 1506 (1st Cir. 1989), and *United States v. De León-Quiñones*, 588 F.3d 748 (1st Cir. 2009). JA 10a. The court rejected Mr. Perry's claim that due process applies even when the suggestive circumstances were not "intentionally orchestrated by the police." JA 10a-11a. The court relied on its decision in *Addison*, explaining that:

> We recently rejected this argument, however, stating: "We decline to adopt the First Circuit's reasoning that a *Biggers* analysis is required in all 'suggestive identification procedures.' *Bouthot*, 878 F.2d at 1516. Instead, we hold that the *Biggers* analysis does not apply to a potentially suggestive out-of-court identification

> where there is a complete absence of improper state action." *State v. Addison*, 160 N.H. ___ (decided October 19, 2010).

JA 10a. Having reaffirmed this conclusion of law and upon finding that the evidence supported the trial court's determination that there was no improper police conduct, JA 10a-11a, the New Hampshire Supreme Court affirmed the denial of Mr. Perry's motion to suppress. The court did not engage in any further legal or factual analysis. Specifically, like the trial court, the New Hampshire Supreme Court did not conduct a factual analysis of the reliability of the identification. JA 11a.

SUMMARY OF ARGUMENT

The New Hampshire Supreme Court should not have required Mr. Perry to show "improper state action" as a prerequisite to his challenge of unreliable eyewitness identification evidence on due process grounds. This Court's cases require a showing of impermissibly suggestive circumstances, but have not required an additional showing that the circumstances were caused by improper state action. The additional requirement imposed by the New Hampshire Supreme Court is contrary to the rationale and operation of the due process safeguards as described in this Court's cases.

In a series of decisions between 1967 and 1977, the Court recognized that eyewitness identification evidence is uniquely susceptible to suggestion, prone to error, and resistant to correction through the normal criminal trial process. Experience and science have since confirmed the Court's findings. In light of its concerns

about eyewitness identification evidence, the Court held that "fairness as required by the Due Process Clause" obligates trial courts to adhere to certain safeguards when identification evidence arises from impermissibly suggestive circumstances. The Court further held that "reliability is the linchpin in determining the admissibility of identification testimony." The Court implemented that test by instructing lower courts to consider the totality of the circumstances, including the suggestive influence, whether the influence was necessitated by an emergency or exigency, and other factors identified by the Court, to determine whether there is "a very substantial likelihood of misidentification."

The Court explained that the admissibility of eyewitness identification evidence depends on the nature of the due process right at stake. A suspect's constitutional rights are not violated at the moment when a witness makes an unreliable out of court identification, but rather when the State offers the unreliable identification evidence during trial. Thus, while the exclusion of unreliable identification evidence may deter the police from orchestrating suggestive circumstances, deterrence is not the primary purpose of the due process safeguards. For this reason, the Court held that even if the police engage in impermissibly suggestive conduct, eyewitness identification evidence is admissible if it is reliable.

By the same token, the due process safeguards should not be construed to allow the State to claim the absence of police involvement as justification for the admissibility of identification evidence which poses a "very substantial risk of misidentification." If reliability is the rationale for allowing the State to use identifications which were

influenced by the police, then it must also be the rationale for limiting the State's use of unreliable identification evidence at trial even when the suggestive circumstances were not orchestrated by the police. The Court indicated as much when it noted both unintended influence by the police and the particular circumstances of the encounter between the witness and the suspect as potential threats to reliability.

Rather than recognizing these principles, the New Hampshire Supreme Court mistakenly employed a deterrence-based exclusionary rule by equating "impermissibly suggestive" circumstances with "improper state action." Violations of the Fourth and Fifth Amendments are subject to such an exclusionary rule which ignores reliability in favor of deterring future police misconduct. In that context, police conduct or other state action occurring outside of the courtroom is required in order to establish a constitutional claim. However, those Fourth and Fifth Amendment exclusionary rule principles have no bearing on the due process analysis of eyewitness identification evidence where reliability, rather than deterrence, is the goal, and where the violation occurs when the State offers the evidence in court.

As recognized by the trial court, Mr. Perry had strong claims regarding the suggestive circumstances and the reliability of Ms. Blandon's identification. Mr. Perry's constitutional claim deserved to be heard, especially since Ms. Blandon's out of court identification turned out to be the crucial evidence at trial. For all of these reasons, the decision of the New Hampshire Supreme Court should be vacated and the case remanded for proceedings consistent with a holding that the Due Process Clause does not

require a criminal defendant to show improper state action or intentional orchestration by the police in order to challenge the reliability of an eyewitness identification.

ARGUMENT

I. This Court Has Recognized That Due Process Requires Safeguards Regarding The Admissibility Of Eyewitness Identification Evidence Because It Is A Uniquely Unreliable Kind Of Evidence.

Under the Fourteenth Amendment, a State shall not "deprive any person of . . . liberty . . . without due process of law." The requirement of due process embodies certain core principles of fairness, [5] including the principles which limit the use of unreliable eyewitness identification evidence in criminal trials. In a series of cases from *Stovall v. Denno*, 388 U.S. 293 (1967), to *Manson v. Brathwaite,* 432 U.S. 98 (1977), this Court cited its concerns for "fairness as required by the Due Process Clause" in recognizing safeguards against the use of unreliable eyewitness identification evidence. *Brathwaite*, 432 U.S. at 113.[6]

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5. *See generally Michigan v. Bryant*, 131 S.Ct. 1143, 1162 n. 13 (2011); *United States v. Lovasco*, 431 U.S. 783, 790 (1977); *Rochin v. California*, 342 U.S. 165, 170-72 (1952); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948).

6. The Court did not say that these cases created any new principles of law. *Stovall* described the due process principles as "recognized." *Stovall*, 388 U.S. at 301 (citing *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966)). In *Brathwaite,* the Court commented that *Stovall* "did not . . . establish a new standard of due process." *Brathwaite,* 432 U.S. at 114.

Stovall was decided the same day as *United States v. Wade,* 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967). In *Wade* the Court made extensive findings, and concluded that eyewitness identifications are particularly untrustworthy and uniquely resistant to correction at trial, with a resulting "high incidence of miscarriage of justice." *Wade,* 388 U.S. at 228. Although *Wade* dealt with the right to counsel in police lineup procedures, the Court explained in *Brathwaite* that, "The driving force behind [*Wade*, *Gilbert*, and *Stovall*], all decided the same day, was the Court's concern with the problems of eyewitness identification. Thus, *Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability." *Brathwaite*, 432 U.S. at 111-12.

The findings which gave rise to this concern explain the due process safeguards recognized in the cases leading up to and including *Brathwaite*. The Court noted that "Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress." *Id.* In this context, the witness's recollection is vulnerable to distortion or suggestion. *Wade,* 388 U.S. at 228-29. The suggestive influence may result from police procedures, but that is not necessarily so because "[t]he witness's recollection of the stranger can be distorted easily by the circumstances *or* by the later actions of the police." *Brathwaite*, 432 U.S. at 112 (emphasis added). The less detail the witness has actually observed, the more likely the witness is to be susceptible to influence. The "dangers [of suggestion or distortion]. . . are particularly grave when the witness' opportunity for observation [of the suspect] was insubstantial." *Wade*, 388 U.S. at 229.

Moreover, correction of such influence is difficult because "once a witness has picked out the accused," the witness "is not likely to go back on his word." *Id.* In those circumstances, "though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability." *Id.* at 235. Thus, the Court explicitly disagreed with the view, described by Justice Black in repeated dissents, that the evaluation of eyewitness identification testimony is always a matter left to the adversary process and trial by jury. *Foster v. California*, 394 U.S. 440, 446-47 (1969); *Simmons v. United States*, 390 U.S. 377, 395-96 (1968); *Stovall v. Denno*, 388 U.S. 293, 304-06 (1967).

Finally, the Court recognized that, in addition to its unique potential for unreliability and resistance to effective challenge at trial, eyewitness identification evidence may have such a powerful effect on jurors as to make the result of the trial a foregone conclusion. "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation . . . with little or no effective appeal from the judgment there rendered by the witness – 'that's the man.'" *Wade*, 388 U.S. at 235-36. *See also Foster*, 394 U.S. at 443.

Based on the "driving force" of these concerns, *Brathwaite*, 432 U.S. at 111-12, the Court held that due process protects a criminal defendant against being convicted on the basis of eyewitness identification evidence arising from "impermissibly suggestive" circumstances if the evidence is "very substantially likely to lead to misidentification." *Brathwaite*, 432 U.S. at 116; *Neil v.*

Biggers, 409 U.S. 188, 198-99 (1972); *Coleman v. Alabama*, 399 U.S. 1, 5 (1970); *Foster,* 394 U.S. at 443; *Simmons*, 390 U.S. at 384; *Stovall,* 388 U.S. at 302.[7]

The Court said that reliability is the focus of due process in this context, and thus, "reliability is the linchpin in determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114. *See also Biggers*, 409 U.S. at 198 (the "evil" to be avoided is a very substantial likelihood of misidentification). Reliability is assessed after consideration of the "totality of the circumstances."

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7. The exact words used to describe the standard have varied slightly. The Court sometimes used the phrase "unnecessarily suggestive" and other times used "impermissibly suggestive," but it does not appear that different meanings were intended. *Brathwaite*, 432 U.S. at 99 (referred to both phrases but described the issue presented as whether an identification arising from unnecessarily suggestive procedures should be excluded without consideration of reliability); *Biggers*, 409 U.S. at 198-99 (unnecessarily suggestive); *Coleman*, 399 U.S. at 5 (impermissibly suggestive); *Foster*, 394 U.S. at 441 (unnecessarily suggestive); *Simmons*, 390 U.S. at 384 (impermissibly suggestive); *Stovall*, 388 U.S. at 302 (unnecessarily suggestive). The Court also sometimes referred to the "likelihood of *irreparable* misidentification" (emphasis added), *see, e.g.*, *Stovall*, 388 U.S at 302, but in *Biggers* the Court explained that the word "irreparable" applies in cases where the due process objection was to an in court identification deriving from an out of court identification, as opposed to testimony only describing an out of court identification, 409 U.S. at 198. Since Mr. Perry's case presents the latter circumstance, the word "irreparable" is omitted here. Lastly, some of the cases referred to a "substantial likelihood of misidentification," *see*, *e.g.*, *Biggers*, 409 U.S. at 201, but when the Court summarized its prior cases in *Brathwaite* it referred to a "*very* substantial likelihood of misidentification," 432 U.S. at 116 (emphasis added), so that phrase is used here.

Brathwaite, 432 U.S. at 113; *Biggers*, 409 U.S. at 199; *Stovall*, 388 U.S. at 302. Regarding the suggestive influence, trial courts were instructed to consider both the degree of suggestion and whether the suggestion was necessitated by an emergency or exigency. *Simmons*, 390 U.S. at 385 (suggestive circumstances falling short of a showup weighed against need for swift law enforcement action). Regarding the identification of the suspect by the witness, the Court identified five factors: the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the time elapsed between the observation of the crime and the confrontation. *Biggers*, 409 U.S. at 199-200. These factors reflect the Court's concern that an excited or disturbed witness who can offer no details is particularly prone to suggestive influence. *Brathwaite*, 432 U.S. at 112; *Wade*, 388 U.S. at 229. Lastly, putting these factors together with the suggestive circumstances, the Court said that "[a]gainst these factors is to be weighed the corrupting effect of the suggestive identification itself." *Brathwaite*, 432 U.S. at 114.

Two cases illustrate the application of these safeguards and why police conduct is a factor in the analysis, but not a required element of a due process claim. In *Foster*, the police engaged in conduct which was clearly suggestive. The witness failed to make a positive identification of the defendant in a three person lineup where the other two men were substantially shorter than the defendant. *Foster*, 394 U.S. at 441. The police then conducted a showup, presenting the defendant to the witness one on one. The witness still said, "truthfully - I was not sure."

Id. A week later another lineup was conducted, after which the witness declared he was "convinced" of his ability to identify the defendant. *Id*. at 442. The witness also identified the defendant at trial. *Id*. This Court held that the identification evidence should have been excluded from the trial because it was "all but inevitable" that the witness would "identify petitioner whether or not he was in fact 'the man.'" *Id*. at 443 (citation omitted).

In *Biggers*, the police also conducted a showup in which the witness viewed the defendant one on one. *Biggers*, 409 U.S. at 195. This Court agreed that the showup was unnecessary but declined to hold that "unnecessary suggestiveness alone requires exclusion of the evidence." *Id*. at 198-99. The Court rejected the idea that *Foster* recognized a *per se* exclusionary rule applicable whenever unnecessary police conduct has a suggestive influence on an eyewitness. *Id*. at 198. Instead, the Court held that there is no "strict rule barring evidence of unnecessarily suggestive confrontations." *Id.* at 199. The Court explained that:

> It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But . . . the admission of evidence of a showup without more does not violate due process.

Id. at 198. Thus, upon reviewing the evidence in *Biggers* and finding the identification reliable, the Court ruled it admissible notwithstanding the showup conducted by the police. *Id*. at 201.

Together, *Foster* and *Biggers* demonstrate that although police conduct contributing to suggestive circumstances is an important factor (when it is present), it is a factor because it may have influenced the witness and the reliability of the identification, not because the creation of suggestive circumstances by the police violates the Constitution. In short, "reliability," rather than the presence or absence of some "improper" conduct by the police, "is the linchpin for determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114.

II. Experience And Science Have Verified The Court's Findings That Eyewitness Identification Evidence Is Uniquely Prone To Error, Susceptible To Suggestion, And Resistant To Correction Through The Normal Criminal Trial Process.

Because the Court has not addressed the reliability of eyewitness identification evidence since 1977, it is important to recognize that experience and science have confirmed the Court's findings in *Wade* and *Brathwaite* that eyewitness identification evidence is unique and presents dangers not equaled by other kinds of evidence. Since *Brathwaite*, numerous published studies establish that eyewitness misidentification evidence is by far the leading cause of wrongful convictions.[8] Forensic

8. E. Connors, T. Lundregan, N. Miller, & T. McEwan, Convicted by Juries, Exonerated by Science: Case Studies in

DNA analysis in particular has demonstrated that misidentifications by eyewitnesses continue to lead to a high incidence of miscarriages of justice, as previously recognized in *Wade*. *Wade,* 388 U.S. at 228.

In a study of 250 cases in which defendants were exonerated after conviction, Professor Brandon L. Garrett stated that the "role of mistaken eyewitness identifications in these wrongful convictions is now well known. Eyewitnesses misidentified 76% of the exonerees (190 of 250 cases)."[9] Furthermore, Professor Garrett's original study of 200 cases indicated that eyewitness misidentification evidence was the leading contributing factor to wrongful convictions and was four times more likely to contribute to a wrongful conviction than a false confession.[10]

THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); B.L. CUTLER & S.D. PENROD, MISTAKEN IDENTIFICATION: EYEWITNESSES, PSYCHOLOGY, AND THE LAW (1995); Jennifer L. Devenport and Brian L. Cutler, *Impact of Defense-Only and Opposing Eyewitness Experts on Juror Judgments*, 28 LAW & HUM. BEHAVIOR No. 5 569 (2004); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76 (2008); C.R. Huff, *Wrongful Conviction: Societal Tolerance of Injustice,* 4 RESEARCH IN SOC. PROBLEM. & PUB. POL'Y. 99 (1987); B. SCHECK, P. NEUFELD, & J. DWYER, ACTUAL INNOCENCE (2000); Gary L. Wells, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience*, 83 JOURNAL OF APPLIED PSYCHOLOGY No. 3 360 (1998).

9. Brandon L. Garrett, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (Harvard 2011).

10. Garrett, *supra,* note 8, at 76.

In a Department of Justice report studying twenty-eight felony convictions subsequently overturned on the basis of DNA evidence, 85% of the convictions resulted primarily from erroneous eyewitness identifications.[11] Attorney General Janet Reno explained:

> Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible. Even the most honest and objective people can make mistakes in recalling and interpreting a witnessed event; it is the nature of human memory.[12]

In a 2009 Innocence Project study of over 200 cases in which convicted defendants were exonerated by DNA evidence, mistaken eyewitness identifications accounted in whole or in part for 75% of the wrongful convictions.[13] Specifically, the Innocence Project found that "[o]ver 175 people have been wrongfully convicted based, in part, on eyewitness misidentification and have been later proven

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11. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y. & L. 3, 23–24 (2001).

12. Nat'l Inst. of Justice, U.S. Dep't of Justice, Eyewitness Evidence: A Guide for Law Enforcement at iii (1999).

13. Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAVIOR No.1 1, 1 (2009). *See generally* E. Connors, *supra*, note 8; SCHECK ET AL., *supra,* note 8; Wells, *supra,* note 8, *at* 360 (1998).

innocent through DNA testing."[14]

Although some scholars argue that many eyewitness misidentifications are properly discovered before or during trial—since otherwise their inherent unreliability would lead to vastly higher rates of wrongful convictions than have thus far been discovered[15] — even those scholars acknowledge that many wrongful convictions go unnoticed. As noted in a 2005 article, the greater availability of access to DNA in rape cases, the higher rate of misidentification in robbery cases as compared to rape cases (a 2:1 ratio), and the large number of robberies committed each year suggests that:

> [T]he clearest and most important lesson from the recent spike in rape exonerations is that the false convictions that come to light are the tip of an iceberg. Beneath the surface there are other undetected miscarriages of justice in rape cases without testable DNA, and a much larger group of undetected false convictions in robberies and other serious crimes of violence for which DNA identification is useless.[16]

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14. Innocence Project, Reevaluating Lineups: Why Witnesses Make Mistakes And How To Reduce the Chance of a Misidentification at 3 (2009).

15. *See generally* Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. Legal Stud. 395 (1987).

16. Samuel Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. of Crim. L. & Criminology 523, 530-31 (2005).

Another study of over one thousand wrongful convictions has clarified that recall errors by witnesses are the leading cause of wrongful convictions.[17]

The danger described in *Wade*, 388 U.S at 235-36, of a witness's false confidence – the witness who has declared "that's the man" and is thereafter mistakenly convinced of the correctness of the identification – has also been confirmed by social science. Several empirical studies have shown that "eyewitnesses often seem actually to believe that their false identifications are in fact accurate identifications," demonstrating that confidence may be a very poor indicator of identification accuracy.[18] In his review of actual cases of exoneration, Professor Garrett said, "almost all of the eyewitnesses in these trials expressed complete confidence at trial that they had identified the attacker."[19]

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17. Gary L. Wells, E.P. Seelau, S.N. Rydell, & C. A. E. Luus, *Recommendations for Properly Conducted Lineup Identification Tasks*, in Adult Eyewitness Testimony: Current Trends and Developments 223–24 (D.F. Ross, J.D. Read & M.P. Toglia, eds.) (1994).

18. *Id.* at 224. *See also* Siegfried Ludwig Sporer, Steven Penrod, Don Read & Brian Cutler, *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 Psychol. Bull. No. 3 315 (1995); C.A.E. Luus and Gary L. Wells, *Eyewitness Identification Confidence, in Adult Eyewitness Testimony: Current Trends and Developments* 348 (D.F. Ross, J.D. Read & M.P. Toglia, eds.) (1994); R.C.L. Lindsay, *Confidence and Accuracy of Eyewitness Identification from Lineups*, 10 Law & Hum. Behavior No. 3 229 (1986).

19. Garrett, *supra*, note 9, at 63.

These recent findings validate the concerns described by the Court over three decades ago in *Wade* and *Brathwaite*. The findings on which the Court relied in those cases remain valid and the safeguards the Court recognized remain an essential part of the American criminal justice system.

III. The New Hampshire Supreme Court's Requirement Of "Improper State Action" Is Unsupported By This Court's Cases And Conflicts With The Court's Explanation Of The Rationale And Operation Of The Due Process Safeguards.

The New Hampshire Supreme Court began its analysis of Mr. Perry's claim by stating, "Initially, we inquire into whether the identification procedure was impermissibly or unnecessarily suggestive." JA 9a. However, after finding that the police had not employed a "suggestive technique" to obtain the identification, JA 10a, the court then described a limitation not found in this Court's case law. The New Hampshire Supreme Court held that "suggestive" influences are limited to those caused by "improper state action." The court "rejected the argument" that "a suggestive scenario remains suggestive even if it is not intentionally orchestrated by the police." JA 10a. The court further stated that "the *Biggers* analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action." JA 480a-487a; *Addison*, 160 N.H. at 799-803.

Thus, according to the New Hampshire Supreme Court, even if impermissibly suggestive circumstances produce an eyewitness identification which is very

substantially likely to lead to misidentification, due process offers no protection against the admissibility of that evidence at trial unless "improper state action" produced the identification. This ruling should be reversed because it is inconsistent with this Court's explanation of the rationale and operation of the due process safeguards and because it imposes a limitation not recognized by this Court.

A. Admissibility Is Determined By Reliability At Trial, Not By Whether Improper Police Conduct Will Be Deterred

The New Hampshire Supreme Court's requirement of "improper state action" treated the due process safeguards regarding eyewitness identification as akin to the exclusionary rule which applies to Fourth Amendment violations. In essence, the court said that where the police have not done anything wrong, there is no reason to punish the State by excluding identification evidence from the trial. By linking inadmissibility to police misconduct, the court imported Fourth Amendment exclusionary rule principles into the due process safeguards regarding identification evidence. This was a mistake because the Fourth Amendment exclusionary rule and the due process safeguards regarding identification evidence have different goals, operate differently, and address state action in completely different contexts.

The goal of the Fourth Amendment exclusionary rule is to "compel respect" for the amendment's prohibition against unreasonable searches and seizures. *Davis v. United States*, ___ U.S. ___, ___ (2011) (slip op., at 6). *See also Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524

U. S. 357, 363 (1998); *United States v. Leon*, 468 U.S. 897, 906-13 (1984); *Illinois v. Krull*, 480 U.S. 340, 347-52 (1987). "The rule's sole purpose . . . is to deter Fourth Amendment violations" by imposing the sanction of excluding evidence at trial. *Davis v. United States*, ___ U.S. ___, ___ (2011) (slip op., at 6). Thus, the rule does not apply when it would have no deterrent value. For example, the rule does not operate when the police have acted in objective good faith reliance on a warrant issued by a judge. *Leon*, 468 U.S. at 908. Similarly, the exclusionary rule does not apply to a search or seizure by a private person because there is no constitutional violation. The Fourth Amendment protection against unreasonable searches and seizures "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government.'" *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 487-90 (1971).

The Fourth Amendment exclusionary rule's goal of deterrence is at odds with the reliability goal of the due process safeguards for identification evidence. Rather than looking to reliability as the linchpin for determining admissibility, the exclusionary rule "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Davis v. United States*, ___ U.S. ___, ___ (2011) (slip op., at 7). When a trial court finds that the police obtained evidence in direct violation of the Fourth Amendment, the court does not then determine admissibility by looking at whether the evidence is nonetheless reliable. To do so would undermine the goal of deterrence.

On the other hand, if an eyewitness identification is "reliable and trustworthy" it is admitted over a due process objection, even if the police orchestrated an unfair and suggestive procedure which produced the identification. *Brathwaite*, 432 U.S. at 109, 114-17 (identification deriving from unnecessary photo showup admitted in the absence of a very substantial likelihood of misidentification); *Biggers*, 409 U.S. at 199-201 (identification deriving from unnecessary police station showup admitted in the absence of risk of substantial likelihood of misidentification). This is why the Court did not accept the defendant's argument for a *per se* exclusionary rule in *Biggers*. 409 U.S. at 198-99. Deterrence is sometimes a desirable consequence of the exclusion of unreliable identification evidence on due process grounds, but reliability is the goal. *Brathwaite,* 432 U.S. at 112-13. If deterrence were the goal, evidence deriving from intentionally suggestive procedures would always be excluded, the consequence explicitly rejected in *Biggers*. 409 U.S. at 198.

The two sets of principles are also distinguished by the point in the criminal justice process at which the Constitution is violated. The Fourth Amendment is violated at the moment the police conduct an unreasonable search or seizure. Due process, however, is not violated when the police conduct an unnecessarily suggestive identification procedure, not even when the police intentionally create the suggestive circumstances. A "showup without more does not violate due process." *Biggers*, 409 U.S. at 198. Rather, the violation of due process occurs when the eyewitness identification evidence is used in court and then only if it creates a very substantial risk of misidentification.

The point finds further explanation in an opinion, cited in *Brathwaite*, which Justice Stevens wrote while on the Seventh Circuit Court Of Appeal:

> [A] showup does not itself violate any constitutional right of the suspect. Unlike a warrantless search, which may violate a constitutionally protected interest in privacy, the identification of a suspect -- whether fair or unfair -- does not necessarily affect any constitutionally protected interest of the suspect. The due process clause applies only to proceedings which result in a deprivation of life, liberty or property. The due process issue, therefore, does not arise until testimony about the showup -- or perhaps obtained as a result of the showup -- is offered at the criminal trial. If that evidence is unfairly prejudicial, the trial judge may have a constitutional obligation to exclude it, or possibly to mitigate its impact by an appropriate cautionary instruction to the jury. But if a constitutional violation results from a showup, it occurs in the courtroom, not in the police station.

United States ex rel. Kirby v. Sturges, 510 F.2d 397, 406 (7th Cir. 1975); *see Brathwaite*, 432 U.S. at 113.

For these reasons, the Court noted in *Brathwaite* that the Fourth Amendment exclusionary rule principles simply have no bearing on the due process safeguards regarding identification evidence:

> 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.

Brathwaite, 432 U.S. at 113 n. 13.

Therefore, the error of the the New Hampshire Supreme Court was in looking for state action at the wrong point. The court required state action prior to trial at the point of the suggestive influence on the witness. The court failed to recognize that the state action which violates due process occurs later, in court, when the unreliable identification is offered as evidence by the State in its effort to deprive the defendant of his liberty.

B. The Fact That The Police Are Often Involved In A Witness's Identification Of A Suspect Does Not Establish A Rule That Due Process Is Inapplicable In Other Situations.

Most eyewitness identifications occur during police investigations. For that reason, it is not surprising that the relevant cases which have come before this Court involved identifications made during procedures conducted by police. The presence of this common fact does not mean, however, that the Court implicitly created a rule that due process only protects against unreliable identifications arising from police conduct. To the contrary, the language and reasoning in the Court's opinions show that while the police are sometimes involved in the creation of the

suggestive circumstances, their involvement is not a required element of a due process claim.

The Court made clear in *Wade* and *Brathwaite* that its primary concern was with reliability, not with the regulation of police misconduct. In *Wade* the Court said:

> We do not assume that these risks [of unfairness] are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification.

Wade, 388 U.S. at 235. For that same reason, the Court said that its concerns extended to suggestiveness which is created "unintentionally." *Id.* at 229 ("suggestion can be created intentionally or unintentionally in many subtle ways").

Brathwaite reiterated that the concerns identified in *Wade* were the basis of both the right to counsel cases and the due process cases. *Brathwaite*, 432 U.S. at 112. In addition, and most significantly here, the *Brathwaite* Court used the disjunctive "or" in referring to the source of its concerns. In describing the typical encounter between a witness and a stranger who is committing a crime, the Court said, "[t]he witness' recollection of the stranger can be distorted easily by the circumstances or by the later actions of the police." *Id.* Thus, the Court was concerned with all suggestive influences, not just those orchestrated by the police.

Finally, this recognition by the Court that suggestive circumstances are not limited to "improper police conduct" is seen in the other guiding principles set forth by the Court. The constant rule from *Stovall* to *Brathwaite* is that "a claim must be evaluated in light of the totality of the circumstances." *Simmons*, 390 U.S. at 383; *see also Brathwaite*, 432 U.S. at 113; *Biggers*, 409 U.S. at 199; *Coleman*, 399 U.S. at 4; *Foster*, 394 U.S. at 442; *Stovall*, 388 U.S. at 302. Nowhere does the Court instruct trial courts to disregard suggestive circumstances which do not involve police conduct. Similarly, the Court's summary of its case law in *Brathwaite,* and its conclusion that reliability is the linchpin in determining admissibility, do not include an exception for unreliable identifications which are not caused by the police. *Brathwaite*, 432 U.S. at 104-14.

For these reasons, while this Court's cases have happened to involve police conduct which resulted in the challenged eyewitness identification evidence, that fact is not a sound basis on which to conclude that the Court has limited the due process safeguards to those circumstances.

IV. Other Courts Make A Similar Error When They Rely On *Colorado v. Connelly*.

In decisions similar to that of the New Hampshire Supreme Court, some courts analogize to *Colorado v. Connelly*, 479 U.S. 157 (1986), to conclude that the due process safeguards against unreliable identification evidence do not apply unless the suggestive circumstances

are the product of "state action." [20] The reliance of those courts on *Connelly* is misplaced for a number of reasons.

Connelly was a confession case, not an eyewitness identification case. The defendant approached a uniformed police officer and gave an unsolicited murder confession. *Connelly*, 479 U.S. at 160. After what appeared to the police to be a valid *Miranda* waiver, the defendant gave a more detailed confession. *Id.* Unbeknownst to the police, the defendant suffered from a serious mental illness. *Id.* at 161. The defense offered expert testimony to show that, as a result of his mental illness, "the defendant's initial statement was not the product of a rational intellect and a free will." *Id.* at 162. The evidence also showed that, although the defendant understood his rights, his mental illness prevented him from waiving his rights of his own free will. *Id.* Nonetheless, since the police were unaware of Connelly's mental illness, they did not intentionally violate his rights when they took his confession or when they obtained the waiver of his *Miranda* rights. *Id.* at 165.

The Colorado Supreme Court found that use of the defendant's confession at trial would violate due process, but this Court reversed. In doing so, the Court did not discuss *Wade*, *Biggers*, *Brathwaite*, or any of the other cases addressing eyewitness identification evidence. Instead, *Connelly* was decided on the basis of the same deterrence-based exclusionary rule which applies to

20. *See*, *e.g.*, *People v. Owens*, 97 P.3d 227, 234 (Colo. App. 2004); *State v. Holliman*, 570 A.2d 680, 683 (Conn. 1990); *State v. Parker*, 991 So. 2d 411, 415-16 (Fla. Dist. Ct. App. 2008); *State v. Pailon*, 590 A.2d 858, 861-63 (R.I. 1991). *See also*, *People v. Padilla*, 2010 Cal. App. Unpub. Lexis 8644 (Nov. 2010); *People v. Boyd*, 222 Cal. App. 3d 541, 574 (1990).

Fourth Amendment claims. The Court said that its cases suppressing involuntary confessions dealt with police misconduct and "focused on the crucial element of police overreaching." *Connelly*, 479 U.S. at 164. Citing both Fourth and Fifth Amendment cases, the Court repeatedly referred to "the exclusionary rule" applicable to violations of those amendments. The Court noted that the "exclusionary rule imposes a substantial cost on the societal interest in law enforcement" and said that the "purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." *Id.* at 166. Thus, as in the Fourth Amendment cases, the *Connelly* holding centered on deterrence, in contrast to the Court's eyewitness identification cases which disavowed deterrence as the primary goal. *Brathwaite*, 432 U.S. at 109-13; *Biggers*, 409 U.S. at 196-99.

Connelly also states that a defendant has no due process interest in a determination of the reliability of a confession before it is submitted to the jury. *Connelly*, 479 U.S at 167. According to the Court, the confession of a mentally ill defendant "might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . not by the Due Process Clause of the Fourteenth Amendment." *Id.* Likewise, regarding the *Miranda* waiver, the Court said that its rulings regarding voluntariness of a confession have "nothing to do with the reliability of jury verdicts." *Id.* at 168. Thus, the inquiry regarding involuntary confessions from mentally ill defendants is entirely different from the inquiry in the eyewitness identification cases where this Court's rule for determining admissibility focuses on reliability in order to avoid misidentification during jury

trials. *See*, *e.g.*, *Biggers*, 409 U.S. at 198 (the "primary evil" to be avoided is misidentification). In addition, as described above, this Court explicitly disagreed with Justice Black's dissents in which he asserted that the rules of evidence and the trial process provide sufficient protection against unfairness in the use of eyewitness identification evidence. *Foster,* 394 U.S. at 446-47; *Simmons,* 390 U.S. at 395-96; *Stovall*, 388 U.S. at 304-06.

In the same vein, the *Connelly* Court made no findings regarding the general reliability of confessions given by mentally ill defendants. The Court said, "Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed . . . ." *Connelly*, 479 U.S. at 167. The Court rejected that invitation because it would require "a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision." *Id*. at 165-66. Nor did the Court credit reports, research, or studies which examined whether mentally ill defendants gave false confessions. In these respects, again, *Connelly* differs from *Wade* and *Brathwaite*, where the Court made extensive findings based on research which it described at length, and then based its holdings on those findings. *Brathwaite*, 432 U.S. at 112; *Wade*, 388 U.S. at 228-35. It also differs from *Biggers* which counsels courts to look at the mental state of a witness insofar as degree of attention, level of certainty, and the effects of any suggestive influence. *Biggers*, 409 U.S. at 199.

Regarding the point at which the constitutional violation occurred, the Colorado Supreme Court held that the Due Process Clause was implicated because "sufficient

state action was present by virtue of the admission of the confession into evidence." *Connelly,* 479 U.S. at 165. This Court rejected that analysis because it "failed to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Id.* at 165. Yet, as described above with regard to eyewitness identification evidence, the Court holds that there is no constitutional violation at the moment when suggestive circumstances influence an eyewitness. Rather, the violation of due process occurs when the State uses the evidence at trial. *Brathwaite*, 432 U.S. at 113 n. 13; *Biggers*, 409 U.S. at 198.

Therefore, an analogy to *Connelly* is misplaced. *Connelly* deals with involuntary confessions from mentally ill defendants, a category of evidence the Court has not declared to be unique or so prone to causing miscarriages of justice as to warrant special protection. Most importantly, *Connelly* rejects reliabilty as a factor whereas this Court's identification cases declare it to be the guiding principle. In addition, as set forth in *Connelly*, the rule of exclusion applicable to confessions focuses on police conduct and is based on deterrence. In all of these respects, *Connelly* offers no guidance for interpreting this Court's eyewitness identification cases which focus on reliability with the aim of avoiding the risk of misidentification at trial.

V. There Are Good Reasons To Doubt Ms. Blandon's Identification Of Mr. Perry As The Thief She Saw From Her Apartment Window.

Mr. Perry recognizes that this Court does not normally consider factual claims which have not been addressed by the lower courts.[21] Thus, he does not ask the Court to rule on the reliability of Ms. Blandon's identification. He only seeks a ruling in his favor on the question of law presented and, thereafter, a remand. Nevertheless, it is important to note that his motion to suppress raised a significant issue regarding the reliability of Ms. Blandon's identification.

From her apartment window in the middle of the night, Ms. Blandon watched someone commit a theft from her neighbor's car. JA 48a-49a, 55a. She was never able to offer a description of the perpetrator other than that he was tall and a black man. JA 48a, 61a. She could not describe either the perpetrator's clothes or his face. JA 61a-62a. She then identified Mr. Perry as he stood alone with a police officer in what was, in effect, an accidental showup. Here again, she was looking from her window, down into the parking lot. JA 48a-49a. Later, when presented with a proper photo lineup, Ms. Blandon did not identify Mr. Perry, JA 59a-60a, a fact she explained at trial by saying that she did not clearly see his face. JA 235a. Thus, although not orchestrated by the police, Ms. Blandon's identification from her apartment window at night presents the kind of identification which this Court

21. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007); *Nat'l Collegiate Athletic Ass'n. v. Smith*, 525 U.S. 459, 469–70 (1999); *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253–54 (1999) (per curiam); *United States v. Bestfoods*, 524 U.S. 51, 72–73 (1998).

recognized is prone to error, namely an identification not based on a detailed description and made under the suggestive influence of apparent suspicion. *See Wade*, 388 U.S. at 229.

Furthermore, the identification was critical evidence at Mr. Perry's trial. The jury acquitted Mr. Perry of breaking into the car but convicted him of theft for taking items from the trunk. JA 408a-09a. Ms. Blandon testified that she saw the perpetrator take items from the trunk but she did not see him break into the car. JA 213a-14a, 227a. She was the only witness who claimed to have seen the theft which neither her husband nor the car owner saw. JA 145a-46a, 243a-44a. Moreover, her out of court identification of Mr. Perry to Officer Clay at the scene of the crime was only link between her observation of the perpetrator and Mr. Perry. Ms. Blandon was not asked to identify Mr. Perry at trial. Thus, without the evidence of her out of court identification, the jury may well have found the evidence lacking as to the theft charge, as it did with regard to the criminal mischief charge.

Considering these circumstances, the failure of the trial court and the New Hampshire Supreme Court to allow Mr. Perry to challenge the identification evidence on due process grounds was a significant error which should not stand.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Court vacate the decision of the New Hampshire Supreme Court and remand his case for proceedings consistent with a holding that the Due Process Clause does not require a criminal defendant to show improper state action by the police in order to challenge the admissibility of an identification arising from suggestive circumstances.

Respectfully submitted,

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