ORIGINAL

No. 10-8974

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

REPLY BRIEF OF PETITIONER

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The State's brief in opposition endeavors to explain why this Court should not decide whether the Due Process Clause provides safeguards against all unreliable eyewitness identifications or only those unreliable identifications created by state action. The State's argument follows one line of authority but dismisses an equal, if not more substantial, line of authority as the "minority" view. The State then concludes that it has correctly answered a question never addressed by this Court and that the petition for certiorari should be denied.

The First Circuit Court of Appeal and five other federal courts of appeal are not, in any meaningful sense, a "minority." Moreover, if the answer to the question were obvious, those courts would not have, contrary to the State's position, found due process protections to be applicable regardless of whether a state actor's improper conduct produced the identification.

Even the New Hampshire Supreme Court, which denied petitioner's claim, has recognized the need for this Court to address the question presented. The court rejected petitioner's assertion that due process protects against the use of unreliable eyewitness identification evidence regardless of whether the evidence is the product of improper police conduct. Pet. App. 1-2. The court noted that First Circuit law supports petitioner's claim but rejected the First Circuit's views as well. Pet. App. 2. The court's two page opinion relied on its earlier opinion, *State v. Addison*, 160 N.H. 792 (2010)[1], where the court explained:

> Although the First Circuit interprets the *Biggers* test to offer the defendant greater protection under the Federal Constitution than our State Constitution, First Circuit decisions are not binding upon this court even on questions of federal law. *See Martineau v. Perrin*, 119 N.H. 529, 531 (1979). "This State court authority is based upon the parallel position of State and lower federal courts." *Id.* **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.** *Id.*

[1] *Addison v. New Hampshire*, No. 10-8527, raises the same issue presented here and is scheduled for conference May 12, 2011.

Addison, 160 N.H. at 802-03 (emphasis added). In other words, the New Hampshire Supreme Court recognized that until this Court answers the question, parallel and conflicting case law will persist.

Petitioner addresses specific arguments of the brief in opposition as follows:

The State of New Hampshire Wrongly Minimizes The Split In Authority

The State argues that "there is no significant split in authority" because "only a small minority of courts have applied due process principles to identification procedures that were not orchestrated by police action." Brief in Opposition 25. That statement is incorrect. Most federal circuit court opinions addressing the issue contradict the State's position and the New Hampshire Supreme Court's ruling against petitioner.

The First, Second, Fifth, Sixth, Ninth, and Tenth Circuit Courts of Appeal have recognized that a due process challenge to unreliable eyewitness identification evidence does not depend on a showing of improper conduct by a state actor.[2] *See United States v. De León-Quiñones,* 588 F.3d 748, 754-56 (1st Cir. 2009) ("'federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police'")(*quoting United States v. Bouthot,* 989 F.2d 1506, 1515-16 (1st Cir. 1989)); *Dunnigan v. Keane*, 137 F.3d 117, 128 (2d Cir. 1998), *cert. denied,* 525 U.S. 840 (1998) ("the linchpin of admissibility, therefore, is not whether the identification testimony was procured by law enforcement officers, as contrasted with civilians, but whether the identification is reliable"); *Thompson v. Mississippi*, 914 F.2d 736, 739 (5th Cir. 1990), *cert. denied,* 498 U.S. 724 (stating that even in the absence of state action "'a court must scrutinize any pretrial confrontation for possible due process violations'"

[2] These and other federal cases are discussed at length in Perry's Petition for Certiorari, 17-21.

(*quoting United States v. Thevis*, 665 F.2d 616, 643 (5th Cir.1982)[3]; *Thigpen v. Cory*, 804 F.2d 893, 895-97 (6th Cir. 1986)("deterrence of police misconduct is not the basic purpose for excluding identification evidence"); *Green v. Loggins*, 614 F.2d 219, 222-23 (9th Cir. 1980)("a court is obligated to review every pretrial 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"); *United States v. Elliot*, 915 F.2d 1455, 1457 (10th Cir. 1990)(applying due process principles to an in-court identification by a witness who had seen a photo of the defendant in a newspaper).

The brief in opposition wrongly minimizes the weight of this authority. The State quotes the First Circuit but does not discuss that court's explicit rejection of the theory offered by the State. Similarly, the State merely cites the Second and Sixth Circuit cases with no discussion and would accord no weight to the opinions from the Ninth and Tenth Circuits, even though both of those courts applied due process principles to identifications not involving improper police conduct. In contrast to the brief in opposition, federal district courts have recognized the predominant federal view that the "circuit courts that have addressed the issue after *Brathwaite* have determined that identification testimony is subject to due process scrutiny whether or not the alleged unduly suggestive procedure is caused by state action." *Owens v. Ortiz*, 2007 U.S. Dist. LEXIS 98206, 2007 WL 6030392, 25-26 (D.Colo. 2007).

Against the weight of federal authority, the brief in opposition cites a number of state court opinions which the State terms a "majority." These references are, by and large, correct regarding the holdings of those state court cases. However, the contrast between state and federal lines of authority makes petitioner's point that review by this Court is needed. The

[3] Petitioner did not cite Fifth Circuit authority in the petition for certiorari but now adds the Fifth Circuit to the list of circuits siding with his view.

conflict between state and federal courts over a question never addressed by this court is precisely why the petition for certiorari should be granted. The lower courts will continue to struggle with the issue until this court settles it. *See, e.g., People v. Padilla*, 2010 Cal. App. Unpub. LEXIS 8644, 21 (Nov. 2010) (unpublished) ("There is a split of authority as to whether, in the identification context, some sort of state action is required before constitutional due process rights can be implicated."). *See also* Imwinkelried, *et al*, *Courtroom Criminal Evidence*, §2815 at 1310, 1310 n. 117 (4th Ed. 2005)("The courts are split on whether the exclusionary rule will apply to a due process violation [regarding identification evidence] if there is no police action," and "[t]his issue deserves resolution by the Supreme Court.").

The Brief In Opposition Fails To Acknowledge That The Two Competing Lines Of Authority Are Based On Opinions From This Court

The State's brief discusses virtually every opinion from this Court addressing due process and eyewitness identification evidence. However, upon reaching the issue actually presented by the petition, and finding no case from this Court on point, the brief in opposition turns to *Colorado v. Connelly*, 479 U.S. 157 (1986), which is a confession case. According to the State, since *Connelly* says due process does not bar unreliable confession evidence unless it is the product of state actors, the same reasoning should apply in this context so that due process does not bar unreliable identification evidence which is not the product of state actors. This "*Connelly* argument" is the basis of the line of authority found primarily in state court opinions.

The line of authority found in federal court opinions expressly rejects the *Connelly* argument. The federal view relies on this Court's statements that, "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," *Neil v. Biggers*, 409 U.S. 188, 198 (1972), and that "[r]eliability is the

linchpin in determining the admissibility of identification testimony," *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977). As explained by the First Circuit, the language from this Court's eyewitness identification cases shows that the *Connelly* argument is wrong.

> 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. 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. In the latter scenario, the Due Process Clause protects an evidentiary interest: reliability.

Bouthot, 878 F.2d at 1515-16 (citations omitted).

The *Connelly*/deterrence rationale favored by the State conflicts with the reliability rationale followed by federal courts of appeal. Thus, the state / federal split of authority on the question derives from competing interpretations of leading cases from this Court. The states that follow the *Connelly* rationale do so in spite of the direction given by this Court in *Neil v. Biggers*, *Manson v. Brathwaite*, and other eyewitness identification cases. This is the kind of split in authority, based on alternative readings of this Court's case law, which justifies review by this Court.

The Brief In Opposition Improperly Raises Factual Issues

The State argues that the factual circumstances in this case do not provide a proper vehicle for review by this Court. The State then cites to the trial transcript of the case to argue that "there was no 'unnecessarily suggestive identification procedure.'" Brief In Opposition 28. However, that factual issue would not be before the Court if certiorari were granted because the New Hampshire Supreme Court never addressed those facts. Instead, the court noted that "the

witness's identification was not derived from any suggestive technique employed by the police," and on the basis of that fact alone the court rejected petitioner's due process claim as being unsupported by the law. Thus, review by this Court would be limited to the question of law decided by the New Hampshire Supreme Court and set forth in the petition for certiorari.

Under The Current Case Law, An Important Federal Constitutional Right Expands Or Contracts Based Solely On Where A Criminal Defendant Is Prosecuted

The reliance of the brief in opposition on state case law reveals the practical consequences of the split in authority. In many jurisdictions, the scope of a criminal defendant's federal constitutional right to mount a due process challenge to eyewitness identification evidence will vary depending on whether the defendant is charged in state court or federal court.[4] In most federal courts, a defendant who challenges unreliable eyewitness identification evidence will not be required to demonstrate state action or improper police conduct. The federal criminal defendant will receive the protections established by *Neil v. Biggers* and *Manson v. Brathwaite.* However, in state courts in those same jurisdictions, a criminal defendant challenging the same evidence will not have the same federal constitutional right. The state court defendant will be

[4] Categorizing state and federal cases by circuit illustrates the point:

First Circuit (state action not required): *Bouthot*, 878 F.2d 1506; *De León-Quiñones*, 588 F.3d 748. New Hampshire, Rhode Island, Massachusetts, and Maine (state action required): *Addison*, 160 N.H. 792; *Pailon*, 590 A.2d 858; *State v. Bertram*, 591 A.2d 14, 25-27 (R.I. 1991); *Commonwealth v. Colon-Cruz*, 562 N.E.2d 797 (Mass. 1990); *State v. Naoum*, 548 A.2d 120, 124-45 (Me. 1988).

Second Circuit (state action not required): *Dunnigan*, 137 F.3d 117; *Richardson v. Superintendent*, 621 F. 3d 196 (2d Cir. 2010). New York (state action required): *People v. Marte*, 912 N.E.2d 37, 39-40 (N.Y. 2009).

Fifth Circuit (state action not required): *Thompson*, 914 F.2d 736. Louisiana (state action required): *State v. Birch*, 956 So.2d 793, 800 (La. App. 2007).

Sixth Circuit (state action not required), *Thigpen*, 804 F.2d 893. Ohio, Tennessee, and Kentucky (state action required): *State v. Brown*, 528 N.E.2d 523, 533 (Ohio 1988); *State v. Reid*, 91 S.W.3d 247 (Tenn. 2002); *Wilson v. Commonwealth*, 695 S.W.2d 854, 856-58 (Ky. 1985).

Ninth Circuit (state action not required): *Green*, 614 F.2d 219. California (state action required): *People v. Peggese*, 102 Cal.App. 3d 415, 422 (1980).

Tenth Circuit (state action not required): *Elliot*, 915 F.2d 1455; *Milano*, 443 F.2d 1022. Colorado (state action required): *People v. Owens*, 97 P.3d 227, 233-34 (Colo.App. 2004). *See also*, *Owens*, 2007 U.S. Dist. LEXIS 98206, noting that the defendant would have due process protections as a defendant in a federal criminal case but did not in the state court proceedings he challenged as a habeas petitioner.

protected by the Due Process Clause only if he can show that the police or some other state agent acted improperly.

Thus, a defendant's federal constitutional right to due process expands and contracts depending on where he faces trial. The defendant challenging eyewitness identification evidence in Merrimack County Superior Court in Concord, New Hampshire, does not have the same right he would have if he faced charges one mile away in the United States District Court for New Hampshire. The scope of an important federal constitutional right should not vary depending on where the defendant is charged. Without action by this Court, the competing lines of authority will persist, as will the practical effects of the inconsistent case law.[5]

CONCLUSION

This case is one of two pending New Hampshire cases which raise the same question.[6] Together, the cases provide this Court the appropriate opportunity to resolve an important federal constitutional question. Even though the two cases are factually quite different, they present the same pure question of law which was determinative of the outcome. Furthermore, the fact that the issue arose twice in a short period of time in New Hampshire is confirmation, in addition to the recognized split in authority, that the issue is one in need of resolution. This is especially true within New Hampshire and the First Circuit where the contradiction between state and federal interpretations of federal constitutional law is expressly acknowledged.

Finally, this is an issue which affects criminal trials regularly. Eyewitness identification evidence is used every day across the country. The due process principles regulating the

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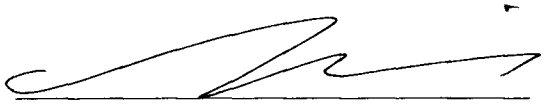
[5] As described in the original petition, state court defendants who attempt to assert their federal due process claims in habeas petitions have been denied relief by the federal courts, under AEDPA, because this Court has not resolved the split in authority. Petition for Certiorari 21, n. 3.

[6] The other case is *Addison v. New Hampshire*, described at p. 1 and n. 1.

admission of such evidence should be clear and consistent. At present they are not. If the presentations of the parties show anything, it is that no one really knows whether this Court requires state action before the due process protections against unreliable eyewitness identification will apply. Petitioner respectfully submits that the Court should answer that question.

For all of the foregoing reasons, petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted this 29th day of April, 2011,



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