No. 10-8974

In The Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

On Writ Of Certiorari To The New Hampshire Supreme Court

BRIEF FOR RESPONDENT

THE STATE OF NEW HAMPSHIRE

MICHAEL A. DELANEY
Attorney General

STEPHEN D. FULLER
Senior Assistant Attorney General
Counsel of Record

THOMAS E. BOCIAN
Assistant Attorney General

SUSAN P. MCGINNIS
Senior Assistant Attorney General

NEW HAMPSHIRE DEPARTMENT OF JUSTICE
CRIMINAL JUSTICE BUREAU
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671
stephen.fuller@doj.nh.gov

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the New Hampshire Supreme Court correctly determined that the admission at trial of a pretrial identification cannot violate due process where no improper state action has caused the circumstances under which the identification was made.

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STATEMENT OF THE CASE

Following a jury trial in the New Hampshire Hillsborough County Superior Court for the Southern Judicial District, the petitioner was convicted of one class B felony count of theft by unauthorized taking, which was subject to an extended term of imprisonment because he had two prior convictions for theft by unauthorized taking and one prior conviction for burglary. JA 96a, 408a.[1] *See* N.H. Rev. Stat. Ann. § 637:3 (2007); N.H. Rev. Stat. Ann. § 637:11, II(b) (2007). The court sentenced him to serve three to ten years in the New Hampshire State Prison. JA 415a, 439a.

A. The Evidence At The Suppression Hearing

At 2:53 a.m. on August 15, 2008, Officer Nicole Clay from the Nashua, New Hampshire Police Department was sent to the back parking lot at 70½ West Hollis Street to investigate "a report about a black male looking through vehicles and attempting to gain entry into vehicles." JA 36a-37a. When she arrived at the multi-story apartment building, she parked her cruiser out front and walked around the building. JA 37a-38a, 42a. There were twelve to fifteen cars in the parking lot, which was "fairly well lit" by lights in the parking lot, lights on the back of the building, and

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[1] "JA" refers to the joint appendix.

"PB" refers to the petitioner's brief.

streetlights on Ash Street, which was the street at the exit to the parking lot. JA 56a.

As Officer Clay entered the parking lot, she heard what "sounded like a metal bat hitting the ground," and she then saw the petitioner carrying two amplifiers and walking toward her from between two vehicles. JA 37a-38a. She asked him to put the amplifiers down and come talk to her, so he did. JA 37a-38a. He said that he was moving the amplifiers because he had just found them on the ground. JA 39a. Officer Clay asked where they had come from, and the petitioner said "that he had just seen a couple of kids leaving the parking lot," that one of them was wearing a white T-shirt, and that the other one was on Ash Street. JA 39a-40a.

Officer Clay walked with the petitioner to Ash Street, where the petitioner pointed out a man who was standing outside a nearby house. JA 40a-41a. The man said that his name was Rowley Anzani, that he had been in the house all night, that he had just come outside to do something for his mother, that his friend had left half an hour earlier, and that he had not seen anyone else on Ash Street in the last ten minutes. JA 41a. While Officer Clay was talking to Anzani, the petitioner kept interjecting "that he had just found the amplifiers and that other kids had stolen them." JA 41a.

When Officer Clay and the petitioner returned to the parking lot, Alex Clavijo walked over and said that his neighbor had told him that someone had

broken into his car. JA 42a. He also said that the amplifiers the petitioner had been carrying and a large wooden box with two speakers mounted inside had been taken from his car. JA 70a-74a. By then, Officer Robert Dunn had arrived, so Officer Clay asked him to wait with the petitioner while she went inside to talk to Clavijo's neighbor. JA 43a. The petitioner was just standing talking to Officer Dunn in the middle of the parking lot; he was not handcuffed or otherwise restrained. JA 40a, 43a, 49a, 57a-58a, 65a.

Clavijo and Officer Clay went up to the second or third floor apartment of Clavijo's neighbor, Nubia Blandon, who came out and spoke to them in the hallway. JA 42a-44a, 48a, 66a. Blandon spoke only Spanish, so Clavijo translated. JA 44a, 67a. Officer Clay did not tell Blandon that there was a suspect in the parking lot with an officer, and they could not see the parking lot from the hallway. JA 44a, 48a, 80a. Blandon said that she had seen a tall, black man walk through the parking lot, look into all the cars, circle Clavijo's car, and then open the trunk of Clavijo's car and remove a large box. JA 48a, 55a, 61a.[2] Blandon also said that the man had been carrying a bat. JA 55a, 75a. Officer Clay asked for a description of that man, and Blandon said "it was the man that was in the back parking lot standing with the police officer." JA 48a. As Blandon spoke, she "pointed towards the

[2] Although the hearing transcript uses the word "truck" several times, the items were taken from the "trunk" of Clavijo's car. JA 280a-81a.

window to show [Officer Clay] that she had already looked out the window to see [the petitioner] and Officer Dunn standing in the parking lot." JA 49a. Officer Clay did not ask Blandon how long she had been watching the petitioner, but it would have taken at least a few minutes for him to take all of the actions that Blandon had described. JA 62a-63a.

At some point, Blandon's husband, Joffre Ullon, who had called in the initial report about a man trying to break into cars, returned from getting coffee. JA 50a, 54a, 80a-81a. He told Officer Clay that he had seen "a black male walking through the parking lot and lifting up on the [car] door handles." JA 54a. Officer Clay asked him for a description, and he also said "it was the man standing outside with the police officer." JA 55a. Officer Clay went back outside and saw that the petitioner and Officer Dunn had moved to the end of the lot, which was about thirty feet away and not as well lit. JA 57a, 58a. She then found Clavijo's wooden box and speakers in the parking lot. JA 74a. When Blandon was shown a photographic array a month later, she was unable to identify the petitioner. JA 59a-60a.

B. Other Evidence From The State's Case At Trial

Blandon watched the petitioner for over half an hour before Officer Clay arrived. JA 216a-17a. After Officer Clay arrived, Blandon left the window and went to tell Clavijo that someone had broken into his

car. JA 216a-18a. She then returned to her window to watch what was going on. JA 216a. When she saw Officer Clay and Clavijo coming upstairs, she waited at her door. JA 222a.

In the meantime, Ullon had gone downstairs and had seen the petitioner walking around the cars in the parking lot. JA 238a. As Ullon was driving out of the parking lot, he saw a bicycle near the exit and then he saw the petitioner standing nearby in an area that was well lit. JA 238a, 247a. The petitioner turned around and hid his face. JA 238a, 247a. Ullon then drove back into the parking lot through the front entrance to try to get a closer look, but the petitioner saw the headlights and hid behind some cars. JA 238a-39a, 245a. Ullon later returned from getting coffee, saw the petitioner in the parking lot with Officer Dunn, and then went upstairs and spoke to Officer Clay. JA 196a, 241a.

Blandon and Ullon were later separately shown a photograph lineup containing a photograph of the petitioner. JA 283a-91a. Blandon could not identify the petitioner's photograph because she had not "clearly perceive[d] the details of his face." JA 235a. Ullon had not seen the petitioner's features clearly, but he still "recognized his face," JA 245a-46a, and "immediately" picked out the petitioner's photograph, JA 290a.

C. Relevant Events Before, During, And After Trial

Prior to trial, the petitioner moved to suppress Blandon's out-of-court identification pursuant to the due process clauses of the state and federal constitutions. JA 12a-17a (citing U.S. Const. amends. V, XIV; N.H. Const. pt. I, art. 15). He argued, in relevant part: (1) that the identification procedure had been "unnecessarily suggestive" because Blandon had identified the petitioner only after she had seen the police cruisers, and had seen the petitioner being arrested and put in handcuffs by police officers, JA 15a-16a; and (2) that Blandon's identification had not been reliable. JA 16a. Accordingly, argued the petitioner, under *Neil v. Biggers*, 409 U.S. 188 (1972), the court had to exclude the identification. The State objected, arguing, in relevant part: (1) that no due process analysis was required because "Blandon's identification of the [petitioner] was not facilitated by the police in any fashion," JA 24a, and because the circumstances were not unnecessarily suggestive, JA 26a; and (2) that the circumstances of the identification demonstrated that it had in fact been reliable, JA 27a-28a.

At a hearing on the motion, the petitioner confirmed that he was not moving to exclude Ullon's identification. JA 51a-53a. He also argued, among other things, that there was sufficient state action present to warrant a due process analysis. JA 76a, 78a. The State argued that there was no unnecessarily suggestive state action because the police had neither

known that Blandon was watching nor done anything to suggest that they wanted her to identify the petitioner. JA 76a-78a. The Hillsborough County Superior Court for the Southern Judicial District ruled that "Blandon's identification of [the petitioner] was not derived from any suggestive technique employed by the police," JA 86a, so it "need not consider whether the identification was otherwise reliable," JA 86a-87a.

At trial, defense counsel said in her opening statement that the case was "about the wrong identification, an inaccurate identification. . . ." JA 113a. Blandon was then extensively cross-examined about the facts that she was watching a person in the parking lot from a window on the fourth floor, that her view was partially blocked by a van, JA 226a, that she could not describe the color of the bicycle the person was riding, JA 233a, that she could not describe the person's clothing or facial features, JA 233a-34a, and that she was unable to pick the petitioner out of a lineup, JA 235a. Blandon's out-of-court identification was admitted at trial, JA 173a, but she was not asked to make an in-court identification of the petitioner.

Ullon's out-of-court identification was also admitted, without objection, at trial. JA 242a-43a, 245a-46a, 285a-87a. Defense counsel then argued in closing that the petitioner was being tried only because there had been "an incomplete investigation" and "a wrong ID," JA 374a, and that the out-of-court identifications by Ullon and Blandon were unreliable and had come about only after the police had provided them with "powerful" context clues, JA 374a-75a.

The petitioner appealed his conviction to the New Hampshire Supreme Court, arguing for the first time that no state action was required to trigger a due process analysis. JA 425a. The New Hampshire Supreme Court did not address the State's preservation, reliability, and harmless error arguments. JA 9a-11a. Instead, it "decline[d] to adopt the First Circuit's reasoning that a *Biggers* analysis is required in all 'suggestive identification procedures,'" and held "'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 10a (quoting *State v. Addison*, 160 N.H. 792, 801, 8 A.3d 118, 125 (2010), *cert. denied*, 131 S. Ct. 2444 (2011)). The state court then found that "[b]ecause the evidence support[ed] the trial court's finding that [the petitioner] failed to carry his burden of proof on the first step of the *Biggers* analysis," improper state action, "[it] need not consider the second step," reliability. JA 10a-11a.

SUMMARY OF ARGUMENT

The New Hampshire Supreme Court correctly concluded that the Due Process Clause of the Fourteenth Amendment does not require that all identification evidence must be deemed reliable before it is admissible in a criminal trial. Instead, as the New Hampshire Supreme Court held, identification evidence needs to be deemed reliable only in cases where the police obtained the challenged evidence as the

result of an improper—that is, unnecessarily suggestive—procedure.

I. The Due Process Clause of the Fourteenth Amendment guarantees a fair trial for all criminal defendants. Despite its broad goals, however, the Clause has been construed narrowly. When confronted with a fair trial claim, this Court has stated that its analysis is largely circumscribed by the protections contained in the Bill of Rights. *Dowling v. United States*, 493 U.S. 342, 352 (1990). By limiting the Due Process inquiry to whether there was a violation of specific constitutional rights, this Court has sought to avoid the expansion of constitutional guarantees under the "open-ended rubric of the Due Process Clause," a circumstance that could invite "undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443 (1992).

There is no specific constitutional right that requires evidence to be deemed reliable before it is admissible in a criminal trial. In fact, in *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), this Court held that reliability was "a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment." It also emphasized that the Due Process Clause was not concerned as much with the potentially, "presumptively false" nature of the evidence at issue as it was with preventing "fundamental unfairness in the use of evidence, whether true or false." *Id.* (quotation omitted).

Accordingly, although the Due Process Clause of the Fourteenth Amendment may be a source of ensuring fundamental fairness, it does not accomplish that end by imposing a special constitutional requirement that witnesses must be adjudged reliable before they may testify.

While the Due Process Clause of the Fourteenth Amendment does not require that evidence be deemed reliable before it is admissible, many other provisions of the Constitution, especially those contained in the Sixth Amendment, ensure that the decision in a criminal case is the product of a fair procedure based upon reliable evidence. For example, the rights to confrontation, cross-examination, counsel, compulsory process, proof beyond a reasonable doubt, and a jury trial all serve to guarantee a just verdict.

II. In *Stovall v. Denno*, 388 U.S. 293 (1967), this Court issued the first of a series of decisions dealing with due process challenges to testimony about an eyewitness's identification of the accused. Those decisions required this Court to confront the problem of the State or the Government using evidence at trial that it had obtained through an identification procedure that may have manipulated or influenced the witness's ability to recognize the perpetrator of a crime. *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977). By the time that those decisions were rendered, the use of manipulated evidence by the prosecution had long been recognized as a due process violation. *See*, *e.g.*, *Lisenba v. California*, 314 U.S. 219, 237 (1941). Accordingly, when the police or prosecution engaged

in such improper manipulative conduct, the Court needed to decide the circumstances, if any, under which identification evidence could nonetheless be admitted at trial. It decided that such improperly influenced identification evidence would be admissible only if it was reliable, a determination that was to be made based upon the consideration of five factors. *See*, *e.g.*, *Brathwaite*, 432 U.S. 113-14.

Viewed in that light, *Stovall* and the cases that followed did not represent or signal a departure from the general proposition that the Due Process Clause of the Fourteenth Amendment does not require courts to make a preliminary reliability determination before a witness may testify at trial. Instead, the *Stovall* line of cases signaled that where the State's improper conduct manipulated or tainted a witness's identification of a criminal defendant, testimony about that identification had to be deemed reliable before it would be admissible. Because *Stovall* and its progeny rested the due process analysis upon the possibility that the government was seeking to use manipulated identification evidence, it follows that government action—an unnecessarily suggestive identification procedure—must be involved before the reliability inquiry will be triggered.

III. The New Hampshire courts correctly applied the principles discussed in the *Stovall* line of cases. That is, the state courts correctly concluded that they did not need to perform a reliability analysis because the police did not conduct a suggestive and unnecessary identification procedure. The witness identified

the petitioner at a time when she was not even asked to do so. She identified him after an officer merely asked for a description of the man that she had seen breaking into cars outside her apartment building. Accordingly, the witness identified the petitioner as the perpetrator of the theft not because of anything the police did. Rather, he was identified because an eyewitness watched him perpetrate the crime and then reported her observations to a police officer.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT GUARANTEE THAT ONLY RELIABLE WITNESSES BE ALLOWED TO TESTIFY AT CRIMINAL TRIALS.

The Due Process Clause of the Fourteenth Amendment guarantees a fair trial for all criminal defendants. *Lisenba v. California*, 314 U.S. 219, 236 (1941). Its "aim . . . is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Id.* Fundamental unfairness occurs when there "is conduct that shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). The New Hampshire Supreme Court held that it does not offend due process to allow a jury to hear and evaluate evidence of an out-of-court identification of a criminal defendant, where the police did not orchestrate or conduct a procedure that led to the identification. JA 10a-11a. Because

juries routinely decide the reliability and weight to be given evidence, *see*, *e.g.*, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), and because many other constitutional protections ensured that the verdict in the petitioner's case was the product of a fair process, the New Hampshire Supreme Court's decision did not result in an unfair, unreliable, or conscience-shocking trial. The petitioner's conviction should be upheld.

A. The Due Process Clause Protects Against State Action That Violates Fundamental Conceptions Of Justice; It Does Not Impose A Requirement That Evidence Must Be Found Reliable Before It Is Admitted At Trial.

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." Nothing in the plain meaning of those words dictates that trial courts are required to make preliminary reliability determinations before witnesses may offer testimony generally, or identification testimony particularly. The petitioner does not argue otherwise in his brief. Nor does he ground his claim for relief in colonial or English custom or practice. Instead, he asserts that this Court over time has interpreted the Due Process Clause to require such preliminary determinations. *See*, *e.g.*, PB 11-17. It has not.

"The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the

Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure that justice shall be done in all criminal prosecutions." *Cone v. Bell*, 129 S. Ct. 1769, 1772 (2009) (quotation omitted). It requires the State "to observe that fundamental fairness essential to the very concept of justice," *Lisenba*, 314 U.S. at 236, and to honor "those canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ." *Rochin*, 342 U.S. at 169.

While those principles may at first seem broad, this Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly" and has cautioned that

> [j]udges are not free, in defining "due process," to impose on law enforcement officials their personal and private notions of fairness and to disregard the limits that bind judges in their judicial function. They are to determine only whether the action complained of violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency.

Dowling v. United States, 493 U.S. 342, 352 (1990) (quotations, citations, ellipses, and brackets omitted) (addressing a challenge under the Due Process Clause of the Fifth Amendment); *see Medina v. California*, 505 U.S. 437, 443 (1992) (noting that "the states have considerable expertise in matters of criminal procedure," and that the procedures through which the

states administer the criminal law are "not subject to proscription under the Due Process Clause" unless they offend principles of justice so rooted in the "traditions and conscience of our people as to be ranked fundamental" (quotation omitted)); *Rochin*, 342 U.S. at 168 (similar).

When courts decide whether particular actions transgress fundamental conceptions of justice, their inquiry is a limited one, largely circumscribed by the Bill of Rights, which "speaks in explicit terms to many aspects of criminal procedure." *Medina*, 505 U.S. at 443; *see Dowling*, 493 U.S. at 352 ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."); *Bute v. Illinois*, 333 U.S. 640, 678-79 (1948) (*Douglas*, J., dissenting) ("The basic requirements for fair trials are those which the framers deemed so important to procedural due process that they wrote them into the Bill of Rights and thus made it impossible for either legislatures or courts to tinker with them."). A limited inquiry is necessary because "the expansion of . . . constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina*, 505 U.S. at 443. Accordingly, in the absence of a violation of the rights contained in the Bill of Rights, a fair trial claim is unlikely to succeed because "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where

the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle or trial by ordeal than a disciplined contest." *United States v. Augenblick*, 393 U.S. 348, 355 (1969) (citations omitted).

Actions that violate fundamental conceptions of justice occur, for example, when a criminal defendant is forced to appear for his jury trial while wearing identifiable prison clothing, *see Estelle v. Williams*, 425 U.S. 501, 503-06 (1976), when criminal defendants are routinely required to wear visible shackles during jury trials, *Deck v. Missouri*, 544 U.S. 622, 627 (2005), when the prosecution knowingly withholds material and exculpatory evidence from the defense, *Brady v. Maryland*, 373 U.S. 83, 86 (1963), when the prosecution knowingly offers perjured testimony that the factfinder relies upon to convict a criminal defendant, *Mooney v. Holohan*, 294 U.S. 103, 112-13 (1935), when a jury is placed in the custody of deputy sheriffs who are also witnesses for the prosecution, *Turner v. Louisiana*, 379 U.S. 466, 473 (1965), when the court refuses to instruct the jury concerning the presumption of innocence, *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978), or when the court fails to protect a criminal defendant against inherently prejudicial media coverage that demonstrably affects the jury venire and turns a trial into a "carnival" and "bedlam," *Sheppard v. Maxwell*, 384 U.S. 333, 355, 358 (1966). The common thread in each of these cases is that state action undermined the fundamental fairness of the trial. That is, in each case, the criminal defendant

suffered prejudice because state action interfered with the jury's ability to decide the case fairly. Significantly, in none of those cases did this Court hold that the due process clauses require trial courts to screen evidence for indicia of reliability.

And in fact, this Court has expressly rejected the argument that due process imposes a *per se* requirement that evidence or the testimony of witnesses must be deemed reliable before it is admissible in court.[3] In *Connelly*, 479 U.S. at 167, for example, the Court held that the Due Process Clause of the Fourteenth Amendment was not concerned with the reliability of a defendant's confession. There, the issue was whether the trial court was required, under the Due Process Clause, to exclude the confession of an arguably insane man who approached the police and admitted that he had murdered a woman several months earlier. *Id.* at 161-62. This Court acknowledged that the defendant's confession "might be proved to be quite unreliable," but decided that reliability was "a matter to be governed by the evidentiary laws of the forum and not by the Due Process Clause of the Fourteenth Amendment." *Id.* at 167. It also emphasized that the Due Process Clause was not concerned as much with

[3] Evidentiary rules—as opposed to constitutional provisions—may, however, require preliminary reliability determinations. *See*, *e.g.*, Fed. Rs Evid. 403, 702, 802; *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) (under the Federal Rules of Evidence, a trial judge should ensure that scientific evidence is reliable).

the potentially, "presumptively false" nature of the evidence at issue as it was with preventing "fundamental unfairness in the use of evidence, whether true or false." *Id.* (quotation omitted).

The Court confirmed that due process does not govern the reliability of testimony in *Dowling v. United States*, 493 U.S. at 345, where it held that the reliability of a witness's testimony was an issue for the jury to decide. There, the defendant was acquitted of charges arising from a home invasion. *Id.* But, during a subsequent trial for bank robbery, the victim of the home invasion was allowed to testify during the Government's presentation of evidence. *Id.* at 344-45. The defendant contended that admitting the victim's testimony amounted to a due process violation because "evidence relating to acquitted conduct is inherently unreliable." *Id.* at 345. This Court flatly rejected that assertion, leaving the issue of reliability to the jury, which "remained free to assess the truthfulness and the significance of [the victim's] testimony" and to weigh that assessment against whatever evidence the defendant may have offered when he had the "opportunity to refute it." *Id.* The Court also noted that the rules of evidence adequately protected the defendant against potential abuse. *Id.* at 352-53.

Both *Connelly* and *Dowling*, thus, rejected the position that due process requires evidence to be deemed reliable before it is admissible. Instead, reliability is to be resolved under the rules of evidence and by the trier of fact. Taken together, *Connelly* and *Dowling* compel the conclusion that while the Due

Process Clause of the Fourteenth Amendment may be a source of ensuring fundamental fairness, it does not accomplish that end by imposing a special or additional constitutional requirement that witnesses must be adjudged reliable before they may testify. Instead, under the Fourteenth Amendment, "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

There is no reason for the principles discussed in *Connelly* not to apply here. The parallels between that case and the instant one are strong. In *Connelly*, the police obtained the evidence at issue while in the process of investigating a murder. But they neither violated any party's constitutional rights nor deliberately tried to manipulate any evidence. So it was here. The police learned of the petitioner's identity while investigating a theft. But they did not violate his or Blandon's constitutional rights in the process. Nor did they try to manipulate Blandon or suggest an answer to her. In fact, quite to the contrary, Blandon pointed out the petitioner in response to the officer's request that she simply describe him. JA 48a-49a. So, Blandon's identification of the petitioner was not even responsive to the question that the officer had posed. Accordingly, just as the jury was left to resolve the issue of the reliability or accuracy of Connelly's statement to the police, so too should the jury here have been left to decide the correctness of Blandon's

identification. And that was essentially the effect of the New Hampshire Supreme Court's decision.[4]

B. Other Provisions Of The Constitution Safeguard The Reliability Of Criminal Trials.

Although the Due Process Clause of the Fourteenth Amendment does not require that evidence be deemed reliable before it is admissible, that result

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[4] Not surprisingly, therefore, the New Hampshire Supreme Court's decision rests comfortably within the majority view. *See*, *e.g.*, *United States v. Kimberlin*, 805 F.2d 210, 233 (7th Cir. 1986); *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972); *United States v. Venere*, 416 F.2d 144, 148 (5th Cir. 1969); *State v. Nordstrom*, 25 P.3d 717, 729 (Ariz. 2001); *People v. Owens*, 97 P.3d 227, 233 (Colo. Ct. App. 2004); *Sheffield v. United States*, 397 A.2d 963, 966-67 (D.C. 1979); *Semple v. State*, 519 S.E.2d 912, 914 (Ga. 1999); *Harris v. State*, 619 N.E.2d 577, 581 (Ind. 1993); *Wilson v. Commonwealth*, 695 S.W.2d 854, 857 (Ky. 1985); *State v. Birch*, 956 So. 2d 793, 800 (La. Ct. App. 2007); *State v. Naoum*, 548 A.2d 120, 124-25 (Me. 1988); *Wood v. State*, 7 A.3d 1115, 1119-21 (Md. Ct. Spec. App. 2010); *Commonwealth v. Sylvia*, 921 N.E.2d 968, 976 (Mass. 2010); *Tidwell v. State*, 784 S.W.2d 645, 647 (Mo. Ct. App. 1990); *People v. Marte*, 912 N.E.2d 37, 39 (N.Y. 2009), *cert. denied*, 130 S. Ct. 1501 (2010); *State v. Brown*, 528 N.E.2d 523, 532-33 (Ohio 1988); *State v. Pailon*, 590 A.2d 858, 863 (R.I. 1991); *State v. Reid*, 91 S.W.3d 247, 272 (Tenn. 2002); *Rogers v. State*, 774 S.W.2d 247, 260 (Tex. Crim. App. 1989), *overruled on other grounds by Peek v. State*, 106 S.W.3d 72, 79 (Tex. Crim. App. 2003); *cf. United States v. Boykins*, 966 F.2d 1240, 1243 (8th Cir. 1992) (witness's identification was properly admitted where she "spontaneously recognized" a co-defendant "without any suggestion from the government"). *But see Thompson v. Mississippi*, 914 F.2d 736, 739 (5th Cir. 1990).

does not mean that the Constitution is unconcerned with the reliability of evidence in criminal proceedings. Quite to the contrary, many other provisions of the Constitution ensure that the decision in a criminal case is the product of a fair procedure based upon reliable evidence. In fact, this Court recognized that very point in *Strickland*, 466 U.S. at 684-85, emphasizing that "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment. . . ." *See Washington v. Texas*, 388 U.S. 14, 18 (1967) (this Court has "increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law").

Consistent with that principle, this Court has held that due process requires that the accused be confronted with the witnesses against him, that he have the assistance of counsel for his defense, that he be given a speedy trial, and that he have the right to compulsory process for obtaining witnesses in his favor. *Id.* Each of these rights bears directly upon, or allows a defendant to demonstrate, the reliability, or lack thereof, of particular testimony or evidence. *See*, *e.g.*, *Doggett v. United States*, 505 U.S. 647, 655 (1992) ("Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."); *Washington*, 388 U.S. at 19 (the right to compulsory process allows a

defendant to put his own version of the facts before the jury "so it may decide where the truth lies").

For example, a criminal defendant's right to confrontation ensures the reliability of evidence by allowing him to test a witness's account through cross-examination. *Crawford v. Washington*, 541 U.S. 36, 55, 62 (2004); *see Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009) ("Confrontation is one means of assuring accurate forensic analysis."); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (cross-examination "assures the accuracy of the truth-determining process" (quotation omitted)). Confrontation represents the Framers' considered "judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined," namely "by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61; *see id.* at 67 ("The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising."); *see also Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2725 (2011) (*Kennedy*, J., dissenting) ("The protections in the Confrontation Clause, and indeed the Sixth Amendment in general, are designed to ensure a fair trial with reliable evidence.").

In practical terms, confrontation allows a defendant to expose testimony as false or as the product of an incompetent witness. *Melendez-Diaz*, 129 S. Ct. at 2537. For example, when confronted at trial, an

"eyewitness who has fabricated his account to the police, [or an] analyst who provides false results may, under oath in open court, reconsider his false testimony." *Id.* And even if nothing so dramatic occurs, a defendant is still able to use cross-examination to expose any number of weaknesses in the State's identification evidence: that the eyewitness was far away, that it was dark, that the eyewitness had a vision problem or was not wearing his eyeglasses, that the events unfolded quickly, that the eyewitness looked away for a period of time, or that the eyewitness harbored a bias. Each such fact would influence the weight, if any, that would be given to the State's evidence. Further, such circumstances are common fodder for cross-examination regardless of whether the witness is identifying an accused as the perpetrator of a particular crime or more generally recounting events that he or she observed.[5]

A criminal defendant's right to counsel also ensures that he has the opportunity to meaningfully

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[5] Sylvia Crawford, whose out-of-court testimony was at issue in *Crawford*, was an eyewitness. That is, although she was not identifying the perpetrator, she did describe the events that had occurred and implicated her husband in criminal conduct. *Crawford*, 541 U.S. at 39, 65. In its recitation of the facts, this Court noted that "Sylvia at one point told the police that she had 'shut [her] eyes and . . . didn't really watch' part of the fight, and that she was in shock." *Id.* at 66. Her testimony was, thus, potentially unreliable. But the solution to that problem was not to have a trial judge make a preliminary assessment of it. Instead, under the Sixth Amendment, the solution was to require cross-examination.

contest the reliability of the evidence against him. As the Court stated in *Nix v. Williams*, 467 U.S. 431, 446 (1984), "[t]he Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination." *See United States v. Cronic*, 466 U.S. 648, 656 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."); *see generally Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (emphasizing importance of right to counsel to ensure fair trial). Indeed, the "very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Cronic*, 466 U.S. at 655 (quotation omitted).

The defendant's right to a jury trial also provides a means of addressing the reliability of evidence by placing in the hands of the accused's peers the determination of whether the witnesses for and against him are to be believed. In *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968), this Court traced the historical roots of the right to a jury trial in the United States. It explained that the "[j]ury trial came to America with English colonists, and received strong support from them." *Id.* at 152. The Framers of the Constitution granted the right to a jury trial

> to criminal defendants in order to prevent oppression by the Government. Those who

> wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Id. at 155-56. Thus, the jury was seen as the means by which the charges against an accused were evaluated against whatever evidence the prosecution had marshaled. *See United States v. Booker*, 543 U.S. 220, 244 (2005) (the Sixth Amendment right to a jury trial protects the "interest in fairness and reliability"); *Herring v. New York*, 422 U.S. 853, 863 n.15 (1975) ("the collective judgment of the jury tends to compensate for individual short-comings and furnishes some assurance of a reliable decision" (quotations omitted)). Importantly, that evaluative process has been considered reliable. Citing "the most recent and exhaustive study of the jury in criminal cases," this Court explained that juries are able to "understand the

evidence and come to sound conclusions." *Duncan*, 391 U.S. at 157.[6]

Another means by which the Constitution ensures the reliability of the evidence presented in a criminal trial is through the requirement that alleged unlawful conduct be proved beyond a reasonable doubt. The beyond a reasonable doubt standard of proof "plays a vital role in the American scheme of criminal procedure, because it operates to give concrete substance to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (quotations omitted). "[B]y impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." *Id.* In other words, by requiring "near certitude," the beyond a reasonable doubt standard of proof compels the factfinder to carefully and rationally assess witness testimony so that a deprivation of life or liberty does not rest upon uncertain,

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[6] This Court has been wary of arguments based upon a "general distrust . . . of the ability of juries to approach their task responsibly and to sort out discrete issues given to them under proper instructions by the judge in a criminal case. . . ." *Spencer v. Texas*, 385 U.S. 554, 565 (1967) (discussing the use of evidence of prior convictions). *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally.").

unreliable, or otherwise inadequately supported or developed evidence.

These many means of testing the reliability of Blandon's identification of the petitioner were on full display here. The petitioner was brought to trial less than eight months after he was indicted. JA 1a, 5a. He was represented by counsel, who ably and vigorously cross-examined Blandon and the officer to whom Blandon had made the identification. JA 203a-06a, 225a-35a. The petitioner presented his version of events by testifying in his own behalf. JA 313a-69a. Further, the trial court correctly instructed the jury concerning the beyond a reasonable doubt standard of proof. JA 395a-96a. And it also gave the jury a special instruction concerning the evaluation of "identification testimony." JA 399a-401a.

The inclusion within the Bill of Rights generally, and the Sixth Amendment particularly, of these many means of testing the reliability of evidence undermines the petitioner's argument that the Due Process Clause of the Fourteenth Amendment requires a pretrial, judicial assessment of an eyewitness's identification testimony. Simply put, the Constitution already has time-tested mechanisms for that type of evaluation. *Connelly* and *Dowling* are two cases that necessarily rest upon a recognition of the importance and value of such mechanisms. This Court should rely upon the principles underlying those cases to hold that while the Due Process Clause of the Fourteenth Amendment plays an important role in ensuring the fairness of criminal proceedings, it does not do so by

imposing a constitutional requirement that the testimony of witnesses be deemed reliable by a judge before it is admissible at trial. *Cf. Crawford*, 541 U.S. at 67 (cautioning against replacing a procedure mandated by the Constitution with one of the Court's "devising").

II. THIS COURT HAS NOT CONSTRUED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO REQUIRE THAT ALL IDENTIFICATION EVIDENCE OBTAINED THROUGH SUGGESTIVE PROCEDURES BE DEEMED RELIABLE BEFORE IT IS ADMISSIBLE AT TRIAL.

In *Stovall v. Denno*, 388 U.S. 293 (1967), this Court issued the first of a series of decisions dealing with due process challenges to testimony about an eyewitness's identification of the accused. Those decisions required this Court to confront the problem of the State or the Government using at trial evidence that it had obtained through an identification procedure that may have manipulated or influenced the witness's ability to recognize the perpetrator of a crime. *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977). By the time that those decisions were rendered, the use of manipulated evidence by the prosecution had long been recognized as a due process violation. *See*, *e.g.*, *Lisenba*, 314 U.S. at 237 ("If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction, he has

been denied due process of law."); *Holohan*, 294 U.S. at 112 (due process is offended when the state deliberately presents perjured evidence); *cf. Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing improper comments by a prosecutor and stating that "although the State is obliged to prosecute with earnestness and vigor," it "is as much its duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one" (brackets omitted)). Accordingly, when the police or prosecution engaged in such improper manipulative conduct, the Court needed to decide the circumstances, if any, under which identification evidence could nonetheless be admitted at trial. It decided that such improperly influenced identification evidence would be admissible only if it was reliable. *Brathwaite*, 432 U.S. at 113-14.

Viewed in that light, *Stovall* and the cases that followed did not represent or signal a departure from, or an exception to, the general proposition that the Due Process Clause of the Fourteenth Amendment does not require courts to make a preliminary reliability determination before a witness may testify at trial. Instead, *Stovall* and its progeny signaled that where the State's conduct manipulated or tainted a witness's identification of a criminal defendant, testimony about that identification had to be deemed reliable before it was admitted at trial. *See Brathwaite*, 432 U.S. at 113-14; *see also Lisenba*, 314 U.S. at 236 (the "aim of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the

use of evidence, whether true or false"). To have held otherwise would have been to allow the State to derive an unfair advantage at trial from its improper, pretrial conduct.

Each of the cases in the *Stovall* line involved identifications whose reliability was attacked by the defense because of the identification procedure set up by the police. In analyzing whether the identification evidence was admissible, this Court engaged in two inquiries: Was there anything improper about the police's conduct? And if so, should the identification nonetheless be admitted?

For example, in *Stovall* itself, the defendant was presented to the victim in handcuffs in the hospital room where she was recovering from the major surgery that was required to save her life after the defendant had stabbed her eleven times. *Stovall*, 388 U.S. at 295. During this identification procedure, the defendant was surrounded by five officers and two members of the district attorney's staff, and was the only black person in the room. *Id.* This Court held that the state's conduct did not violate due process, however, because "an immediate hospital confrontation was imperative" since it was uncertain whether the victim would survive. *Id.* at 302. After finding no improper conduct, this Court made no mention of the reliability of the identification in its due process analysis.

In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the defendant was identified when the police

showed photographs, including the defendant's, to employees of a bank that had been robbed the previous day. *Id.* at 380-82. The Court acknowledged "that improper employment of photographs may sometimes cause witnesses to err in identifying criminals," and that such a

> danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.

Id. at 383. Despite those "hazards of initial misidentification," however, this Court upheld the admission of the identification evidence at issue, noting that identification by photograph had "been used widely and effectively in criminal law enforcement," and that any "danger that the use of the technique may result in convictions based on misidentification [could be] substantially lessened by a course of cross-examination at trial, which exposes to the jury the method's potential for error." *Id.* at 384.

In *Foster v. California*, 394 U.S. 440 (1969), this Court found that the police procedure involved—two lineups, in which the defendant was the only person in both, and a suggestive showup—was unnecessarily

suggestive and unreliable; thus, the identification was inadmissible. *Id.* at 442. The Court stated,

> The suggestive elements in this identification procedure made it all but inevitable that David would identify [the defendant] whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, "This is the man." This procedure so undermined the reliability of the eyewitness identification as to violate due process.

Id. at 443.

In *Coleman v. Alabama*, 399 U.S. 1, 4 (1970), this Court rejected a claim of unnecessary suggestiveness where a shooting victim identified the defendant from a six-person lineup conducted at the local police station. Importantly, for purposes of the instant case, the plurality in *Coleman* specifically noted that "the record [was] utterly devoid of evidence that anything the police said or did prompted [the witness's] virtually spontaneous identification of petitioners among the lineup participants as the proceeding got underway." *Id.* at 6 (although Coleman was the only man in the lineup who was wearing a hat, "nothing in the record show[ed] that he was required to do so").

In *Neil v. Biggers*, and in *Brathwaite*, this Court considered "whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and

unnecessary."[7] *Brathwaite*, 432 U.S. at 99; *see Neil v. Biggers*, 409 U.S. 188, 199 (1972). In *Biggers*, 409 U.S. at 194-95, the police conducted a showup identification seven months after the crime. In *Brathwaite*, 432 U.S. at 101, the identification was made after one officer, relying upon the identifying officer's description, left a photograph of the defendant in the identifying officer's office. In both cases, although the police procedure was improper—that is, unnecessary and suggestive—this Court upheld the admission of the identification evidence because it was reliable. *Id.* at 116; *see Biggers*, 409 U.S. at 198-201. In *Brathwaite*, this Court specifically stated that it was "content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." *Id.* at 116.

And finally, in *Watkins v. Sowders*, 449 U.S. 341, 345-46 (1981), this Court considered whether the Due Process Clause required trial courts to make preliminary determinations, outside the presence of the jury, concerning the admissibility of identification evidence. At issue there were two pretrial identifications of the defendant as the person who had committed an

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[7] *Biggers* answered this question with respect to identification evidence obtained before *Stovall* was decided. *Biggers*, 409 U.S. at 199. *Brathwaite* dealt with identification evidence obtained after *Stovall*. *Brathwaite*, 432 U.S. at 109.

armed robbery of a liquor store. *Id.* at 342. One witness made the identification through a showup; the other made it through a lineup; both were conducted by the police. *Id.* at 342-43. In concluding that a preliminary determination was not necessary in every case, this Court emphasized that "cross-examination ha[d] always been considered a most effective way to ascertain truth," that "the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform," and that "the *only* duty of a jury in cases in which identification has been admitted will often be to assess the reliability of that evidence." *Id*. at 347, 349.

Based upon this Court's reasoning in all of the cases in the *Stovall* line, at least three related points emerge. First, those cases cannot stand for the proposition that identification evidence is a special type of evidence that generally is so dubious that it must always be evaluated by a judge before it is introduced to a jury. *See* PB 17. That proposition would undermine this Court's repeated insistence that only evidence derived from unnecessarily suggestive procedures will be subjected to a reliability determination. And it would be inconsistent with a point that this Court recognized in *Brathwaite* and *Watkins*:

> While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart—the "integrity"—of the adversary process. Counsel

> can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.

Brathwaite, 432 U.S. at 113 n.14 (quotation omitted); *see Watkins*, 449 U.S. at 348.

Second, *Stovall*, *Simmons*, *Foster*, *Coleman*, *Biggers*, *Brathwaite*, and *Watkins* cannot stand for the proposition that all suggestive identifications must be submitted to a judge for a reliability determination before trial. Certainly, the showup in *Stovall* was suggestive—he was the only black man in the room and he was accompanied by an entourage of policemen and prosecutors. But this Court did not require reliability as a condition of admissibility there. Instead, it focused upon the necessity of the procedure. So, any argument that all suggestive identifications must be subjected to a pretrial reliability determination is an argument that *Stovall* should be overruled and that this Court should ignore its repeated emphasis upon the need for the identification procedure to be both suggestive and unnecessary, before the five reliability factors will apply. The petitioner has not pointed to any case law that would justify such a sweeping proposition.

Third, *Stovall*, *Simmons*, *Foster*, *Coleman*, *Biggers*, *Brathwaite*, and *Watkins* cannot have been premised upon the proposition that the Due Process

Clause of the Fourteenth Amendment requires preliminary reliability assessments of all potentially untrustworthy evidence, for that proposition is counter to cases like *Connelly* and *Dowling*. It is also inconsistent with the aim of the Due Process Clause, which "is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba*, 314 U.S. at 236. Instead, the *Stovall* line of cases should be viewed as consistent with the rest of this Court's Due Process jurisprudence which, as explained earlier, focuses upon whether the government has taken actions that deprive a defendant of a fundamentally fair trial.

Since there is no broadly applicable constitutional requirement that conditions admissibility upon a pretrial assessment of reliability, *Stovall*, *Simmons*, *Foster*, *Coleman*, *Biggers*, and *Brathwaite*, must have been driven by some other due process concern. Because this Court's opinions in those cases repeatedly focused upon the dangers of police misconduct during the identification procedure, *see*, *e.g.*, *Brathwaite*, 432 U.S. at 111-12; *Foster*, 394 U.S. at 442-43; *Simmons*, 390 U.S. at 383; *Stovall*, 388 U.S. at 298-99, the inescapable conclusion is that the due process concern at issue was whether the State or the Government was manipulating identification evidence and then using it at trial. *See*, *e.g.*, *State v. Nelson*, 260 S.E.2d 629, 648 (S.C. 1979) ("In effect, when police manipulate suggestive elements of an identification procedure to convince a witness that 'there is the man,' the reliability of the witness' subsequent identification of

the defendant in court can be so undermined as to violate due process."). Such a conclusion finds support in the fact that by the time *Stovall* was decided, the use of improperly obtained evidence had long been considered a due process violation. *See*, *e.g.*, *Lisenba*, 314 U.S. at 237 ("If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction, he has been denied due process of law."). Seen in that light, *Stovall* and its progeny represented an effort to strike "the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime." *Kirby v. Illinois*, 406 U.S. 682, 691 (1972).

Case law discussing the applicability of the Sixth Amendment right to counsel during identification procedures supports the conclusion that this Court harbored concern about the use of prosecution-manipulated identification evidence. For example, in *United States v. Wade*, 388 U.S. 218, 236-37 (1967), decided the same day as *Stovall*, this Court held that the defendant was entitled to the assistance of counsel at a post-indictment lineup. It emphasized the "degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification," and pointed out that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more

such errors than all other factors combined." *Id.* at 229 (brackets and quotation omitted); *see id.* at 235 ("The fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem of getting sufficient proof, because he has not 'come clean,' involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way.").

In *Moore v. Illinois*, 434 U.S. 220, 229 (1977), this Court held that the defendant was entitled to counsel during a corporeal identification procedure conducted as part of a pretrial hearing. It emphasized that the police could "suggest, intentionally or unintentionally, that they expect the witness to identify the accused," and that such a suggestion "coming from a police officer or prosecutor" could "lead a witness to make a mistaken identification." *Id.* at 225. The Court also noted that counsel could intervene to stop "suggestive features of a procedure before they influence[d] a witness' identification." *Id.*

And in *United States v. Ash*, 413 U.S. 300, 312 (1973), this Court again referred to the "opportunities for prosecuting authorities" to take advantage of identification procedures through "suggestive influences." It concluded, however, that the Sixth Amendment did not require that defense counsel be able to attend a meeting between a witness and the prosecution during which a photographic array was used. *Id.* at 321. The Court left open the possibility that any

identification that took place during such a meeting could be excluded on due process grounds. *Id.* at 318 n.11. It also noted that any identification conducted by the defense could be excluded if it was the product of an improper identification procedure. *Id.* The latter circumstance, of course, would not be a matter of due process, for the Fourteenth Amendment does not create a constitutional basis upon which the State may challenge a defendant's conduct; it guards against certain state action. U.S. Const. amend. XIV, § 1. But, by noting the possibility of excluding identification evidence obtained by the defense, *Ash* further demonstrates that this Court's concern with identification evidence was that it could be manipulated by a party and then introduced at trial to the prejudice of one side or the other in a criminal case.

Because *Stovall* and its progeny rested the due process analysis upon the possibility that the government was seeking to use manipulated identification evidence, it follows that government action must be involved before the protections outlined in those cases will be triggered. That is, it is only when there is government conduct—an unnecessarily suggestive identification procedure—that the test for reliability set out in *Biggers* and *Brathwaite* will apply. The New Hampshire Supreme Court reached that conclusion, and it was correct.

In urging a contrary result, the petitioner relies in part upon a portion of *Brathwaite* which provides that "reliability is the linchpin in determining the admissibility of identification testimony." PB 14

(quotation omitted); *see* PB 28. *See also United States v. Bouthot*, 878 F.2d 1506, 1516 (1st Cir. 1989); *Dunnigan v. Keane*, 137 F.3d 117, 128 (2d Cir. 1998) (relying upon that language); *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986) (same). Both the petitioner and these courts, however, have wrenched that passage from *Brathwaite* out of context. *Brathwaite*, 432 U.S. at 99, involved "*a police procedure* that was both suggestive and unnecessary." (Emphasis added.) Its statement that "reliability is the linchpin" addressed when testimony *tainted by a suggestive police procedure* may be admitted. Besides, in *Stovall*, this Court did not even discuss reliability. So, reliability cannot, contrary to the petitioner's claims, be the linchpin of admissibility for all suggestive identification procedures. What the reliability inquiry represents is a threshold that the State must overcome in order to admit identification evidence that its agents obtained through procedures that were unnecessarily suggestive and, hence, manipulative. *See Brathwaite*, 432 U.S. at 112 (balancing the need to deter the police from using unnecessarily suggestive procedures and the need to ensure that reliable evidence is not unnecessarily withheld from the trier of fact).

The petitioner also devotes several pages of his brief to arguing that the New Hampshire Supreme Court "imported Fourth Amendment exclusionary principles into the due process safeguards regarding identification evidence." PB 23-27. Pointing to the state court's reference to "improper state action," the petitioner seems to assert that the court relied too

heavily upon a Fourth Amendment deterrence-type rationale which, he says, is inconsistent with the reliability inquiry that this Court discussed in *Biggers* and *Brathwaite*. PB 23; JA 10a.

Nothing in the New Hampshire Supreme Court's opinion suggests that its reference to "improper state action" was based upon a misunderstanding about the nature of a due process claim under the Fourteenth Amendment. The state court did not cite the Fourth Amendment. JA 9a-11a. Nor in any obvious way did it base its opinion upon Fourth Amendment principles or a deterrence rationale. Instead, by referring to "improper state action," the New Hampshire Supreme Court recognized that a successful due process claim will exist only when the State unfairly uses identification evidence that it obtained through impermissible, manipulative means.

At bottom, the petitioner is asking this Court to deem identification evidence a special type of evidence that is entitled to its own reliability rules—mandated by the Due Process Clause of the Constitution, no less. But, as noted earlier, he has not identified any text in the Constitution that requires identification evidence to be treated differently. Nor has he pointed to any colonial or English custom that would suggest that such identification evidence should be singled out for special, constitutional rules regarding reliability. And there is no basis in logic for such a distinction. Either the Due Process Clause forbids the introduction of unreliable evidence or it does not. *Connelly* and *Dowling* correctly say that it does not.

In urging a contrary conclusion, the petitioner relies heavily upon the results of studies conducted by social scientists to argue that identification evidence is generally unreliable. PB 17-22. The problem with that argument is that, as explained earlier, this Court's case law, from *Stovall* to *Brathwaite*, was not based upon reliability. Instead, it was based upon the State's or the Government's use of potentially manipulated evidence at trial. To the extent that the petitioner's arguments implicate state evidentiary rules or undermine the weight that identification evidence is assigned by the trier of fact in some cases, such rules and special jury instructions adequately address the concerns that he has raised. *See*, *e.g.*, *United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972) (setting forth a model jury instruction on eyewitness identification evidence); *People v. Marte*, 912 N.E.2d 37, 40-41 (N.Y. 2009) (discussing the application of state rules of evidence and the possible use of expert testimony regarding eyewitness identification), *cert. denied*, 130 S. Ct. 1501 (2010). In light of these extant safeguards, there is no need for this Court to require a broad constitutional rule in their stead. *See District Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2322 (2009) ("[j]udicial imposition of a categorical [rule] . . . might pretermit other responsible solutions being considered in Congress and state legislatures").

The bottom line is that the Due Process Clause of the Fourteenth Amendment does not contain a broad

constitutional requirement that all evidence be deemed reliable before it is admissible. Rather, the rights to confrontation, counsel, compulsory process, a jury trial, and proof of the allegations beyond a reasonable doubt, among others, remain the means by which the Constitution enables a criminal defendant to test the reliability of the State's evidence and thereby achieve a just and fair verdict. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

III. BECAUSE THE POLICE DID NOT EMPLOY AN UNNECESSARILY SUGGESTIVE IDENTIFICATION PROCEDURE, THERE WAS NO REASON TO CONDUCT A PRETRIAL RELIABILITY ASSESSMENT.

The New Hampshire courts correctly applied the principles discussed in *Stovall*, *Simmons*, *Foster*, *Coleman*, *Biggers*, and *Brathwaite*. That is, the state courts correctly concluded that they did not need to perform a reliability analysis because the police did not conduct "a suggestive and unnecessary identification procedure." *Brathwaite*, 432 U.S. at 106.

As the petitioner forthrightly concedes in his brief, the police did not conduct an identification procedure at all. PB 34 ("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 recognized is prone to error. . . ."). To explain, when Officer Clay arrived at West Hollis Street, she parked her cruiser in front of the building and walked to the parking lot, where she encountered the petitioner carrying some of the stolen property. JA 37a-38a, 41a-42a, 72a-73a. He pointed toward a man on Ash Street and said that the man had been in the parking lot. JA 40a. Officer Clay went over and spoke to the man, but he denied involvement in the thefts. JA 41a.

When Officer Clay returned to the parking lot, Clavijo approached her and said that his neighbor, Blandon, had told him that someone had broken into his car. JA 42a. Officer Clay then decided to go and speak with Blandon. Before leaving, she asked Officer Dunn "to stay with Mr. Perry because it was an ongoing investigation and [they] needed to make sure [they] had all parties that had knowledge of the situation . . . remain on scene until [they] figured out what was going on." JA 43a, 79a-80a. After Officer Clay left, the petitioner stood with Officer Dunn. JA 43a. He was not handcuffed or restrained in any way. JA 40a, 43a.

Officer Clay spoke to Blandon in the hallway of her apartment building, where neither of them could see the parking lot or the petitioner. JA 44a, 48a. Officer Clay never pointed out the petitioner to Blandon or indicated in any way that he was a suspect. JA 44a, 49a. She merely asked Blandon to describe what she had seen. JA 48a. In response, Blandon said that she had seen a tall, black man, JA 61a, "walk and

look into all of the cars in the parking lot and that he then circled Mr. Clavijo's car," opened the trunk, and removed a large item, JA 55a. She also said that she had seen him "carrying a bat." JA 55a. Officer Clay asked for a more specific description of the man, and Blandon said "it was the man that was in the back parking lot standing with the police officer." JA 48a. As Blandon spoke, "[s]he kind of went back into her apartment and pointed towards the window to show . . . that she had already looked out the window to see Mr. Perry and Officer Dunn standing in the parking lot." JA 49a.

Under these circumstances, far from identifying the defendant as the result of some police-orchestrated procedure—let alone an unnecessarily suggestive one—Blandon pointed out the petitioner at a time when she was not even asked to do so. That is, she identified him after Officer Clay merely asked for a description of the man whom she had seen lurking in the parking lot and taking items from Clavijo's car. A responsive answer to that question would have consisted of additional details about the petitioner's physical characteristics or other traits. Accordingly, the petitioner was identified as the perpetrator of the theft not because of anything the police did. Rather, he was identified because he had the misfortune that an eyewitness watched him perpetrate the crime and then reported her observations to a police officer.

In light of the facts outlined above, the trial court supportably found, and the New Hampshire Supreme Court agreed, that the identification evidence at issue

was not "derived from any suggestive technique employed by the police." JA 86a; *see* JA 10a. Because the police did not conduct an identification procedure, the New Hampshire Supreme Court correctly concluded that the protections set forth in *Biggers* and *Brathwaite* did not apply. In the alternative, because the state courts supportably found that any procedure was not unnecessarily suggestive, there was no need to decide whether Blandon's identification of the petitioner was reliable. *Brathwaite*, 432 U.S. at 106. On either or both of those bases, the decision of the New Hampshire Supreme Court should be affirmed.

In conclusion, the verdict in the petitioner's case was the product of a fair trial during which he exercised many of the constitutional rights that have been discussed in this brief. For example, he was represented by counsel, who ably and vigorously cross-examined Blandon and the officer to whom Blandon had made the identification. JA 203a-06a, 225a-35a. Defense counsel pressed the identification issue in her opening statement, arguing that the case was "about the wrong identification, an inaccurate identification. . . ." JA 113a. Defense counsel then raised the identification issue again in closing argument, asserting that the petitioner was being prosecuted because of incorrect and unreliable identification evidence. JA 374a-75a. In addition, the petitioner presented his version of events by testifying in his own behalf. JA 313a-69a. Finally, the trial court correctly instructed the jury concerning the beyond a reasonable doubt standard of proof, JA 395a-96a, the presumption of

innocence, JA 395a, and the evaluation of "identification testimony" in particular, JA 399a-401a.

Under these circumstances, a properly instructed jury weighed the evidence that was presented at a trial during which both parties were vigorously represented by able counsel. It then reached a verdict. The Constitution requires nothing more.[8]

[8] Should this Court reverse the judgment of the New Hampshire Supreme Court, the respondent reserves the right, on remand, to raise preservation issues, to contend that any error in admitting the identification evidence was harmless, and to argue that the identification was reliable, all of which are arguments that the respondent advanced in its brief to the state court. JA 452a-53a, 463a-67a.

CONCLUSION

The judgment of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

MICHAEL A. DELANEY
Attorney General

STEPHEN D. FULLER
Senior Assistant Attorney General
Counsel of Record

THOMAS E. BOCIAN
Assistant Attorney General

SUSAN P. MCGINNIS
Senior Assistant Attorney General

NEW HAMPSHIRE DEPARTMENT
OF JUSTICE
CRIMINAL JUSTICE BUREAU
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3671
stephen.fuller@doj.nh.gov