

No. 10-8974

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**In the Supreme Court of the United States**

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BARION PERRY, PETITIONER

*v.*

STATE OF NEW HAMPSHIRE

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*ON WRIT OF CERTIORARI  
TO THE NEW HAMPSHIRE SUPREME COURT*

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING RESPONDENT**

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### **QUESTION PRESENTED**

Whether the Due Process Clause requires a judicial inquiry into the reliability of an eyewitness identification, where the identification was not procured under unnecessarily suggestive circumstances orchestrated by law enforcement.

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**BRIEF FOR THE UNITED STATES  
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**INTEREST OF THE UNITED STATES**

This case presents the question whether the Due Process Clause of the Fourteenth Amendment requires a judicial inquiry into the reliability of an eyewitness identification, where the identification was not procured under unnecessarily suggestive circumstances orchestrated by law enforcement. Because the Due Process Clause of the Fifth Amendment applies to defendants tried in federal courts, the United States has a significant interest in the disposition of this case.

**STATEMENT**

1. In the early morning hours of August 15, 2008, police in Nashua, New Hampshire, received a report that a man was breaking into cars in an apartment

building parking lot. Pet. App. A7. The report came from Joffre Ullon, who lived in a fourth-floor apartment with his wife, Nubia Bandon. J.A. 226a, 240a. Bandon had been looking out the window and noticed a tall African-American man peering into cars in the parking lot, then opening the trunk of a neighbor's car and removing items. Pet. App. A8; J.A. 48a, 55a, 61a, 213a-214a. Bandon told her husband what she saw, and he went to investigate as Bandon watched from the window. J.A. 213a, 239a. Ullon saw the man looking into cars, and the man apparently saw Ullon, because he turned away and tried to hide. J.A. 238a-239a. Ullon returned to the apartment and called the police. J.A. 240a-241a.

Officer Nicole Clay was dispatched to investigate. Pet. App. A7. When Officer Clay arrived on the scene, she heard a loud metallic clang. *Ibid.* Then she saw petitioner walking out from between two cars, carrying two amplifiers, with a metal baseball bat on the ground behind him. *Ibid.*; J.A. 162a-163a, 175a. Officer Clay asked where the amplifiers came from; petitioner said he had found them on the ground in the parking lot and was just moving them. Pet. App. A8.

In the meantime, Bandon woke up her neighbor, Alex Clavijo, to tell him that someone had broken into his car. J.A. 122a, 216a. Clavijo went downstairs and saw that one of the rear windows of his car had been shattered and that the amplifiers and speakers from the car's stereo system were missing, along with a metal bat and a wrench. J.A. 122a-124a.

Clavijo approached Officer Clay and told her that Bandon had witnessed someone breaking into his car. Pet. App. A8. Officer Clay left petitioner in the parking lot with another officer and went with Clavijo to see

Blandon. *Ibid.*; J.A. 171a. Officer Clay asked petitioner to stay in the parking lot with the officer because “it was an ongoing investigation and we needed to make sure we had all parties that had knowledge of the situation to remain on scene until we figured out what was going on.” J.A. 43a.

Blandon spoke with Officer Clay from the doorway of her apartment. Pet. App. A8. Blandon told Officer Clay that she had watched from her apartment window as a tall African-American man carrying a baseball bat circled Clavijo’s car, opened the trunk, and removed a large box (which contained the speakers from the car’s stereo system). *Ibid.*; J.A. 55a-56a, 61a, 213a-214a. Officer Clay asked for a more specific description of the man, and Blandon pointed toward the window and said that the man was standing with a policeman outside. Pet. App. A8-A9; J.A. 48a, 173a-174a. Ullon said the same thing. J.A. 55a. At the time of this identification, petitioner was standing next to the officer but was not handcuffed or otherwise restrained. Pet. App. A11; J.A. 43a.

The police then arrested petitioner. Pet. App. A9. Clavijo identified the amplifiers petitioner had been carrying as the ones from his car. J.A. 180a. Clavijo’s speakers were in the parking lot, a short distance from where Officer Clay first encountered petitioner, and Clavijo’s wrench was in petitioner’s pocket. J.A. 177a-178a, 180a, 189a-191a.

About a month later, the police showed Blandon and Ullon a photo array that included petitioner’s photograph and asked them to identify the man who had broken into Clavijo’s car. Pet. App. A9. Blandon was unable to make an identification, but Ullon immediately

picked out petitioner. *Ibid.*; see J.A. 234a-235a, 242a-243a, 290a.

2. Petitioner was charged in state court on one count of theft, in violation of N.H. Rev. Stat. Ann. § 637:3 (2007), and one count of criminal mischief, in violation of N.H. Rev. Stat. Ann. § 634:2 (2007). Pet. App. A7; J.A. 20a. He moved to suppress Blandon's initial identification of him on the ground that admitting it at his trial would violate his due process rights. Pet. App. A3-A6.

The trial court denied the motion. Pet. App. A7-A12. The court explained that whether admission of the identification evidence would violate due process depends on (1) whether the identification procedure was "unnecessarily suggestive" and (2) whether that procedure was "so suggestive as to render the identification unreliable and inadmissible." *Id.* at A9-A10 (citing *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977); internal quotation marks omitted). The court determined that the identification procedure was not unnecessarily suggestive because "Blandon pointed out [petitioner] from her apartment window without any inducement from the police" and her identification "was spontaneously given." *Id.* at A10. The court explained that "Officer Clay did not ask Ms. Blandon whether the man standing in the parking lot was the man [she] had seen breaking into Mr. Clavijo's car" or "direct Ms. Blandon's attention towards the window"; Officer Clay "could not even see [petitioner] and [the other officer] from where she was standing." *Ibid.*

The court acknowledged that certain circumstances surrounding the identification—that "the parking lot was dark," that petitioner "was standing with a uniformed officer in the parking lot where the crime was

committed,” and that petitioner “was the only black male in the vicinity”—may “cast doubt” on it. Pet. App. A10. But, the court explained, the proper course was for petitioner to cross-examine Bandon about those matters at trial, not to exclude the evidence altogether under the Due Process Clause. *Id.* at A10-A11.

The jury found petitioner guilty of theft and acquitted him of criminal mischief. J.A. 408a-409a. The trial court sentenced him to three to ten years of imprisonment. Pet. C.A. Br. App. 24.<sup>1</sup>

3. The New Hampshire Supreme Court affirmed. Pet. App. A1-A2. The court explained that the “admissibility of identification evidence over a due process objection” is determined using the two-step analysis set out in *Neil v. Biggers*, *supra*, which asks first whether the identification procedure was unnecessarily suggestive and second whether that procedure resulted in an identification that is so unreliable that its introduction at trial would violate due process. Pet. App. A1. The New Hampshire Supreme Court agreed with the trial court that petitioner’s claim “failed \* \* \* on the first step of the *Biggers* analysis” because Bandon’s “identification of [petitioner] was not derived from any suggestive technique employed by the police.” *Id.* at A1-A2.

#### SUMMARY OF ARGUMENT

The Due Process Clause does not require a judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under un-

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<sup>1</sup> Petitioner’s lengthy sentence is attributable to his extensive criminal history, which includes two prior felony convictions for theft and at least one prior felony conviction for burglary. J.A. 310a, 346a-347a, 438a.

necessarily suggestive circumstances orchestrated by law enforcement.

A. This Court's decisions establish a limited due process protection against the introduction at trial of eyewitness identifications obtained by the police under suggestive circumstances. If the police obtain an identification under suggestive circumstances—through a lineup, showup, photo array, or similar procedure in which the police suggest that a certain suspect is the perpetrator—and those circumstances were unnecessary, then a court should ask whether the identification is unreliable. If the police suggestion produces a very substantial likelihood that the identification is wrong, then the evidence may not be admitted at the defendant's trial. Short of that point, the circumstances of the identification go to weight, not admissibility.

B. Police involvement is a necessary prerequisite for a due process analysis into the reliability of an identification. Every one of the Court's decisions in this area involved identifications obtained by the police, and every example the Court has provided of unnecessarily suggestive circumstances likewise involved law enforcement. The Court adopted its limited due process rule because it was concerned that police suggestion would lead a witness to choose the wrong person, not because it believed that eyewitness identifications are inherently unreliable. Further, the Court adopted its due process rule after balancing the need for police deterrence against the need to allow the jury to hear all relevant, probative evidence. Absent suggestive police practices, the rationale for exclusion is diminished substantially. The one time the Court considered a due process challenge to an identification made under suggestive circum-

stances not orchestrated by the police, the Court rejected it. See *Coleman v. Alabama*, 399 U.S. 1 (1970).

C. The Due Process Clause does not impose a general threshold of evidentiary reliability in criminal cases. The guarantee of a fair trial is primarily furthered through the specific rights provided in the Sixth Amendment, including the rights to counsel, compulsory process, and confrontation. This Court has declined to expand the Due Process Clause to give criminal defendants a right to exclude unreliable evidence at trial, recognizing that it is the role of the jury to weigh the evidence. Moreover, the Court has declined to fashion due process rules that exclude relevant evidence from the jury in the absence of police involvement, because such rules would impose a substantial societal cost with no corresponding deterrence benefit. See *Colorado v. Connelly*, 479 U.S. 157 (1986).

D. Cases involving eyewitness identification testimony where no police suggestion occurs do not require a new due process rule. Concerns about reliability may be fully addressed through the right to counsel at post-indictment lineups, through vigorous cross-examination at trial, through state and federal rules of evidence, and through jury instructions concerning eyewitness identification evidence. Petitioner's proposed approach would exact a substantial societal cost by excluding relevant and probative evidence in criminal trials, would take away the jury's crucial role in finding facts in our adversary system, and would invite criminal defendants to bring freestanding due process challenges to all sorts of potentially unreliable evidence. The New Hampshire Supreme Court correctly rejected that approach, and its judgment should be affirmed.

**ARGUMENT****THE ADMISSION AT TRIAL OF AN UNRELIABLE EYEWITNESS IDENTIFICATION DOES NOT VIOLATE THE DUE PROCESS CLAUSE IN THE ABSENCE OF POLICE INVOLVEMENT IN GENERATING THE IDENTIFICATION**

In this case, an eyewitness watched from her window as a man walked through the parking lot below, peered into several cars, forced entry into one of the cars, and removed its stereo system. She continued watching as a police officer arrived on the scene and questioned the man about his activities. When the police officer later asked her for a description of the person who committed the crime, she informed the officer that the man was standing outside in the parking lot, talking with another officer. The question in this case is whether the Due Process Clause requires special judicial scrutiny of this identification because petitioner happened to be standing next to a police officer when the eyewitness identified him. The answer is no.

**A. This Court Has Recognized A Limited Due Process Protection Against The Introduction At Trial Of Certain Unreliable Identification Evidence Resulting From Police Suggestion**

The Due Process Clause of the Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, § 1. In a series of cases, this Court determined that when police obtain an identification under unnecessarily suggestive circumstances, and police influence produces a very substantial likelihood of a mistaken identification, the Due Process Clause

precludes the introduction of the identification at trial.<sup>2</sup> A careful review of those cases makes clear that the Court intended the due process protection to be a limited one.

1. The concern that motivated the Court to adopt the due process principle at issue was police influence during situations orchestrated to obtain identifications, such as lineups, showups, and photo arrays. This concern was first enunciated not in the context of the Due Process Clause, but in the context of the Sixth Amendment right to counsel. In *United States v. Wade*, 388 U.S. 218 (1967), and a companion case, *Gilbert v. California*, 388 U.S. 263 (1967), the Court considered whether a post-indictment lineup is a “critical stage” of a prosecution where a defendant is entitled to the assistance of counsel. *Wade*, 388 U.S. at 237. In concluding that such a lineup is a critical stage, the Court relied in significant part on concerns that the police may engineer lineups to suggest to the witness that a certain suspect is guilty.

The Court explained that its focus was not the reliability of eyewitness identifications generally, but the substantially increased risk of a mistaken identification that arises when “the prosecution presents the suspect to witnesses for pretrial identification” under suggestive circumstances. *Wade*, 388 U.S. at 228; see *id.* at 228-229 (“[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages

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<sup>2</sup> The Court has not had occasion to reconsider these decisions in light of its recent recognition that the reliability of evidence at a criminal trial is addressed through the protections of the Sixth Amendment and the local rules of evidence, rather than the Due Process Clause. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); see also pp. 27-30, *infra*.

of justice than any other single factor.” (quoting Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 26 (1965)). The Court determined that it would be unfair if the State could “compel[]” a confrontation “between the accused and the victim or witnesses,” and then manipulate the lineup to suggest that a certain person is the perpetrator of the crime. *Id.* at 228, 232-233. The “first line of defense” to mitigate these concerns, the Court decided, was the assistance of counsel; counsel could “be alert for” and object to “conditions prejudicial to the suspect” at police-arranged identifications. *Id.* at 228-230, 235.

In *Stovall v. Denno*, 388 U.S. 293 (1967), decided the same day as *Wade* and *Gilbert*, the Court explained that the concern about police influence that motivated the decision to afford defendants counsel at post-indictment lineups could also support a due process claim. The primary argument made by the defendant was that the Court’s new Sixth Amendment rule should apply retroactively. *Id.* at 294. The Court rejected that argument, *id.* at 300-301, and then considered the back-up argument that the showup at issue—where the police brought the defendant to the witness’s hospital room in handcuffs—“was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process,” *id.* at 302. The Court rejected that argument, explaining that even if the identification procedures were suggestive, they were necessary: the witness had just undergone “major surgery to save her life,” it was uncertain she would survive, and the police used “the only feasible procedure” to identify or exonerate the suspect. *Id.* at 295, 302.

2. In the cases that followed, the Court reiterated that the due process concern raised by identification

evidence was the risk of misidentification created by police influence. The Court explained that even with unnecessary police suggestion, the resulting identification may still be admissible.

In *Simmons v. United States*, 390 U.S. 377 (1968), for example, the defendant argued that his due process rights were violated when witnesses identified him in court as a bank robber following out-of-court identifications that were allegedly tainted by police suggestion. *Id.* at 382-383. The Court explained that, although police influence on a witness to choose a certain suspect posed a “danger,” *id.* at 383, the danger could “be substantially lessened by \* \* \* cross-examination at trial.” *Id.* at 384. Accordingly, the Court held that the Due Process Clause does not require exclusion of an identification unless the identification has been irreparably tainted by police influence: the police procedure must have been “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Ibid.* That was not the case in *Simmons*, because the photo array used by the police was not unnecessarily suggestive and there was “little chance” that police influence led to a misidentification. *Id.* at 385.<sup>3</sup>

In *Foster v. California*, 394 U.S. 440 (1969), by contrast, the Court determined that the identification procedures used by the police were so suggestive that it was “all but inevitable that [the witness] would identify petitioner” as the perpetrator of the robbery. *Id.* at 443. The Court recognized that “[t]he reliability of properly

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<sup>3</sup> The Court also rejected the due process challenge to an identification at a lineup in *Coleman v. Alabama*, 399 U.S. 1 (1970), on the ground that the identification was “not at all induced by the conduct of the lineup.” *Id.* at 6; see pp. 20-21, *infra*.

admitted eyewitness identification, like the credibility of other parts of the prosecution's case[,] is a matter for the jury." *Id.* at 442 n.2. But when the police placed the defendant in a series of suggestive lineups, arranged a "one-to-one confrontation" with the defendant, and even told the witness, "This is the man," the Court determined that police suggestion "so undermined the reliability of the eyewitness identification as to violate due process." *Id.* at 441-443. *Foster* is the only case in which the Court has found a due process violation based on the introduction of tainted identification evidence at trial.

3. In its final two decisions addressing due process challenges to eyewitness identification evidence, the Court clarified that the Due Process Clause limits the introduction of identification evidence at trial only when two things are true: the identification is the product of unnecessary suggestion by the police and the identification has been so tainted by police suggestion that there is a very substantial likelihood that it is wrong.

In *Neil v. Biggers*, 409 U.S. 188 (1972), and *Manson v. Brathwaite*, 432 U.S. 98 (1977), the Court considered whether exclusion is mandatory when an identification is the product of unnecessary police suggestion, or whether countervailing concerns might permit the introduction of that evidence at trial notwithstanding the police suggestion. In *Biggers*, which addressed only identifications made before *Stovall*, the Court held that an identification obtained under unnecessarily suggestive circumstances is not automatically inadmissible, because the purpose of a rule of exclusion would be to "deter the police" from using such procedures, and before *Stovall*, the police lacked notice that due process

limited the use of identification evidence. 409 U.S. at 199.

In *Brathwaite*, the Court expanded upon its holding in *Biggers*, explaining that even for post-*Stovall* identifications, the Due Process Clause does not preclude the use of an identification at trial absent a very substantial likelihood of misidentification that cannot be addressed by the adversary process. 432 U.S. at 117. The Court considered two different approaches to identifications tainted by unnecessary police suggestion: a per se rule of exclusion and a “more lenient” approach of allowing admission of the evidence so long as it was sufficiently reliable. *Id.* at 110. A significant factor favoring exclusion, the Court observed, was the “need for deterrence”: excluding all identifications made under suggestive circumstances would have a “direct and immediate impact on law enforcement agents” because the police would know if they used such procedures, the evidence could be unavailable at trial. *Id.* at 111. Also favoring exclusion was the need for accuracy, because police suggestion may distort the witness’s recollection. *Id.* at 112.

But the Court also recognized strong countervailing concerns. Eyewitness identification evidence is probative evidence of guilt, and it may be reliable despite police influence. *Brathwaite*, 432 U.S. at 112. A per se rule of exclusion “goes too far,” the Court decided, because it “keeps evidence from the jury that is reliable and relevant,” and therefore “may result \* \* \* in the guilty going free.” *Ibid.* The Court explained that the defendant’s “evidentiary interest” in keeping the identification from the jury is “limited \* \* \* in our adversary system,” which presumes that the jury can resolve any “doubts as to the accuracy of the identification” af-

ter cross-examination and argument. *Id.* at 113-114 & n.14 (citation omitted).

Accordingly, rather than require exclusion of every identification made under unnecessarily suggestive circumstances, the Court held that such an identification only is inadmissible at trial when there is a “very substantial likelihood of irreparable misidentification” resulting from police suggestion. *Brathwaite*, 432 U.S. at 113, 116 (citation omitted). Whether such a likelihood exists depends upon “the opportunity for the witness to view the criminal at the time of the crime,” “the witness’[s] degree of attention,” “the accuracy of his prior description of the criminal,” “the level of certainty demonstrated at the confrontation,” and “the time between the crime and the confrontation.” *Id.* at 114.

4. In every one of the decisions addressing due process limitations on eyewitness identification testimony, the Court was motivated by concerns that police would fashion procedures that would suggest to a witness that a particular suspect was the perpetrator, which could lead the witness to choose the wrong person. At the same time, the Court was reluctant to take reliable, probative evidence of guilt from the jury. And the Court recognized that providing counsel at post-indictment lineups would provide an additional check on unnecessary police suggestion. Accordingly, the due process protection recognized by the Court is a narrow one: Even where law enforcement officials unnecessarily create a risk of misidentification by using a suggestive lineup, showup, or photo array, the resulting identification is admissible at the suspect’s trial unless the police suggestion has so tainted the identification that there is a very substantial likelihood of misidentification.

**B. Police Suggestion Is A Necessary Prerequisite To A Due Process Inquiry Into The Reliability Of Eyewitness Identification Evidence**

Petitioner contends (Br. 11-17) that this Court's decisions establish that the Due Process Clause requires a judicial analysis of the reliability of any identification obtained under suggestive circumstances, even where law enforcement played no role in orchestrating those circumstances. He is mistaken.

1. Every one of this Court's cases addressing the due process protection against use at trial of unreliable identifications made under suggestive circumstances involved police conduct. The cases considered lineups, showups, and photographic identifications—formal confrontations between a witness and a suspect designed by police to obtain an identification. See *Brathwaite*, 432 U.S. at 101 (photographic identification); *Biggers*, 409 U.S. at 194-195 (lineups and showup); *Coleman v. Alabama*, 399 U.S. 1, 3 (1970) (lineup); *Foster*, 394 U.S. at 441 (two lineups and a showup); *Simmons*, 390 U.S. at 382 (photos); *Stovall*, 388 U.S. at 295 (showup).

Contrary to petitioner's suggestion (Br. 29), this was not happenstance. Police suggestion triggered the due process concerns in the first place. The Court did not say that the Due Process Clause protects against use of unreliable eyewitness testimony in general; it concentrated on the particular risk of mistaken identification when police "focus[] the witness'[s] attention on [a suspect] as the man believed by the police to be the guilty person." *Stovall*, 388 U.S. at 296. The Court explained that the police are in a unique position of influence because they can arrange a "confrontation \* \* \* between the accused and the victim or witnesses to a crime" and

then “present[] the suspect to witnesses” in a manner that suggests he is guilty. *Wade*, 388 U.S. at 228.

It is the “coercive pressure” the police place on a witness to identify a certain person that implicates the due process guarantee of a fundamentally fair trial. *Brathwaite*, 432 U.S. at 116; see *Foster*, 494 U.S. at 443. The Court has never suggested that it would be fundamentally unfair to admit an identification at trial simply because it is unreliable. Instead, the Court focused on the “potential for improper influence” when the police arrange confrontations for purposes of obtaining an identification. *Wade*, 388 U.S. at 233.

2. A due process inquiry into reliability of an identification, the Court has explained, is required only when the identification is made under “unnecessarily suggestive” circumstances. See, e.g., *Brathwaite*, 432 U.S. at 112-113; *Biggers*, 409 U.S. at 198-199; *Foster*, 394 U.S. at 442; *Stovall*, 388 U.S. at 302. Both requirements—that the circumstances be suggestive and that they be unnecessary—are premised on the understanding that police influence is what raises due process concerns.

a. Suggestive circumstances are instances where the police arrange a confrontation of a witness and suspect in a manner that suggests, implicitly or explicitly, that a certain suspect is the guilty party. See *Stovall*, 388 U.S. at 296; see also *Simmons*, 390 U.S. at 383 (listing examples of suggestive identification procedures, all of which involve law enforcement); *Wade*, 388 U.S. at 232-233 (same). When the police set the stage for an identification, they are in a unique position to influence the witness. *Brathwaite*, 432 U.S. at 116 (asking whether there was “pressure on the witness to acquiesce in the suggestion” made by the police).

Petitioner points to two different statements to support his view that the Court “was concerned with all suggestive influences, not just those orchestrated by the police.” Br. 28. First, he cites (*ibid.*) the Court’s statement in *Wade* that “[s]uggestion can be created intentionally or unintentionally.” 388 U.S. at 229. But that statement was made only in the context of *police* suggestion. *Ibid.*; see *Moore v. Illinois*, 434 U.S. 220, 224-225 (1977) (“Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they expect the witness to identify the accused. Such a suggestion, *coming from a police officer or prosecutor*, can lead a witness to make a mistaken identification.” (right to counsel context; emphasis added)). Second, petitioner cites (Br. 12, 28) the Court’s remark in *Brathwaite* that a “witness’[s] recollection \* \* \* can be distorted easily by the circumstances or by later actions of the police.” 432 U.S. at 112. The “circumstances” to which the Court refers are not suggestive identification circumstances; rather, they are the circumstances of the crime itself, *i.e.*, “an encounter with a total stranger under circumstances of emergency or emotional stress.” *Ibid.* Accordingly, this Court’s cases do not support petitioner’s expansive understanding of “suggestive” circumstances.

b. Further, the due process protection at issue is triggered only when an identification is made under *unnecessarily* suggestive circumstances. The necessity inquiry only makes sense in the context of police conduct. In *Stovall*, for example, the Court found no due process violation when police officers took a murder suspect in handcuffs to the witness’s hospital room, because even though the practice of showing suspects singly to witnesses is disfavored, the possibility the witness might

not survive made an immediate confrontation “imperative.” 388 U.S. at 302. Because the Court concluded that the procedure, though suggestive, was necessary, it did not consider the separate question whether the resulting identification was sufficiently reliable. *Ibid.* See *Simmons*, 390 U.S. at 384-385 (identification procedures were necessary because “a serious felony had been committed” and it was “essential” for FBI agents to swiftly determine whether they were on the right track). The Court’s requirement that a suggestive identification procedure be “unnecessary” before it implicates due process concerns reflects the well-established principle that “the exigencies of the situation” may “make the needs of law enforcement so compelling” that they justify investigatory techniques that are normally not permitted. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (citation and internal quotation marks omitted).

Petitioner acknowledges (Pet. 13) that a due process inquiry is required only when an identification is made under unnecessarily suggestive circumstances, but he provides no explanation of how to determine whether suggestive circumstances are necessary outside the context of police investigations. And it would be difficult to conduct such an inquiry outside the context of law enforcement, particularly where, as here, no one deliberately arranged the circumstances to obtain an identification.

3. The Court’s explanation of when identifications obtained under unnecessarily suggestive circumstances are admissible at trial also presumes police involvement. The Court stated that even when an identification results from unnecessarily suggestive circumstances, the identification is not kept from the jury absent a “very substantial likelihood” that the identification is wrong.

*Biggers*, 409 U.S. at 198 (citation omitted). To reach that conclusion, the Court weighed the costs of exclusion against its benefits. A significant factor favoring exclusion, the Court observed, was that it would “deter[] \* \* \* improper identification practice” by the police. *Brathwaite*, 432 U.S. at 111. The Court explained that excluding unreliable identifications tainted by police suggestion would “influence” the police to “guard against unnecessarily suggestive procedures” in order to avoid making the evidence unavailable at trial. *Id.* at 112. That deterrence rationale makes little sense in the context of private actors, who are unlikely to be repeat players and do not operate under standard procedures like the police. Moreover, private actors, unlike government institutions, are unlikely to take action to improve identification procedures when concerns arise about the reliability of eyewitness identifications. See, e.g., John Schwartz, *Changes to Police Lineup Procedures Cut Eyewitness Mistakes, Study Says*, N.Y. Times, Sept. 19, 2011, at A13; see also p. 32, *infra*.

Petitioner contends (Br. 14-15, 25) that police involvement is not required to raise due process concerns because this Court said that “reliability is the linchpin in determining the admissibility of identification testimony.” *Brathwaite*, 432 U.S. at 114. But that statement appears in the second part of the Court’s analysis, which addresses whether an identification made under unnecessarily suggestive circumstances may nonetheless be admitted at trial because it is sufficiently reliable. The question of reliability only arises after it is established that police conduct has unfairly influenced an identification. See pp. 12-14, *supra*; see *McDaniel v. Brown*, 130 S. Ct. 665, 674 (2010) (per curiam) (“[W]hen *the police* have used a suggestive eyewitness identification proce-

dure, ‘reliability is the linchpin in determining’ whether an eyewitness identification may be admissible.” (emphasis added; citation omitted).

Contrary to petitioner’s suggestion (Br. 28), the Court did not choose between deterrence and reliability as the goal in its eyewitness identification cases. Rather, the Court determined that it could both deter police from using certain procedures and foster the search for truth in the trial process by allowing the jury to consider identification evidence obtained under unnecessarily suggestive circumstances so long as the evidence is sufficiently reliable. *Brathwaite*, 432 U.S. at 111-113. The ultimate question under the Due Process Clause, the Court explained, is whether the introduction of the identification would make the defendant’s trial fundamentally unfair, and the Court determined that such unfairness would arise only where law enforcement attempts to influence a witness to identify a certain suspect and where there is a very substantial likelihood that the resulting identification is wrong. *Id.* at 116-117.

4. Significantly, the one time the Court considered a due process claim where some of the allegedly suggestive circumstances were not orchestrated by the police, the Court rejected it.

In *Coleman v. Alabama*, *supra*, the Court considered two defendants’ claim that a station-house lineup was “so unduly prejudicial and conducive to irreparable misidentification as fatally to taint” the witness’s later in-court identification. 399 U.S. at 3 (plurality opinion). Every Member of the Court rejected that claim.<sup>4</sup> A plurality of the Court found no due process violation be-

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<sup>4</sup> See 399 U.S. at 6 (plurality opinion), 13-14 (Black, J., concurring), 21 (Harlan, J., concurring), 22 n.2 (Burger, J., dissenting), 28 n.2 (Stewart, J., dissenting).

cause the witness's identifications were "not at all induced by the conduct of the lineup." *Id.* at 6 (plurality opinion).

The plurality specifically rejected the view that circumstances not controlled by the police could raise due process concerns. The defendants had argued that the lineup was defective because the witness believed at the time of the lineup that the police "had caught his assailants." *Coleman*, 399 U.S. at 6 (plurality opinion). The plurality rejected the argument because "the record is utterly devoid of evidence that anything the police said or did prompted" the witness's identification. *Ibid.*

The plurality also rejected the argument that the lineup was impermissibly suggestive because one of the defendants happened to be wearing a hat during the lineup and "[o]ne of the attackers had worn a hat." *Coleman*, 399 U.S. at 6 (plurality opinion). The plurality explained that "nothing in the record shows that [the defendant] was required to" wear a hat. *Ibid.* In the absence of any police conduct creating suggestive identification circumstances, the Court easily rejected the defendants' due process challenge.

**C. The Due Process Clause Does Not Impose A General Threshold Of Evidentiary Reliability In Criminal Cases**

Petitioner proposes a freestanding due process protection against the introduction of unreliable identification evidence at a criminal trial, even in the absence of any concerns about government actors unfairly influencing the identification. Such an approach is inconsistent with the Court's explanation of the role of the Due Process Clause in criminal trials and its decisions requiring government involvement before excluding evidence from criminal trials on due process grounds.

1. In criminal cases, “denial of due process is the failure to observe the fundamental fairness essential to the very concept of justice.” *Lisenba v. California*, 314 U.S. 219, 236 (1941). The Court has “defined the category of infractions that violate ‘fundamental fairness’ very narrowly.” *Dowling v. United States*, 493 U.S. 342, 352 (1990). “Judges 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.” *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (citation and internal quotation marks omitted). Rather, the task under the Due Process Clause is 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.” *Ibid.* (citations and internal quotation marks omitted).

While “[t]he Constitution guarantees a fair trial through the Due Process Clauses,” it “defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.” *Strickland v. Washington*, 466 U.S. 668, 684-685 (1994). The Sixth Amendment provides defendants with the rights to effective assistance of counsel, *id.* at 687; to compulsory process, *Taylor v. Illinois*, 484 U.S. 400, 408-409 (1988); and to confrontation and an opportunity for effective cross-examination of witnesses, *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985) (per curiam). By providing defendants with these mechanisms to test the prosecution’s witnesses, the Constitution guarantees “not that evidence be reliable, but that reliability be assessed in a particular manner.” *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

2. The Due Process Clause does not guarantee that all evidence admitted at a defendant's trial be unassailably reliable. As the Court has explained, "[t]he aim of the requirement of due process 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. The admission of inaccurate testimony does not render a trial fundamentally unfair because the trial process includes multiple means to address that testimony. The Court only has required exclusion of evidence in limited circumstances where government involvement in procuring or presenting the evidence so skewed the defendant's trial as to make it fundamentally unfair.

Indeed, this Court already has declined to hold that the Due Process Clause imposes a threshold of evidentiary reliability in criminal trials. In *Dowling v. United States*, *supra*, the Court found no due process bar to the introduction at trial of evidence of a defendant's prior crime, even though the defendant had been acquitted. 493 U.S. at 352. The Court recognized that such evidence "has the potential to prejudice the jury," but it determined that that potential was appropriately addressed "through nonconstitutional sources like the Federal Rules of Evidence," rather than through the strong medicine of the Due Process Clause. *Ibid.* The defendant argued that the evidence of his prior crime was "inherently unreliable"; the court responded that the defendant "had the opportunity to refute" the evidence of the prior crime and that it was the role of the jury to "assess the truthfulness and the significance" of that evidence. *Id.* at 353. Under those circumstances, the Court would not "condemn[]" the introduction of the evidence as fundamentally unfair. *Ibid.*

*Kansas v. Venstris*, 129 S. Ct. 1841 (2009), makes the same point, albeit in the context of the right to counsel. In that case, the defendant contended that “jailhouse snitches are so inherently unreliable” that the Court should “craft a broader exclusionary rule” for violations of the Sixth Amendment right to counsel using jailhouse snitches as opposed to other government agents. *Id.* at 1847 n.\*. The Court declined to do so, explaining that “[o]ur legal system \* \* \* is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses” and that the Court has long avoided using the Constitution to override state rules of criminal procedure. *Ibid.*

3. Rather than expand the due process guarantee to require the exclusion of all unreliable evidence, this Court has focused on the critical element of governmental involvement. Even when testimony is false—not merely unreliable—the Court has hesitated before deploying the Due Process Clause. The Court has held that it violates the Due Process Clause for a prosecutor to present at trial material testimony he or she knows to be false. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). The Court explained that exclusion was required because it is unfair for the government to “knowingly use” the evidence at the defendant’s trial “to obtain a tainted conviction.” *Napue*, 360 U.S. at 269. Except in those limited circumstances, “it is not improper to put on a witness whose testimony may be impeached” because “[t]ruth determination is still the traditional jury function.” *United States v. Perkins*, 94 F.3d 429, 433 (8th Cir. 1996), cert. denied, 519 U.S. 1136 (1997).

This Court’s decision in *Colorado v. Connelly*, 479 U.S. 157 (1986), makes clear that government conduct,

not evidentiary unreliability, is required before the Court will invoke the Due Process Clause to exclude relevant evidence at a criminal trial. In that case, the Court determined that the Due Process Clause did not bar use at trial of a confession prompted not by police questioning but by the “voice of God” in the defendant’s head. *Id.* at 161-162, 165-166. The Court determined that the confession was not involuntary, and its admission did not violate due process, because the “crucial element of police overreaching” was missing. *Id.* at 163. “The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause”; instead, the Court explained, a due process violation turns on police influence. *Id.* at 165-166. Excluding evidence that was not the result of police action, the Court observed, would “impose[] a substantial cost on the societal interest in law enforcement” by precluding the jury from considering “what concededly is relevant evidence” and would “serve absolutely no purpose in enforcing constitutional guarantees” because the police “had done nothing wrong.” *Id.* at 162, 166 (citation omitted).

The Court explained that in the absence of police influence, the presumption was that all relevant evidence—even unreliable evidence—should be heard by the jury. Exclusion of relevant evidence “deflect[s] a criminal trial” from its “basic purpose,” which is “to decide the factual question of the defendant’s guilt or innocence.” *Connelly*, 479 U.S. at 166 (citation omitted). The reliability of evidence “is 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. “[T]he Constitution rightly leaves this sort of in-

quiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area.” *Ibid.* *Connelly* therefore confirms that the Due Process Clause does not broadly regulate the introduction of unreliable evidence at a defendant’s trial.

**D. This Court Should Not Fashion A New Due Process Principle For Cases Involving Eyewitness Identification Testimony**

Petitioner contends (Br. 17-22) that eyewitness identification evidence generally poses unique risks of wrongful convictions and that those risks cannot be addressed through the normal criminal trial process. He is mistaken.

1. The concerns petitioner raises about eyewitness identifications are not new. The Court recognized the potential fallibility of eyewitness identification in *Wade* and in several decisions since then, but it has not found those concerns sufficient to justify due process scrutiny of all identification evidence. See *Wade*, 388 U.S. at 228-229; see also, *e.g.*, *United States v. Crews*, 445 U.S. 463, 472-473 (1980). Rather, the Court recognized that it was “the influence of improper suggestion” by the police that poses a special risk of “miscarriages of justice.” *Wade*, 388 U.S. at 229 (citation omitted); see *United States v. Owens*, 484 U.S. 554, 561 (1988) (declining to assume that “out-of-court statements of identification are inherently less reliable than other out-of-court statements” in the absence of police suggestion).

The social science sources petitioner cites (Br. 17-22) confirm that it is *police* suggestion in formal confrontations such as lineups and showups that raises special reliability concerns. See, *e.g.*, Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go*

*Wrong* 49, 51-62 (2011); Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification* 10-15 (2009). Moreover, as petitioner recognizes (Br. 17-20), the increasing use of new forms of reliable and probative evidence, such as DNA evidence, has served as an important check on mistaken eyewitness identification evidence. See, e.g., *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2316 (2009) (“DNA testing can provide powerful new evidence unlike anything known before.”). Accordingly, recent developments have not undercut the Court’s rule that absent unnecessary police suggestion that fatally taints reliability, identification evidence is “for the jury to weigh.” *Brathwaite*, 432 U.S. at 116.

2. The Sixth Amendment provides criminal defendants with ample opportunity to test the accuracy of eyewitness identification evidence, and the Court should not create an extra due process check to ensure the defendant’s trial is fair. The “first line of defense,” the Court has explained, is the right to the assistance of counsel at lineups and showups conducted after the initiation of adversary proceedings. *Wade*, 388 U.S. at 235. The presence of counsel at the lineup helps to “prevent[] \* \* \* unfairness” in the way the police present the suspect to the witness. *Ibid.* And at trial, defense counsel may test the accuracy of an identification through cross-examination, “the greatest legal engine ever invented for the discovery of truth.” 5 Wigmore, *Evidence* § 1367 (James H. Chadbourn rev. ed. 1974). The “central concern” of the Confrontation Clause is “to ensure the reliability of the evidence against a criminal defendant.” *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

With respect to eyewitness identification evidence in particular, the Court has stated that “[w]hile identification testimony is significant evidence, such testimony is still only evidence,” and “[c]ounsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification.” *Brathwaite*, 432 U.S. at 114 n.14 (quoting *Clemons v. United States*, 408 F.2d 1230, 1251 (1968), cert. denied, 394 U.S. 964 (1969)); see, e.g., *Simmons*, 390 U.S. at 384 (“The danger that use of [an identification procedure] may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method’s potential for error.”). “The testimony of an eyewitness is almost uniquely subject to effective cross-examination. In nearly any type of identification case, the areas for inquiry will be limited only by counsel’s experience and imagination.” Lawrence Taylor, *Eyewitness Identification* 228 (1982). It is only when police influence on a witness has created a serious and irreparable risk of mistaken identification—one that cannot be cured by normal operation of the adversary process—that the Court has found the type of fundamental unfairness that raises due process concerns. *Brathwaite*, 432 U.S. at 116. “Short of that point,” the Court has concluded, “such evidence is for the jury to weigh.” *Ibid.*; see, e.g., *United States v. Scheffer*, 523 U.S. 303, 334-335 (1998) (“[E]ven highly dubious eyewitness testimony is, and should be, admitted and tested in the crucible of cross-examination.” (Stevens, J., dissenting)).

The opportunity for cross-examination is “further buttressed \* \* \* by the requirement that the state prove every element of the crime, including the identity of the accused beyond a reasonable doubt,” *State v.*

*Pailon*, 590 A.2d 858, 863 (R.I. 1991), as well as the due process guarantee that a conviction must be supported by constitutionally sufficient evidence, meaning evidence that would “convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense,” *Jackson v. Virginia*, 443 U.S. 307, 316-317 (1979).

3. Other, non-constitutional features of our adversary system provide additional checks against convictions based on unreliable identification evidence. The rules of evidence require that eyewitness testimony be relevant and competent. See Fed. R. Evid. 401-402, 601; see also, *e.g.*, Fed. R. Evid. 602 (requirement that witnesses testify from personal knowledge), 701 (exclusion of opinion testimony of lay witness not rationally based on witness’s perception). Trial courts may exclude evidence that is so patently untrustworthy that it falls below the threshold of competency. See Fed. R. Evid. 601; N.H. R. Evid. 601. An identification also may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. See Fed. R. Evid. 403; N.H. R. Evid. 403.

Moreover, any danger that the jury may give undue weight to a possibly unreliable identification “can be \* \* \* guarded against by appropriate jury instructions.” *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972). Most of the federal circuits have provided an instruction about eyewitness testimony in their model instructions for criminal trials.<sup>5</sup> Numerous States have

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<sup>5</sup> See 3d Cir. Crim. Jury Instruction 4.15 (2010); *United States v. Holley*, 502 F.2d 273, 277-278 (4th Cir. 1974); 5th Cir. 2001 Crim. Jury Instruction 1.29; 6th Cir. Pattern Crim. Jury Instruction 7.11 (2011); Pattern Crim. Fed. Jury Instruction for the 7th Cir. 3.08 (1998); Manual of Model Crim. Jury Instructions for the District Courts of the 8th Cir. 4.08 (2011); 9th Cir. Model Crim. Jury Instruction 4.11 (2010); 10th Cir.

likewise provided such model instructions to guide their juries.<sup>6</sup> There is a “strong presumption that juries will follow the[se] instructions.” *Scheffer*, 523 U.S. at 336 (plurality opinion). Thus for identification testimony, like any other testimony, the defense can fully test reliability using the many tools available at trial, and the court can appropriately instruct the jury about its possible shortcomings and ensure the verdict is supported by sufficient admissible evidence.

4. Creating a new due process rule for identification testimony that was not influenced by police suggestion would frustrate the administration of justice because it would lead to the exclusion of relevant, probative evidence at trial, without any corresponding benefit of deterring certain police conduct. The Court justified a limited due process rule regarding identification testimony on the ground that it would lead police to “guard against

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Crim. Pattern Jury Instruction 1.29 (2011); 11th Cir. Pattern Jury Instruction (Crim. Cases) Special Instruction 3 (2010); *United States v. Telfaire*, 469 F.2d 552, 558-559 (D.C. Cir. 1972).

<sup>6</sup> See, e.g., Rev. Ariz. Jury Instruction - Crim. 39 (3d ed. 2008); 1 Judicial Council of Cal. Crim. Jury Instruction 315 (2010); Conn. Crim. Jury Instruction 2.6-4 (2007); 2 Ga. Suggested Pattern Jury Instruction (Crim. Cases) 1.35.10 (4th ed. 2011); Ill. Pattern Jury Instruction Crim. 3.15 (4th ed. 2011); Pattern Instructions for Kan. - Crim. 52.20 (3d ed. 2011); 1 Md. Crim. Jury Instructions & Commentary §§ 2.56, 2.57A, 2.57B (David E. Aaronson ed., 3d ed. 2009); Mass. Crim. Model Jury Instruction 9.160 (2009); 10 Minn. Jury Instruction Guides, Crim. 3.19 (5th ed. 2006); N.H. Crim. Jury Instruction 3.06 (1985); N.Y. Crim. Jury Instruction “Identification—One Witness” and “Identification—Witness Plus” (2d ed. 2011); 1 Pa. Suggested Standard Crim. Jury Instruction 4.07B (2d ed. 2010); Okla. Uniform Jury Instruction Crim. 9-19 (2d ed. 2009); Tenn. Crim. Pattern Jury Instruction 42.05 (14th ed. 2010); Utah Model Jury Instruction CR404 (2d ed. 2010); Model Instructions from the Vt. Crim. Jury Instruction Comm. 5-601, 5-605 (2003); W. Va. Crim. Jury Instruction 5.05 (6th ed. 2003).

unnecessarily suggestive procedures.” *Brathwaite*, 432 U.S. at 112. Keeping an identification that was not obtained by the police from the jury would “serve absolutely no purpose in enforcing constitutional guarantees,” *Connelly*, 479 U.S. at 162, 166, and would impose an “enormous societal cost” by “excluding truth in the search for truth in the administration of justice,” *Nix v. Williams*, 467 U.S. 431, 445 (1984). It would provide a windfall to defendants when witnesses, through no fault of the government, happen to see defendants on television, in a newspaper, or standing near a police officer.

Petitioner’s proposal also would diminish the role of the jury in our adversary system. In *Watkins v. Sowders*, 449 U.S. 341 (1981), the Court held that the Constitution does not require a court to conduct a hearing outside the jury’s presence about possible police suggestion during a lineup or showup because “the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform.” *Id.* at 347. Indeed, “the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of the evidence.” *Ibid.* Our entire legal system “is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses.” *Ventris*, 129 S. Ct. at 1847 n.\*. If juries are considered incompetent to evaluate eyewitness testimony, it is difficult to know what they are competent to do.

Finally, petitioner’s proposal would invite the courts to constitutionalize the rules of evidence. “It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness.” *Brathwaite*, 432 U.S. at 113-114 n.14 (citation omitted). If the Court were to adopt a special rule for eyewitness

identification evidence not obtained by the police, no doubt criminal defendants would argue that other types of potentially unreliable evidence—such as confidential informant testimony or testimony of a cooperating co-conspirator—also raise due process concerns. And it would make the Court “a rule-making organ for the promulgation of state rules of criminal procedure”—a role the Court has so far rejected. *Medina v. California*, 505 U.S. 437, 443 (1992) (citation omitted). Further, it would “short-circuit” the efforts of federal and state law enforcement officers, legislatures, and courts to address potential concerns about eyewitness identification testimony. *Osborne*, 129 S. Ct. at 2322; see, e.g., U.S. Dep’t of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* iii (Oct. 1999) (describing “improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system”); *State v. Henderson*, No. A-8-08 (062218), 2011 WL 3715028, at \*46-47 (N.J. Aug. 24, 2011) (adopting additional procedures for eyewitness identifications under the state constitution); see also, e.g., 725 Ill. Comp. Stat. Ann. 5/107A-5 (2006); N.C. Gen. Stat. Ann. § 15A-284.52 (2009); Ohio Rev. Code Ann. § 2933.83 (2010); W. Va. Code Ann. § 62-1E-1 to -3 (2010); Wis. Stat. Ann. § 175.50 (2006).

5. This case makes clear that the special due process rule petitioner suggests is not needed. Petitioner had ample opportunity to test Bandon’s identification of him at trial. Defense counsel vigorously cross-examined Bandon about her ability to identify petitioner, pointing out that she saw him from “quite a distance,” J.A. 226a; that her view of him was partially blocked by a van, *ibid.*; that she did not describe his facial features or clothing, J.A. 233a; that she may not have been paying close attention to him because she was “scared,” *ibid.*; and that she

was unable to pick him out from a photographic array, J.A. 234a-235a. During closing argument, defense counsel urged the jury not to credit Blandon's identification for these reasons. J.A. 374a-375a.

The trial court then gave the jury a special instruction regarding eyewitness evidence. The court stated that the jurors should consider the witness's "capacity and \* \* \* opportunity to observe the person in question at the time of the crime," including such factors as distance, lighting, and the witness's attentiveness. J.A. 399a. The court stressed that "[i]f [an] identification was influenced by the circumstances under which it was made, you should examine the identification with great care." J.A. 400a. So instructed, the jury considered the evidence (which, in addition to Blandon's identification, included Ullon's two identifications of petitioner) and found petitioner guilty. Here, the police had no influence in generating the identification and petitioner had an ample opportunity to challenge the identification at trial. A new due process rule to supplant existing procedures is unwarranted.

CONCLUSION

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

Respectfully submitted.

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