No. 10-8974

IN THE
Supreme Court of the United States

BARION PERRY,
Petitioner,
v.

STATE OF NEW HAMPSHIRE,
Respondent.

ON WRIT OF CERTIORARI TO THE
NEW HAMPSHIRE SUPREME COURT

BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The American Psychological Association (APA) is the leading association of psychologists in the United States. A nonprofit scientific and professional organization, it has approximately 155,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's major purposes are to increase and disseminate knowledge regarding human behavior, to advance psychology as a science and profession, and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare.[1]

APA has filed more than 135 amicus briefs in state and federal courts around the country. These briefs have been cited frequently by courts over the years, including this Court. *See, e.g.*, *Graham* v. *Florida*, 130 S. Ct. 2011, 2026 (2010); *Panetti* v. *Quarterman*, 551 U.S. 930, 962 (2007); *Atkins* v. *Virginia*, 536 U.S. 304, 316 n.21 (2002).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether the case is one in which there is sufficient scientific research, data, and literature relevant to a question before the court that APA can usefully contribute

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[1] Both parties' written consent to the filing of this brief is being submitted contemporaneously. No counsel for a party authored this brief in whole or in part, and no person other than APA, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

to the court's understanding and resolution of that question. APA regards this as one of those cases.[2]

SUMMARY OF ARGUMENT

I.A. Accurate eyewitness identifications are a crucial part of the truth-seeking process. But identifications can be inaccurate, and the admission into evidence of inaccurate identifications can violate a criminal defendant's due process rights. Several decades ago, this Court established a framework for courts to address claims that a particular identification should be excluded from evidence because it was both made under suggestive circumstances and bears insufficient independent indicia of reliability, *i.e.*, probable accuracy. In doing so, the Court made clear that "[r]eliability is the linchpin in determining the admissibility of identification testimony," *Manson* v. *Brathwaite*, 432 U.S. 98, 114 (1977), and that "the primary evil to be avoided" is the "'likelihood of … misidentification,'" *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972) (quoting *Simmons* v. *United States*, 390 U.S. 377, 384 (1968)). Here, however, the New Hampshire Supreme Court imposed an additional condition—that state actors improperly caused an identification to be made under suggestive circumstances—before any due process inquiry can be made.

In considering the propriety of that additional requirement, this Court should take account of extensive psychological research, much of it conducted since 1977,

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[2] APA gratefully acknowledges the assistance of Steven Penrod, J.D., Ph.D.; Gary Wells, Ph.D.; Jennifer Dysart, Ph.D.; Nancy Steblay, Ph.D.; Kirk Heilbrun, Ph.D.; David DeMatteo, J.D., Ph.D.; and Lori Butts, J.D., Ph.D., in the preparation of this brief.

which shows that the presence or absence of state action in creating any suggestiveness is frequently irrelevant to "the primary evil to be avoided," *i.e.*, the "likelihood of … misidentification." *Biggers*, 409 U.S. at 198. In particular, this research has identified many factors bearing on the reliability of an eyewitness identification that are independent of the conduct of law enforcement. These include the passage of time between observation and identification; the level of stress experienced by the witness during the crime; the duration of the witness's exposure to the perpetrator; the distance between the witness and the perpetrator; the perpetrator's brandishing of a weapon at the crime scene; and racial differences between the witness and the perpetrator. The fact that reliability—the "linchpin" of admissibility—is affected by so many factors unrelated to state action calls into serious question requiring state action as a prerequisite for due process scrutiny of identifications.

B. The risk of inaccurate eyewitness identifications is not merely a theoretical possibility. Controlled experiments as well as studies of actual identifications have consistently found that the rate of incorrect identifications is approximately 33 percent. This high error rate provides further reason not to immunize an entire category of identifications from any due process scrutiny.

C. The problem of unreliable identifications cannot be adequately addressed by allowing such identifications into evidence and then relying on cross-examination, jury instructions, or expert testimony to avoid wrongful conviction. Research shows that juries tend to "over believe" eyewitness testimony, making jury reliance on even unreliable identifications likely. Research also shows that jury instructions are typically ineffective (and in any event largely within the discre-

tion of trial courts to give or deny). Expert testimony is likewise within the discretion of trial courts, and exclusions of it are often upheld on appeal under a deferential standard of review. Finally, cross-examination can do little to affect a witness who is being entirely truthful but whose identification is nonetheless incorrect.

II. The identifications that the decision below immunizes from due process scrutiny—those that involve suggestiveness but not state action—are particularly likely to lead to false identifications. As this case demonstrates, it is one-on-one identifications, as opposed to line-ups or photo arrays, that are most likely to involve suggestiveness but not state action. But when made under suggestive circumstances, as here, one-on-one identifications present the most troubling features of "show-ups," a form of one-on-one identification in which police affirmatively present a single suspect to a witness and request an identification. Like show-ups—which this court has recognized create serious risks of erroneous identification—other one-on-one identifications communicate to the eyewitness that the police believe the lone suspect to be the culprit. And, in contrast to lineups, they do not offer "incorrect" choices, which can serve as a safeguard with an eyewitness who opts to make an identification despite being uncertain. The decision below thus immunizes from due process scrutiny identifications that pose a serious risk of inaccuracy.

ARGUMENT

I. SCIENTIFIC RESEARCH SUPPORTS DUE PROCESS INQUIRY INTO THE RELIABILITY OF ALL EYEWITNESS IDENTIFICATIONS MADE UNDER SUGGESTIVE CIRCUMSTANCES

A. Many Factors That Affect The Accuracy Of Eyewitness Identifications Are Unrelated To Police Conduct

Eyewitness testimony is often a critical part of the truth-seeking process. Accurate eyewitness identifications can provide powerful evidence of guilt or innocence. This Court and others, however, have long recognized that eyewitness identifications are often *in*accurate. *See, e.g.*, *United States* v. *Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known[.]"). This Court has further held that the admission of an identification that is likely inaccurate can violate a criminal defendant's due process right to a fair trial. *See Neil* v. *Biggers*, 409 U.S. 188, 198 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process[.]").

Building on these principles, this Court, in a series of cases decided between 1967 and 1977, established a framework for addressing claims that an eyewitness identification was made under such suggestive circumstances that due process requires its exclusion from evidence. *See Manson* v. *Brathwaite*, 432 U.S. 98 (1977); *Biggers*, 409 U.S. 188; *Stovall* v. *Denno*, 388 U.S. 293 (1967). Of particular note, this Court held that reliability—*i.e.*, probable accuracy—"is the linchpin in determining the admissibility of identification testimony." *Manson*, 432 U.S. at 114; *accord Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981) ("It is the reliability of identification evidence that primarily determines its admissi-

bility."). Here, however, the New Hampshire Supreme Court concluded that government-created suggestiveness is a linchpin of admissibility, holding that a court need not even inquire into the reliability of an identification unless state actors improperly caused the identification to be made under suggestive circumstances.

In considering this additional limitation on due process scrutiny, this Court should be take account of a large body of psychological research, much of it conducted since 1977, that has identified a host of factors bearing on the accuracy of an eyewitness identification. Many of these factors, several of which are discussed in detail below, are independent of the conduct of law-enforcement officials (and, indeed, independent of suggestiveness from any source). Hence, government-created suggestiveness is not a proper proxy for reliability. Rather, there is a risk of erroneous identification—and of a resulting conviction of an innocent person—even when state actors do not orchestrate suggestive identification circumstances. The New Hampshire Supreme Court's conclusion that state-created suggestiveness is a prerequisite for a court even to consider the reliability of an eyewitness identification derogates the focus on accuracy that lies at the core of this Court's relevant precedent.

1. Cognitive psychologists have long "established that when we experience an important event, we do not simply record it in our memory as a videotape recorder would." Loftus et al., *Eyewitness Testimony: Civil and Criminal* § 2-2, at 12 (4th ed. 2007). This finding traces its origin to the 1930s work of Frederic Charles Bartlett. Through a series of experiments, Bartlett debunked the notion that "remembering is … the re-excitation of innumerable fixed, lifeless and fragmentary traces." Bartlett, *Remembering: A Study in Ex-*

perimental and Social Psychology 213 (1932). Instead, the process of remembering "is an imaginative reconstruction or construction…. It is thus hardly ever really exact, even in the most rudimentary cases of rote recapitulation[.]" *Id.* Inaccuracies are common, because the process of remembering necessitates the active processing of sensory inputs through the individual's pre-existing cognitive patterns, patterns that are not infallible. As one more recent commentary explained, "human perception does not work like a camera or video recorder. Rather, what is perceived and stored in memory is often incomplete or distorted as a result of the individual's state of mind or the nature of the event observed." Brigham et al., *Disputed Eyewitness Identification Evidence*, 36 Ct. Rev. 12, 13 (1999). Bartlett's "reconstructive" analysis enjoys widespread acceptance in the scientific community. *See, e.g.*, Castelli et al., *Evaluating Eyewitness Testimony in Adults and Children*, in *The Handbook of Forensic Psychology* 243, 244 (Weiner & Hess eds., 3d ed. 2006).

Psychologists analyzing the nature of memory have focused on its three discrete steps: (1) the acquisition or encoding stage, when a witness perceives an event and information is thereby entered into the memory system; (2) the retention or storage stage, the period between acquisition and the witness's attempt to recall the information; and (3) the retrieval stage, when the witness attempts to recall the stored information. *See* Loftus et al., *Eyewitness Testimony* § 2-2, at 13. "This three-stage analysis is central to the concept of human memory," and "[p]sychologists who conduct research in this area try to identify and study the important factors that play a role in each of the three stages." *Id.* Those psychologists have identified in particular numerous factors that may adversely affect an eyewitness's mem-

ory at each stage. At the acquisition stage, memory is subject to both event-specific variables (such as duration of the event) and witness-specific variables (such as age). *Id.* At the retention stage, additional factors such as the passage of time or post-event information may contaminate the witness's memory. *Id.* Finally, at the retrieval stage, the witness's memory may be negatively affected by the method of questioning or the witness's confidence level. *Id.*[3]

2. Building on this body of research regarding the nature of memory generally, psychologists have conducted a large number of empirical studies—most using controlled experimental methods—that document the adverse impact of various factors on the accuracy of eyewitness identification. Researchers have long divided these variables into two categories: "estimator variables," those that are beyond the control of state actors, and "system variables," those that are not. *See, e.g.*, Wells, *Applied Eyewitness Testimony Research*, 36 J. Personality & Soc. Psychol. 1546, 1548 (1978). Due to the breadth and depth of this research, almost any overview of it is necessarily incomplete.[4] But the following recitation of several factors underscores that

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[3] Because memory is subject to many sources of contamination, researchers have recommended that it be regarded by the criminal-justice system as similar to a fingerprint, hair sample, or other trace evidence from a crime scene. *See, e.g.*, Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 622-623.

[4] More extensive discussions appear in, for example, Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in Pub. Int. 45, 51-68 (2006); and Wells & Olsen, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 280-290 (2003).

many of them are unrelated to the conduct of law-enforcement officials.[5]

a. Passage of Time. Empirical research establishes that as time passes between an event and an associated identification, the identification becomes increasingly unreliable—put simply, the memory "decays." *See, e.g.*, Deffenbacher et al., *Forgetting the Once-Seen Face*, 14 J. Experimental Psychol. 139, 147-148 (2008). Importantly, "[t]he decay function is not linear; rather, greater decay occurs early on and the rate of decay lessens over time." Cutler, *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 336 (2006). Even a gap of only a few hours between exposure and identification, then, can affect the reliability of an identification.

b. Witness Stress. The level of stress experienced by an eyewitness at the time of exposure to the perpetrator can also affect the reliability of a subsequent identification. One "meta-analysis"—an analysis of data from a cross-section of prior studies—found "clear

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[5] Eyewitness science is widely accepted within the scientific community, and its key findings are largely uncontroversial. *See, e.g.*, Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics 177, 180 (2006) ("[E]yewitness reliability research today is an established body of knowledge. It uses well-accepted methodologies. It is part of the research agenda at major universities throughout the world. It is a subject of thousands of peer-reviewed publications. It has existed for decades[, and t]here is nearly unanimous consensus among researchers about the field's core findings[.]"); Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405, 410, 413 tbl. 5 (2001) (illustrating consensus among experts).

support for the hypothesis that heightened stress has a negative impact on eyewitness identification accuracy." Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Hum. Behav. 687, 694 (2004) (analyzing 27 studies). Another study, involving participants at military survival schools who were exposed to genuine stress, similarly found "robust evidence that eyewitness memory for persons encountered during events that are … highly stressful[] … may be subject to substantial error." Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L. & Psychiatry 265, 274 (2004). Being the victim of a crime is of course a stressful experience.

c. Exposure Duration. Studies have similarly demonstrated that the reliability of an eyewitness identification diminishes when the witness sees the perpetrator for only a short period of time. One study, for example, found an accuracy rate of 85 to 95 percent when subjects were exposed for forty-five seconds to the image of the perpetrator during a videotaped reconstruction of robbery, and a subsequent photo array contained the perpetrator. But that rate fell to between 29 and 35 percent when the exposure lasted only twelve seconds. *See* Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 British J. Psychol. 339, 345 tbl. 1 (2003); *see also* Shapiro & Penrod, *Meta-Analysis of Facial Identification Studies*, 100 Psychol. Bull. 139, 140, 150 (1986) (conducting a meta-analysis of 128 existing studies involving nearly 17,000 subjects and finding a linear

trend in the relationship between exposure duration and identification accuracy).[6]

d. Distance. As everyday experience tells us, clarity of vision decreases with distance. Experimental research provides specifics about this relationship between distance and the ability to identify faces. The research reveals that—for people with normal vision—this ability begins to diminish at approximately 25 feet, and nearly disappears by approximately 150 feet. *See* Loftus & Harley, *Why Is It Easier To Identify Someone Close Than Far Away?*, 12 Psychonomic Bull. & Rev. 43, 63 (2005), *cited in* Wells & Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1, 9-10 (2009); *see also* Meissner et al., *Person Descriptions as Eyewitness Evidence*, in 2 *The Handbook of Eyewitness Psychology* 1, 3 (Lindsay et al. eds., 2007).

e. Weapon Focus. Weapon focus "refers to the visual attention eyewitnesses give to a perpetrator's weapon during the course of a crime"—attention that is "expected … [to] reduce his or her ability to later recall details about the perpetrator or to recognize the perpetrator." Wells et al., *Eyewitness Evidence: Improving*

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[6] Notably, the study discussed in the text controlled for many of the other factors discussed herein. Both the 85 to 95 percent and 29 to 35 percent figures therefore likely overstate the accuracy of real-world identifications: Research has shown that the various factors that affect eyewitness accuracy often interact to compound the risk of mistaken identification. *See* Pezdek, *Content, Form, and Ethical Issues Concerning Psychological Expert Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 29, 37 (Cutler ed., 2009).

Its Probative Value, 7 Psychol. Sci. in Pub. Int. 45, 53 (2006). Several studies, including a meta-analysis, have found that weapon focus has a statistically significant adverse impact on eyewitness identification accuracy. *See* Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 Law & Hum. Behav. 413, 420 (1992); O'Rourke et al., *The External Validity of Eyewitness Identification Research: Generalizing Across Subject Populations*, 13 Law & Hum. Behav. 385, 392 (1989).

f. Cross-Race Bias. Finally, extensive empirical research demonstrates that eyewitnesses are more accurate at identifying perpetrators of their own race than those of a different race. For example, a 2001 meta-analysis that spanned 39 research articles and nearly 5,000 participant witnesses concluded that cross-race identifications are 56 percent more likely to be erroneous than same-race identifications. *See* Meissner & Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 Psychol., Pub. Pol'y & L. 3, 15, 21 (2001).

The point here is not that state actors can never contribute to inaccuracy. They certainly can.[7] Nor is the point that any eyewitness identification affected by one or more of these factors is necessarily flawed or inaccurate. The point is simply that eyewitness reliability—the linchpin of admissibility under this Court's precedent—is not determined by the presence or absence of state-created suggestiveness. It is instead determined by numerous factors identified by scientific

[7] For example, they can make leading statements during photo arrays or line-ups, arrange arrays or line-ups in which only one of the choices resembles a prior description of the perpetrator, or have a witness participate in multiple line-ups or arrays.

research, many of which (the estimator variables) have nothing to do with the conduct of law enforcement. Eyewitness testimony can be unreliable even where there is no state-created suggestiveness. Conversely, eyewitness testimony can be reliable even when suggestiveness (state-created or otherwise) does exist, for example, where other factors reinforce the accuracy of an identification made in circumstances that otherwise would be questionable. Put simply, the decision below immunizes some identifications from any due process scrutiny without regard to many of the factors that bear on what this Court has held to be the key point regarding admissibility.[8]

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[8] In *Biggers* and *Manson*, this Court enumerated five factors relevant to the probable accuracy of an eyewitness identification: "the opportunity of the witness to view the criminal at the time of the crime, the witness' 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." *Manson*, 432 U.S. at 114 (citing *Biggers*, 409 U.S. at 199-200). As shown by the discussion in the text, most of these factors are indeed relevant to probable accuracy—with the notable exception of witness certainty, *see infra* n.14. But given that notable exception, and given the plethora of other accuracy-related factors that researchers have identified since *Biggers* and *Manson*, APA urges the Court, in an appropriate case, to revisit the *Manson* framework so as to bring it in line with current scientific knowledge. *See* Wells & Quinlivan, 33 Law & Hum. Behav. at 21 ("*Manson* was a reasonable proposition in 1977, but we know much more today."); Report of the Special Master, *State* v. *Henderson*, No. A-8-08, at 77-79 (N.J. June 18, 2010) (listing several shortcomings with the *Manson* framework in concluding that it is not "valid and appropriate in light of recent scientific and other evidence"), *available at* http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%29.PDF (last visited Aug. 5, 2011).

B. False Identifications Are A Common Occurrence

That the various factors that can cause eyewitness error have actually resulted in false identifications is not simply a theoretical possibility. Indeed, more than four decades ago this Court observed that "the annals of criminal law are rife with instances of mistaken identification." *Wade*, 388 U.S. at 228. Studies released as early as 1932 and as recently as 2008 confirm that observation, documenting wrongful convictions that rest largely or wholly on eyewitness identifications. *See, e.g.*, Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008) (of the first 200 cases of post-conviction exoneration by DNA, nearly 80 percent included at least one eyewitness who mistakenly identified the innocent defendant); Borchard, *Convicting the Innocent* xiii (1932) ("[T]he major source of these [65 wrongful convictions] is an identification of the accused by the victim.").[9]

These anecdotal accounts have been supplemented with systematic research into the prevalence of erroneous identification. First, researchers have conducted a variety of studies of actual witness identifications. These studies have consistently found that the rate of

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[9] Although DNA testing for innocence claims has been available only since the early 1990s—and only a small fraction of cases are suitable for testing because DNA was not collected, has deteriorated, or was lost or destroyed—proven post-conviction DNA exonerations in the United States exceed 270. *See The Innocence Project—Know The Cases*, http://www.innocenceproject.org/know/ (last visited Aug. 5, 2011); *see also* Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 524, 529 & tbl. 1 (2005) (noting 196 non-DNA exonerations between 1989 and 2003 alone).

inaccurate identifications is roughly 33 percent. For example, one analysis of 1,561 identification attempts by witnesses viewing line-ups in England found that 39 percent correctly identified the suspect, 20 percent incorrectly identified a "filler," and 41 percent made no identification—meaning that at least 33.9 percent of the identifications were wrong (20 percent divided by 59 percent, with the denominator being those who made *some* identification, correct or incorrect). *See* Wright & McDaid, *Comparing System and Estimator Variables Using Data from Real Line-ups*, 10 Applied Cognitive Psychol. 75, 77 tbl. 1 (1996).[10] A similar result was reached through an analysis of 843 identification attempts in England by witnesses viewing line-ups: The suspect was correctly identified 36 percent of the time, a filler was incorrectly identified 22 percent of the time, and no identification was made 42 percent of the time—an inaccuracy rate of at least 37.9 percent (22 percent divided by 58 percent). *See* Valentine et al., *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups*, 17 Applied Cognitive Psychol. 969, 970 (2003) (citing Slater, *Identification Parades*, Police Research Group, Home Office Study (London 1994)).[11] Archival studies thus yield the alarming find-

[10] The percentage of incorrect identifications is "at least" 33.9 percent because whenever the suspect identified by the police is not actually the culprit, a "correct" identification of the suspect by the witness is not truly a correct identification, *i.e.*, not an identification of the culprit.

[11] *Accord* Behrman & Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 Law & Hum. Behav. 475, 480-482 (2001) (study of 58 line-ups in California found a 32.4 percent inaccuracy rate); Wright & Skagerberg, *Post-identification Feedback Affects Real Eyewitnesses*, 18 Psychol. Sci. 172, 175 (2007) (inaccuracy rate of 26.6 percent).

ing that approximately one of every three identifications is wrong.

Controlled field experiments have produced similar misidentification rates. Several studies collectively "gathered [data] … from 291 mock-eyewitnesses who were administered 536 separate identification tests." Cutler & Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* 12 (1995).[12] In some of the tests, the "target," *i.e.*, the person who had interacted with the eyewitness, was included, while in others the target was absent. In tests that did not include the target, eyewitnesses nonetheless made an inaccurate identification 35.8 percent of the time. *Id.*; *see generally id.* at 10-14.[13]

These high rates of inaccurate eyewitness identifications underscore the need for courts to be hesitant about immunizing from due process scrutiny any identi-

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[12] These studies utilized non-violent scenarios that were brief but involved unusual conduct by the customer. *See, e.g.*, Platz & Hosch, *Cross Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. Applied Soc. Psychol. 972, 975 (1988) (customer attempt to pay in Mexican pesos); Pigott et al., *A Field Study of the Relationship Between Quality of Eyewitnesses' Descriptions and Identification Accuracy*, 17 J. Police Sci. & Admin. 84 (1990) (customer attempt to pay with "crudely altered … money order"). The delay between interaction and identification ranged from two to twenty-four hours. *Compare* Krafka & Penrod, *Reinstatement of Context in a Field Experiment on Eyewitness Identification*, 49 J. Personality & Soc. Psychol. 58, 62 (1985) (testing both two-hour and twenty-four-hour delays), *with* Platz & Hosch, 18 J. Applied Soc. Psychol. at 975 (two hours).

[13] The relevant studies are those cited in footnote 13, as well as Brigham et al., *Accuracy of Eyewitness Identifications in a Field Setting*, 42 J. Personality & Soc. Psychol. 673, 674-676 (1982).

fications that are currently subject to such scrutiny. Yet the New Hampshire Supreme Court's rule would immunize an entire category of suggestive identifications, for reasons that, as discussed, are unrelated to what this Court has deemed the linchpin for admissibility. The risk that this approach would lead to the admission of inaccurate identifications provides an additional reason to reverse the judgment below.

C. Traditional Tools Of The Adversary System Cannot Be Relied Upon To Overcome The Prejudicial Effect Of Incorrect Eyewitness Identifications

Respondent or its amici may assert that to the extent the New Hampshire Supreme Court's rule would allow the admission of many unreliable identifications, that can be addressed with traditional tools of the adversary system, such as cross-examination, jury instructions, or expert testimony. Scientific research and recent experience cast doubt on that claim.

As an initial matter, it is important to emphasize the extent to which eyewitness identifications are "over believed" by juries, because that phenomenon makes clear that the admission of unreliable identifications is highly problematic. In a seminal 1983 study, researchers presented individuals with crime scenarios derived from previous empirical studies and asked the individuals to predict the accuracy rate of eyewitness identifications observed in the studies. *See* Brigham & Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 22-24 (1983). On average, nearly 84 percent of respondents overestimated the accuracy rates of identifications. *See id.* at 28. Moreover, the magnitude of the overestimation was significant. For example, the

study's respondents estimated an average accuracy rate of 71 percent for a highly unreliable scenario in which only 12.5 percent of eyewitnesses had in fact made a correct identification. *See id.* at 24. Other studies confirm that jurors routinely "over believe" eyewitness testimony. *See, e.g.*, Sigler & Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002) (conviction rate by mock juries increased from 49 percent to 68 percent when a single, vague eyewitness account was added to the circumstantial evidence described in a case summary). Even when unreliable eyewitness identification is admitted, therefore, juries are quite likely to believe it.

Cross-examination cannot be relied on to address this problem. As this Court has observed, "even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability." *Wade*, 388 U.S. at 235. That is particularly true in this context: What most affects jurors' assessment of a particular eyewitness identification is the level of confidence expressed by the witness. *See* Cutler & Penrod, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 185 (1990); Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. Applied Psychol. 79, 83 (1981). And cross-examination is largely useless with a mistaken (albeit honest) eyewitness who is very confident and consistent. *See, e.g.*, *State* v. *Clopten*, 223 P.3d 1103, 1110 (Utah 2009) ("Cross-examination will often expose a lie or half-truth, but may be far less effective

when witnesses, although mistaken, believe that what they say is true.").[14]

Jury instructions on the potential fallacies of eyewitness identifications are similarly inadequate to address the problem of unreliable identifications. To begin with, no decision of this Court holds that such instructions are constitutionally required when requested. It is thus often (though not always) left to the discretion of trial judges to decide on a case-by-case basis whether to give any such instructions. *See*, *e.g.*, *United States* v. *Luis*, 835 F.2d 37, 41 (2d Cir. 1987) (noting that several circuits, "including this Circuit,

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[14] Jurors' evident belief that eyewitness confidence correlates with accurate identifications was once shared by many in the judiciary. Indeed, in *Biggers* this Court stated, albeit without citing any scientific authorities, that confidence is an indication of accuracy. *See* 409 U.S. at 199-200. Subsequent research, however, has called this notion into very serious question. As one report concluded, "[t]he outcomes of empirical studies, reviews, and meta-analyses have converged on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak, with average confidence-accuracy correlations generally estimated between little more than 0 and .29." Brewer et al., *The Confidence-Accuracy Relationship in Eyewitness Identification*, 8 J. Experimental Psychol. Applied 44, 44-45 (2002). Even these various correlation figures are likely overestimates, moreover, because the confidence of eyewitnesses in actual cases, unlike in controlled experiments, may be infected by positive feedback received in the investigative process (for example, an officer stating during a photo array or line-up, "good, you identified the suspect"). *See supra* n.6; *see also* Wells et al., 7 Psychol. Sci. in Pub. Int. at 45; Wells & Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 374 (1998). Indeed, witness confidence can be affected by a host of factors that have no relation to reliability. *See, e.g.*, Wells & Quinlivan, 33 Law & Hum. Behav. at 11-12.

have left the matter [of eyewitness-related instructions] to the trial court to be determined in the exercise of its discretion" (citing cases)). Moreover, researchers have tested the impact of eyewitness-related instructions on jurors' decision-making. *See* Cutler & Penrod, *Mistaken Identification* at 255-268 (summarizing studies). They have found that a common eyewitness-related instruction "proved completely ineffective at sensitizing jurors to eyewitness evidence." *See* Cutler et al., *Nonadversarial Methods for Improving Juror Sensitivity to Eyewitness Evidence*, 20 J. Applied Soc. Psychol. 1197, 1198-1200, 1202-1206 (1990).[15] Other studies have found likewise. *See* Green, *Judge's Instruction on Eyewitness Testimony*, 18 J. Applied Soc. Psychol. 252, 260 (1988) ("Jurors who heard [a commonly given] instruction were no more sensitive to factors known to be problematic to eyewitness identification than were jurors who had no instruction.").

Finally, expert testimony regarding eyewitness science, and in particular regarding the accuracy factors discussed above, can help juries to better understand eyewitness testimony (and its limits), and thus reduce the incidence of wrongful convictions based on inaccurate identifications. But as is true of jury instructions, this Court has not held that expert testimony on eyewitness reliability must be admitted when proffered (assuming it otherwise meets the requirements of Rule 702). And although most courts have rejected a per se ban on such testimony, state and federal appellate

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[15] The instruction, which runs approximately ten paragraphs, was approved for use by federal courts in the District of Columbia Circuit in *United States* v. *Telfaire*, 469 F.2d 552, 558-559 (D.C. Cir. 1972) (per curiam).

courts frequently sustain a trial judge's exclusion of it, employing deferential review. *See, e.g.*, *United States* v. *Curry*, 977 F.2d 1042, 1051-1052 (7th Cir. 1992); *United States* v. *Moore*, 786 F.2d 1308, 1312-1313 (5th Cir. 1986); *State* v. *Rich*, 549 A.2d 742, 743-744 (Me. 1988) ("On two previous occasions, we have found no abuse of discretion in the trial court's determination that the effects of stress on eyewitness reliability were not beyond the common knowledge of the ordinary juror.... [T]he trial justice is vested with broad discretion and the exclusion of Dr. Bishop's testimony in this case was not an abuse of that discretion."). It thus cannot be deemed a sufficient safeguard against the dangers of unreliable identifications.

II. THE NEW HAMPSHIRE SUPREME COURT'S RULE INSULATES FROM DUE PROCESS SCRUTINY PROCEDURES THAT ARE PARTICULARLY LIKELY TO LEAD TO FALSE IDENTIFICATIONS

Many of the identifications that the rule adopted by the New Hampshire Supreme Court insulates from due process scrutiny are particularly likely to be inaccurate.

A. The identifications that the judgment below insulates will typically result from circumstances in which the witness had the opportunity to view only one person, and to say whether or not that person was the culprit. (These are referred to hereafter as one-on-one identifications.) That is because identification procedures in which more than one individual is viewed—such as line-ups and photo arrays—by their nature almost invariably require significant police involvement. One-on-one identifications, in contrast, may occur spontaneously, as this case illustrates. But as explained below, such identifications pose risks of inaccuracy as sig-

nificant as those made as a result of suggestive police procedures.

No identification procedure has been more roundly condemned for being inherently suggestive—and hence leading to inaccurate identifications—than "show-ups," a type of one-on-one identification in which police affirmatively present a suspect to a witness and ask for an identification. This Court itself observed decades ago that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned." *Stovall*, 388 U.S. at 302. Indeed, the Court observed in another case that same day, "[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police." *Wade*, 388 U.S. at 234 (citing Frankfurter, *The Case of Sacco and Vanzetti* 31-32 (1927)); *accord, e.g.*, *State* v. *Dubose*, 699 N.W.2d 582, 593-594 (Wis. 2005) ("[E]vidence obtained from an out-of-court showup is inherently suggestive.").

Psychological research confirms these observations, demonstrating that show-ups are more likely than other procedures to produce an erroneous identification. In one meta-analysis of studies comparing line-ups and show-ups (involving over 3,000 total witnesses), researchers found that show-ups produce twice as many false identifications as fair line-ups. *See* Steblay et al., *Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 Law & Hum. Behav. 523, 532 (2003); *accord* Dysart & Lindsay, *Show-up Identifications: Suggestive Technique or Reliable Method?*, in Lindsay et al., 2 *The Handbook of Eyewitness Psychology* 137,

141 (Lindsay et al. eds., 2007).[16] Survey research reinforces these experimental results: Experts in eyewitness psychology generally agree that "[t]he use of a one-person showup instead of a full lineup increases the risk of misidentification." Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychologist 405, 408 tbl. 1, 411-412 tbls. 3-4 (2001); *see also* Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony*, 44 Am. Psychologist 1089, 1093 tbl. 3 (1989).[17]

B. The identification at issue in this case did not involve a traditional show-up, *i.e.*, an affirmative presentation of a suspect to a witness by police. Instead, the one-on-one identification occurred by happenstance. But the two principal reasons that show-ups more frequently produce inaccurate identifications extend to

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[16] The time gap between the witnessed event and the attempted identification significantly affects this disparity. When the gap is less than two hours, the disparity is essentially nonexistent, whereas with a twenty-four-hour gap, show-ups are almost four times as likely to produce a misidentification. *See* Yarmey et al., *Accuracy of Eyewitness Identifications in Showups and Lineups*, 20 Law & Hum. Behav. 459, 465 (1996).

[17] The point here is not that show-ups have no proper place in law enforcement. To the contrary, they can be a valuable fact-finding procedure if proper precautions are taken to minimize their suggestiveness and due account is given to the potential unreliability of the witnessing conditions. For example, when properly employed show-ups can lead to the prompt release of innocent suspects. But when they are instead carried out under suggestive circumstances and based on unreliable eyewitness observations, they create a substantial risk of a false identification. They are thus a procedure for which due process scrutiny is particularly important.

other forms of one-on-one identifications, such as the one here. Such identifications should thus not be allowed to escape due process scrutiny when they are made under suggestive circumstances.

First, unlike with line-ups and photo arrays, in show-ups, "the identity of the police suspect is [inherently] obvious." Loftus et al., *Eyewitness Testimony* § 4-7, at 91. Cognitively, then, the witness's task is not to select the culprit from a pool of candidates, but rather to confirm the police's determination that the suspect might be the culprit. *See id.*[18] And this inherent suggestiveness of show-ups exists with other one-on-one identifications, *i.e.*, even when the police do not arrange the witness-suspect confrontation. That is because what renders show-ups suggestive is simply the appearance that the police have identified the suspect as the culprit. And officers need not affirmatively present a suspect to a witness in order to create that appearance. To the contrary, almost any apparent connection between the police and a suspect may suffice. This case demonstrates as much: The police never presented petitioner to the witness, yet when she identified him he was standing with an officer who had arrived in response to her husband's call about the break-in. *See* Pet. 3, 5. Even when police do not deliberately

[18] By comparison, "when the identity of a suspect is obvious in a line-up, the line-up is considered unfair." Loftus et al., *Eyewitness Testimony* § 4-7, at 92. That is so both as a matter of law, *see Foster* v. *California*, 394 U.S. 440, 442-443 (1969), and as a matter of science, *see, e.g.*, Lindsay & Wells, *What Price Justice? Exploring the Relationship of Lineup Fairness to Identification Accuracy*, 4 Law & Hum. Behav. 303, 313 (1980); Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. Applied Psychol. 940, 941 (1999).

arrange a one-on-one identification, then, it may well be a suggestive procedure.

The second reason that show-ups yield more false identifications is that some witnesses opt to make a positive identification even if they are uncertain—perhaps out of a desire to assist law enforcement or because they take comfort in the belief that the perpetrator of a crime is in fact off the streets. With line-ups and photo arrays, these "guess" identifications will frequently result, as a matter of simple probabilities, in the selection of a person whom the police do not suspect (one of the "fillers" in a line-up, for example). *See* Loftus et al., *Eyewitness Testimony* § 4-7, at 92. But this safety valve is absent where a witness is given only one option: Even if the police have not identified the right person, that is the only person for the witness to identify. *See id.* In other words, a one-on-one identification, unlike a line-up or photo array, is not truly a test of a witness's memory, because it is impossible for the witness to "fail" the test by picking someone known not to be the perpetrator. And there is no reason to believe that the tendency of some witnesses to make an identification even if uncertain changes when a one-on-one identification is not a traditional show-up, *i.e.*, is not arranged by the police. Such identifications should not be categorically excluded from due process scrutiny.

CONCLUSION

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

Respectfully submitted.

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AUGUST 2011