No. 10-8974

IN THE

Supreme Court of the United States

BARION PERRY,

Petitioner,

vs.

NEW HAMPSHIRE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When a criminal defendant challenges the reliability of an eyewitness identification, but the circumstances alleged to make it unreliable were not caused by any state action, is the admissibility of the identification controlled by the Due Process Clause of the Fourteenth Amendment, or is it solely a question of state evidence law?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The petitioner in this case seeks to expand the due process limitations on the admissibility of eyewitness

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

identification, an admittedly controversial category of evidence. Imposing further constitutional limits on evidence threatens to blur the boundary between protected constitutional rights and the rights of the States to establish and implement their own evidentiary procedures. Such constitutionalization of state evidentiary procedures is an unnecessary suppression of the States' rights to conduct their own criminal trials and is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts are thoroughly stated in the briefs for Petitioner and Respondent. They are summarized here to frame the issues in this brief.

During the early morning hours of August 15, 2008, the Nashua Police Department received a report that a black male was attempting to break into vehicles located in the back parking lot of an apartment building. J. A. 82a-83a. Officer Nicole Clay arrived at the scene and observed a black male, later identified as Perry, standing between vehicles and holding two amplifiers. J. A. 37a-38a, 83a. When Officer Clay arrived at the parking lot, she heard a noise as if an aluminum baseball bat had fallen to the ground. J. A. 83a. Officer Clay asked Perry to put down the amplifiers and speak with her. J. A. 83a. Perry did so. He claimed he had found the amplifiers on the ground and was moving them, but that he had seen two "kids" leaving the parking lot. J. A. 83a. The amplifiers were later identified as belonging to Alex Clavijo, who said he had kept them in the trunk of his vehicle. J. A. 131a-133a; 163a-165a.

While Officer Clay spoke briefly with a man Perry indicated was one of the "kids" he had seen exiting the parking lot, Clavijo approached Officer Clay and said his neighbor, Nubia Blandon, had witnessed someone break

into his vehicle. J. A. 83a-84a. Officer Clay accompanied Clavijo into the apartment building to talk with Blandon, leaving Perry with another police officer, Officer Robert Dunn. J. A. 83a.

Blandon, through Clavijo as a translator, explained what she had seen to Officer Clay. J. A. 84a. Blandon said she had watched a tall black male look inside vehicles parked in the lot, circle Clavijo's car, open Clavijo's trunk, and remove a large item. J. A. 84a. Blandon said the man had been carrying a baseball bat. J. A. 84a. When Officer Clay asked for a more specific description, Blandon pointed through her apartment window and said the person she had seen was the man standing with the police officer in the parking lot. J. A. 84a. Perry was arrested and charged with theft by unauthorized taking and criminal mischief. J. A. 82a, 84a. At a subsequent photo array, Blandon was unable to identify Perry. J. A. 84a.

Perry moved to suppress Blandon's out-of-court identification, arguing it was obtained under unnecessarily suggestive circumstances. J. A. 12a. The trial court cited the state's "two-step test" for evaluating a due process challenge to an out-of-court identification: (1) whether the identification procedure was unnecessarily suggestive; and (2) if so, whether the identification procedure was so suggestive as to render the identification unreliable. J. A. 85a. The trial court concluded that, because Blandon's identification was not the result of any suggestive police technique, the identification was admissible and the court was not required to proceed to step number two to consider whether the identification was otherwise reliable. See J. A. 86a-87a.

At trial, Officer Clay testified as to Blandon's identification. J. A. 173a-174a. Perry was convicted of theft by unauthorized taking in a jury trial. J. A. 408a-409a. He appealed the conviction to the New Hampshire

Supreme Court, claiming the admission of Blandon's out-of-court identification violated Perry's rights under the Due Process Clause and the New Hampshire Constitution. J. A. 426a. The New Hampshire Supreme Court affirmed, citing the two-step test and concluding, as the trial court did, that the analysis did not apply under the circumstances because the potentially suggestive out-of-court identification was not the result of police conduct. J. A. 9a-11a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

Trial rights protected by the Due Process Clause have largely been limited to those explicitly guaranteed by another provision of the Constitution. Expanding due process rights under the "fundamental fairness" approach in criminal trials has been limited primarily to those circumstances where the jury is not given a full presentation of the case, and where additional safeguards are therefore needed to protect the defendant's rights. This Court should be wary of stretching this approach further.

Creating and implementing rules of evidence are matters of state concern. The Due Process Clause provides basic limitations, but federal courts should not unnecessarily interfere with the States' implementation of criminal procedures.

A standard of admissibility hinging on "reliability" is impractical. The theories addressing the reliability of eyewitness identification procedures have changed dramatically since the Court last revisited the issue. The science and psychology of eyewitness identifications is a field of continuous evolution. A rule of constitutional law cannot turn on something so unpredictable.

An identification that is questionable but not contrived is a legitimate brick in the prosecution's wall of evidence. Excluding evidence with some probative value merely because it might point the wrong direction is contrary to the foundation of modern evidence law. Exclusion of identification evidence on the theory that it is uniquely likely to mislead the jury would be justified only if it were proved that measures less than exclusion are not adequate and cannot be made adequate. That case has not been proved by the empirical studies to date.

ARGUMENT

I. This Court should be wary of untethered due process claims.

A. The Bill of Rights and "Fundamental Fairness."

Identifying the boundaries of "due process," specifically in the context of a criminal trial, has been a longstanding source of debate. See *Chambers* v. *Florida*, 309 U. S. 227, 235-236 (1940). A phrase that "antedates the establishment of our institutions," *Hurtado* v. *California*, 110 U. S. 516, 539 (1884) (Harlan, J., dissenting), the hundreds of years of legislation and litigation addressing the concept have nevertheless left it a nebulous one:

> "But is it 'due process of law'? The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. . . . To what principles, then, are we to resort to ascertain whether this process . . . is due process?" *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. (59 U. S.) 272, 276-277 (1856).

"As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, 314 U. S. 219, 236 (1941). Due process protects the "specific guarantees of the Bill of Rights" and "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Albright* v. *Oliver*, 510 U. S. 266, 282 (1994) (Kennedy, J., concurring in the judgment) (internal quotation marks omitted).

Trial errors that violate a criminal defendant's "due process" rights generally stem from the former category, that is, the right asserted is tethered to some explicit guarantee of the Constitution. "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation." *Dowling* v. *United States*, 493 U. S. 342, 352 (1990). It "require[s] that only the most basic procedural safeguards be observed." *Patterson* v. *New York*, 432 U. S. 197, 210 (1977).

Justice Harlan's opinion for the Court in *Spencer* v. *Texas*, 385 U. S. 554 (1967), is instructive. The state procedure under attack was Texas's practice of permitting the prosecution to admit a defendant's prior convictions during the guilt phase of trial, with appropriate limiting instructions to the jury. *Id.*, at 556. Rejecting the notion that this Court serves "as a rule-making organ for the promulgation of state rules of criminal procedure," the Court found it "impossible" to find that the Texas rule, while prejudicial to a defendant, violated the Due Process Clause. *Id.*, at 564.

Importantly, *Spencer* distinguished the due process claim in that case from the one presented in *Jackson* v. *Denno*, 378 U. S. 368 (1964). *Jackson* involved procedures to guarantee a specific federal constitutional right—the right against self-incrimination—and the

federal procedural requirements were imposed to implement that explicit right. See *Spencer*, 385 U. S., at 564-565. "In the procedures before us, in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach. In this area, the Court has always moved with caution before striking down state procedures." *Id.*, at 565. Were the Court to proceed under the guise of "due process" to select a procedure for the proper use in state court of a defendant's past criminal convictions, the States' hands would be significantly tied.

> "It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not." *Id.*, at 568-569.

Burgett v. *Texas*, 389 U. S. 109 (1967), provides an informative contrast with *Spencer*. In that case, one of the defendant's prior convictions had been entered in a case where the defendant had apparently not been represented by counsel. *Id.*, at 112-114. The ruling relied expressly on the holding of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), that the specific Sixth Amendment right to counsel was incorporated into the Fourteenth Amendment's Due Process Clause. See *Burgett*, *supra*, at 114. The Court quoted *Spencer*, and distinguished it on the ground that, unlike *Spencer*, the result in this case was prompted by a "specific federal right," not a general "fairness" approach. *Id.*, at 115-116.

Several other due process trial rights further demonstrate this pattern. *Doyle* v. *Ohio*, 426 U. S. 610 (1976), held that the use of a defendant's silence after receiving *Miranda* warnings for impeachment purposes violated the Due Process Clause. *Id.*, at 619. Use of a suspect's

silence under these circumstances "would be fundamentally unfair" in light of a suspect's Fifth Amendment rights and the "implicit" promise of those rights that a suspect's "silence will carry no penalty." See *id.*, at 618. This due process right did not stand on its own, but stood to give meaning to a protection already recognized as required by the Fifth Amendment, specifically "the right-to-remain-silent component of *Miranda*." See *Brecht* v. *Abrahamson*, 507 U. S. 619, 628 (1993).

The use of coerced confessions is similar. The admission of a defendant's involuntary confession is a violation of due process, see *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978), but this right is clearly tied to the Fifth Amendment right against self-incrimination. Since the incorporation of this right, see *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964), in challenges to the admission of an allegedly coerced confession under the Fifth and Fourteenth Amendments, the Court has not been required to proceed with separate analyses for each claim. Admission of a defendant's coerced confession violates the explicit terms of the self-incrimination clause, and thus these rights are in effect synonymous. See, *e.g.*, *Arizona* v. *Fulminante*, 499 U. S. 279, 282 (1991) ("Fifth and Fourteenth Amendments" mentioned at the beginning of the opinion, with no separate analysis thereafter).

Donnelly v. *DeChristoforo*, 416 U. S. 637 (1974), demonstrates this point with respect to the due process limitations of a prosecutor's closing argument. See *id.*, at 642. There, the prosecutor made two statements, acknowledged by the state court to be improper, about the defendant's guilt. *Id.*, at 638, 640. Reiterating the limited power of a federal court to review a state court trial proceeding, the Court noted that the prosecutor's remarks did not make this, "a case in which the State has denied a defendant the benefit of a specific provi-

sion of the Bill of Rights, . . . or in which the prosecutor's remarks so prejudiced a specific right . . . as to amount to a denial of that right." *Id.*, at 643. If a specific guarantee were involved, the Court reasoned, it would have taken "special care" to protect that right from the prosecutor's conduct. See *ibid.* Instead, the only claim made was that the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process," a claim the Court concluded was not supported by the record. *Ibid.*

The Court is far less hesitant to find a state proceeding a violation of the Due Process Clause when it implicates an explicit constitutional guarantee. The other route, *i.e.*, the "fundamental fairness" approach, is risky because it threatens to allow this Court to "substitute[] [its] judgment of what is right for what the Constitution declares shall be the supreme law of the land." See *Stovall* v. *Denno*, 388 U. S. 293, 305 (1967) (Black, J., dissenting). This in turn threatens, in Justice Black's words, to turn this Court into "not a Constitution-interpreter, but a day-to-day Constitution-maker," see *ibid.*, or in Justice Stewart's words, a "roving commission to impose upon the criminal courts of [the states] [its] own notions of enlightened policy." *Spencer*, 385 U. S., at 569 (Stewart, J., concurring). This Court has consistently expressed that it does not seek to do so.

B. "Untethered" Due Process Rights.

A few untethered trial rights have been recognized as protected by the Due Process Clause. But these rights generally rise to the level of a due process violation because they transform the trial into a "pretense," see *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935), that is, a proceeding in which the jury is not provided all the information it needs to reach a fair conclusion. The same is not true in the present case.

A conviction obtained by false evidence, known to be false, violates the Due Process Clause. *Ibid*. "[T]he fundamental conceptions of justice" cannot be fulfilled where the "State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury . . . ." *Ibid*. The same is true when the State fails to correct false evidence presented to the jury, even if the State did not solicit the evidence. See *Napue* v. *Illinois*, 360 U. S. 264, 269 (1959).

As an "extension" of that ruling, it is likewise a due process violation for a prosecutor to withhold from a defendant favorable evidence that is material to guilt or punishment. *Brady* v. *Maryland*, 373 U. S. 83, 86-87 (1963). A criminal trial in which the prosecutor withholds such evidence "casts the prosecutor in the role of an architect of a proceeding." See *id.*, at 87-88. Like the rule declared in *Mooney*, the *Brady* rule seeks to prevent the state from "contriving" a conviction by misleading the jury. Such a manipulation of a criminal trial cannot be said to satisfy the principles of "fundamental fairness."

Under narrow circumstances, the admission of an improper identification can also violate a defendant's right to due process. In *Stovall*, *supra*, the Court recognized for the first time that the suggestiveness of an identification procedure "was anything other than a matter to be argued to the jury." See *Neil* v. *Biggers*, 409 U. S. 188, 199 (1972). The Court's discussion of the due process restrictions on eyewitness identifications in *Stovall* was brief and cursory, citing only a Fourth Circuit case for the proposition that an identification obtained by a procedure "so unnecessarily suggestive and conducive to irreparable mistaken identification" could stand as an independent due process violation.

See *Stovall*, 388 U. S., at 301-302 (citing *Palmer* v. *Peyton*, 359 F. 2d 199 (CA4 1966)). The Fourth Circuit case drew a due process claim seemingly from thin air, citing search and interrogation cases that have nothing to do with identification procedures. See *Palmer*, *supra*, at 202, and nn. 7-11. This dictum in *Stovall* swept far broader than was necessary to resolve the issues in that case; the Court noted the existence of the right, then quickly went on to conclude that under the circumstances the identification procedure used was not a denial of due process. See *Stovall*, *supra*, at 301-302.

The actual holding of *Stovall* is squarely contrary to petitioner's thesis that due process turns on reliability alone. The showup procedure in that case was not one iota more reliable than the "widely condemned" showups, see *id*., at 302, because the witness, Mrs. Behrendt, was in the hospital with 11 stab wounds requiring major, life-saving surgery. See *id*., at 295. In all likelihood, that condition would make the identification less reliable. Yet the showup did not violate due process because it was necessary. See *id*., at 302. Necessity has nothing to do with reliability. There was no due process violation because the police did nothing wrong. " 'No one knew how long Mrs. Behrendt might live. Faced with the responsibility of identifying the attacker, with the need for immediate action and with the knowledge that Mrs. Behrendt could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital room.' " *Ibid*. (quoting Court of Appeals opinion). Stovall thus holds that police misconduct in staging an unnecessarily suggestive identification is a necessary condition to a due process violation. But it is not a sufficient condition.

In subsequent cases, the Court clarified that a due process challenge to an *improper* identification is to be evaluated by the totality of the circumstances, weighing

the reliability of the identification against the "corrupting effect of the suggestive identification itself." See *Manson* v. *Brathwaite*, 432 U. S. 98, 114 (1977). Perry and supporting *amici* have made much of the Court's statement in *Manson* that "reliability is the linchpin in determining the admissibility of identification testimony . . . ." *Id.*, at 114. But this statement must be taken in context of the entire opinion. In saying this, the Court was rejecting a *per se* approach to unnecessarily suggestive identifications that would require exclusion of any identifications obtained by unnecessarily suggestive procedures "without regard to reliability." See *id.*, at 110. The Court instead selected a less severe approach, permitting admission of identifications that, while obtained by unnecessarily suggestive means, are nevertheless reliable. See *id*., at 110, 114. Importantly, designation of "reliability" as the linchpin of admissibility did nothing to affect the first part of the analysis, *i.e.*, that the identification procedure used was improper. The State did not contest that element. "Petitioner at the outset acknowledges that 'the procedure used in the instant case was suggestive [because only one photograph was used] and unnecessary' [because there was no emergency or exigent circumstance]." See *id.*, at 109 (brackets in original). It was with this threshold condition undisputed that the Court held that "under all the circumstances of this case there is [not] 'a very substantial likelihood of irreparable misidentification,' . . . [and therefore] such evidence is for the jury to weigh." *Id.*, at 116.

Considering the cases just discussed, which involved circumstances under which the Court was willing to recognize a due process right borne from the "fundamental fairness" component of the Fourteenth Amendment, a pattern becomes clear—these rights are necessary to prevent deception of the jury. In those cases, the jury was not provided with everything it needed to

adequately evaluate the case against the defendant. A jury presented with false evidence, proffered or vouched for by a prosecutor who knows it to be false, reasonably believes the evidence to be true and cannot adequately evaluate its trustworthiness. A jury that is not presented with relevant and exculpatory evidence about the defendant's guilt due to the State's withholding of such is deprived of a full presentation of the case. And lastly, procedures staged by police for the purpose of obtaining an unreliable identification of the defendant misleadingly presents the jury with a deliberately tainted identification. The juries under these circumstances do not have an opportunity to fairly judge the strength of the case or the reliability of the evidence presented against the defendant because essential components of the case have been withheld.

Under circumstances like those in the present case, where the contested evidence is simply something of questionable reliability, nothing is withheld from the jury to prevent it from meaningfully evaluating the evidence. The jury here was presented with the factors of Blandon's identification that rendered it questionable, *e.g.*, the time of night, J. A. 160a-161a, 225a, the vagueness of Blandon's initial description of the person she had seen in the parking lot, J. A. 205a-206a; J. A. 233a-234a, and the fact that Perry was the only person standing in the parking lot, other than Officer Dunn, at the time of Blandon's identification. J. A. 174a. The jury heard that Blandon later could not identify Perry from a photo array. J. A. 234a-235a; J. A. 302a. Counsel for Petitioner had a full opportunity to cross examine Officer Clay and Blandon about the nature and circumstances of the out-of-court identification. The jury, with all the evidence before it, could then decide whether Blandon's identification was trustworthy or simply too unreliable to be believed. Any questions related to the strength of Blandon's identification go to

the weight of the evidence, not its admissibility. The admission of a purportedly weak item of evidence, as alleged here, does not infringe on the fairness of the proceeding. The trial court's admission of the evidence does not rise to the level of a due process violation, and the New Hampshire Supreme Court was correct in so holding.

II. Rules of evidence are within the province of the state and should not be dominated by federal regulations.

"Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." *Walker* v. *Sauvinet*, 92 U. S. 90, 93 (1876). Provided it comports with the explicit guarantees in the Bill of Rights and those limited principles that rise to the level of "fundamental," "[t]he State is free to regulate the procedure of its courts in accordance with its own conceptions of policy." *Brown* v. *Mississippi*, 297 U. S. 278, 285 (1936). "We do not sit as a court of criminal appeals to review state cases. The States are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution." *Burgett* v. *Texas*, 389 U. S. 109, 113-114 (1967).

This freedom includes the ability to regulate evidence, "and [the state's] decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Patterson* v. *New York*, 432 U. S. 197, 201-202 (1977) (citations omitted). The Due Process Clause therefore plays a limited role in evaluating rules of evidence. It "does not permit the federal courts to engage in a finely tuned review of the wisdom

of state evidentiary rules." *Marshall* v. *Lonberger*, 459 U. S. 422, 438, n. 6 (1983). It "has never been perverted so as to force upon the . . . States a uniform code of criminal procedure." *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946).

This Court has been wisely restrained in invoking the Due Process Clause to regulate evidentiary standards, refusing to unnecessarily meddle in states' evidentiary procedures and consistently harkening back to the underlying purpose of due process protections as promising only a basic foundation of rights to a criminal defendant. See, *e.g.*, *Lisenba* v. *California*, 314 U. S. 219, 228-229 (1941) ("The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason alone, render its reception a violation of due process"); *Estelle* v. *McGuire*, 502 U. S. 62, 75 (1991) (evidence of prior abuse of deceased child and instructions on use of that evidence did not deny due process, citing *Lisenba*, *supra*, and *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974)).

In limited circumstances, distinguishable from those here, procedural due process restricts the evidence that may be admitted against a criminal defendant. But these instances are narrow and few, and largely leave evidentiary issues to be resolved by state courts and legislatures.

Admission of a coerced confession violates a criminal defendant's right to due process, as it "deprive[s] him of 'that fundamental fairness essential to the very concept of justice.' " *Payne* v. *Arkansas*, 356 U. S. 560, 567 (1958) (quoting *Lisenba*); see also *Brown*, 297 U. S., at 286. But coerced confessions stand in a category of their own, as this Court has recognized that confessions hold a unique evidentiary value. They are "like no other evidence. Indeed, 'the defendant's own confession

is probably the most probative and damaging evidence that can be admitted against him . . . .'" *Arizona* v. *Fulminante*, 499 U. S. 279, 296 (1991) (quoting *Bruton* v. *United States*, 391 U. S. 123, 139 (1968) (White, J., dissenting)).

Refusing to allow a defendant to present evidence critical to the defense that bears "persuasive assurances of trustworthiness," may violate the "traditional and fundamental standards of due process." *Chambers* v. *Mississippi*, 410 U. S. 284, 302 (1973). A criminal defendant's ability to present his or her case should not be so restricted by a mechanical application of evidentiary rules, when doing so would "defeat the ends of justice." *Ibid*. But in *Chambers*, the Court limited the finding of a due process violation to the specific combination of errors that had occurred, that is, where the strict application of Mississippi's "voucher" rule, which prohibits cross-examination of one's own witness, and hearsay rules significantly hindered the defendant's ability to show that another person committed the charged murder. *Id.*, at 295, 302. The Court stated, "In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.*, at 302-303.

Importantly, the Court has declined to use the Due Process Clause as a mechanism for blocking admission of other types of potentially unreliable evidence. *Colorado* v. *Connelly*, 479 U. S. 157 (1986), refused to extend due process protections to a defendant's confession induced by internal forces, such as a mental illness, as opposed to state coercion. See *id.*, at 167.

> "We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its

> own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, see, *e.g.*, Fed. Rule Evid. 601, and not by the Due Process Clause of the Fourteenth Amendment." *Ibid.*

The notion that the due process clause encompasses evidentiary determinations at all is not rooted in the Constitution. As Justice Black noted in his dissent in *Stovall*,

> "No one has ever been able to point to a word in our constitutional history that shows the Framers ever intended that the Due Process Clause of the Fifth or Fourteenth Amendment was designed to mean any more than that defendants charged with crimes should be entitled to a trial governed by the laws, constitutional and statutory, that are in existence at the time of the commission of the crime and the time of trial." *Stovall* v. *Denno*, 388 U. S. 293, 305 (1967) (Black, J., dissenting).

The admissibility of Blandon's identification in the present case should be governed by New Hampshire's evidentiary rules, not the jurisprudence of federal courts.

III. A standard of "reliability" is too unpredictable to be a constitutional rule.

"[A] court should not adopt a rule that is sure to promote uncertainty when a better expedient is available." Friendly, In Praise of *Erie*, 39 N. Y. U. L. Rev. 383, 387, n. 23 (1964). This is especially true when defining the scope of a constitutional rule that must guide prosecutors, defense attorneys, and judges in the admissibility of evidence. A standard hinging on the

"reliability" of eyewitness identifications does not come close. The proper methods for gathering such evidence have been the source of a "decades-long research effort," see Steblay, Dysart, & Wells, Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion, 17 Psychol. Pub. Pol'y & L. 99, 99 (2011), which has resulted in varying conclusions and recommendations.

In 1999, the Department of Justice issued a guide to assist law enforcement agencies in developing sound protocol for eyewitness identifications. See U. S. Dept. of Justice, National Institute of Justice, Eyewitness Evidence: A Guide for Law Enforcement (Oct. 1999) (NIJ Guidelines). Developed by a group of over 30 police investigators, prosecutors, defense attorneys, and research professionals across the United States and Canada, the NIJ Guidelines sought to "identify, define, and assemble a set of investigative tasks that should be performed in every investigation involving eyewitness evidence to best ensure the accuracy and reliability of this evidence." NIJ Guidelines v-vi, 3.

The NIJ Guidelines itself acknowledged that its recommendations were based on a snapshot of "currently accepted scientific principles and practices," and that "[a]dvances in social science and technology will, over time, affect procedures used to gather and preserve eyewitness evidence." See NIJ Guidelines 3, 8. Its creators anticipated that new procedures and advancements in communication might require amending the guidelines. See NIJ Guidelines 8-9. For instance, "blind" identification procedures, those in which the investigator does not know the identity of the suspect, were recognized as "impractical" for some agencies to utilize in 1999, but the NIJ Guidelines noted that such procedures had been lauded by psychology researchers and were "a direction for future exploration." NIJ

Guidelines 9; cf. Wells, Eyewitness Identification Evidence: Science and Reform, 29 Champion 12, 18 (April 2005) (advocating for double-blind). The NIJ Guidelines also noted that "computer-based imaging systems and the Internet," will someday enable inter-departmental sharing of images, and that the recommended guidelines were not intended to "inhibit the development and field testing" of such future technologies. NIJ Guidelines 9. Thus, the NIJ Guidelines in effect admitted that the guiding principles to yield maximum reliability developed in 1999 might focus on different factors and look far different than those released five or ten years later.

A recent opinion of the New Jersey Supreme Court exemplifies the inherent problem with a constitutional standard based on "reliability." In 2006, the New Jersey Supreme Court ordered a review of the state's two-part "*Manson*/*Madison*"[2] test used to evaluate the admissibility of identification evidence, a test the state adopted soon after this Court's 1977 decision in *Manson* v. *Brathwaite*. *State* v. *Henderson*, No. A-8-08 (N. J., Aug. 24, 2011), p. 34 .[3] The New Jersey Supreme Court declared the "assumptions and other factors reflected" in the test no longer valid, and that the current test "does not provide a sufficient measure for reliability." *Id.*, at 107. The court called for a "revised framework" to approach the issue, suggesting a list of 13 variables "to evaluate the overall reliability of an identification and determine its admissibility." *Id.*, at 115-117. The court further noted that the suggested factors did not comprise an exhaustive list, recognizing "that scientific

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2. *Manson* v. *Brathwaite*, 432 U. S. 98 (1977); *State* v. *Madison*, 109 N. J. 223, 536 A. 2d 254 (1988).

3. Page number references are to the slip opinion, available at http://www.cjlf.org/files/Henderson.NJ.Supreme.pdf.

research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now." *Id.*, at 117. Having constitutionalized the issue under the state constitution, see *id.*, at 110, n. 10, the New Jersey Supreme Court has effectively assumed the role of a continuing commission to revise identification procedure. Perhaps it can discharge this function for the state adequately, but it is doubtful this Court could do so for the nation, given its other responsibilities.

The changeable nature of the science is reflected in scientific literature. The earliest set of published recommendations for lineup procedures was released in 1967 in the American Criminal Law Quarterly. Wells, *et al.*, Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603, 610 (1998). A series of published guidelines followed. See *id.*, at 610-612. Years later, however, experts recognized that while the previous guidelines were "well intentioned," "often recommendations were made that either were or are inconsistent with what we know now based on empirical research findings" of states conducted during the 1980s and 1990s. *Id.*, at 612.

Several specific aspects of identification procedures illustrate the ongoing debate among researchers in identifying the most accurate method, including sequential versus simultaneous procedures, lineups versus showups, the selection of "fillers," and the value of eyewitness confidence.

A. Sequential v. Simultaneous Procedures.

"A sequential procedure is one in which the eyewitness views one lineup member at a time, deciding whether or not that person is the culprit before seeing

the remaining lineups." Wells, *et al.*, 22 Law & Hum. Behav., at 617. A simultaneous procedure displays all the members at the same time. Though the 1999 NIJ Guidelines noted support for sequential procedures within the scientific community, it did not indicate a preference for one method over the other and included recommendations for both types of procedures. NIJ Guidelines 9, 33-37.

The "status quo" for more than a century has been the simultaneous lineup. Steblay, *et al.*, 17 Psychol. Pub. Pol'y & L., at 124. However, sequential procedures have been gaining favor with researchers and are required in some jurisdictions. See *id.*, at 129-130. The researchers who favor them contend that sequential procedures reduce the likelihood of "relative judgments," the theory that witnesses tend to identify the person in the lineup that looks most like the culprit as compared to the other persons in the lineup. Wells, *et al.*, 22 Law & Hum. Behav., at 613, 617. "When compared to the usual simultaneous procedure, it is clear that the sequential procedure produces a lower rate of mistaken identifications (in perpetrator-absent lineups) with little loss in the rate of accurate identifications (in perpetrator-present lineups)." *Id.*, at 639.

This view is not unanimous, however. Many experiments have been conducted to determine whether sequential procedures produce more accurate results, Wells, 29 Champion, at 14, and the results have varied. One report noted that the data from some studies may not be generalized, and that "the sequential superiority effect may vary as a function of study methodology." See McQuiston-Surrett & Malpass, Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory, 12 Psychol. Pub. Pol'y & L. 137, 157 (2006); but see Steblay, *et al.*, 17 Psychol. Pub. Pol'y & L., at 103. "Finding superior eyewitness identification tech-

niques for law enforcement is a work in progress." Malpass, Tredoux, & McQuiston-Surrett, Public Policy and Sequential Lineups, 14 Legal and Criminological Psychol. 1, 11 (2009).

B. Lineups v. *Showups.*

In *Stovall*, the Court recognized that the practice of showups, or showing suspects singly to an eyewitness, "has been widely condemned," citing several scholarly articles. *Stovall*, 388 U. S., at 302, and n. 6; see also *Simmons* v. *United States*, 390 U. S. 377, 383-384 (1968). One study concluded that showups failed to meet its recommended guidelines for the appropriate structure of a lineup or photospread because they may "convey to the eyewitness which person is the suspect." Wells, *et al.*, 22 Law & Hum. Behav., at 631.

But this result is not universal. Another study suggests that that showups might be preferable to lineups because they prevent the "relative judgment" problem described above. See Gonzalez, Ellsworth, & Pembroke, Response Biases in Lineups and Showups, 64 J. Personality & Soc. Psychol. 525, 536 (1993). And the research is continuing; the National Science Foundation recently awarded a $305,000 grant for a project studying the merits of lineups and showups. Fisher, UAHuntsville Research Could Improve Reliability of Identifying Crime Suspects, UAHuntsville Research News (July 18, 2011), http://chargerpost.uah.edu/pages/studentnews.php?id=556. The researcher believes showups may not be inherently overly suggestive, and that the manner in which they are conducted might be the source of any reliability problems. *Ibid.*

C. Selection of Fillers.

A lineup procedure naturally requires the participation of other persons, and the characteristics of these

"fillers," is important to the reliability of the identification. See, *e.g.*, *Foster* v. *California*, 394 U. S. 440, 442-443 (1969) (noting that in a lineup procedure, the defendant's height and clothing stood out from the fillers). But what are the criteria for selecting fillers? "In general, the psychological literature has argued that the distractors in a lineup should match the description of the culprit that was given previously by the eyewitness who will view the lineup." Wells, Rydell, & Seelau, The Selection of Distractors for Eyewitness Lineups, 78 J. Applied Psychol. 835, 835 (1993). But others have argued a better distractor is one who resembles the suspect in the lineup, rather than one who resembles the witness's prior description of the culprit.[4] See *ibid.* The American Law Institute in an early set of guidelines also recommended that a lineup generally include "a reasonable number of [persons] whom are similar in dress and appearance to the person to be identified." ALI, Model Code of Pre-Arraignment Procedure § 160.2(1), pp. 76-77 (1975).

D. Eyewitness Confidence.

The confidence of the eyewitness in making the identification has long been viewed as an important measure of its reliability. See Wells, *et al.*, 22 Law & Hum. Behav., at 619. This Court explicitly referenced "the level of certainty demonstrated at the confrontation," as one of the factors to be considered in evaluating the reliability of an identification. See *Manson* v. *Brathwaite,* 432 U. S., at 114. Mock-jury studies show

4. Wells, Rydell, and Seelau provide a useful clarification for the terms "suspect" and "culprit" used throughout the literature on this issue: "The suspect might or might not be the culprit (*i.e.*, actual perpetrator); that is the very question one is trying to answer by conducting the lineup." Wells, Rydell, & Seelau, 78 J. Applied Psychol., at 836.

that jurors tend to believe witnesses who exude confidence in their identifications, at times even ignoring the surrounding conditions of the procedure if the witness was very confident. Wells, *et al.*, 22 Law & Hum. Behav., at 621. Studies on the relation between confidence and accuracy do show an overall positive correlation, but the relationship is complex, depending on a variety of factors. See Wells, *et al.*, 22 Law & Hum. Behav., at 622. A witness's confidence may be bolstered from factors other than the strength of his or her memory, such as repeated questioning, identifications from co-witnesses, or the reaction of the person administering the identification procedure. See Wells, *et al.*, 22 Law & Hum. Behav., at 624-626; Wells, 29 Champion, at 17-18; see also Wells, Olsen, & Charman, The Confidence of Eyewitnesses in Their Identifications From Lineups, 11 Current Directions Psychol. Sci. 151 (2002). Thus one of the commonly accepted means of evaluating reliability, specified by this Court as a factor and followed by state and federal courts since then, is not as straightforward as previously believed.

The above discussion is not intended to be a comprehensive report of the current status of eyewitness identifications in the research world. It is merely to show that the "best" protocol for identification procedures is not clear. Certainly, there are trends and a general consensus with respect to some aspects, such as the preference for lineups over showups, but even these beliefs are not set in stone. The research and theories are not solid enough on which to rest a constitutional standard. The rules for identification procedures are best left in the hands of the states, who can modify their rules of identification admissibility as the science evolves.

Lastly, even if the scientific and investigative community could agree on a process for obtaining the more

reliable identifications, the courts are not commanded to accept the procedure as a requirement of due process.

> "To say that [a procedure] is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment." *Spencer* v. *Texas*, 385 U. S. 554, 567-568 (1967).

IV. A questionable but uncontrived identification is a legitimate brick in the prosecution's wall of evidence.

Under the Federal Rules of Evidence, relevant evidence is admissible unless excluded by a specific rule, see Rule 402, and relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. The Advisory Committee explained,

> "The standard of probability under the rule is 'more * * * probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, '*A brick is not a wall*,' or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 576 (1956), quotes Professor McBaine, '* * * [I]t is not to be supposed that every witness can make a home run.' " Advisory Committee's Note to Fed. Rule Evid. 401, 28 U. S. C. App., p. 325 (emphasis added).

In addition to specific rules of exclusion, the trial judge has discretion to exclude evidence, among other reasons, because it is unduly prejudicial. See Fed. Rule Evid. 403. These basic rules of evidence have been widely copied in the states, including New Hampshire. See N. H. Rule Evid. 401-403.

To qualify for this general rule of admissibility, an item of evidence need only push the overall probabilities in one party's favor, not establish proof by itself. Evidence that is "unreliable" in the sense that it *might* point in the wrong direction is nonetheless admissible, unless excluded by a specific rule or by the judge under Rule 403, if it has the requisite effect on the overall probabilities. Examining a party's evidence brick by brick, and tossing each brick out because it is not a wall, is contrary to the foundation of modern evidence law.

The facts of the present case illustrate the cumulative probability nature of evidence and McCormick's metaphor:

1. Officer Clay encountered Perry in a parking lot with Clavijo's amplifiers in his hands, J. A. 163a, probably because he stole them, possibly because his story about moving them out of traffic as a Good Samaritan was true. J. A. 342a.

2. Officer Clay heard a metallic clang as she approached Perry, J. A. 162a, and she saw an aluminum baseball bat on the ground, J. A. 175a, probably because Perry dropped the bat, possibly because someone else did. J. A. 200a.

3. Perry had a tool in his pocket, identified by Clavijo as the tool he kept in his car, J. A. 136a, 189a, probably because he had just taken it from Clavijo's car, possibly because he carried the same kind of tool for fixing his bicycle, J. A. 315a, and the similarity is just a coincidence.

4. Joffrey Ullon, Nubia Blandon's husband, identified Perry as the person walking around the parking lot looking into cars, both on the scene and in a photo lineup, J. A. 241a-242a, probably because he really is, possibly because Ullon was mistaken, perhaps in part because he assumed the person talking to the police officer was the culprit.

5. Nubia Blandon identified Perry at the scene as the person she saw taking the amplifiers out of Clavijo's car, J. A. 173a, probably because he really is, possibly because she was mistaken, perhaps in part because she assumed the person talking to the police officer was the culprit.

In a hypothetical civil case of *Clavijo* v. *Perry*, with a preponderance standard, Item 1 might be sufficient proof by itself, but Items 1-3 certainly would. The probability of the less likely explanation for each fact, small enough individually, becomes very small when all are considered together. For the actual criminal case of *State* v. *Perry*, with a burden of proof beyond a reasonable doubt, a jury would be justified in returning a guilty verdict with just these items, but some juries might find this evidence insufficient. Ullon's identification, which Perry did not challenge, makes the case stronger, but conceivably some jurors might still not be convinced.

At this point, the challenged identification provides one more brick in the wall of evidence. While it is possible that Blandon's spontaneous identification was mistaken, the probability of mistake is far less than the probability of correctness. This was not a "show-up" in the usual sense of the word. The police did not bring Perry to Blandon and ask if he was the culprit. Perry was not in handcuffs or otherwise visibly under arrest.

J. A. 86a.[5] He was just standing with a police officer, as Blandon herself was.

On a calm and correct assessment of the probative value of the evidence under Rule 401, the identification makes Perry's guilt more probable than it would be without the identification. Some special justification would be required to take this evidence out of the usual rules that relevant evidence is admissible and that "[v]igorous 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." *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 596 (1993).

Petitioner claims that eyewitness identification has "such a powerful effect on jurors as to make the result of the trial a foregone conclusion," Brief for Petitioner 13, relying on Justice Brennan's opinion for the Court in *United States* v. *Wade*, 388 U. S. 218, 235-236 (1967). *Amicus* NACDL claims that " 'the jury is likely to give the erroneously admitted evidence substantial weight, however skillful the cross-examination.' " Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 9 (quoting *Watkins* v. *Sowders*, 449 U. S. 341, 356-357 (1981) (Brennan, J., dissenting)). But this Court is being asked to make a permanent constitutional rule of exclusion of relevant evidence, immune from amendment by the normal legislative and rule-making processes as our knowledge advances. See Part II, *supra*. Exclusion of relevant evidence is a drastic measure, to be taken only if no alternative is adequate. Such a rule should require, at the very least, a solid empirical foundation.

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5. Perry was not, in fact, arrested until after the identification. See Brief for Petitioner 5.

Amicus American Psychological Association (APA) attempts to provide this empirical basis, but its efforts come up short. It may well be that jurors relying only on their personal experience give excessive weight to eyewitness identification, but there is no need to limit them to personal experience.

Two methods of improving the jury's evaluation of eyewitness testimony, rather than suppressing it, are instructions from the judge and expert testimony. The literature on these methods discusses improvements in terms of jury confusion, jury sensitivity, and jury skepticism. Confusion needs no explanation. "Juror *sensitivity* is a 'desirable effect' . . . . Jurors who show sensitivity demonstrate an ability to weigh and combine factors likely to influence the quality of an identification allowing them to differentiate between identifications of varying quality." Martire & Kemp, Can Experts Help Jurors to Evaluate Eyewitness Evidence? A Review of Eyewitness Expert Effects, 16 Legal & Criminological Psychol. 24, 25 (2011). "The term skepticism refers to a less desirable situation . . . where expert evidence results in a 'tendency to doubt or to disbelieve an eyewitness's testimony' as a direct result of the expert's evidence . . . ." *Id.*, at 26 (citations omitted).

The APA brushes off instructions claiming, "[t]hey have found that a common eyewitness-related instruction 'proved completely ineffective at sensitizing jurors to eyewitness evidence.' " Brief for American Psychological Association as *Amicus Curiae* 20 (APA Brief) (quoting Cutler *et al.*, Nonadversarial Methods for Improving Juror Sensitivity to Eyewitness Evidence, 20 J. Applied Soc. Psychol. 1197, 1205 (1990)). The "common" instruction referred to is an antique, the one from *United States* v. *Telfaire*, 469 F. 2d 552, 558-559 (CADC 1972) (*per curiam*), predating almost all of the research in the field. In fact, almost all the research in the sur-

vey APA cites is on the efficacy of this one instruction. See B. Cutler & S. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 255-264 (1995). A finding that one antiquated instruction is ineffective is a far cry from a finding that instruction in general is hopeless.

Research with different instructions has been sparse. One experiment with a revision of the *Telfaire* instruction produced more acquittals but not necessarily more accurate decisions, possibly because of a defense bias in the wording. Green, Judge's Instruction on Eyewitness Testimony: Evaluation and Revision, 18 J. of Applied Psych. 252, 269 (1988). Another experiment added to the instruction "a commentary on the psychological findings regarding eyewitness identification." Cutler & Penrod, *supra*, at 257. "[T]his experiment produced evidence that judges' instructions produce skepticism. It might also be the case that the instructions improved sensitivity, but there is no way to tell given the design of the experiment." *Ibid*.

Remarkably, it appears that researchers have largely abandoned efforts to determine if simply educating jurors on the factors that affect eyewitness identification reliability is effective. Certainly the possibility cannot be dismissed on the current state of the evidence.

To the extent that *amicus* Innocence Network argues that vigorous development of improved instructions should proceed under courts' general authority to properly instruct juries, see Brief for Innocence Network as *Amicus Curiae* 17-22, CJLF agrees. See *State* v. *Henderson*, No. A-8-08 (N. J., Aug. 24, 2011), pp. 127-128 (directing preparation of new instructions). That point is no help to petitioner, who seeks a suppression remedy as a matter of federal constitutional law.

With regard to expert testimony, particularly, APA concedes that such testimony "can help juries to better understand eyewitness testimony (and its limits), and thus reduce the incidence of wrongful convictions based on inaccurate identifications." APA Brief 20. The only contrary argument the APA can muster is that this Court "has not held that expert testimony on eyewitness reliability must be admitted when proffered . . . ." *Ibid*. They should have said "has not *yet* held . . . ." Such a holding, if necessary, would be far less intrusive and far less damaging than the rule proposed in this case. If exclusion of such testimony "infringe[s] upon a weighty interest of the accused" it would be "unconstitutionally arbitrary or disproportionate." See *United States* v. *Scheffer*, 523 U. S. 303, 308 (1998). Requiring such testimony routinely would, of course, be expensive, but it could be justified if it were proved that improved instructions cannot do the job.

Quite obviously, a categorical rule of exclusion of evidence would achieve whatever reduction in wrongful convictions it might yield at the heavy cost of a large number of wrongful acquittals. If there were no other way, bearing that cost might be the correct policy choice, whether it is constitutionally required or not. But the case has not been proved that there is no better way. Jury instructions different from those disparaged in the APA's decades-old research, see APA Brief 20, might be better. Expert testimony might be better.

Even as a matter of general evidence law, the principle stated in *Daubert*, *supra*, should govern courts' handling of "admissible but shaky" evidence until a powerful case has been made that a specialized rule of exclusion is necessary. That case has not been made. For this Court to impose a rule of exclusion as a constitutional mandate would require an even stronger case,

for the reasons explained in Part II, *supra*. That case has certainly not been made.

CONCLUSION

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

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Respectfully submitted,

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