

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 OF *AMICI CURIAE*
WILTON DEDGE, HERMAN ATKINS,
JENNIFER THOMPSON, AND MICHELE
MALLIN IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
PRELIMINARY STATEMENT	1
SUMMARY OF ARGUMENT	4
ARGUMENT.....	5
I. Suggestive Circumstances, Whatever Their Source, Undermine The Reliability of Eyewitness Evidence	5
II. The Admission Of Evidence Made Unreliable By Suggestive Circumstances Creates A Substantial Risk of Misidentification And Wrongful Conviction.....	10
III. Courts Must Ensure the Reliability of Eyewitness Identifications Involving Suggestive Circumstances, Regardless of Source, Before They Are Admitted	13
IV. The Experiences of <i>Amici</i> Demonstrate The Threats Posed By Identifications Involving Suggestive Circumstances To Fair Trials and Their Determination of Truth	17
CONCLUSION	31

TABLE OF CITED AUTHORITIES

	<i>Page</i>
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<i>Manson v. Brathwaite</i> , 432 U.S. 98 (1977)	13, 14
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<i>Perry v. State of New Hampshire</i> , No. 08-8974 (U.S. Feb. 11, 2011)	9
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U.S. Const. amend XIV	2
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	<i>Page</i>
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Amy L. Bradfield et al., <i>The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy</i> , 87 J. APPLIED PSYCHOL. 112 (2002) . .	10, 11
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	<i>Page</i>
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	<i>Page</i>
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	<i>Page</i>
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	<i>Page</i>
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INTEREST OF *AMICI CURIAE*

Amici are exonerees who were wrongfully convicted and imprisoned for several years as a result of mistaken eyewitness identifications, and crime victims whose sincere but mistaken identifications helped convict and imprison innocent persons.¹ The Court's ruling in this case will determine whether defendants and crime victims may be denied procedural protections against future wrongful convictions based on unreliable and mistaken eyewitness identifications. Accordingly, *amici* submit this brief to illustrate that suggestive circumstances, regardless of whether they are the result of improper state action, can create a substantial risk of misidentification that will irreparably compromise a defendant's right to a fair trial, and inevitably result in the wrongful conviction of innocent persons.

PRELIMINARY STATEMENT

The purpose of a criminal trial is to determine the truth regarding culpability, not only to assess whether the accused is guilty and deserving of punishment, but also to render justice for the victim and prevent the future occurrence of crime. Reliable evidence is the foundation of a fair trial and its determination of truth; it is essential for the service of these purposes of retribution, justice and

1. Pursuant to Supreme Court Rule 37.6, counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent to the filing of this brief from both parties have been filed with the Clerk.

prevention. Courts have a responsibility to the victim, the accused, and the public to ensure that evidence admitted at trial is sufficiently reliable, and properly of use to the jury that will make the final determination of truth.

Eyewitness misidentification is the single greatest cause of wrongful convictions in the United States, playing a role in more than 75% of convictions overturned by DNA testing.² This Court has long recognized the vagaries and vulnerabilities of eyewitness evidence, and the threats that identifications involving suggestive circumstances pose to the fairness of criminal trials. Indeed, this Court has held that the Due Process Clause of the Fourteenth Amendment requires trial courts to ensure the reliability of eyewitness identifications when they involve suggestive circumstances. However, the New Hampshire Supreme Court and other courts limit this protection to identifications involving suggestive circumstances intentionally orchestrated by state actors. By doing so, they misunderstand the due process interest underlying this Court's holding – the right not to be tried on the basis of an unreliable identification that carries a substantial risk of being mistaken. They also ignore other sources of suggestion that are just as likely to undermine the reliability of an identification, and an untold number of misidentifications that have resulted, and will result, in a wrongful conviction.

2. Innocence Project, *Eyewitness Misidentification*, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>. See also BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (2011) (finding that 190 of the first 250 DNA-based exonerations in the United States involved eyewitness misidentification).

Amici urge this Court to make clear that due process protection against unreliable eyewitness evidence extends to *all* identifications made under suggestive circumstances, not just those involving improper state action. Three decades of robust scientific research has abundantly demonstrated what this Court has long suspected, and what *amici* know all too well: suggestive circumstances, whatever their source, can produce unreliable eyewitness identifications that pose serious and unique threats to the fairness and integrity of a criminal trial, and cause a substantial likelihood of misidentification and wrongful conviction. *Amici* Wilton Dedge and Herman Atkins were convicted on the strength of misidentifications suggested by circumstances having nothing to do with police or prosecutorial misconduct. *Amici* Jennifer Thompson and Michele Mallin can attest that suggestive circumstances can cause even conscientious eyewitnesses exposed to sustained contact with a perpetrator to make a mistaken identification. As all of their cases³ illustrate, whether suggestive circumstances are orchestrated by the police or entirely unrelated to intentional state action, their potential effect is the same: the eyewitness takes the stand and, with conviction and confidence, even under cross-examination, provides the jury persuasive and often dispositive direct evidence implicating the accused that is patently unreliable – and frequently tragically wrong.

3. The facts of the crimes and mistaken identifications in the cases involving *amici* are taken from media reports, citations to which have been provided.

SUMMARY OF ARGUMENT

In criminal trials, eyewitness evidence – particularly when it comes from the victim – is often the most compelling and weighty evidence that a jury will consider. Yet, as recent scientific research has confirmed, this evidence is often fraught with unique reliability concerns that juries can not properly assess, because they do not fully comprehend the nature of memory and its susceptibility to contamination. This contamination results from external circumstances that suggest to the eyewitness something about the perpetrator or event that she did not actually observe, and thus unknowingly alter and define her memory of her observation.

Thus, it is up to the trial court, in its role as evidentiary gatekeeper, to assess the reliability of eyewitness identifications involving suggestive circumstances before they are admitted, regardless of their source. Indeed, this Court has already held that due process mandates such an assessment. When courts limit their pre-trial assessments of suggestiveness to circumstances involving improper state action, they ignore identifications that are similarly tainted, and just as unreliable. By undergoing the same assessments with identifications involving non-state suggestive circumstances, and by employing a number of available remedies when a substantial risk of misidentification is found, courts can ensure the defendant's right to a fair trial, and prevent future wrongful convictions.

Amici are living proof that identifications involving suggestive circumstances, regardless of their source, can lead to disastrous consequences. Their lives have

been seriously and irreversibly changed by mistaken identifications, by years lost in prisons for heinous crimes they did not commit, or by the unremitting guilt and denial of justice that comes with helping send the wrong man to prison for crimes committed against them. Their stories illustrate the need for courts to ensure the reliability of eyewitness evidence involving suggestive circumstances as they would any other evidence bearing the indicia of unreliability, in order to prevent sincere but mistaken identifications from leading juries astray in their determination of the truth.

ARGUMENT

I. Suggestive Circumstances, Whatever Their Source, Undermine The Reliability of Eyewitness Evidence

During the past three decades, researchers have demonstrated that our memory does not, as jurors tend to believe,⁴ function like a videotape, capable of thoroughly recording and faithfully replaying an observation at any time, but is instead a constructive, dynamic, and corruptible process. This process is comprised of three successive phases: “encoding” or “acquisition,” which occurs when the witness perceives the event; “storage,” which is the eyewitness’s retention of the acquired information from the occurrence of the event through her attempt to recall it; and “retrieval,” which is the process through which the witness attempts to recall

4. See, e.g., John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 20 (1983).

and reconstruct the event.⁵ During the first phase, the eyewitness constructs a memory based on only limited bits of information regarding the event, due to the effects of several event-related or “estimator” variables, including eyewitness stress level, the duration of the event, lighting conditions, and others.⁶ Subsequently, while the memory of the event is being stored, it can become unknowingly commingled with post-event information processed by the eyewitness.⁷ This memory may then be further impaired or distorted by a variety of factors during the process of retrieval.⁸ Throughout all of this, the memory is subject to rapid and continuous decay.⁹

Because the accuracy and reliability of memory is subject to so many external influences, researchers

5. ELIZABETH F. LOFTUS ET AL., *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 12-13 (4th ed. 2007); Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 *APPLIED COGNITIVE PSYCHOL.* 489, 489 (2007).

6. See LOFTUS ET AL., *supra* note 5, at 12-50; see also, e.g., R.C.L. Lindsay et al., *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 *LAW & HUM. BEHAV.* 526 (2008) (discussing effects of distance).

7. See LOFTUS ET AL., *supra* note 5, at 58-63; see also, e.g., Elizabeth F. Loftus et al., *Semantic Integration of Verbal Information into a Visual Memory*, 4 *EXPERIMENTAL PSYCHOL.: HUM. LEARNING & BEHAV.* 19 (1978).

8. See LOFTUS ET AL., *supra* note 5, at 70-72; see also, e.g., ELIZABETH F. LOFTUS & EDITH GREENE, *Warning: Even Memory for Faces May be Contagious*, 4 *LAW & HUM. BEHAV.* 323 (1980).

9. See, e.g., Kenneth A. Deffenbacher, *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness’s Memory Representation*, 14 *J. EXPERIMENTAL PSYCHOL.: APPLIED* 139 (2008).

commonly urge that eyewitness identifications should properly be regarded as trace evidence, subject to degradation and contamination from external sources, like a bloodstain or fingerprint at a crime scene.¹⁰ For an eyewitness, this contamination is caused by external circumstances involving information that somehow suggests to the eyewitness something about the characteristics of the perpetrator or event that she did not actually observe, and thus alters and defines her memory of her observation. Indeed, an extensive body of research demonstrates that the memories of eyewitnesses regarding events and faces are highly malleable, and can easily be altered by information received after they have observed the event in question.¹¹

10. See, e.g., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 2 (1999); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 622-23 (2006); LOFTUS ET AL., *supra* note 5, at 173.

11. See generally, e.g., Elizabeth F. Loftus & Jacqueline E. Pickerell, *The Formation of False Memories*, 25 PSYCHIATRIC ANNALS 720 (1995); D. Stephen Lindsay, *Misleading Suggestions Can Impair Eyewitness' Ability to Remember Event Details*, 16 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, AND COGNITION 1077 (1990); Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139 (1986); Fiona Gabbert et al., *Say it to my face: Examining the effects of socially encountered misinformation*, 9 LEGAL & CRIMINOLOGICAL PSYCHOL. 215 (2004); Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360 (1998); DANIEL L. SCHACTER, THE SEVEN SINS OF MEMORY 112-137 (2001); LOFTUS ET AL., *supra* note 5, at 58-69; Skagerberg, *supra* note 5, at 489.

Just as with physical trace evidence, contamination undermines the reliability of memory regardless of its source. While suggestive circumstances do sometimes result from law enforcement procedures, such as manipulated line-ups and photo arrays or leading statements during eyewitness interviews, they often have nothing to do with intentional police misconduct. For example, if an officer simply forgets to instruct an eyewitness that a lineup does not necessarily contain a suspect, this may suggest to the eyewitness that the suspect is present, and cause her to feel compelled to make an identification, whether or not she recognizes any of the candidates.¹² Similarly, studies have shown that circumstances contributing to suggestibility can result from other sources, including conversations with co-witnesses, exposure to narratives or descriptions of the witnessed event rendered by others, or mere circumstance.¹³ As the stories of *amici* exonerees

12. See, e.g., Michael R. Leippe et al., *Cueing Confidence in Eyewitness Identifications : Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions*, 33 LAW & HUM. BEHAV. 194, 196 (2009).

13. See generally, e.g., Fiona Gabbert et al., *supra* note 11 (studying effects of misinformation conveyed in discussions between co-witnesses to an event); Daniel B. Wright et al., *Memory conformity: Exploring misinformation effects when presented by another person*, 91 BRIT. J. PSYCHOL. 189 (2000) (same); Lorraine Hope et al., “*With a little help from my friends . . .*” *The role of co-witness relationship in susceptibility to information*, 127 ACTA PSYCHOLOGICA 476 (2008) (same for acquainted co-witnesses, such as family or friends); D. Stephen Lindsay, *supra* note 11 (studying effects of misinformation conveyed in post-event narratives of an event); David F. Ross et al., *Unconscious Transference and*

demonstrate, non-state suggestive circumstances can be just as harmful as those resulting from intentional police conduct.

This case provides a clear example of how suggestive circumstances that are not orchestrated by state actors can create a substantial risk of misidentification. Shortly after observing someone removing items from her neighbor's car from her apartment window and calling the police, eyewitness Nubia Blandon happened to see Barion Perry standing in that same parking lot with a police officer. Petition for Writ of Certiorari at 5-7, *Perry v. State of New Hampshire*, No. 08-8974 (U.S. Feb. 11, 2011). Before this sighting, Ms. Blandon could only describe the perpetrator as a tall African-American man. *Id.* at 3. She could not describe the perpetrator's facial features, clothing, or other physical characteristics. *Id.* Ms. Blandon later stated that she "did not clearly perceive the details of his face," as she was "so scared" that she "didn't really pay attention" to these details while observing the event. *Id.* at 7-8. Indeed, Ms. Blandon was later unable to pick Mr. Perry's photograph out of a lineup and did not identify him in court. *Id.* at 8. However, upon seeing Mr. Perry standing in the parking lot with a uniformed police officer, shortly after witnessing what she understood to be a break-in, Ms. Blandon identified him to another police officer as the perpetrator. *Id.* at 7. Notably, at the moment Ms. Blandon observed Mr. Perry, he was the only civilian in the parking lot, and the only African-American. *Id.* at 3.

Mistaken Identity: When a Witness Misidentifies a Familiar but Innocent Person, 79 J. APPLIED PSYCHOL. 918 (1994) (analyzing widely recognized phenomenon in which an eyewitness misconceives a familiar person from another context as the perpetrator of the witnessed crime).

Based on the totality of the circumstances, this scenario, though not intentionally staged by the police, created a significant suggestion that Mr. Perry was the perpetrator. Ms. Bandon identified Mr. Perry based on post-event information with suggestive characteristics – specifically, the presence of a police officer, standing with a man sharing the same broad physical characteristics actually observed by Ms. Bandon in the perpetrator, in the general vicinity of the witnessed crime, only minutes after that crime took place and police were called onto the scene.

II. The Admission Of Evidence Made Unreliable By Suggestive Circumstances Creates A Substantial Risk of Misidentification And Wrongful Conviction

Suggestive circumstances undermine the reliability not only of an eyewitness's memory, but of her confidence in that memory as well. Studies have consistently shown that suggestion can inflate a eyewitness's confidence in the accuracy of a mistaken identification, by imparting post-event information or social cues that tend to support or confirm that identification.¹⁴ This inflation of confidence

14. See, e.g., Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 115 (2002); Amy Bradfield Douglass & Nancy Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 APPLIED COGNITIVE PSYCHOL. 859, 864-65 (2006); Susan Dixon & Amina Memon, *The Effect of Post-Identification Feedback on the Recall of Crime and Perpetrator Details*, 19 APPLIED COGNITIVE PSYCHOL. 935, 946-47 (2005); Gary L. Wells & Amy L. Bradfield, *supra* note 11, at 361; Skagerberg, *supra* note 5, at 491.

often also extends to the eyewitness's retrospective reports of her observation experience, causing her to exaggerate the quality of the "estimator" variables that affected her ability to observe the perpetrator and the crime – and that factor into assessments of her identification's reliability.¹⁵

Just as with memory, suggestion contaminates and distorts eyewitness confidence regardless of its source. Although confidence-inflating suggestion is sometimes imparted by state actors, such as lineup administrators who inform an eyewitness that she has identified the police's prime suspect, it can and does also come from sources unrelated to police misconduct, such as co-witnesses or reports or other descriptions of the witnessed event.¹⁶

15. See, e.g., Dixon & Memon, *supra* note 14, at 937 (finding witnesses receiving confirming post-identification feedback "reported a better view of the culprit, increased attention to the event, a stronger basis for making an identification, less time to make an identification, increased ease of identification, and increased willingness to testify."); see also Skagerberg, *supra* note 5, at 491 ("Positive feedback inflated certainty, willingness to testify in court as well as scores on the other testimony-relevant questions based on the [Neil v.] Biggers criteria (i.e. . . . certainty, attention, view, time and the pre-identification description)" (citation omitted); Bradfield et al., *supra* note 14, at 118 (confirming feedback "inflated witnesses' recollections of their ability to make out details of the culprit's face," as well as ease of identification and willingness to testify).

16. See, e.g., C.A. Elizabeth Luus & Gary L. Wells, *The Malleability of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. APPLIED PSYCHOL. 714, 714 (1994); Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, in 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 501, 507 (R.C.L. Lindsey et al., eds., 2007); Skagerberg, *supra* note 5, at 491.

Unfortunately, the inflation of confidence in mistaken identifications caused by suggestive circumstances becomes highly problematic at trial, as jurors tend to rely heavily on an eyewitness's confidence when assessing the dependability of their identification.¹⁷ This reliance persists even when juries are presented with evidence of suggestion, probably because laypersons do not understand its disruptive influence on the relationship between confidence and accuracy.¹⁸ The eyewitness herself does not understand this influence; as the *amici* crime victims can attest, an eyewitness making a mistaken identification due to suggestion is not lying but honestly reporting, with confidence and conviction, on what she believes she saw.

As a result of this overemphasis on eyewitness confidence, as well as a fundamental insensitivity to more dependable indicators of eyewitness accuracy such as cross-race identification, lighting conditions, and weapon focus, juries are unable to make the same credibility and weight determinations with mistaken eyewitnesses that

17. See, e.g., Gary L. Wells, et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 *PSYCHOL. SCI. IN THE PUB. INT.* 45, 65 (2006); see also Gary L. Wells et al., *Accuracy, Confidence, and Juror Perception in Eyewitness Identification*, 64 *J. APPLIED PSYCHOL.* 440, 446 (1979); R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 *J. APPLIED PSYCHOL.* 79, 86-87 (1981); Boyce et al., *supra* note 16, at 507.

18. See Amy Bradfield Douglass & Dawn McQuiston-Surrett, *Post-Identification Feedback: Exploring the Effects of Sequential Photospreads and Eyewitnesses' Awareness of the Identification Task*, 20 *APPLIED COGNITIVE PSYCHOL.* 991, 992 (2006).

they make with other witnesses.¹⁹ Thus, cross-examination at trial has been recognized as having limited utility for addressing potential reliability concerns inherent in an eyewitness identification.²⁰

III. Courts Must Ensure the Reliability of Eyewitness Identifications Involving Suggestive Circumstances, Regardless of Source, Before They Are Admitted

Because juries have such great difficulties dealing with the reliability problems inherent in identifications involving suggestive circumstances, it is up to the trial court, in its role as evidentiary gatekeeper, to assess the reliability of these identifications before they are admitted. Indeed, this Court has recognized that such assessments are required to achieve “fairness as required by the Due Process Clause of the Fourteenth Amendment.” *See Manson v. Brathwaite*, 432 U.S. 98, 113-114 (1977). But when courts limit pre-trial assessments of suggestiveness to instances involving intentional state action, they ignore eyewitness identifications that can be just as unreliable, resulting from circumstances that can be just as contaminating for an eyewitness’s memory. As illustrated above, and as the stories of *amici* exonerees demonstrate below, non-state suggestive circumstances can produce unreliable eyewitness identifications that pose

19. *See generally* LOFTUS et al., *supra* note 5, at 123-33; Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, in 2 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE, *supra* note 16, at 475-85; Brigham & Bothwell, *supra* note 4, at 19-29.

20. *See, e.g.*, Benton et al., *supra* note 19, at 489-90.

serious and unique threats to the fairness and integrity of a criminal trial.

As an initial matter, courts should examine and weigh the corrupting effect of suggestive circumstances, whatever their source, against the totality of factors involved in an identification, as this Court has instructed. *See Manson*, 32 U.S. at 114; *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). These factors include, but should not be limited to, ones previously identified by this Court, such as an eyewitness's opportunity to view the perpetrator during the crime, her degree of attention, the accuracy of her prior description of the perpetrator, and the level of certainty she demonstrated when first confronted with the accused in a photograph or in person. *Manson*, 32 U.S. at 114; *Neil v. Biggers*, 409 U.S. at 199-200. As discussed above, it is important that courts examine objective measures of these factors when possible, due to the distorting influence of suggestion on an eyewitness's own retrospective reports of these factors. Although none of these factors alone guarantees or condemns the reliability of an identification, as scientific research has shown and the *amici* crime victims can attest, when examined together, they can help the court determine whether the identification sought to be offered at trial is sufficiently reliable based on the observation underlying it, or whether the suggestion at issue created a substantial risk of misidentification.

If a substantial risk of misidentification is found, the court can employ a number of remedies to fix the reliability problem. Certainly, if the identification is altogether unreliable, it should be excluded entirely. *See Manson*, 432 U.S. at 112 (noting Court's concern "that the jury not hear

eyewitness testimony unless that evidence has aspects of reliability”). But remedies short of exclusion are also available. For example, courts can instruct juries to place greater, if not exclusive, weight on “primary” identification evidence, when it exists – namely, the eyewitness’s *initial* description of the perpetrator, event, and event-related factors such as her opportunity to review and her level of certainty. This measure can minimize the contaminating effect of suggestive circumstances on an eyewitness’s memory and confidence that occur subsequent to the “primary” identification. Along these same lines, the court can suppress any part of an identification that carries a substantial risk of contamination. Additionally, if a certainty statement was taken from the eyewitness when she made an initial out-of-court identification, the court should preclude the witness from testifying to her level of certainty at trial, thus preventing typical juror over-reliance on this factor. Courts can also provide guidance to jurors regarding the vagaries of eyewitness identification and memory in jury instructions, based on recent scientific research, or through expert testimony tailored to the facts at issue. In these ways, courts may alleviate the reliability concerns that can severely compromise the accused’s right to a fair trial, and the jury’s determination of the truth regarding culpability.

In this case, these practices would have enabled the trial court to admit the only direct eyewitness evidence of the crime at issue without jeopardizing Mr. Perry’s right to a fair trial. If it had conducted a pre-trial assessment of the totality of circumstances involved in Ms. Blandon’s identification of Mr. Perry, including the lighting in the parking lot, the distance from Ms. Blandon’s window to the witnessed crime, and most critically, Ms. Blandon’s

admission that that she was too frightened to pay full attention to many of the perpetrator's face or other physical details while observing the event, as well as her inability to identify Mr. Perry from a photo array after identifying him in the parking lot following the crime, and weighed these factors against the suggestive circumstances under which she first encountered Mr. Perry, described above, the court would likely have found that these circumstances created a substantial risk of misidentification. In order to address this risk, the court likely would have suppressed Ms. Blandon's identification of Perry, or perhaps instructed the jury to treat it with caution, in favor of her "primary" identification, given before the suggestive circumstances arose: that she saw a tall African-American male removing items from a car, but did not see his face, clothing, or facial hair. This identification more faithfully captures Ms. Blandon's report of the actual crime, by eliminating the contaminating effect of the suggestive post-event information that she had processed, and provided the jury with more reliable evidence of the crime for which Perry was standing trial.

As the circumstances surrounding Ms. Blandon's identification of Mr. Perry demonstrate, suggestive circumstances that are not the result of intentional state action can have the same effect on the reliability of an eyewitness identification, and on the fairness and integrity of a criminal trial. Without similar judicial protections, the effects of such identifications can be devastating, as the stories of *amici* show.

IV. The Experiences of *Amici* Demonstrate The Threats Posed By Identifications Involving Suggestive Circumstances To Fair Trials and Their Determination of Truth

As *amici* Jennifer Thompson and Michele Mallin remain painfully aware, suggestive circumstances can distort an eyewitness's memory and produce a mistaken identification, no matter how scarring and sustained an event may be, and regardless of how hard they try to remember a perpetrator correctly. And as *amici* Wilton Dedge and Herman Atkins can never forget, these suggestive circumstances often have nothing to do with intentional state action. Their cases demonstrate the urgent need for this Court to reiterate that due process requires trial courts to assess the reliability of *all* identifications involving suggestive circumstances.

Wilton Dedge

On the morning of December 8, 1981, a 17-year-old cosmetology student known as "Trish" was attacked in her Canaveral Groves, Florida home by a man with a boxcutter. Leonora LaPeter, *Guilty until proven innocent*, ST. PETERSBURG TIMES, Nov. 14, 2004, at 16A. The man sliced off her clothes, cut her, and threw her onto her bed. *Id.* After slicing Trish repeatedly all over her body, he held the boxcutter to her neck, looked her in the eye, and raped her. *Id.* The man then emptied Trish's purse, went through her wallet, and raped her a second time. *Id.* After punching her twice, the attacker left. *Id.* The ordeal lasted 45 minutes, and by the end, the man had slashed Trish 65 times, across her face, neck, stomach, chest, arms, and legs. *Id.*

Shortly after the attack, Trish told police her assailant stood between six feet and six feet two inches tall, and weighed between 160 and 200 pounds. *Dedge v. State*, 442 So.2d 429, 430 (Fla. Ct. App. 1983). She described him as a muscular man, who “looked like a construction worker” with “big arms” that could easily throw her around and pin her down. Armen H. Merjian, *Anatomy of a Wrongful Conviction: State v. Dedge and What it Tells Us About Our Flawed Criminal Justice System*, 13 U. PA. J. L. & SOC. CHANGE 137, 143 (2009-10). She said that he had hazel eyes and a receding hairline. *Id.*

On December 12, just four days after the attack, Trish and her sister drove to their nearby hometown and pulled up to a convenience store. LaPeter, *supra*, at 16A. Trish went inside to buy her sister cigarettes and a Coke, and promptly felt a man staring at her. *Id.* That stare made her feel uneasy, and after she turned and saw a man standing nearby, Trish ran out of the store to her car. *See id.* Though she immediately noticed that the man inside looked shorter than her attacker, and had a darker mustache, she still felt shaken, recalling her ordeal. *Id.* Crying, she told her sister that the man she saw inside “looked like” the man who raped her. *Id.* As the man exited the store, Trish’s sister told her that she recognized him, from her elementary school days, as Walter Dedge. *Id.* Trish refused to call the police at that time, but after seeing the man again in the same store the following week, she did so. *Id.* By that time, Trish had become certain that the man who had stared at her in the convenience store was her attacker. *Id.*

On January 8, 1982, based on Trish’s sister’s recognition, the police arrested Walter Dedge. *Id.* Two

days later, police showed Trish's sister a photo lineup that included Walter's picture. *Id.* Trish's sister identified Walter Dedge, but then said that the man her sister identified in the convenience store was not in fact Walter, but his brother, Wilton. *Id.* The following day, police arrested Wilton, and showed Trish a new photo lineup including Wilton's photo. *Id.* On January 11, 1982, over a month after the rape, Trish identified 20-year-old Wilton Dedge, the man she felt staring at her in the convenience store, as her attacker. *Id.*

"When I found out they were looking for me, I turned myself in," said Wilton later. John L. Smith, *Adjusting takes time for falsely accused ex-con after 22 years in prison*, LAS VEGAS REV. J., Sep. 5, 2004, at B1. "I wanted to get it straightened out. I believe if the police department had really stood back and looked, they'd know this wasn't right." *Id.* On the day of the attack, Wilton had been 46 miles away, working at a garage in Smyrna Beach, and had several alibi witnesses to attest to his whereabouts. LaPeter, *supra*, at 1A. In stark contrast to the initial description Trish gave the police, Wilton stood only five feet five inches tall, and weighed just 125 pounds. *Dedge v. State*, 442 So.2d at 430. He had blue eyes, a slight build, and a full head of hair, unlike the described assailant. Merjian, *supra*, at 143. Nevertheless, on the basis of Trish's identification, Wilton Dedge was arrested and prosecuted.

During trial, in September of 1982, Wilton took the stand and proclaimed his innocence. *Id.* at 144. No less than six witnesses swore that Wilton was in Smyrna Beach on the day of the attack; four of them testified that they were certain Dedge was at the garage until closing time.

Id. The prosecution offered three pieces of evidence to implicate Dedge as Trish's attacker: a pubic hair found on Trish's bed, a canine scent lineup and identification, and Trish's testimony. *Dedge v. State*, 442 So.2d at 430; LaPeter, *supra*, at 16A. The analyst who initially examined the pubic hair stated in his report that it had similarities and differences to the sample given by Dedge, but that "the differences were not sufficient to entirely eliminate Dedge as a possible source." LaPeter, *supra*, at 16A. The canine scent lineup was conducted three months after the crime, using a scent sample taken eight days earlier from Dedge, on a paper towel handled by others and left in a paper bag. *Id.* The jury deliberated for four hours and found Wilton guilty of the assault. *Id.* After he read the verdict, the judge stated that he was told the jury had based it on Trish's identification. *Id.* The judge sentenced Wilton to 30 years in prison. *Id.*

After 18 long months in Sumter Correctional Institute, the District Court of Appeal granted Wilton a retrial, based on the trial court's improper exclusion of the defense's own scent identification expert. *Dedge v. State*, 442 So.2d at 430-31. During retrial, defense counsel exposed major flaws in the canine scent identification, and again challenged the hair evidence, emphasizing that the prosecution's experts could not definitively state that it was Wilton's. Merjian, *supra*, at 144-48. The prosecution presented the hair, the testimony of a jailhouse informant (who was serving a 180-year sentence for three murder-for-hire plots) claiming that Wilton confessed the crime to him in suspiciously precise detail – and Trish's identification. *Id.* Wilton again took the stand in his own defense, to no avail. *Id.* at 148. In August 1984, Wilton was convicted again for raping Trish, and this time, the judge gave him a life sentence. LaPeter, *supra*, at 16A.

By the time advanced DNA testing finally exonerated Wilton in 2004, he had spent 22 years in prison – more than half his life. Two of those years were spent in solitary confinement, which he requested after fearing for his life in general population. *Id.* at 17A. “I never got to have kids. I never got to get married. Now I’ve got to start, and I’ve got nothing,” he said shortly after his release. Luisa Yanez, *Wrongful conviction: DNA test frees man after 22 years*, MIAMI HERALD, Aug. 13, 2004, at 3B. “I’m very, very disappointed. There’s anger there. But I can’t dwell on anger or I’ll mess up my life.” LaPeter, *supra*, at 17A.

As Wilton tries to move forward, Trish has to look back, at her horrific ordeal and her two in-court identifications of Wilton as her attacker. The Brevard County State Attorney at the time of Wilton’s release said that Trish was “devastated” by the news that she had sent the wrong man to prison. Laurin Sellers, *DNA testing frees man accused in 1981 rape*, ORLANDO SENTINEL, Aug. 12, 2004, at A12. He also said that police had no prospects for finding and bringing to justice the man who actually brutalized Trish that December day 22 years ago. *See id.*

Herman Atkins

A 23-year-old woman was working at a Lake Elsinore, California shoe store on April 8, 1996, when a young, slim African-American man walked in and asked to try on a pair of shoes. Fred Dickey, *Worst Case Scenario*, L.A. TIMES MAG., Jun. 25, 2000, at 19. He was the only customer in the store, and took his time examining the merchandise. *Id.* When the woman returned from the stock room, the man held a gun to her neck, dragged her back into the stock room, raped her repeatedly, and forced

her to perform oral sex. Samantha Weinberg, *Trials and Errors*, THE OBSERVER, May 4, 2003, at 22. As he fled, he told the woman that he would kill her if she followed. *Id.*

The woman called the police, and after undergoing a medical exam, she went into an interview room with her mother to look through photographs in recent yearbooks from local high schools for her attacker. Dickey, *supra*, at 19. She did not recognize anyone from the yearbooks. *Id.* However, while waiting for a detective to return with more photographs, the woman spotted a “Wanted” poster that happened to be lying on a nearby table in the interview room. *Id.* The man on the “Wanted” poster was a young, slim, African-American man, just like the one who attacked her – though this one was from Los Angeles, and was nowhere to be found in the yearbooks the detective asked her to look through. *See id.* Nevertheless, after the detective returned to the interview room, according to his account, the woman told him, “I think this is him. If it’s not him, it’s someone who looks just like him.” *Id.* When recounting that moment on the witness stand at Herman’s trial, however, the woman sounded much more definitive; she testified that she turned to her mother, pointed at the poster, and said “That’s him.” *Id.*

The face on the poster belonged to Herman Atkins, a 20-year-old man from Los Angeles. *Id.* Herman was wanted by the Los Angeles police in connection with a January 26, 1986 incident, in which gunshots were fired that allegedly wounded two police officers. *Id.* Herman claimed says he was just trying to foil a robbery that day; police believed it was a drug deal gone wrong. Weinberg, *supra*, at 22. Herman became scared and fled first to Texas, and then to Arizona, where he was arrested by

Phoenix police 10 months later. *Id.*; Dickey, *supra*, at 19. Herman was then extradited back to California, after the Phoenix police discovered that there was an outstanding warrant for his arrest on nine counts of attempted murder in Los Angeles – and one on charges of multiple rape and robbery in Lake Elsinore. Weinberg, at 22.

Herman agreed to accept a plea for an eight-year sentence to assault with a deadly weapon for the shooting incident, after a preliminary hearing revealed that the attempted murder charges were not appropriate. *Id.* “I was shooting at a guy who was robbing my friend and me. I was a stupid kid who got scared and ran. I deserved to be punished.” Dickey, at 18. But the rape and robbery charge was another issue. “I’m thinking, it’s a mistake,” was Herman’s reaction to the charge. Weinberg, *supra*, at 22. Herman was from inner-city Los Angeles, and had never even heard of the small town of Lake Elsinore. Dickey, *supra*, at 18. “We just assumed it was a case of mistaken identity or whatever, and it would clear itself up.” Weinberg, *supra*, at 22.

However, the charge did not go away. Herman was prosecuted for the rape and robbery, and the victim took the stand to identify him and testify to details regarding the vicious assault. *See id.* at 23-24. A state serologist testified that the blood markers in the body fluids found on the vaginal swab and the victim’s sweater revealed the same blood type as both Herman and the victim, and that Herman could not be excluded as the source. Dickey, *supra*, at 19. The serologist also said that the markers excluded 94% of the population, a claim later demonstrated to be false. Editorial, *An innocent man, 12 years in prison*, SAN JOSE MERCURY NEWS, March 10, 2000, at 6B. On the basis

of this evidence, two corroborating misidentifications, and the victim's testimony, Herman was convicted of burglary, rape, and forced oral copulation, and later sentenced to 47 years and 8 months in prison. *See* Weinberg, *supra*, at 24; Dickey at 19. "I couldn't believe that the system could make this kind of mistake," Herman thought. Weinberg, *supra*, at 24. "I couldn't believe I was going to spend the rest of my life paying for a crime I did not commit." *Id.*

At 21 years old, Herman entered the Old Folsom maximum security facility as a convicted rapist. "I gave up hope. As far as I was concerned, it was the beginning of the end of my life," he said later. *Id.* at 26. Herman endured 13 years, three months, and six days of hell, surviving three attempts on his life and constantly fearing others, witnessing murders and suicides, race riots and rapes, hangings and stabbings. *Id.* at 26; Dickey, *supra*, at 16. After finally being exonerated by DNA evidence and released on February 18, 2000, Herman was so utterly changed, and had lost so much time, that he was scared to leave. "Got no skills, no education, no friends, no way to make a living." Dickey, *supra*, at 16. What he had were memories of his years in prison, which would "walk with me until the day I die." *Id.*

Herman's life wasn't the only one affected by his wrongful conviction. "Saying I'm sorry is not enough," said the victim shortly after Herman's release. *Id.* at 34. "Nothing I can say will replace those years out of his life. I feel terrible. Absolutely terrible. Here I was, trying to get a rapist off the streets, and then I find out he could still be out there." *Id.* "I thought he was the one." *Id.*

Jennifer Thompson

Jennifer Thompson went out of her way to observe as much as she possibly could about the man who raped her at knifepoint in her Burlington, North Carolina apartment that summer night in 1984. She studied every detail on the man's face, and searched for scars, tattoos, and anything that would help her identify him later. Jennifer Thompson, *I Was Certain, But I Was Wrong*, N. Y. TIMES, Jun. 18, 2000, at 15. She used all light sources available to her in the darkness, including her blinds, her bedroom window, even her stereo display; she even lured him toward the bathroom and the kitchen, turning on the lights in each, hoping to catch another glimpse.²¹ She made sure to stand near him when she got up from the bed, to assess how tall he was in relation. PBS Frontline, *supra*. She wanted to make sure that, if given the opportunity, she would be able to help put him in prison for what he did to her. Thompson, *supra*, at 15.

Thankfully, Jennifer did get that opportunity, after escaping her apartment and finding help. Hours later, after an examination was conducted and evidence was collected with a rape kit, she went to the police station to work on a composite sketch of her attacker. PBS Frontline, *supra*. She did the best she could, looking through hundreds of noses, eyes, eyebrows, and hairlines. Thompson, *supra*, at 15. She recounted her experience several times, and gave as many statements as she possibly could. PBS Frontline, *supra*.

21. PBS Frontline: What Jennifer Saw, <http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/thompson.html> [hereinafter PBS Frontline] (last visited Jul. 21, 2011).

The police distributed Jennifer's composite sketch, and received a tip about a young man named Ronald Cotton, who had a record that included guilty pleas to breaking and entering and sexual assault. 60 Minutes (CBS Broadcast Jul. 12, 2009) [hereinafter 60 Minutes]. The police placed a photograph of Ronald in an array with photographs of five other men for Jennifer to examine. *Id.* Jennifer was told that the array may or may not include a photo of her attacker. *Id.* Jennifer studied the photographs for five minutes, and identified Ronald's. *Id.* Ronald was arrested and placed in a physical lineup with five other men, and after narrowing the decision to two of the men, Jennifer again identified Ronald. *Id.*

“[W]hat was said to me afterwards was, ‘That’s the same person you picked out in the photo lineup. So, in my mind I thought, bingo. I did it right,’ Jennifer said. *Id.* ‘His mannerisms, his voice, his height, his weight – it all just added up on my mind. And as the evidence started to come in, it was almost just conclusive to me that this had been the rapist,’ she said. PBS Frontline, *supra*. “[M]y mind would always see Ronald Cotton. When I would have a nightmare, when I would re-live the night in my head, Ronald Cotton’s head, his face was right there for me to see for years.” *Id.* Jennifer became completely certain she had found the right man; she had no hesitations about sending him to the electric chair. Thompson, *supra*, at 15.

With little physical evidence tying Cotton to the scene of the crime, and a shaky alibi, Ronald was tried and convicted in January 1985, on the strength of Jennifer's testimony. Thompson later said that the day Ronald was convicted was the happiest day of her life, because she could put the whole ordeal behind her. *Id.*

However, with Ronald behind bars, the rapes continued in Burlington. A few months later, Bobby Leon Poole was arrested and charged with raping at least half a dozen women in the area. James Thorner, *Ron Cotton: Freedom: Tenacity Paid Off: Innocent Man Carries Scars from His Decade in Prison*, GREENSBORO NEWS & RECORD (N.C.), July 10, 1995, at A2. Poole pleaded guilty to some of the charges, and was given a life sentence. *Id.* Incredibly, Poole was assigned to the same prison wing as Ronald, and arrived there shortly after Ronald did. *Id.* Poole bragged to others in that prison wing about committing several rapes, including Jennifer's, and Ronald burned with anger and frustration – but quietly held hope that he might soon be exonerated. *See id.*

In 1987, during a retrial following an appellate court reversal of Ronald's conviction, Poole was brought into court after word surfaced of his admission to the crime. Thompson, *supra*, at 15. Poole was presented to Jennifer, who was told of his bragging and asked if he was the man who put her through that harrowing ordeal three years before. *Id.* Jennifer studied Poole and responded that she had never seen him in her entire life, and in fact had no idea who he was. *Id.* After Jennifer again identified Ronald as the perpetrator, Ronald was convicted a second time. *Id.*

In 1995, new counsel sought to have DNA testing done on the scant physical evidence left by the perpetrator at the crime scene. Thorner, *supra*, at A2. Jennifer was asked to submit a blood sample for the testing, and agreed because she “knew that Ronald Cotton had raped me and DNA was only going to confirm that.” Thompson, *supra*, at 15. The DNA testing excluded Ronald Cotton for Jennifer's rape, and implicated Bobby Leon Poole. Thorner, *supra*,

at A2. After being confronted with the evidence, Poole confessed in writing to raping Jennifer that summer night in 1984. *Id.*

Jennifer was devastated. “The man I was so sure I had never seen before in my life was the man who was inches from my throat, who raped me, who hurt me, who took my spirit away, who robbed me of my soul. And the man I had identified so emphatically on so many occasions was absolutely innocent.” Thompson, *supra*, at 15. “I live with constant anguish that my profound mistake cost him so dearly. I can not imagine what would have happened had my mistaken identification occurred in a capital case.” *Id.*

Jennifer also lives with the pain caused by her ordeal on that summer night in 1984, but even though she now knows the truth about the man who put her through it, her mind can not quite process it. “I still see Ronald Cotton. And I am not saying that to point a finger . . . I would do anything to erase that face out of my mind, but I can’t. . . [M]y mind now says, ‘Well, it’s Bobby Poole,’ but his is still the face I see.” PBS Frontline, *supra*.

Michele Mallin

In March 1985, a man abducted 20-year-old Texas Tech student Michele Mallin at knifepoint in a church parking lot, as she was getting into her car. Rick Casey, *A tale of twin traumas*, HOUSTON CHRON, Aug. 5, 2009, at B1 [hereinafter Casey, *Twin traumas*]. The man forced his way into Michele’s car, drove her to the outskirts of town, raped her, robbed her of what little money and jewelry she had, and fled. Bob Ray Sanders, *Innocence lost in attack, but courage was found*, FORT WORTH STAR-TELEGRAM, Jan. 23, 2011, available at 2011 WLNR 1368725.

She was the fifth woman at Texas Tech to be raped, all by a perpetrator fitting the same general description: tall, African-American, short curly hair, large eyes. Elliott Blackburn, *State's first posthumous pardon releases hurt, anger for Cole family*, LUBBOCK AVALANCHE-JOURNAL, Mar. 20, 2010, available at 2010 WLNR 5852625.

Police had already been investigating the previous rapes, and had zeroed in on a 24-year-old suspect named Timothy Cole. *Id.* Cole was an Army veteran and a business student at the school. *Id.* About a month after Michele's attack, police officers came to her dorm room and showed her an array containing six photographs. Rick Casey, *What's the matter with Texas DAs?: No sign lesson learned*, HOUSTON CHRON., Aug. 7, 2009, at B1 [hereinafter Casey, *Texas DAs*]. The officers did not warn her that the suspected perpetrator might not have been among those in the array. *Id.* Five of the photographs were black-and-white mugshots of inmates staring off camera, complete with visible prisoner numbers. *See id.*; Blackburn, *supra*. The sixth was a color Polaroid of Robert Cole taken at his home, with him staring straight into the camera, surrounded by wood paneling. Blackburn, *supra*.

Mallin pointed to the Polaroid and said to officers, "I think this is him." Casey, *Texas DAs, supra*, at B3. A police officer asked if she was positive, and Mallin, feeling encouraged, said that she was. *Id.* The police report stated that Mallin "positively identified" Timothy Cole; it said nothing of her earlier, equivocal response. Later, in a physical lineup, she identified Cole again. Casey, *Twin traumas, supra*, at B7. The more Michele saw Timothy Cole, the more she became certain that he was her attacker. *Id.*

A year later, Michele identified Timothy Cole from the witness stand, at his trial. *Id.* Cole was convicted for Michele's rape, despite some notable inconsistencies, including the fact that Cole was a life-long asthmatic who didn't smoke, and the perpetrator had smoked several cigarettes during the attack. *See Casey, Texas DAs, supra*, at B3. After the jury rendered its verdict, Michele tearfully thanked them, and the 25-year-old Cole was sent to prison for 25 years. Blackburn, *supra*; Sanders, *supra*.

Timothy Cole served 14 of those years before dying in prison, due to heart complications brought on by his asthma. Brandon Formby, *Years later, state clears wrongfully convicted man*, DALLAS MORNING NEWS, Mar. 20, 2010, at 4B. In 2007, eight years after Cole's death, his family received a letter from Jerry Wayne Johnson, a man serving life in prison for two rapes, including that of a 15-year-old girl, confessing to Michele's rape.²² A 2008 DNA test confirmed that Johnson was indeed the man who raped Michele. Formby, *supra*, at 4B. Michele was crushed by the revelation. "I was sad and horrified at the terrible thing that had happened. . . . I didn't intend for it to happen." Sanders, *supra*. "I was very traumatized [at the time]," she said shortly after Cole's conviction was reversed in 2010. CNN Justice, *supra*. "I tried my hardest to remember what he looked like." *Id.*

22. *Texan Who Died In Prison Cleared of Rape Conviction*, CNN JUSTICE, Feb. 6, 2009, <http://www.cnn.com/2009/CRIME/02/06/texas.exoneration/index.html?iref=allsearch> (last visited 8/4/2011) [hereinafter CNN Justice].

CONCLUSION

As *amici* Jennifer Thompson and Michele Mallin can attest, eyewitness memory is subject to contamination like any other trace evidence, from suggestive circumstances that can shape and harden observations into identifications that, however sincere and sure, are profoundly unreliable. The cases of *amici* Wilton Dedge and Herman Atkins undeniably demonstrate that suggestive circumstances having nothing to do with intentional state action can be just as destructive to a fair trial and its determination of truth. As the jury verdicts in all four of their cases and untold others show, courts have a responsibility to ensure the reliability of eyewitness identifications involving any suggestive circumstances, as they would any other evidence bearing the indicia of unreliability, and the potential for such grave miscarriages of justice.

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