No. _____

SUPREME COURT OF THE UNITED STATES

BARION PERRY
Petitioner

v.

STATE OF NEW HAMPSHIRE
Respondent

On Petition For Writ Of Certiorari
To The New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a witness in a criminal case identifies a suspect out-of-court, under suggestive circumstances which give rise to a substantial likelihood of later misidentification, due process requires the trial judge to determine whether the out-of-court identification and any subsequent in-court identification are reliable before either may be admitted into evidence. **Question**: Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances, as held by the First Circuit Court of Appeal and other federal courts of appeal, or only when the suggestive circumstances were orchestrated by the police, as held by the New Hampshire Supreme Court and other courts?

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PETITION

Barion Perry respectfully petitions for a writ of certiorari to the New Hampshire Supreme Court in State v. Barion Perry, No. 2009-0590 (N.H. November 18, 2010).

OPINION BELOW

The opinion of the New Hampshire Supreme Court is provided at Appendix 1.

STATEMENT OF JURISDICTION

The New Hampshire Supreme Court issued its opinion affirming Perry's conviction on November 18, 2010. This Court has jurisdiction under the United States Constitution, Article II, Section 2, and 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In the early morning of August 15, 2008, while still dark, a Honda Civic belonging to Alex Clavijo was broken into through a rear window while parked in a lot adjacent to the apartment building in which Clavijo resided in Nashua, New Hampshire. Clavijo later reported that stereo equipment, a wrench, and a bat were removed from the car.

Two of Clavijo's neighbors from the same apartment building, Nubia Blandon and Joffre Ullon, a married couple, called the police to report suspicious activity by a black male they observed in the parking lot. Only Blandon claimed to have observed any actual criminal activity, i.e., she said that from her apartment window above the parking lot, she observed the man removing items from the rear of the car in the parking lot below. Blandon left her apartment at one point to inform Clavijo that someone had broken into his car. After police responded to the parking lot, encountered Perry, spoke with another man pointed out by Perry, and went inside to talk with Blandon, Blandon pointed, from inside her apartment, toward her window and indicated that the man standing with police in the parking lot was the man she had seen taking items from the car. Blandon never provided any substantial description of the perpetrator, could not pick Perry from a photo line-up, and did not identify Perry at trial.

Prior to trial, Perry moved to exclude Blandon's out-of-court identification and the State objected. Nashua police officer Nicole Clay was the only witness called to testify at the hearing on the motion.

Clay testified that on August 15, 2008 at approximately 2:52 a.m., she was dispatched to the parking lot of a large apartment building for a report "about a black male looking through vehicles and attempting to gain entry into vehicles." Upon her arrival, Clay heard a metallic clang that sounded like a bat hitting the ground. Clay observed Perry standing in the lot holding amplifiers.

Perry walked toward her. Clay asked Perry to put down the amplifiers and speak to her, which he did. Perry explained that he had found the amplifiers on the ground and was moving them. Clay said that Perry told her that before her arrival he had seen two individuals leaving the lot. Perry pointed out another male nearby and identified him as one of the individuals he had seen. Clay questioned this other man briefly before letting him go.

At this point, Clavijo approached Clay and identified himself as the owner of the car that had been broken into. Clavijo told Clay that he did not see anything but that his neighbor did. Clavijo and Clay went into the apartment building together to speak with Blandon.

Before going inside, Clay asked Officer Robert Dunn, who had arrived on the scene, to stand with Perry, and the two of them remained standing together in the lot. Dunn was in full uniform. Both Clay and Dunn had arrived in fully-marked police cruisers. While Perry stood with Dunn, Perry was the only black man in the area. No one else stood with Dunn.

Clay spoke with Blandon in the hallway outside her apartment, with Clavijo translating. Clay testified that the apartment was on the second or third floor. Clay could not see Perry from where she spoke with Blandon. Clay asked Blandon for a description of the man she had seen. The only description Blandon provided was that he was a tall black man. She gave no description of the man's facial features, facial hair, clothing, etc.

Blandon then told Clay that the man presently standing in the "back lot" with the police officer (Dunn) was the man she had seen previously. Clay testified that Blandon "kind of went back into her apartment and pointed towards the window to show me that she had already looked out the window to see Mr. Perry and Officer Dunn standing in the parking lot."

Clay testified that Blandon told her that she had seen the man walking and looking in the twelve to fifteen cars in the lot before circling Clavijo's car, opening the trunk, and taking a large

item from the trunk. Clay said Blandon told her she saw the man carrying a bat. The two amplifiers Clay found Perry holding were different than the one large item Blandon said she had seen the man removing from the trunk. The large speaker box Blandon was presumed to have seen was found in a different part of the lot from where Clay encountered Perry.

Blandon did not tell Clay how she came to observe the man in the lot or how long she observed him. Clay said she did not know how long Blandon was at the window before Clay knocked on her door. Clay admitted that the man's actions as described by Blandon could have occurred in "a couple of minutes." Clay never asked and Blandon did not say if she was constantly at the window after first spotting the perpetrator. Clay never asked and Blandon did not say if she was doing other things during the time the perpetrator was in the lot. Clay never asked and Blandon did not say if she was on the phone while observing the perpetrator.

Clay never looked out Blandon's window to see Blandon's point of observation. Clay testified that the parking lot was "fairly well lit", but also said it was the middle of summer, so the trees had leaves. She said that when she went inside to speak with Blandon, Perry and Dunn were in the middle of the lot, and the lighting was "excellent." However, when she returned to the lot, Perry and Dunn were at the end of the lot about thirty feet from the building, where the lighting was "a little bit darker."

Clay testified that Blandon was later shown a photo array that included a photo of Perry. Blandon was unable to pick Perry from the array.

The State never argued that the scenario of Perry standing with Dunn in the lot was not suggestive, but only that the identification should not be excluded because the police did not act intentionally to set-up the scenario. The trial court denied the motion to exclude the identification, ruling that the identification was not the product of an unnecessarily suggestive procedure solely

because the police did not manufacture the identification.

At trial, Blandon testified that she woke up about 2:30 a.m. the morning of the incident because Ullon had to go to New York. She testified that she looked out her apartment window over a total period of "as much as half an hour." During this time, she saw a "young man" twice circle the parking lot on a bicycle looking at cars. She observed him leave, return without the bicycle, and approach the area of Clavijo's car. Although she testified that her view of the rear of Clavijo's car was "perfect", she also said that her apartment was on the fourth floor; the area she was observing was "quite a distance" away; and the view of Clavijo's car was partially blocked by another vehicle.

Blandon testified that at first, she thought the man in the parking lot was one of Clavijo's friends, but when she saw the man opening the rear of Clavijo's car and removing the music system, she consulted with Ullon and then called the police. Blandon testified that she neither saw nor heard the car window being broken.

Ullon testified that he got up the morning of the incident about 2:15 a.m. so he could travel to New York. He left the apartment to get coffee. He said that while in the parking lot, he saw a person walking around, trying to look in cars. He said that as he was about to exit the lot, he saw a man standing there and a bicycle lying on the ground. Ullon said the man turned to avoid being seen. Ullon drove by a second time to get a better look, but the man hid behind the cars.

Ullon said that he continued out the lot to get coffee and while doing so, called Blandon to tell her to call the police. He said he later called the police himself because they could not understand Blandon. Blandon testified that about fifteen minutes passed from the time Ullon called the police until the police arrived.

Blandon testified that after the police were called, she went across the hall to let Clavijo know what was happening. She rang his doorbell several times before he awoke and answered.

Though Blandon said she did not go to Clavijo's apartment until after seeing the police arrive, she spoke to Clavijo about the theft in the present tense. She told Clavijo, "somebody's robbing you," and did not tell Clavijo the police were there. Clavijo also testified that Blandon used the present tense: "they're stealing – they breaking [sic] into your car."

Blandon said Clavijo went to the lot, "and the police were right there." However, Clavijo described going back to sleep for five to ten minutes before going to the lot. He admitted to bringing a bat with him for protection. Clavijo testified that he "went downstairs to check [on his car]. And then the police officers arrived right there."

Clay testified that she was dispatched to the scene following a report that there was a black man trying to enter vehicles in the parking lot. When she arrived at the back of the lot, around 2:50 a.m., she heard a metallic clang and then saw a tall black man holding two stereo amplifiers. She identified the man as Perry. Clay said she also saw a metal bat on some debris on the ground near a fence behind Perry. She also found a box with two speakers and a maroon bicycle on the ground a couple car lengths away from where she encountered Perry.

Ullon testified that he returned to the apartment to drop off the coffee and pick up his son. He said that at the time he returned to the lot, he saw the man he had seen before in the lot with a young female police officer (presumably Clay).

Clay testified that when she encountered Perry, she asked him to put down the amplifiers and speak with her, which he did. She testified that Perry told her that he found the amplifiers in the lot and was only moving them. At trial, Perry explained that he did not want anyone to run over the amplifiers and was only moving them out of the way. Perry further testified that he had been taking a commonly-used shortcut through the lot and a nearby alley where it was common for people in the nearby apartments to discard refuse, including electronics. Perry testified that he had

had his bicycle with him earlier in the day, but had gotten a flat tire, such that he no longer had his bicycle with him when he was in the lot. Perry consistently denied breaking into the car and stealing equipment.

Perry told Clay that he had seen people running through the lot or an alley and that they must have stolen the equipment. He testified that one of the people had been riding a bicycle. Clay found one man nearby, but let him go after questioning him briefly.

Clay testified that she was then approached by the owner of the car, Clavijo. Clay and Clavijo went into the apartment building to speak with Blandon. Before going into the apartment building with Clavijo, Clay asked Perry to wait with Dunn, who had arrived on the scene.

Clay and Clavijo spoke with Blandon in the hallway between Clavijo's apartment and Blandon's, with Clavijo translating. Clay asked Blandon for a description of the person Blandon saw in the lot. Clay testified that Blandon did not give Clay any specific description.

Clay said that rather than providing a description, Blandon gestured toward her apartment window and told Clay that the person she had seen in the lot was currently standing in the lot talking with the other officer (Dunn). However, at trial, Blandon had no recollection of seeing the man with Dunn.

Blandon testified that she did see the man she had seen in the lot speaking with Clay. Blandon never explicitly testified whether she witnessed the initial encounter between Perry and Clay. She never said she saw the police encounter the man while he was holding stolen equipment.

The only testimony Blandon ever gave describing the man she claimed to see removing the equipment was that he appeared to be a young man of African descent and that he had a bicycle. She could not describe his clothing in any way. She could not remember the color of the bicycle at trial or when speaking to the police. She said she was "so scared" she "didn't really pay attention"

and thus could not describe the man's facial features in any way.

After speaking with Blandon, Clay then spoke with Ullon. Clay did not indicate that Ullon made any identification at that time. Nor did Ullon, during his testimony, indicate he made any identification to Clay at that time.

Clay arrested Perry at the scene the night of the break-in. She found a tool, "silver wrench vice pliers," in Perry's back pocket that Perry told her he carried in order to fix his bicycle. Perry testified that he had purchased the tool at Walmart. Clavijo, however, told Clay and testified that it was his tool, taken from his car. Clavijo admitted on cross examination that the wrench was of a common type and that he had purchased it at Walmart.

On September 21, 2008, Blandon and Ullon went to the police station. Ullon was shown a series of photos and asked to pick out the person he had seen in the lot. He testified that he picked a photo, but that "it was not entirely clear" because "it was night time" and "because of his black race." At trial, Ullon confirmed the photo he picked, and the photo lineup was published to the jury. Ullon never made an in-court identification of Perry as the man he had seen in the lot.

Blandon was also shown a photo array including a photo of Perry, but she could neither pick out any person as the man she saw in the lot nor provide a description because she "did not clearly perceive the details of his face". When asked at trial if she had been able to point out the person she saw taking something from Clavijo's car, Blandon responded, "Not point, as I said thank God the officer arrived in time and found out who the person was." Blandon never made an in-court identification of Perry as the man she had seen in the lot.

After hearing the evidence at trial, the jury found Perry guilty of theft by unauthorized taking and acquitted him of criminal mischief. The trial court sentenced Perry to 3 to 10 years at the New Hampshire State Prison. Perry appealed, but the New Hampshire Supreme Court rejected Perry's

due process claim. The New Hampshire Supreme Court agreed with the trial court that Perry was not protected by the Due Process Clause because the suggestive circumstances leading to Blandon's identification were not the result of police conduct. The New Hampshire Supreme Court based its ruling on the same legal question one month prior in State v. Michael Addison, 160 N.H. 792 (2010); Appendix 13.

The New Hampshire Supreme Court recognized that its decision was contrary to rulings of the United States Court of Appeal for the First Circuit, which has twice held that due process applies when an identification arises out of suggestive circumstances, regardless of whether the circumstances were created by state action. United States v. DeLeon-Quinones, 588 F.3d 748, 754 (1st Cir. 2009); United States v. Bouthot, 878 F. 2d 1506 (1st Cir. 1989). However, the New Hampshire Supreme Court declined to follow the First Circuit, stating:

> Until the United States Supreme Court has ruled on whether state action is a prerequisite to the Biggers test, this court and the First Circuit have parallel authority in passing on federal constitutional questions. [citation omitted]. We hold that the Biggers analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action.

Addison at 803; Appendix 19.

REASONS FOR GRANTING THE WRIT

The question arises from the conflicting holdings of the First Circuit and the New Hampshire Supreme Court regarding whether due process safeguards apply to all unreliable identifications or only to those orchestrated by state actors. The First Circuit's decision is based on principles set forth in this Court's cases. Other federal courts of appeal agree with the First Circuit. Nevertheless, the New Hampshire Supreme Court and some other courts have rejected the First Circuit's reasoning. The question should be considered because it has resulted in conflicting rulings among the lower courts, because those courts rejecting the First Circuit's reasoning do so contrary to principles established by this Court, and because unreliable eyewitness identification evidence creates a great risk that innocent defendants will be convicted.

I. RELIABILITY, RATHER THAN THE PRESENCE OR ABSENCE OF STATE ACTION, "IS THE LINCHPIN IN DETERMINING THE ADMISSIBILITY OF IDENTIFICATION TESTIMONY""[1]

The New Hampshire Supreme Court erred because it failed to examine this Court's cases addressing due process and eyewitness identification evidence. The constitutional principles which govern the admissibility of eyewitness identification testimony differ from the principles which govern the exclusionary rule. In the eyewitness identification context, the Due Process Clause of the Fourteenth Amendment of the United States Constitution protects against unfair trials and wrongful convictions resulting from unreliable eyewitness testimony. Unreliable eyewitness evidence is excluded not to address the violation of a constitutional right but rather because the admission of unreliable evidence would itself violate due process. In contrast, when evidence is obtained in violation of the Fourth or Fifth Amendment, or some other independent constitutional right, the evidence may be excluded by operation of the exclusionary rule as means of deterring similar future violations, regardless of the reliability of the evidence.

These principles are set forth in this Court's cases. Evidence derived from an unconstitutional interrogation or search is excluded from trial for the purpose of deterring future police misconduct. See, e.g., Colorado v. Connelly, 479 U.S. 157, 166 (1986); United States v. Leon, 468 U.S. 897, 906-913 (1984). The focus of the exclusionary rule is on the violation of a constitutional right and on deterring future violations of that right. Connelly, 479 U.S. at 166 ("The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."). Thus, the exclusionary rule does not operate when "law enforcement officers have acted in objective good faith" in reliance on a warrant, Leon, 468 U.S. at 908, nor does it operate to bar admission of an involuntary confession which was not the product of

[1] Manson v. Brathwaite, 432 U.S. 98 (1977), discussed in detail infra.

police interrogation or other state action. Connelly, 479 U.S. at 165. Similarly, the Fourth Amendment protection against unreasonable searches and seizures "is wholly inapplicable 'to a search or seizure, even an unreasonable one, affected by a private individual not acting as an agent of the Government.'" United States v. Jacobsen, 466 U.S. 109, 13-114 (1984), quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting); See also Coolidge v. New Hampshire, 403 U.S. 443, 487-490 (1971). In short, evidence which does not derive from police misconduct is not suppressed by operation of the exclusionary rule because there is no improper state action to deter.

The due process principles governing the admissibility of eyewitness identification evidence have a different foundation. In this context the focus is on the reliability of the evidence and fairness at trial, rather than on police misconduct and deterring future constitutional violations. This Court's concern with the reliability of eyewitness identifications is longstanding. The Court has stated that "the vagaries of eyewitness identification are well-known," that "the annals of criminal law are rife with instances of mistaken identification," and that "the identification of strangers is proverbially untrustworthy." United States v. Wade, 388 U.S. 218, 228-229 (1967) (footnotes, citations, and quotes omitted). For these reasons, in Stovall v. Denno, 388 U.S. 293 (1967), Neil v. Biggers, 409 U.S. 188 (1972), and Manson v. Brathwaite, 432 U.S. 98, 114 (1977), the Court established principles recognizing and governing due process claims relating to eyewitness identification.

Reiterating the potential "dangers and unfairness" inherent in eyewitness identification testimony, Stovall 388 U.S. at 298, the Court held that the Due Process Clause protects against "unnecessarily suggestive" identifications which are "conducive to irreparable mistaken identification." Stovall 388 U.S. at 302 ("This is a recognized ground of attack . . . ."). Stovall

further instructed trial courts that whether due process principles have been violated in this context "depends on the totality of the circumstances." Id.

The Court next considered whether unnecessarily suggestive police procedures automatically resulted in the exclusion of identification evidence from trial. In Neil v. Biggers the Court explained that the admissibility of eyewitness identification testimony is not governed by operation of the exclusionary rule. Such a rule would be inconsistent with the purpose of due process protections in this context. Id. at 409 U.S. at 199. Identification evidence arising from suggestive circumstances is not barred from trial because the defendant's rights were violated. Id. at 198. In fact, such evidence is not automatically barred at all, even when the suggestive circumstances were created by police misconduct. Id. ("evidence of a showup without more does not violate due process"). Rather, "it is the likelihood of misidentification which violates a defendant's right to due process and which is the basis of the exclusion of evidence." Id. In short, the constitutional error does not derive from state action creating the suggestive circumstances, but rather from the admission into evidence of an unreliable identification that is substantially likely to condemn the wrong person.

In Manson, the Court completed its explanation of due process principles regarding eyewitness identifications. The Court stated that:

> Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest. Thus considerations urging the exclusion of evidence deriving from a constitutional violation do not bear on the instant problem.

432 U.S. at 113. Stovall and Biggers "did not, singly or together, establish a strict exclusionary rule" because "the standard, after all, is that of fairness as required by the Due Process Clause." Id. The goal is not to penalize a violation of constitutional rights during the creation of suggestive

circumstances that lead to an identification, but rather to protect an "evidentiary interest" in the fairness of the trial process. Id. Thus, "reliability is the linchpin in determining the admissibility of identification testimony." Id. at 114.

II. THE COURT DEVELOPED A TWO-PART ANALYSIS TO PREVENT EYEWITNESS IDENTIFICATION WHEN THERE IS A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION

The Court's cases resulted in a specific framework for evaluating the admissibility of eyewitness identification testimony. The first step in the analysis is determining whether an identification arises out of unnecessarily suggestive circumstances. Bouthot, 878 F. 2d at 1514; DeLeon-Quinones 588 F. 3d at 753. If there were no suggestive circumstances, then the due process concerns about reliability are not implicated. Id. However, if unnecessarily suggestive circumstances were involved, then the second step is to consider whether there is a "very substantial likelihood of misidentification." Manson, 432 U.S. at 116; Bouthot, 878 F. 2d at 1514; DeLeon-Quinones 588 F. 3d at 753. While the cases before this Court have always involved police conduct, the Court has never said that state action must be involved in the identification before a trial court may rely on due process to bar an identification that is substantially likely to be wrong.

Whether there is a substantial likelihood of misidentification such that due process bars use of identification evidence at trial is determined by the "totality of the circumstances." Stovall 388 U.S. at 302; Simmons v. United States, 390 U.S. 377, 383 (1968); Foster v. California, 394 U.S. 440, 442 (1969); Manson, 432 U.S. at 113. In Biggers, the Court reiterated the necessity of considering the totality of the circumstances but stated that specific factors to be considered include:

(1) the witness's opportunity to view the criminal;
(2) the witness's degree of attention;

(3) the accuracy of any prior description given by the witness;
(4) the witness's level of certainty in making the identification; and
(5) the lapse of time between the crime and the confrontation.

409 U.S. at 199-200. The Court has also stated that "against these factors is to be weighed the corruptive effect of the suggestive identification itself." Manson, 432 U.S. at 114.

III. BLANDON'S IDENTIFICATION OF PERRY WAS SUBSTANTIALLY LIKELY TO BE WRONG BUT THE LOWER COURTS NEVER REACHED THAT ISSUE BECAUSE THEY FAILED TO CONDUCT THE REQUIRED DUE PROCESS ANALYSIS

Perry's case presents the kind of unreliable eyewitness identification evidence which should be addressed according to the due process principles recognized by this Court. Nubia Blandon's identification of Perry would have been barred from trial had the lower courts found that due process applied and engaged in the two-part analysis required by this Court. This petition does not ask this Court to engage in that factual analysis but rather to find that the lower courts erred when they failed to do so. The record demonstrates that Perry elicited more than sufficient grounds to warrant the required two-part due process analysis.

Addressing each of the Biggers factors in light of the suggestive circumstances illustrates that Blandon's out-of-court identification was unreliable. First, in terms of her "opportunity to view," there was not evidence to indicate that Blandon had a good opportunity to observe the perpetrator before the police arrived. At the suppression hearing, Clay could not say how Blandon came to observe the perpetrator or how long she observed him. The period of observation could have been as little as "a couple of minutes." Clay could not say whether Blandon's observation was interrupted or whether Blandon was engaged in other activities, such as calling the police, during her observation. The observation took place at night from at least two or three stories above a partially-lit lot with nearby trees. Clay never looked from the window herself, so she could not

describe the view from Blandon's vantage point.

Second, the State presented no evidence regarding Blandon's "degree of attention." Blandon's inability to provide any substantial description of the perpetrator tends to undermine any assertion that she did pay close attention.

Third, Blandon gave almost no "prior description" of the perpetrator. The only description presented at the suppression hearing was that the perpetrator was a tall black man.

Fourth, regarding Blandon's "level of certainty in making the identification," the State presented no evidence at the suppression hearing indicating that Blandon expressed either doubt or a particular degree of certainty regarding her identification. There is no indication that Clay asked whether Blandon was certain about the identification.

Fifth, regarding "the lapse of time between the crime and the confrontation," there was a relatively short lapse of time between the observation of the crime and the identification. A short period of time between the crime and the identification typically enhances the reliability of the identification because the witness's memory remains fresh. However, in this case, it was precisely because the police encounter with Perry took place shortly after the report of the crime that Blandon might assume the police had apprehended the perpetrator. Further, Blandon's failure to provide any substantial description to the police, when asked immediately after the crime, indicates that she never had substantial identifying information. Thus, it was not staleness or freshness of her memory that was at issue, but rather whether Blandon ever had any reliable information regarding the perpetrator.

Finally, Blandon was unable to pick Perry from a photo array. While failures to make later identifications are not listed among the Biggers factors, in the instant case, the failure to identify Perry from the array clearly undermines the reliability of the identification under the totality of the

circumstances. This failure to select a photo from an array of men presumably matching Blandon's meager description stands in stark contrast to Blandon's pointing to Perry as the lone black man standing with the uniformed officer.

Based on these facts and this Court's cases, Perry was entitled to have his due process claims considered by the lower courts. However, since both declined to find due process protections applicable, Blandon's unreliable identification was admitted into evidence and considered by the jury which convicted Perry.

IV. THE NEW HAMPSHIRE SUPREME COURT'S DECSIONS WAS CONTRARY TO PRINCIPLES RECOGNIZED BY THIS COURT, AS ILLUSTRATED BY THE DECISIONS OF FEDERAL COURTS OF APPEAL

In declining to follow precedents of the First Circuit Court of Appeal, the New Hampshire Supreme Court acted contrary to the principles established by this Court in Stovall, Manson, and Biggers. The cases from the First Circuit are Bouthot and DeLeon-Quinones. In Bouthot, 878 F.2d 1506, the witness failed to identify the defendant in a photo lineup shortly after witnessing the crime. Thereafter the witness saw the defendant in court and watched him during courtroom proceedings. Two years later, the witness claimed to be able to identify the defendant. 878 F.2d at 1513-15. In response to a motion to suppress, the prosecution argued that due process protections were inapplicable because there was no police misconduct which created the suggestive circumstances allegedly giving rise to the identification. Id. 1514. The prosecution argued the situation was analogous to Connelly, 479 U.S. 157, a case in which this Court declined to apply the exclusionary rule to a confession which resulted from the defendant's own mental illness rather than from a violation of the defendant's constitutional rights by the police. The First Circuit rejected the analogy:

> The Connelly logic does not apply to this case. Whereas coerced confessions may violate an independent constitutionally protected interest, the suggestive identification of a suspect per se does not violate any constitutionally protected interest. In the latter scenario, a constitutional violation, if any, occurs only when testimony regarding the suggestive pretrial identification (or an in-court identification based upon it) is introduced at trial. [citations omitted] Whereas a coerced confession is suppressed primarily to deter future violations of the Constitution, overly suggestive identifications are suppressed primarily to avoid an unfair trial. [citation omitted] In the latter scenario, the Due Process Clause protects an evidentiary interest: reliability. . . . . Because the due process focus in the identification context is on the fairness of the trial and not exclusively on police deterrence, it follows that **federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process.**

Bouthot, 878 F.2d at 1515-16 (emphasis added). Applying these principles, the First Circuit then conducted the two-part due process analysis adopted by this Court.

Twenty years later, the First Circuit reaffirmed Bouthot in De Leon-Quinones. That case involved another unplanned courtroom encounter which was not orchestrated by the prosecution or the police. 588 F. 3d at 754. Again, the prosecution responded to the defense motion to suppress by arguing that the exclusionary rule does not apply in the absence of improper state action. As in Bouthot, the First Circuit rejected the prosecution argument that state action was necessary and conducted the required due process analysis. Id. at 754-56.

The Bouthot – De Leon-Quinones interpretation of this Court's case law is correct and is supported by Stovall, Biggers, and Manson. Those cases emphasize that the due process concern is with the reliability of identification evidence. Biggers, 409 U.S. at 198; Manson, 432 U.S. at 113. They expressly reject the idea that suggestive identifications violate a constitutional right or require a per se exclusionary rule. Manson, 432 U.S. at 113. Most importantly, the cases establish that due process does not operate in this context to deter police misconduct or other improper state action but rather to protect against the injustice caused by mistaken eyewitness identification testimony. Id.

Other federal courts of appeal agree with the First Circuit. In Green v. Loggins, 614 F. 2d

219 (9th Cir. 1980), the witness failed to identify the defendant during a police photo lineup four hours after a shooting. Months later, while both the defendant and the witness were in jail, there was an "accidental, inadvertent encounter" in which jail officials called the defendant by name in the presence of the witness. Id. at 222. The defendant sought to exclude the witness's in-court identification as a product of that suggestive encounter. The prosecution responded that the "the fundamental purpose of judicial review in the context of a pre-trial confrontation is the deterrence of culpable police conduct" and thus the defendant should be denied relief because "exclusion of the challenged in-court identification will not serve any deterrent purpose." Id. Relying on Manson, the Ninth Circuit rejected this argument.

> Although we recognize that there is no intentionally wrongful police conduct involved in an accidental encounter, we also recognize that the deterrence of such conduct is not the primary purpose behind judicial review of tainted identification testimony. Rather, a court reviews a challenged in-court identification essentially to determine whether the witness' testimony retains sufficient indicia of reliability. . . . **A court is obligated to review every pre-trial encounter, accidental or otherwise, in order to insure that the circumstances of the particular encounter have not been so suggestive as to undermine the reliability of the witness' subsequent identification.**

Id. at 222-223 (emphasis added). The Ninth Circuit then reviewed the record and upheld the district court's grant of a writ of habeas corpus based on factual findings that the inadvertently suggestive circumstances gave rise to an unreliable in-court identification.[2]

The Sixth Circuit has followed the Ninth Circuit's Green opinion. In Thigpen v. Cory, 804 F. 2d 893 (6th Cir. 1986), the defendant argued in a federal habeas claim that his due process rights

[2] Another Ninth Circuit panel and one of the circuit's district courts have followed these same principles. See Dearinger v. United States, 468 F. 2d 1032, 1035-36 (9th Cir. 1972) (whether news stories and photos of defendant tainted in-court identification recognized as a due process claim governed by Stovall); Easter v. Stainer, 1994 U.S. Dist. Lexis 5668, order at 49-53 (N.D. CA. 1994) (analyzing claim that news stories rendered identification inadmissible as a due process claim governed by totality of the circumstances review and the five factors in Biggers). But see United States v. Peele, 574 F.2d 489, 491 (9th Cir. 1978) (pre-dating Green, stating that Stovall does not apply where there was no police involvement in the suggestive identification procedure but also acknowledging that "a case might arise where the mind of a witness is so clouded by suggestions from nongovernment sources that a conviction based principally on the

were violated when a witness identified him during trial. The witness had failed to identify the defendant in a police lineup but, after seeing the defendant during pretrial proceedings, claimed to be able to make an identification at trial. The "state appellate court and the federal district court relied on the fact that police machinations did not cause the confrontations between the witness and the defendant" and thus denied relief. Id. at 895. The Sixth Circuit reversed, stating that, "This was an erroneous basis for decision, for the deterrence of police misconduct is not the basic purpose for excluding identification evidence." Id. Citing Green as well as this Court's statement in Manson that "is the likelihood of misidentification that violates a defendant's right to due process," the Sixth Circuit found due process applicable regardless of whether the police created the suggestive circumstances. Id. After analyzing the totality of the suggestive circumstances in light of the Biggers factors, the court found that the identification was unreliable and that the defendant's due process rights had been violated. Id. at 897. The Sixth Circuit reversed the district court and remanded with an order to grant the writ of habeas corpus. Id. at 989.

The Second Circuit has expressly adopted the conclusions reached in Bouthot, Green, and Thigpen. In Dunnigan v. Keane, 137 F. 3d 117 (2nd Cir. 1998), the prosecution argued that due process principles did not apply to the defendant's challenge of an identification which was the result of suggestive circumstances created by a "private investigator acting independently and not as an agent of the police." Id. at 128. The Second Circuit rejected that argument citing the analysis in Bouthot, 878 F. 2d at 1516, as well as this Court's statements that it is the admission into evidence of an unreliable identification which violates the defendant's right to due process, Biggers, 409 U.S. at 198, not the creation of the suggestive circumstances which led to the unreliable identification. Manson, 432 U.S. at 113, n. 13. Thus, the Dunnigan court concluded that "the linchpin of

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testimony of that witness violates due process.).

admissibility, therefore, is not whether the identification testimony was procured by law enforcement officers, as contrasted with civilians, but whether the identification is reliable." Dunnigan, 137 F. 3d at 128. See also Raheem v. Kelly, 257 F.3d 122, 137 (2nd Cir. 2001) (unintentionally suggestive lineup subject to due process analysis because "the purpose of excluding identifications that result from suggestive police procedures is not deterrence but rather the reduction of the likelihood of misidentification.")

The Tenth Circuit has also applied due process principles to claims that suggestive circumstances, such as newspaper photos, led to an unreliable identification even though the circumstances were not the product of state action. United States v. Elliot, 915 F. 2d 1455 (10th Cir. 1990) (applying Manson and due process principles to an in-court identification by a witness who had seen a photo of the defendant in newspaper); United States v. Milano, 443 F.2d 1022 (10th Cir. 1971) (same).

These opinions of five federal circuit courts of appeal and the principles stated in this Court's cases establish that the New Hampshire Courts were clearly wrong in failing to recognize that due process protections apply to Perry's claim.[3] The New Hampshire Supreme Court simply failed to recognize the basis of this Court's opinions regarding eyewitness identification evidence, notwithstanding precedent from the First Circuit and other federal courts of appeal.

[3] The conflict and uncertainty among the lower courts regarding this issue is also seen when defendants convicted in state court seek habeas corpus relief in federal court. While defendants presenting claims such as Perry's find substantial support in cases from the federal courts of appeal, the claims are nonetheless denied because there are conflicting state court opinions and because this Court has never addressed the issue. See Richardson v. Superintendent, 621 F. 3d 196, 202 (2nd Cir. 2010), reversing Richardson v. Superintendent, 639 F. Supp. 266 (E.D. NY. 2009) ("Given the absence of any holding from the Supreme Court addressing circumstances like these," the district court was not justified in overturning the state court decisions.); Owens v. Ortiz, 2007 U.S. Dist. LEXIS 98206, 2007 WL 6030392 (D.Colo. 2007) (The federal district court said the state court was wrong to rely on Connelly in requiring state action, but habeas relief was denied because there has not yet been a Supreme Court opinion directly addressing the issue.)

V. SOME COURTS AGREE WITH THE NEW HAMPSHIRE SUPREME COURT, BUT THOSE COURTS IGNORE OR FAIL TO FOLLOW THE PRINCIPLES ESTABLISHED BY THIS COURT

As noted by the New Hampshire Supreme Court, there are some cases which support its holding. Examining those cases does not establish the validity of the New Hampshire Supreme Court's holding but the cases do show why this Court should grant review of Perry's case.

The New Hampshire Supreme Court cited two federal cases. The court cited United States v. Kimberlin, 805 F.2d 210, 233 (7th Cir. 1986), which contains a single line of analysis stating "we do not agree" that due process applies when the witness saw the defendant on television. The court also cited United States v. Zeiler, 470 F. 2d 717, 720 (3rd Cir. 1972), which held that due process does not apply when a witness is exposed to news stories which might influence later identification testimony but never cites or discusses this Court's explanation of due process in Stovall, Biggers, or Manson.

The New Hampshire Supreme Court also cited the decisions of other state courts. While nominally on point, those decisions either completely ignore or contradict the principles set forth in Stovall, Manson, and Biggers. Green v. State, 279 Ga. 455, 614 S.E.2d 751, 754-55 (Ga. 2005), only cites other state court opinions with no discussion of any opinion by this Court or any federal court of appeal on the due process issue. Commonwealth v. Colon-Cruz, 408 Mass. 533, 562 N.E.2d 797, 805 (Mass. 1990), contains a one line analysis with no mention of federal cases explaining due process. In State v. Pailon, 590 A.2d 858, 863 (R.I. 1991), Rhode Island adopts the Colorado v. Connelly argument which was expressly rejected by the First Circuit in Bouthot. (The Rhode Island opinion does not cite Bouthot or refer to the language in Stovall, Manson, and Biggers. Thus, there are two state supreme courts (New Hampshire and Rhode Island) within the First Circuit which reject First Circuit analysis of this important federal constitutional issue.)

Finally, State v. Reid, 91 S.W.3d 247, 272-73 (Tenn. 2002) cert. denied, 540 U.S. 828, 124 S. Ct. 56, 157 L. Ed. 2d 52 (2003), follows Pailon with no independent examination of federal cases.

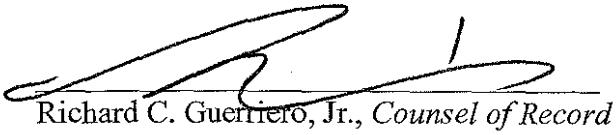
VI. AFTER REVIEW, THIS COURT SHOULD REMAIND WITH INSTRUCTIONS THAT THE NEW HAMPSHIRE COURTS APPLY DUE PROCESS PRINCIPLES TO PERRY'S CLAIM

There is a conflict between the decisions of federal courts of appeal and decisions of state highest appellate courts. Moreover, the state court decisions incorrectly ignore this Court's explanation of due process as well as the federal circuit court opinions explaining those principles. This Court should act to correct the New Hampshire Supreme Court's failure to follow those principles. Perry's request is that the Court grant review and thereafter remand this case to the New Hampshire courts. In the remand the lower courts should be instructed that due process protections apply regardless of whether state action gave rise to Blandon's identification of Perry.

CONCLUSION

For all of the foregoing reasons, this Court should grant Perry's petition for a writ of certiorari.

Respectfully submitted,



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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0590, State of New Hampshire v. Barion Perry, the court on November 18, 2010, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The defendant was convicted of theft by unauthorized taking. On appeal, he contends that the admission of a witness's out-of-court identification of him violated his right to due process under the State and Federal Constitutions. See N.H. CONST. pt. I, art. 15; U.S. CONST. amend. XIV. We first address the defendant's claim under the State Constitution, and cite federal opinions for guidance only. See State v. Ball, 124 N.H. 226, 231-33 (1983).

The admissibility of identification evidence over a due process objection is governed by the Biggers test. See Neil v. Biggers, 409 U.S. 188 (1972). The Biggers test requires a two-step analysis. State v. King, 156 N.H. 371, 373-74 (2007). In King, we articulated the analysis as follows:

> Initially, we inquire into whether the identification procedure was impermissibly or unnecessarily suggestive. At this stage of the inquiry, the defendant has the burden of proof. Only if the defendant has met his burden must we then consider the factors enumerated in Neil v. Biggers . . . to determine whether the identification procedure was so suggestive as to render the identification unreliable and, hence, inadmissible. At this stage of the inquiry, the State bears the burden.

Id. at 374 (quotation omitted). We will overturn the trial court's ruling only if its decision was contrary to the weight of the evidence. State v. Bell-Rogers, 159 N.H. 178, 181 (2009).

Here, the trial court found that the witness's identification of the defendant was not derived from any suggestive technique employed by the police. As the trial court found, the witness pointed out the defendant from her apartment window without any inducement from the police. The defendant, relying upon decisions of the First Circuit Court of Appeals in United States v. Bouthot, 878 F.2d 1506 (1st Cir. 1989), and United States v. De Leon-

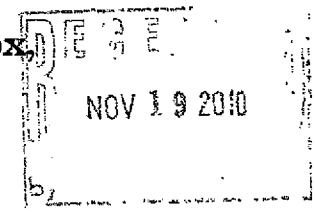
Quinones, 588 F.3d 748 (1st Cir. 2009), argues that a suggestive scenario remains suggestive even if it is not intentionally orchestrated by the police in order to produce an identification. We recently rejected this argument, however, stating: "We decline to adopt the First Circuit's reasoning that a Biggers analysis is required in all 'suggestive identification procedures.' Bouthot, 878 F.2d at 1516. Instead, we hold that the Biggers analysis does not apply to a potentially suggestive out-of-court identification where there is a complete absence of improper state action." State v. Addison, 160 N.H. ___, ___ (decided October 19, 2010). Because the evidence supports the trial court's finding that the defendant failed to carry his burden of proof on the first step of the Biggers analysis, we need not consider the second step. See King, 156 N.H. at 374.

In Addison, we also concluded that the Federal Constitution provides no greater protection than does the State Constitution under these circumstances. See Addison, 160 N.H. at ___. Accordingly, we reach the same result under the Federal Constitution as we do under the State Constitution.

Affirmed.

Dalianis, Duggan, Hicks and Conboy, JJ., concurred.

Eileen Fox,
Clerk



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