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Perry v. New Hampshire: Abandoning the Supreme Court's Fundamental Concern with Eyewitness Reliability

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Note

PERRY v. NEW HAMPSHIRE: ABANDONING THE SUPREME COURT'S FUNDAMENTAL CONCERN WITH EYEWITNESS RELIABILITY

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In *Perry v. New Hampshire*,[1] the Supreme Court of the United States considered whether the Due Process Clause of the Fourteenth Amendment[2] requires preliminary judicial screenings of the reliability of suggestive eyewitness identifications, even when not arranged by police.[3] The Court concluded that due process is not implicated when the identification is not the result of suggestive, police-arranged procedures.[4] The majority's focus on the presence of suggestive police arrangement in its eyewitness identification jurisprudence led it to incorrectly conclude that deterrence was the primary aim of the due process constraint on eyewitness testimony.[5] The majority failed to recognize that the due process framework arose out of the Court's reliability concerns and that the presence of police arrangement in its eyewitness jurisprudence, which reflects a practical reality, was only discussed as it affected reliability.[6] The Court should have revised the current due process framework to better measure reliability and rec-

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1. 132 S. Ct. 716 (2012).
2. U.S. CONST. amend. XIV, § 1, cl. 2.
3. *Perry*, 132 S. Ct. at 723.
4. *Id.* at 730.
5. *See infra* Part IV.A.
6. *See infra* Part IV.A.

ognized that the due process constraint is implicated in all suggestive circumstances.[7]

I. THE CASE

At approximately 3:00 AM on August 15, 2008, Officer Nicole Clay of the Nashua Police Department responded to a call alerting police that a black man was attempting to gain access to multiple automobiles parked behind an apartment complex.[8] When Officer Clay entered the parking lot in her marked police cruiser, she heard what sounded like an aluminum bat hit the ground.[9] Officer Clay immediately noticed a black man, later identified as Barion Perry, standing between two automobiles.[10] After Officer Clay exited her police cruiser, Perry began to walk toward her holding two audio amplifiers in his hands.[11] As Perry walked towards Officer Clay, he stated that he had found the amplifiers lying on the ground and was "just moving them."[12]

Alex Clavijo, one of the residents of the apartment complex, approached Officer Clay only moments later.[13] Clavijo stated that he owned one of the automobiles that had been broken into and further indicated that his neighbor, Nubia Blandon, had witnessed an individual break into his car.[14] Officer Clay asked Perry to remain with another officer who had arrived on scene so that she could speak with Clavijo's neighbor.[15] Officer Clay and Clavijo met Blandon in the hallway outside of her fourth-floor apartment.[16] When asked to describe what she had seen, Blandon stated that she watched a tall black man with a baseball bat in his hand circle Clavijo's car, open the

7. *See infra* Part IV.B.

8. State v. Perry, No. 08-S-1797-1798, at 1 (N.H. Super. Ct. Apr. 28, 2009) (order denying defendant's motions to suppress).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 2. Perry also asserted that he saw two "kids" leaving the parking lot. *Id.* He walked with Officer Clay to a nearby street and identified an individual as one of the "kids." *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*; Perry v. New Hampshire, 132 S. Ct. 716, 721 (2012).

trunk of the car, and remove a large box from within.[17] When Officer Clay asked her for a more specific description of the man, Blandon pointed to her window and stated that the individual standing with the police officer in the parking lot was the individual she had seen.[18] Perry was arrested following this conversation.[19] Approximately one month after Perry's arrest, the police presented Blandon with an array of photographs containing a picture of Perry, but she was unable to identify him.[20]

Prior to trial in the New Hampshire Superior Court, Perry moved to suppress Blandon's out-of-court identification, averring that the introduction of such testimony would violate his rights to due process under the Fifth and Fourteenth Amendments.[21] According to Perry, Blandon's identification of him was both unreliable and unnecessarily suggestive.[22] Additionally, Perry argued that Blandon's identification was inevitable because he was the only black man in the vicinity and was standing next to a police officer at the time.[23]

Over Perry's objection, the superior court determined that no due process violation would arise from admitting Blandon's out-of-court identification.[24] Relying upon the test set forth in *Neil v. Big-*

17. *Perry*, No. 08-S-1797-1798, at 2. The large box contained audio equipment. *Id.* at 2 n.1. Clavijo acted as a translator between Officer Clay and Blandon, as Blandon spoke only in Spanish. *Id.* at 2.

18. *Id.* at 2–3.

19. *Id.* at 3.

20. *Id.*

21. *Id.*; U.S. CONST. amend. V; *id.* amend. XIV, § 1, cl. 2. Perry also argued that the introduction of Blandon's out-of-court identification would violate Part 1, Article 15 of the New Hampshire Constitution, which also secures the accused's right to due process. *Perry*, No. 08-S-1797-1798, at 3; N.H. CONST. pt. I, art. 15; *see also, e.g.*, State v. Damiano, 474 A.2d 1045, 1047 (N.H. 1984) (stating that this article guarantees every citizen due process of law). In addition to asking the court to suppress the out-of-court identification, Perry moved to suppress any in-court identification by Blandon. *Perry*, No. 08-S-1797-1798, at 3. Perry argued that an in-court identification would not have a basis independent of the suggestive out-of-court identification. *Id.*

22. *Perry*, No. 08-S-1797-1798, at 3.

23. *Id.* at 4. Perry averred that the situation, in effect, constituted a "one-man show-up." *Id.* A show-up is an identification procedure where an officer shows a witness a single suspect or a single photograph of that suspect. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 55 (2011).

24. *Perry*, No. 08-S-1797-1798, at 3, 6.

gers[25] and *Manson v. Braithwaite*,[26] the court explained that to determine the admissibility of eyewitness identification, it must engage in a two-step inquiry.[27] Under this test, the court must first consider "whether the identification procedure was unnecessarily suggestive."[28] If the court answers this question in the affirmative, it must then and only then determine whether the identification was nonetheless reliable.[29] The court concluded that Blandon's identification of Perry was not the result of suggestive, police-arranged procedures[30] because nothing Officer Clay did caused Blandon to identify Perry.[31] Finding no police-arranged suggestiveness, the court did not consider whether the identification was independently reliable.[32] The court admitted Blandon's out-of-court identification at trial.[33] Perry was subsequently convicted of theft by unauthorized taking.[34]

25. 409 U.S. 188, 199–200 (1972).

26. 432 U.S. 98, 114 (1977).

27. *Perry*, No. 08-S-1797-1798, at 3. The term "two-step inquiry" is not equivalent to "due process constraint." The two-step inquiry is a test used by courts to determine whether the due process constraint will prevent eyewitness identification evidence from being introduced. *See infra* Part II.A.

28. *Perry*, No. 08-S-1797-1798, at 3 (quoting State v. Cyr, 453 A.2d 1315, 1317 (N.H. 1982)).

29. *Id.* at 3–4.

30. The term "police-arranged" is somewhat ambiguous in this context as it may connote either intention with regard to the arrangement itself (that is, the police intended to conduct a show-up), or intention with regard to the suggestion (that is, police intended to suggest that the defendant was the individual who committed a crime). The Supreme Court's majority opinion in *Perry* seemed to suggest that both are needed. *See infra* Part III. This Note uses "police-arranged" to connote that police the least intentionally arranged the confrontation between the witness and the accused. Therefore, "police-arranged" does not refer to instances where police inadvertently caused the confrontation between the witness and the accused. Moreover, it does not include instances where someone other than the police arranged the circumstances, regardless of whether that person did so intentionally.

31. *Perry*, No. 08-S-1797-1798, at 4.

32. *Id.* at 5.

33. *Id.* The court also admitted Blandon's in-court identification on similar grounds. *Id.*

34. State v. Perry, No. 2009-0590, slip op. at 1 (N.H. Nov. 18, 2010), *aff'd*, Perry v. New Hampshire, 132 S. Ct. 716 (2012). Perry was initially charged with one count of theft by unauthorized taking and one count of criminal mischief. *Perry*, No. 08-S-1797-1798, at 1.

Perry appealed his conviction to the New Hampshire Supreme Court, contending that the admission of Blandon's out-of-court identification violated his due process rights as secured by state and federal constitutions.[35] Relying on the same two-step inquiry as the lower court, the New Hampshire Supreme Court held that no due process violation occurred because Blandon's out-of-court identification was not the result of suggestive, police-arranged procedures.[36] Because Perry failed to demonstrate that the identification resulted from police-arranged suggestiveness, the court did not reach the second step and declined to consider the reliability of the identification.[37] The court affirmed the superior court's denial of Perry's motion.[38]

The Supreme Court of the United States granted certiorari to determine whether the Fourteenth Amendment's Due Process Clause requires trial courts to conduct preliminary judicial screenings of the reliability of eyewitness identifications made under suggestive circumstances not arranged by police.[39]

II. LEGAL BACKGROUND

Since its inception, the due process framework for analyzing the admissibility of eyewitness testimony has gone largely unchanged in Supreme Court jurisprudence.[40] Part II.A of this Note traces the Supreme Court's development of the due process constraint. Part II.B explains how, relying on the Supreme Court's due process jurisprudence, state and lower federal courts have adopted divergent approaches under the due process framework, using either fairness-based or deterrence-based rationales. Part II.C describes how the New Jersey Supreme Court took a rather unique approach by revising the due process framework in light of emerging scientific findings concerning the reliability of eyewitness testimony.

35. State v. Perry, No. 2009-0590, slip op. at 1.

36. *Id.* at 1–2.

37. *Id.* at 2.

38. *Id.*

39. Perry v. New Hampshire, 132 S. Ct. 716, 723 (2012).

40. *See infra* Part II.A.

A. The Supreme Court Developed a Two-Part Test to Determine Whether Due Process Requires Suppression of Eyewitness Identification Evidence

As early as 1967, the Supreme Court was aware that certain pretrial occurrences "might well settle the accused's fate and reduce the trial itself to a mere formality."[41] The Court noted that "[t]he vagaries of eyewitness identification are well-known," and recognized the vast number of miscarriages of justice stemming from mistaken identifications.[42] Additionally, the Court recognized that state-created suggestive witness identifications may have substantially contributed to this miscarriage.[43] To prevent such miscarriages of justice, the Court, in a series of decisions made on the same day, recognized two constitutional protections.[44]

The Court in *United States v. Wade*[45] recognized that the defendant's Sixth Amendment right to counsel[46] extended to pretrial confrontations between the accused and adverse witnesses.[47] The Court reasoned that it must scrutinize such confrontations "to determine whether the presence of . . . counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine" adverse witnesses.[48] Thus, under *Wade*, courts were to exclude identification evidence obtained in the absence of and

41. United States v. Wade, 388 U.S. 218, 224 (1967).

42. *Id.* at 228.

43. *Id.*

44. *Id.* at 236–37 (recognizing a Sixth Amendment right to counsel at pretrial lineups); Stovall v. Denno, 388 U.S. 293, 301–02 (1967) (recognizing, in addition to the holding in *Wade*, an independent due process constraint on the admissibility of eyewitness testimony).

45. 388 U.S. 218 (1967).

46. U.S. CONST. amend. VI.

47. *Wade*, 388 U.S. at 236–37. The *Wade* decision was released on the same day as *Gilbert v. California*, which also dealt with a constitutional right to counsel at pretrial lineups. 338 U.S. 263, 264–265 (1967).

48. *Wade*, 388 U.S. at 227. The Court was concerned that a defendant would be unable to attack the credibility of a pretrial lineup if it was conducted in the absence of defendant's counsel, because a defendant on his own may not be able to demonstrate that the lineup procedure suggestively signaled to the witness that the defendant was the culprit. *Id.* at 231–32.

without notice to counsel, unless the identification had an independent source of reliability.[49]

In addition to the exclusionary rule of *Wade*, the Supreme Court in *Stovall v. Denno*[50] recognized a due process constraint[51] on the admissibility of eyewitness identifications.[52] The Court explained that a defendant was entitled to relief when the "confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law."[53] The Court explained that determining whether the confrontation was overly suggestive depends upon the totality of the circumstances.[54] In *Stovall* the police brought the handcuffed defendant to the hospital room where a victim of the crime was recovering.[55] The Court concluded that no due process violation had occurred be-

49. *See id.* at 236–37, 242 (finding that the lineup should not have been conducted without notice to and the presence of counsel, and remanding the case to the District Court to determine whether the witness's in-court identification of Wade had an independent source). To determine whether an identification had an independent source, the Court explained that it ought to consider:

> [T]he prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Id. at 241.

50. 388 U.S. 293 (1967).

51. The Court indicated that the due process constraint was tied to Fourteenth Amendment rights rather than Fifth Amendment rights by referencing Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966). *Stovall*, 388 U.S. at 302; *see Palmer*, 359 F.2d at 200 (considering whether a voice identification procedure violated the defendant's Fourteenth Amendment due process rights).

52. *Stovall*, 388 U.S. at 301–02. Although this is the first Supreme Court case recognizing the constraint, the Court stated that "[t]his is a recognized ground of attack upon a conviction independent of any right to counsel claim." *Id.* at 302.

53. *Id.* at 301–02.

54. *Id.* at 302.

55. *Id.* at 295. The defendant was also the only black man present in the hospital room. *Id.*

cause the confrontation was imperative given the victim's critical condition.[56]

In *Simmons v. United States*,[57] the Court again had occasion to consider an alleged due process violation, this time in the context of an in-court identification following a pretrial identification by photograph.[58] The Court explained that in-court identifications following pretrial identification procedures would be deemed inadmissible only if the underlying identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[59] Consistent with the Court's language in *Stovall*, it explained that "each case must be considered on its own facts."[60] The Court again found that, under the specific facts of the case, no due process violation had occurred.[61] According to the Court, the photographic identification procedure used was necessary for law enforcement and, given that the witnesses saw the assailants for up to five minutes under good lighting conditions, the identifications were likely reliable.[62]

Although the *Stovall* Court initially recognized a due process constraint tied to the admissibility of eyewitness testimony,[63] the Supreme Court did not have occasion to overturn a decision based on a viola-

56. *Id.* at 302. The Court concluded that the show-up was imperative because the victim was the only individual who could exonerate the defendant, and she might have died in the hospital. *Id.*

57. 390 U.S. 377 (1968).

58. *Id.* at 381.

59. *Id.* at 384.

60. *Id.*; *cf.* Stovall v. Denno, 388 U.S. 293, 302 (1967) (concluding that each alleged due process violation case "depends on the totality of the circumstances").

61. *Simmons*, 390 U.S. at 386.

62. *Id.* at 384–85. The Court explained that the procedure was necessary because the FBI needed to develop leads as quickly as possible. *Id.* at 385. The Court indicated that its approach accorded with *Stovall*. *Id.* at 384. Yet, "[t]he inquiry mandated by *Simmons* is similar to the independent-source test used in *Wade* where an in-court identification is sought following an uncounseled lineup." Manson v. Brathwaite, 432 U.S. 98, 122 (1977) (Marshall, J., dissenting). In both cases, the issue was whether the witness identified the defendant solely on the basis of his memory of events at the time of the crime, or whether he was merely remembering the person he picked out in a pretrial procedure." *Simmons*, 390 U.S. at 383–84; *Brathwaite*, 432 U.S. at 122.

63. *Stovall*, 388 U.S. at 301–02.

tion of that constraint until *Foster v. California*.[64] Unlike *Stovall* and *Simmons*, "this case present[ed the Court with] a compelling example of unfair lineup procedures."[65] In this instance, police first arranged a lineup in which the defendant stood out physically from the other individuals.[66] Moreover, while the witness thought the defendant was among the individuals he had seen, the witness was unsure.[67] The police then arranged a one-on-one confrontation between the defendant and the witness.[68] The witness, however, remained uncertain as to whether the defendant was one of the individuals he had seen.[69] Only after arranging a second lineup, in which the defendant was the only person who had been in the first lineup, was the witness confident in his identification.[70] Explaining that the "suggestive elements in this identification procedure made it all but inevitable that" the witness would identify the defendant, the Court concluded that "[t]his procedure so undermined the reliability of the eyewitness identification as to violate due process."[71]

The Court held, once again, that the admission of an in-court identification following a pretrial identification procedure did not give rise to likely misidentification of a defendant in *Coleman v. Alabama*.[72] In this instance, the witness claimed to have "got a real good look" at his assailants "in the car lights" of a passing car.[73] The witness, however, gave only a vague and factually incorrect description of his assailants prior to the pretrial lineup conducted by police.[74] When

64. 394 U.S. 440, 443–44 (1969).

65. *Id.* at 442.

66. *Id.* at 441. The defendant, who was nearly six feet tall, stood next to two other men who were nearly half a foot shorter. *Id.* The defendant also wore a leather jacket similar to that allegedly worn by the perpetrator. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 441–42.

71. *Id.* at 443. According to the Court's later evaluation of *Foster* in *Biggers*, the basis of the exclusion was the "likelihood of misidentification." Neil v. Biggers, 409 U.S. 188, 198 (1972).

72. 399 U.S. 1, 5 (1970).

73. *Id.* at 4.

74. *Id.* The witness claimed that the assailants were "young, black males, close to the same age and height." *Id.* Although both defendants were black, there was an age difference of approximately ten years and a height difference of nearly a foot. *Id.*

the police arranged a lineup, the witness, before the lineup even began, unequivocally identified the defendants as his assailants.[75] Although one of the defendants was the only individual in the pretrial lineup wearing a hat, and the witness was previously unable to describe his assailants with certainty, the Court concluded that the in-court identification "did not stem from an identification procedure at the lineup 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'"[76] To the contrary, the Court found that the facts supported the contention that the in-court identification was "entirely based upon observations at the time of the" incident.[77]

The Court, in *Neil v. Biggers*,[78] made clear that unnecessary suggestiveness alone does not mandate the exclusion of identification evidence.[79] Rather, the Court developed a two-step test explaining that if it first determined that the identification procedure was suggestive, it must then consider "whether under the 'totality of the circumstances' the identification was [nonetheless] reliable."[80] The Court noted,

> the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[81]

The Court explained that "[i]t is the likelihood of misidentification which violates a defendant's right to due process."[82] Basing its decision on an application of the reliability factors it outlined, the

75. *Id.* at 5.

76. *Id.* at 4–6 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)). There was no indication that law enforcement required the defendant to wear a hat. *Id.* at 6.

77. *Id.* at 5–6.

78. 409 U.S. 188 (1972).

79. *Id.* at 199.

80. *Id.*

81. *Id.* at 199–200.

82. *Id.* at 198. Accordingly, "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" *Id.* (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

Court concluded that no due process violation occurred as a result of a show-up conducted by police.[83]

The Supreme Court reaffirmed the *Biggers* two-step test in *Manson v. Brathwaite*.[84] The first step, the Court explained, was to determine "whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification."[85] If a court answers this in the affirmative, it must then determine "whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification."[86] The Court explained that the basis for excluding identifications made under suggestive circumstances was a "concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability."[87] As a result, the Court concluded that "reliability is the linchpin" of whether eyewitness identifications are admissible.[88]

B. Following the Supreme Court's Eyewitness Jurisprudence, State and Lower Federal Courts Diverged Between Fairness-Based and Deterrence-Based Approaches

Looking to the Supreme Court's decisions in *Stovall* and its progeny, lower federal and state courts are to consider whether, under the totality of the circumstances, the identification procedure was so suggestive as to fatally taint the reliability of the resulting identification.[89] Although in each of the Supreme Court's cases the suggestive circumstances were in some way arranged by police, the Court did not indicate whether the police arrangement was essential or incidental to its holdings.[90] This failure resulted in divergent application of the due process framework.[91] Some state and lower federal courts cast the jus-

83. *Id.* at 200–01.

84. 432 U.S. 98, 114 (1977).

85. *Id.* at 107.

86. *Id.*

87. *Id.* at 112.

88. *Id.* at 114. Judged by the factors set forth in *Biggers*, the Court concluded that the introduction of eyewitness testimony pertaining to a pretrial identification by a single-photograph display did not violate the defendant's due process rights. *Id.* at 114–17.

89. *See supra* Part II.A.

90. *See supra* Part II.A.

91. *Compare* Thigpen v. Cory, 804 F.2d 893, 895 (6th Cir. 1986) (determining that the "deterrence of police misconduct [was] not the basic purpose for excluding identification evidence"), *with* State v. Pailon, 590 A.2d 858, 860 (R.I. 1991) ("There seems little doubt

tification for the due process constraint as a concern with reliability of eyewitness testimony.[92] As a result, these jurisdictions have reasoned that the framework is applicable to instances where the suggestive circumstances were unintentionally arranged by law enforcement and where there was a complete absence of police arrangement.[93] By contrast, most state and lower federal courts interpret the constraint as supported by a deterrence rationale.[94] Accordingly, these jurisdictions refuse to apply the constraint to instances where the suggestiveness is not police-arranged.[95]

1. A Minority of Jurisdictions, Citing the Reliability Rationale, Apply the Due Process Framework to Any Suggestive Circumstances, Regardless of Whether Police Arranged Them

Basing their decisions on the constraint's concern with securing reliable eyewitness evidence, some state and federal jurisdictions have reasoned that the constraint applies to suggestive circumstances irrespective of whether police arranged the circumstances intentionally.[96] For example, the United States Court of Appeals for the Ninth Circuit, in *Green v. Loggins*,[97] explained that "a court is obligated to review *every pre-trial encounter* [under the due process framework], 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 . . . identification."[98] In *Green*, the police accidentally placed the defendant in the same holding cell as an eyewitness seek-

that the Court's exclusionary rule relating to evidence obtained in violation of [due process] was directed entirely at the deterrence of illegal police procedures . . . .").

92. *See infra* Part II.B.1.

93. *See infra* Part II.B.1.

94. *See infra* Part II.B.2.

95. *See infra* Part II.B.2.

96. *See, e.g.*, United States v. Bouthot, 878 F.2d 1506, 1516 (1st Cir. 1989) ("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 . . . ."); *Thigpen*, 804 F.2d at 895 (holding that the presence of state action was not necessary in order to review admissibility); Green v. Loggins, 614 F.2d 219, 223 (9th Cir. 1980) ("[A] court is obligated to review every pre-trial encounter, accidental or otherwise . . . .").

97. 614 F. 2d 219 (9th Cir. 1980).

98. *Id.* at 223 (emphasis added).

ing protective custody.[99] The witness "did not appear to recognize [the defendant] until . . . a booking officer asked both [the witness] and [the defendant] to identify themselves."[100] The State maintained that this encounter was above constitutional due process review because it would serve no deterrent purpose.[101] The court, however, expressly rejected the notion that deterrence was a fundamental purpose of the constraint.[102] Rather, the court explained that the due process constraint serves to ensure reliability.[103]

Adopting the reasoning set forth in *Green*, the United States Court of Appeals for the Sixth Circuit, in *Thigpen v. Cory*,[104] agreed that due process requires courts to review suggestive circumstances even when there is no police arrangement.[105] The court reiterated that "deterrence of police misconduct is not the basic purpose for excluding identification evidence."[106] Basing its reasoning on the Supreme Court's language in *Biggers*, the court explained that "only the effects of, rather than the causes for" a pretrial encounter are determinative of whether the identification was irreparably suggestive.[107]

99. *Id.* at 221.

100. *Id.* at 222.

101. *Id.* If the suggestion is the result of unintentional conduct, the conduct cannot be deterred because unintentional acts, by their very nature, cannot be prevented.

102. *Id.*

103. *Id.* The court found that the admission of the witness's in-court identification lacked the requisite reliability, and that its admission was not harmless error. *Id.* at 225.

104. 804 F.2d 893 (6th Cir. 1986).

105. *Id.* at 895. In this case, the witness, who had been robbed by two men, encountered the defendant on three separate occasions. *Id.* at 894–95. First, although the defendant appeared in a pretrial lineup, the witness only identified another man, who happened to be the defendant's brother. *Id.* at 894. Second, the witness saw the defendant once again at the brother's preliminary hearing. *Id.* at 895. Last, the witness saw the defendant at the brother's trial, where the defendant at one point sat next to the witness. *Id.* It was only at the trial that the witness told law enforcement that he recognized the defendant as the other assailant. *Id.*

106. *Id.*

107. *Id.* at 895. The court concluded that the defendant's due process rights were violated as a result of the admission of the witness' identification testimony. *Id.* at 898. *See also* Neil v. Biggers, 409 U.S. 188, 198 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process . . . .").

2. *Most Jurisdictions, Citing a Deterrence Rationale, Apply the Due Process Framework Only to Instances Involving Police Arrangement*

Most federal and state jurisdictions recognize the due process framework's deterrent purpose and, as a result, restrict its application to instances involving police-arranged confrontations.[108] For example, the Third Circuit, in *United States v. Zeiler*,[109] reasoned that the due process framework was not applicable "[w]hen . . . there [wa]s no evidence that law enforcement officials encouraged or assisted in impermissive identification procedures."[110] Finding no evidence suggesting that "the pretrial publicity [identifying the defendant as the culprit] was controlled or directed by law enforcement," the court concluded that the eyewitness made a competent identification of the defendant.[111] Reasoning that the Supreme Court's *Wade* and *Simmons* decisions "were concerned with the conduct of law enforcement officials," the court found that eyewitness testimony should be admitted when law enforcement did not participate in the identification procedure.[112]

The Supreme Court of Rhode Island, in *State v. Pailon*,[113] explained that suggestive circumstances caused by private individuals did not invoke the protections of the due process constraint.[114] In *Pailon*, a citizen approached the witness, who had been assaulted and robbed while working at her jewelry store, and told her the names of

108. *See, e.g.*, State v. Holliman, 570 A.2d 680, 684 (Conn. 1990) ("[I]t is well established that conduct that may fairly be characterized as state action is a necessary predicate to a challenge under the due process clause . . . ."); Wilson v. Commonwealth, 695 S.W.2d 854, 857 (Ky. 1985) ("Implicit in the first prong of the *Biggers* test is a finding that the government had some hand in arranging the confrontation."); State v. Birch, 41,979, p. 7 (La. App. 2 Cir. 5/9/07), 956 So.2d 793, 800 (holding that due process is not implicated unless there is a showing of state action); State v. Pailon, 590 A.2d 858, 863 (R.I. 1991) ("[A]bsent state action, no constitutional violation that would give rise to the creation of an exclusionary rule has been committed.").

109. 470 F.2d 717 (3d Cir. 1972).

110. *Id.* at 720.

111. *Id.* at 718–19.

112. *Id.* at 720. The court reasoned that excluding eyewitness testimony based on pretrial publicity would impose an untenable duty on law enforcement to prevent news sources from publishing photographs of arrested individuals. *Id.*

113. 590 A.2d 858 (R.I. 1991).

114. *Id.* at 861.

the men who had robbed her.[115] When the citizen brought the victim a photograph of the defendant, the victim "instantly" identified the man in the photograph as her assailant.[116] In determining whether to apply the due process framework, the court noted that "[t]here seems little doubt that the [Supreme] Court's exclusionary rule . . . was directed entirely at the deterrence of illegal police procedures."[117] The court supported its statement by noting that in every case in the Supreme Court's eyewitness jurisprudence, the "offending conduct . . . was carried out by governmental rather than private action."[118] Because the conduct at issue in this case was carried out by private individuals, the court determined that it need not apply the due process framework as no constitutional violation occurred in the admission of the eyewitness's identification.[119]

C. The New Jersey Supreme Court Revised Its Due Process Framework in Response to the Significant Doubt That Developments in Social Science Cast on the Reliability of Eyewitness Testimony

Recognizing that developments in social science have cast doubt upon the long-standing due process framework, the New Jersey Supreme Court in *State v. Henderson*[120] revised its test for evaluating the reliability of an eyewitness's identification.[121] The court pointed to recent research, which it thought convincingly demonstrated that commonly held notions about the reliability of human memory are oversimplified.[122] The current test for evaluating eyewitness identifi-

115. *Id.* at 859–60. The citizen claimed to know who had robbed her because the same individuals had also robbed his mother. *Id.* at 860.

116. *Id.* The victim turned the photograph over to a security guard employed at the store, who in turn gave it to the police department. *Id.* The police arranged a lineup some time later and the victim, after several minutes of studying the individuals in the lineup, identified the defendant. *Id.* Although it took her several minutes to make this identification, the victim testified that she recognized the defendant instantly but wanted to be sure of her identification. *Id.*

117. *Id.*

118. *Id.* at 861–62.

119. *Id.* at 863.

120. 27 A.3d 872 (N.J. 2011).

121. *Id.* at 877–78.

122. *Id.* at 894.

cations,[123] the court explained, neither accurately measures reliability nor sufficiently deters police misconduct.[124] To remedy the test's shortcomings, the court proposed a revised due process framework that would require courts to first consider both "system and estimator variables" and second to redevelop jury instructions to help jurors accurately assess the value of eyewitness testimony.[125]

To begin, the court noted the substantial evidence suggesting that eyewitness identifications are perhaps the most unreliable form of evidence used in criminal cases.[126] The substantial number of eyewitness misidentifications, the court explained, "stem from the fact that human memory is malleable."[127] According to the court, scientific research demonstrates "that an array of variables can affect and dilute memory and lead to misidentifications."[128] These variables are divided into two subcategories: (1) system variables, and (2) estimator variables.[129] System variables are those "which are within the control of the criminal justice system."[130] In contrast, "estimator variables are factors beyond the control of the criminal justice system," for example, stress and race bias.[131] Both sets of factors, however, "can alter memory and affect eyewitness identifications."[132]

The court explained that the current framework for identifying due process violations based on suggestive police procedures that was set out in *Brathwaite* inadequately addressed reliability and did not suf-

123. The current test is the approach adopted by the Supreme Court in *Manson v. Brathwaite*. *Id.* at 889; *see also supra* Part II.A.

124. *Henderson*, 27 A.3d at 918.

125. *Id.* at 919 (emphasis omitted). For a discussion of system and estimator variables, see *infra* notes 129–131 and accompanying text.

126. *Id.* at 885–86.

127. *Id.* at 888.

128. *Id.* at 895.

129. *Id.*

130. *Id.* The court listed several system variables, including blind administration, pre-identification instructions, lineup construction, avoiding feedback and recording confidence, and multiple viewings. *Id.* at 896–901. It also noted that its list of system variables was non-exhaustive and was expected to expand in light of scientific research. *Id.* at 922.

131. *Id.* at 904. Other estimator variables include weapon focus, duration of observation, distance and lighting, witness characteristics, characteristics of the perpetrator, memory decay, and the conduct of private actors. *Id.* at 904–09.

132. *Id.* at 922.

ficiently deter inappropriate police conduct.[133] According to the court, the *Brathwaite* framework ignores the effect that estimator variable can have on reliability in the absence of suggestive police arrangement.[134] Furthermore, some of the *Brathwaite* test relies in part on the eyewitnesses to self-report, but the suggestive procedures and circumstances themselves can adversely affect this self-reporting.[135] The court noted that the *Brathwaite* approach also has the rather perverse effect of rewarding police suggestiveness.[136] According to the New Jersey court, the more suggestive the procedures employed, the more likely the witness is to both appear confident in his assertions and self-report better viewing opportunities.[137]

To better account for reliability and provide for more meaningful deterrence, the court proposed a revised framework.[138] The New Jersey court explained that if a defendant can show suggestiveness tied to a system variable,[139] then a court should explore all relevant system and estimator variables at a pretrial hearing.[140] In this situation, although the state must proffer evidence demonstrating that the identification is reliable and accounts for both system and estimator variables, "the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification."[141] The court explained that "broader [pretrial] hearings will provide more meaningful deterrence [and] will address reliability with greater care and better reflect how memory works."[142]

In some regards, the New Jersey test is similar to that of deterrence-based approaches in that it restricts pretrial hearings to instances involving police.[143] What makes this approach distinct, however, is partly its recognition that courts need to rethink the variables

133. *Id.* at 918.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 919.

139. A system variable is within the control of the criminal justice system. *See supra* note 130.

140. *Id.* at 919–20.

141. *Id.* at 920

142. *Id.* at 922.

143. *See id.* at 920 (requiring that the initial showing of suggestiveness come from a system, or a criminal-justice-system-controlled, variable); *see also infra* Part II.B.2.

that affect reliability, including variables that are not within the control of law enforcement.[144]

Additionally, the New Jersey court suggested that courts use revised jury instructions to help jurors weigh the value of eyewitness testimony.[145] According to the court, jurors have an incomplete understanding of how memory works. Although "[e]veryone knows . . . that bad lighting conditions make it more difficult to perceive the details of a person's face," jurors generally lack knowledge of how many of the system and estimator variables affect memory and therefore reliability.[146] Thus, the court called for revised jury instructions to better explain the effects both system and estimator variables have on the reliability of eyewitness identification.[147]

The court's approach, driven in part by advances social science, revised the manner in which New Jersey courts measure reliability and aimed to provide jurors with a foundation to weigh eyewitness testimony.[148] Although this approach restricted pretrial review of eyewitness identifications to instances involving police conduct, it rethought how police conduct may affect reliability.[149] Furthermore, the court's directive to revise jury instructions was motivated by a desire to give jurors a better platform from which to evaluate eyewitness testimony by providing them with an enhanced understanding of how memory works.[150]

III. THE COURT'S REASONING

In *Perry v. New Hampshire*, the Supreme Court affirmed the judgment of the New Hampshire Supreme Court, concluding that the Due Process Clause of the Fourteenth Amendment does not require courts to conduct preliminary judicial screenings of the reliability of

144. *See Henderson*, 27 A.3d at 919 (advocating for consideration of system and estimator variables). For examples of the factors law enforcement control, see *supra* note 130.

145. *Henderson*, 27 A.3d at 919. The court referred the task of revising jury instructions to two state committees. *Id.* at 925.

146. *Id.* at 910. The jury instructions used in this case, for example, did not mention that a witness's level of certainty might be affected by the construction of the lineup. *See id.* at 882–83 (excerpting the model jury instructions given at trial).

147. *Id.* at 925–26.

148. *Id.* at 919.

149. *Id.* at 896–903, 920. A more thorough pretrial hearing will also provide for more meaningful deterrence. *Id.* at 922.

150. *Id.* at 911, 919.

eyewitness identifications where there is an absence of police-arranged suggestiveness.[151] Writing for the majority, Justice Ginsburg noted that the Court has recognized and applied the due process constrain when an identification was procured through suggestive, police-arranged circumstances.[152] Reasoning that police arrangement was essential to the decisions in the Court's eyewitness identification jurisprudence, the majority explained that the framework had not, and would not, be extended to include suggestive circumstances not arranged by police.[153] The majority was concerned that expanding the application of the due process framework would overburden lower federal and state courts, particularly with regard to pretrial screenings.[154] This practical concern aside, the majority also was mindful of the fact that determining the weight of eyewitness testimony fell within the purview of the jury.[155] Furthermore, the majority recognized that a defendant is protected from the effects of unreliable eyewitness testimony by certain federal and state laws.[156]

Summarizing its eyewitness identification jurisprudence, the majority explained that the Court has tied the due process constraint on the admissibility of eyewitness testimony to suggestive, police-arranged circumstances.[157] The Court, however, asserted that a showing of police-arranged suggestiveness in the procurement of an eyewitness's identification does not itself mandate exclusion.[158] Rather courts must consider whether, in light of the surrounding circumstances, the identification was nonetheless reliable.[159] That is, due process operates "[o]nly when evidence is so extremely unfair that its admission violates fundamental conceptions of justice."[160]

Noting that the decisions of prior eyewitness admissibility cases "turn[ed] on the presence of state action and aim[ed] to deter police from rigging identification procedures," the majority explained that

151. Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012).

152. *Id.* at 720.

153. *Id.* at 720–21.

154. *Id.* at 727.

155. *Id.* at 720.

156. *Id.*

157. *Id.* at 723–25.

158. *Id.* at 724.

159. *Id.* at 724–25.

160. *Id.* at 723 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)) (internal quotation marks omitted).

police-arranged suggestiveness was a necessary predicate to the application of the due process framework.[161] The Court reasoned that it had not, and would not expand the scope of the constraint to include all suggestive circumstances because the deterrence rationale would be wholly irrelevant in the absence of improper police conduct.[162]

After criticizing the reasoning of Perry and the dissent, both of which argued that police arrangement was not essential for a show-up to violate due process, the majority expressed an additional concern that expanding the scope of the process protections would overburden the judicial system.[163] The Court recognized that most, if not all, identifications involve some degree of suggestion.[164] As a result, if the scope of due process was enlarged to include all suggestive circumstances, then courts would be forced into holding pretrial hearings on a routine basis.[165]

The Court's unwillingness to enlarge the scope of the due process protections rested largely on its recognition that the jury's role is to determine the weight of evidence.[166] Furthermore, the Court rec-

161. *Id.* at 720–21. The majority supported this conclusion by reference to three cases in its eyewitness identification jurisprudence: *Brathwaite*, *Coleman*, and *Wade*. *Id.* at 725–27. According to the majority, *Brathwaite* stands for the proposition that no due process concern arises unless there are suggestive, police-arranged circumstances. *Id.* at 726. The majority explained that deterrence was a fundamental aim of the *Brathwaite* Court's decision. *Id.*; *see* Manson v. Brathwaite, 432 U.S. 98, 112 (1977) ("The second factor [motivating exclusion] is deterrence."). The majority also pointed to *Coleman*, explaining that "[n]o due process violation occurred [in that case] because nothing 'the police said or did prompted'" the identification. *Perry*, 132 S. Ct. at 726 (quoting Coleman v. Alabama, 399 U.S. 1, 6 (1970)). The majority also supported its conclusion with the language of *Wade*, reasoning that the Court in that case was responding to the dangers of "police rigging" when it recognized the defendant's right to counsel at pretrial lineups. *Id.* at 726–27; *see* United States v. Wade, 388 U.S. 218, 228 (1967) ("A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the *prosecution presents* the suspect to witnesses for pretrial identification." (emphasis added)). The Court also noted that all the cases in its eyewitness identification jurisprudence involved suggestive procedures that were arranged by police. *Perry*, 132 S. Ct. at 721 n.1.

162. *See id.* at 720–21 (noting that the deterrence rationale is the driving force behind the constraint).

163. *Id.* at 727.

164. *Id.*

165. *Id.*

166. *Id.* at 728.

ognized that federal and state safeguards protect a defendant against the effects of dubious eyewitness testimony by affording the defendant other means to persuade the jury.[167] Among these safeguards are the defendant's Sixth Amendment right to confront an adverse witness, Sixth Amendment right to counsel, eyewitness-specific jury instructions, and state and federal rules of evidence.[168] These safeguards, the Court explained, caution jurors against the hazards of eyewitness testimony, allowing them to better evaluate the weight of such evidence.[169] The Court concluded that, in the absence of police-arranged suggestiveness, these safeguards suffice to challenge the reliability of eyewitness testimony.[170] Finding no suggestive, police-arranged circumstances and that the trial-level safeguards it had outlined were successfully applied, the Court affirmed the decision of the New Hampshire Supreme Court and concluded that no due process violation occurred as a result of the admission of Blandon's identification testimony.[171]

In a separate concurring opinion, Justice Thomas argued that *Stovall v. Denno* and its progeny were incorrectly decided and therefore should not be extended to the case at hand.[172] Justice Thomas explained that the aforementioned cases were "premised on a substantive due process right to fundamental fairness."[173] According to Justice Thomas, however, the Fourteenth Amendment "is not a secret repository of substantive guarantees against unfairness."[174] Although he ultimately agreed with the majority that due process extends only to cases involving suggestive, police-arranged procedures, he would limit the majority's use of *Stovall* and its progeny to their specific facts.[175]

Justice Sotomayor, in dissent, argued that the majority incorrectly determined that the due process constraint extends only to cases involving suggestive, police-arranged circumstances.[176] The majority, in

167. *Id.* at 728–29.

168. *Id.*; *see, e.g.*, FED. R. EVID. 403; N.H. R. EVID. 403 (2011).

169. Perry v. New Hampshire, 132 S. Ct. 716, 728–29 (2012).

170. *Id.* at 721.

171. *Id.* at 726, 730.

172. *Id.* at 730 (Thomas, J., concurring).

173. *Id.* (internal quotation marks omitted).

174. *Id.* (citations omitted) (internal quotation marks omitted).

175. *Id.*

176. *Id.* at 731 (Sotomayor, J., dissenting).

Justice Sotomayor's view, mistakenly identified deterrence as the primary aim underlying due process.[177] In contrast, Justice Sotomayor maintained that the driving force behind *Wade* and *Stovall* was the desire to ensure that the jury heard only reliable evidence.[178] Sotomayor argued that the due process issue raised in previous eyewitness identification cases lay in the negative effects suggestion had on the fairness of a trial, and not, as the majority suggested, in the act of suggestion itself.[179]

Justice Sotomayor worried that the majority had fashioned a new and substantial limitation on a long-standing due process protection by restricting its application to instances involving police-arranged suggestion.[180] According to Justice Sotomayor, the majority did not hold simply that identifications must arise out of the conduct of police to trigger the due process constraint, but rather that the suggestive circumstances must be police-arranged.[181] By requiring that the suggestion itself be intentionally police-arranged, Justice Sotomayor argued that the majority had attached a mens rea requirement onto the due process analysis.[182] Justice Sotomayor argued that this new approach fails to recognize that intentional- and inadvertent-police suggestion result in the same due process concern: the increased likelihood of misidentification.[183] As a result, Justice Sotomayor argued that due process is equally applicable in these instances.[184]

Justice Sotomayor also challenged the majority's assumption that enlarging the scope of due process would entail a practical burden on the courts.[185] The defendant, Justice Sotomayor explained, still carries the burden of demonstrating the overly suggestive circumstanc-

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 733.

181. *Id.* at 734. Justice Sotomayor alternatively described such circumstances as "police-rigg[ed], police-designed, or police-organized." *Id.* (alteration in original) (internal quotation marks omitted).

182. *Id.* As Justice Sotomayor explained, under the majority's approach, the intent of law enforcement is controlling. *Id.*

183. *Id.* at 731–32.

184. *Id.* at 735. Justice Sotomayor did not address whether due process protections should apply to suggestive circumstances in which there is an absence of police action. *Id.* at 731 n.1.

185. *Id.* at 737.

es.[186] And, as she pointed out, the Court has "set a high bar for suppression" of eyewitness identification.[187] Furthermore, because a defendant may rely upon evidentiary rules and raise objections at or before trial, courts are already required to entertain objections about admitting eyewitness evidence.[188] Finally, Justice Sotomayor pointed out that there has been no flood of claims in jurisdictions that apply due process protections to all suggestive circumstance, thus the majority's concern that expanding the scope of the constraint would significantly overburden the courts was unfounded.[189]

The majority's reliance on the jury to ultimately weigh eyewitness testimony was not persuasive, according to Justice Sotomayor.[190] Jurors, as she pointed out, are easily swayed by the testimony of an eyewitness.[191] Furthermore, scientific literature suggests that the jurors' ability to weigh testimony is severely complicated by a witness's false sense of confidence, which is inflated by suggestiveness.[192] These concerns aside, Justice Sotomayor pointed out that the majority's reliance on jurors to weigh eyewitness testimony was an argument that had appeared in dissent after dissent in previous decisions.[193] Those arguments ultimately failed, and Justice Sotomayor saw no need to revive them in the instant case.[194]

While there may have been reasons why the identification evidence in Perry's case was in fact reliable, Justice Sotomayor explained that the Court's new approach meant that those reasons would never be examined.[195] Justice Sotomayor concluded that the majority's fail-

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 737–38.

190. *Id.* at 737.

191. *Id.*

192. *Id.* at 738–39.

193. *Id.* at 737; *see, e.g.*, Foster v. California, 394 U.S. 440, 447 (1969) (Black, J., dissenting) ("[T]he jury must . . . be allowed to hear eyewitnesses and decide for itself whether it can recognize the truth and whether they are telling the truth."); Simmons v. United States, 390 U.S. 377, 395 (1968) (Black, J., concurring in part and dissenting in part) ("The weight of the evidence . . . is not a question for the Court but for the jury . . . .").

194. *Perry*, 132 S. Ct. at 737 (Sotomayor, J., dissenting).

195. *Id.* at 739.

ure to assess the reliability of Blandon's testimony was wrong and that the case should be remanded.[196]

IV. ANALYSIS

In *Perry v. New Hampshire*, the Supreme Court determined that the Due Process Clause of the Fourteenth Amendment does not require courts to conduct preliminary judicial screenings of the reliability of an eyewitness identification when the identification was not the result of suggestive, police-arranged procedures.[197] The majority in *Perry* erred in identifying deterrence as a fundamental aim of the due process constraint.[198] As Justice Sotomayor pointed out in dissent, due process protections arose out of a concern for ensuring the reliability of an eyewitness identification.[199] The majority misinterpreted its own eyewitness jurisprudence by concluding that deterrence was fundamental to these decisions and by improperly relying on the fact that such cases happened to involve police arrangement.[200] Given the significant scientific doubt cast upon the reliability of eyewitness testimony, the Court should have reevaluated the manner in which it measures reliability, much like the New Jersey Supreme Court did.[201] The Court's approach, however, ought to be more expansive than that of New Jersey, and should apply the revised due process framework to all suggestive circumstances.[202]

196. *Id.* at 740. Justice Sotomayor did not offer her opinion on whether Blandon's identification of Perry was reliable. *Id.* at 739.

197. *Id.* at 730 (majority opinion).

198. *See infra* Part IV.A.

199. *Perry*, 132 S. Ct. at 735 (Sotomayor, J., dissenting); *see supra* Part III. Although this Note adopts Justice Sotomayor's evaluation of the Court's eyewitness jurisprudence, it departs from her approach in a two significant ways. First, whereas Justice Sotomayor did not address whether all suggestive circumstances warrant an application of the due process protections, this Note argues they do. *See supra* note 184. Second, this Note argues for a revised due process framework that completely abandons the current measures of reliability. *See infra* Part IV.B.2.

200. *See infra* Part IV.A.

201. *See infra* Part IV.B.1.; *see also supra* Part II.C.

202. *See infra* Part IV.B.2.

A. *Because of Its Misguided Focus on Police Arrangement, the* Perry *Court Mistakenly Identified Deterrence as a Primary Aim of Due Process*

The majority erred in its conclusion that deterrence is a primary aim of the due process constraint.[203] Due process protections arose not out of the Court's concern with deterring police arrangement, but rather out of the Court's concern with ensuring the reliability of an eyewitness's identification.[204] In reaching its conclusion, the majority incorrectly interpreted the Court's eyewitness identification jurisprudence and incorrectly relied upon the fact that the cases comprising this jurisprudence involved police arrangement.[205] Although the Court's eyewitness identification jurisprudence reflected a concern about the "corrupting effect[s]" of suggestion on reliability,[206] the majority's decision narrowed the focus to police-arranged suggestive circumstances.[207] The majority also placed too much emphasis on the fact that these cases involved police arrangement, for it failed to recognize that this merely reflects a practical fact of criminal proceedings.[208]

The Supreme Court has consistently recognized that the underlying concern of due process, first introduced in *Stovall*, is the Court's interest in ensuring the reliability of eyewitness identifications.[209]

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203. *See Perry*, 132 S. Ct. at 726 (majority opinion) (finding that "[a] primary aim of excluding identification evidence . . . is to deter law enforcement").

204. *Id.* at 735 (Sotomayor, J., dissenting).

205. *See id.* at 721, 725–27 (majority opinion) (noting that previous decisions focused on the presence of state action, disagreeing with the contention that the presence of police action in prior cases was mere coincidence, and arguing that a primary aim of exclusion was deterrence of improper police conduct).

206. *Id.* at 735 (Sotomayor, J., dissenting) (alteration in original).

207. *Id.* at 731.

208. *See id.* at 735 ("The vast majority of eyewitness identifications . . . use[d] in criminal prosecutions are obtained in lineup, showup, and photograph displays arranged by the police.").

209. *See* Stovall v. Denno, 388 U.S. 293, 301–302 (1967) (recognizing that due process may be violated when a confrontation was so suggestive that it led to a likely mistaken identification); Manson v. Brathwaite, 432 U.S. 98, 111–12 (1977) (noting that "[t]he driving force behind . . . *Stovall* . . . was the Court's concern with the problems of eyewitness identification"); Neil v. Biggers, 409 U.S. 188, 198 (1972) (explaining that "[i]t is . . . apparent that the primary evil to be avoided is a very substantial likelihood of irreparable misidentification" (citation omitted) (internal quotation marks omitted)).

Stovall, according to the Court's subsequent evaluation in *Brathwaite*, reflected the Court's concern that jurors not hear eyewitness testimony when such testimony lacks reliability.[210] Likewise, in *Biggers*, the Court identified "the primary evil to be avoided," as the increased "likelihood of irreparable misidentification."[211] As the *Biggers* Court explained, "[i]t is the likelihood of misidentification which violates a defendant's right to due process."[212] Furthermore, it is on this basis that the Court excluded, for the first and only time, the proposed eyewitness testimony in *Foster*.[213] Finally, in its most recent eyewitness-related decision prior to *Perry*, the Court concluded that "*reliability* is the linchpin in determining the admissibility of identification testimony."[214]

In other words, the Court's due process concern lies in the effects suggestion may have on the reliability of an eyewitness's identification.[215] The majority, however, recast this interest by claiming that a primary concern of the Court lies in the source, rather than the effect, of the suggestion.[216] In concluding that deterrence is a fundamental aim of due process protections, the *Perry* Court misinterpreted *Brathwaite*, *Coleman*, and *Wade*.[217] The majority's reliance on *Brathwaite* to support its contention that deterrence is a primary aim of the due process constraint is inappropriate, for the Court only discussed deterrence in this instance "because Brathwaite challenged [the Court's] two-step inquiry as *lacking* deterrence value."[218] Furthermore, the *Brathwaite* Court only listed deterrence as the "second fac-

210. *Brathwaite*, 432 U.S. at 111–12.

211. *Biggers*, 409 U.S. 198.

212. *Id.*

213. *Id.; see Perry*, 132 S. Ct. at 737 (Sotomayor, J., dissenting) (recognizing that "*Foster* is the only case in which [the Court has] found a due process violation").

214. *Brathwaite*, 432 U.S. at 114 (emphasis added).

215. *Perry*, 132 S. Ct. at 732.

216. *Id.* at 731. If the source of the suggestion is not law enforcement, no deterrable conduct took place; law enforcement officers cannot prevent something from occurring when it is outside of their control. Therefore, if deterrence is a "primary aim," as the majority argued, the source of the suggestion must be law enforcement. *See id.* at 726 (majority opinion) ("A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement . . . .").

217. *See id.* at 725–27 (interpreting these three cases).

218. *Id.* at 726, 736 (Sotomayor, J., dissenting); *Brathwaite*, 432 U.S. at 111–12.

tor."[219] As Justice Sotomayor pointed out, this language neither indicates that deterrence is a "primary aim" of the constraint, nor suggests that deterrence is absolutely essential to the *Brathwaite* holding.[220]

The majority also incorrectly reasoned that no due process violation occurred in *Coleman* "because nothing 'the police said or did prompted'" the identification.[221] As Justice Sotomayor pointed out, the majority took this language out of context, for it was originally used to further the contention that the witness's identification was reliable.[222] No due process violation occurred in *Coleman* because the "identifications were entirely based upon observations at the time of the assault," not merely because there was an absence of suggestive police conduct in arranging the lineup.[223] Furthermore, the majority's interpretation of this case conflicts with its earlier assessment of *Coleman* in *Biggers*. The *Biggers* Court explained that the witness's identification was admissible in *Coleman* because the "evidence could support a finding that the in-court identification was 'entirely based upon observations at the time of the assault.'"[224]

Lastly, the majority incorrectly concluded that "the risk of police rigging was the very danger to which the" *Wade* Court was responding when it recognized a right to counsel during lineup procedures.[225] To the contrary, the *Wade* Court fashioned an exclusionary rule to minimize the potential that a conviction would rest upon a misidentification.[226] The majority's reading of *Wade* also conflicts with the

219. *Brathwaite*, 432 U.S. at 112.

220. *Perry*, 132 S. Ct. at 736.

221. *See id.* at 726 (majority opinion) (quoting Coleman v. Alabama, 399 U.S. 1, 6 (1970)) (explaining the rationale behind the *Coleman* decision).

222. *Id.* at 736 (Sotomayor, J., dissenting); *see also Coleman*, 399 U.S. at 5–6 (explaining that the defendant's claim that the identification was unreliable as a result of unnecessarily suggestive police procedures had no merit because the procedures used were not suggestive).

223. *Coleman*, 399 U.S. at 5–6.

224. *Biggers*. 409 U.S. at 197–98 (quoting *Coleman*, 399 U.S. at 5–6).

225. *See Perry*, 132 S. Ct. at 726–27 (majority opinion) (discussing the *Wade* rationale).

226. *See Stovall*, 388 U.S. at 297 ("A conviction which rests on a mistaken identification is a gross miscarriage of justice. The *Wade* . . . rule[is] aimed at minimizing that possibility . . . .").

Brathwaite Court's prior assessment of the case, since that Court explained how concerns of reliability drove the decision in *Wade*.[227]

Aside from its improper reading of previous Supreme Court cases, the majority incorrectly relied upon the fact that there are no instances in its eyewitness jurisprudence where suggestion was caused by anyone other than law enforcement.[228] While true, the Court in its previous due process cases was concerned not with the sources of suggestive conduct, but rather with the effects of this conduct on reliability.[229] Police arrangement was discussed in the earlier cases simply because police conduct was present in some form.[230] Moreover, considering that there have only been a handful of Supreme Court cases involving due process protections, it is unsurprising that this handful of cases involved police arrangement.[231] Of the thousands of eyewitness identifications the State seeks to introduce each year, "[t]he vast majority . . . are obtained [through identification procedures] arranged by the police."[232] The majority failed to recognize this practical fact and, therefore, erred in holding that the source, rather than the effect, of suggestion drove the result in these cases.

B. In the Face of Significant Scientific Criticism of Due Process, the Perry *Court Should Have Revised the Current Measures of Reliability and Included All Suggestive Circumstances Within the Scope of the Constraint*

In reaching its conclusion, the majority relied on the same outmoded test that the Court promulgated nearly forty years ago in *Biggers*.[233] Given that the current framework has been the subject of longstanding scientific criticism, however, the Court should have

227. *See Brathwaite*, 432 U.S. at 112 ("*Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability.").

228. *See Perry*, 132 S. Ct. at 721, n.1 (noting that the Court had never required pretrial screening absent police involvement).

229. *See id.* at 731 (Sotomayor, J., dissenting) ("Our due process concern . . . arises not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification.").

230. *See supra* Part II.A.

231. *See Perry*, 132 S. Ct. at 735 (discussing the "practical reality" that police are often involved in obtaining identifications).

232. *Id.*

233. *Id.* at 724 (majority opinion).

reevaluated this framework.[234] Much like the New Jersey Supreme Court, the majority should have redefined the manner in which it evaluates reliability.[235] Moreover, to ensure reliability of eyewitness evidence, the *Perry* Court should have adopted a broader approach than that of New Jersey by including all suggestive circumstances within the scope of the revised due process constraint.[236]

1. *Similar to the New Jersey Supreme Court, the* Perry *Court Should Have Redefined Its Current Measures of Reliability*

Rather than continuing to rely upon the same due process framework, the Court should have reconsidered, in light of longstanding scientific criticism, the manner in which it evaluates the reliability of eyewitness identification. That is, the Court should have adopted the system and estimator variables outlined in *Henderson*,[237] rather than continue to use the five factors outlined in *Biggers*.[238] Although the due process concern lies in ensuring reliability of eyewitness testimony, the Court has remained stagnant by continuing to use an approach that does not adequately measure reliability.

As the New Jersey Supreme Court recognized in *Henderson*, eyewitness identifications are perhaps the most unreliable form of evidence used in criminal trials.[239] This assertion is supported, the court explained, by the relationship between misidentifications and wrongful convictions.[240] For example, of the defendants who have been exonerated on the basis of post-conviction DNA analysis, nearly seventy-five percent were identified by an eyewitness.[241] Astonishingly, in

234. *See infra* Part IV.B.

235. *See infra* Part IV.B.1. The scientific literature referenced in *Henderson* is sufficient for revising the due process constraint and therefore the Court does not need to conduct any additional research. Nearly all of the scientific literature referenced in this Note was discussed by *Henderson*.

236. *See infra* Part IV.B.2.

237. New Jersey v. Henderson, 27 A.3d 872, 896–911 (N.J. 2011).

238. Neil v. Biggers, 409 U.S. 188, 199–200 (1972).

239. *Henderson*, 27 A.3d at 885–86.

240. *Id.*

241. *Id.* at 886; *see also* GARRETT, supra note 23, at 48 (noting that 190 of 250 exonerees were misidentified by a witness). Defendants were either directly identified as being the assailant, or were said to have been in the vicinity when the crime occurred. *Id.* at 51. The majority of the exonerees in this particular study were convicted of rape. *Id.*

some instances, several witnesses independently misidentified these defendants.[242]

The *Henderson* court recognized that eyewitness memory is not like a videotape that can be "replay[ed]" inside the witness's head, but rather is "a constructive, dynamic, and selective process."[243] The witness's memory is affected by variables that may decrease the reliability of an identification.[244] The variables, which may affect the witness's memory and therefore the reliability of her identification, are divided into two subcategories: system variables and estimator variables.[245]

System variables, which are within the control of law enforcement, include whether the identification procedure was administered in a blind fashion, the content and existence of pre-identification instructions, the construction of the lineup, whether the witness was given any confirmatory feedback, whether the eyewitness had multiple opportunities to view the defendant during the course of the investigation, whether the individuals comprising the lineup were viewed sequentially or simultaneously, whether the police used composite sketches to produce an image of the suspect, and whether the police facilitated a one-man showup.[246] Take, for example, whether police conducted a pretrial lineup procedure in a blind fashion, that is, whether the officer conducting the pretrial lineup knew which individual in the lineup was the primary suspect. "[B]y consciously or unconsciously communicating to [a] witness[] which lineup member is the suspect," an officer may influence the witness's response.[247] "Even seemingly innocuous words and subtle cues—pauses, gestures, hesita-

242. GARRETT, *supra* note 23, at 50. This was the case in nearly forty percent of the exonerees studied. *Id.*; *see also* Bloodsworth v. State, 76 Md. App. 23, 55, 543 A.2d 382, 398 (1988) (explaining that the defendant was identified by five eyewitnesses); Christine E. White, Comment, *Clearly Erroneous: The Court of Appeals of Maryland's Misguided Shift to a Higher Standard for Post-Conviction Relief*, 71 MD. L. REV. 886, 886–87 (2012) (noting that Bloodsworth was exonerated on the basis of DNA testing).

243. *Henderson*, 27 A.3d at 895; *see also* GARRETT, *supra* note 23, at 48 ("[E]yewitness memory is not just fallible; more important, it is malleable.").

244. *Henderson*, 27 A.3d at 895.

245. *Id.*

246. *Id.* at 896–900. The list of system variables provided by the court is nonexhaustive. *Id.* at 920.

247. Sarah M. Greathouse & Margaret Bull Kovera, *Instruction Bias and Lineup Presentation Moderate the Effects of Administrator Knowledge on Eyewitness Identification*, 33 LAW & HUM. BEHAV. 70, 71 (2009).

tions, or smiles—can influence a witness' behavior."[248] What is further alarming is that the witness may not even be aware that such suggestion is occurring.[249]

Estimator variables, which are outside the control of law enforcement, include the witness's level of stress, whether the criminal used a weapon, whether the witness is a different race than the perpetrator, and the decay of the witness's memory over time.[250] As an illustration, take the instance of a victim being robbed at gunpoint. The presence of a gun may draw the witness's attention away from the assailant's face and onto the gun itself.[251] Thus, the presence of a visible weapon may decrease the witness's ability to make a reliable identification or provide an accurate description of the assailant.[252]

The way witnesses evaluate individuals when making an identification may also contribute to the likelihood of misidentification.[253] In a pretrial lineup, for instance, an eyewitness may use a "relative-judgment process" when selecting an individual as the perpetrator.[254] That is, the witness will "choose[] the lineup member who most resembles the culprit *relative to the other members of the lineup*."[255] As a result of making a relative judgment, the witness may make a positive identification, even if the actual perpetrator is absent from the lineup.[256]

Although the reliability of eyewitness identifications has been called into question, it is reasonable to ask why misidentifications are

248. *Henderson*, 27 A.3d at 896.

249. *Id.* at 896–97.

250. *Id.* at 904–07.

251. *Id.* at 904–05.

252. *Id.* at 905.

253. *See, e.g.*, Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOLOGIST 553, 560–61 (1993) [hereinafter Wells, *Eyewitness Identification*] (referencing studies that suggest that human cognitive processes operate differently when identifying individuals from photographs or lineups).

254. *Id.* at 560.

255. *Id.*

256. *Id.* In a study conducted by Professor Wells, 200 individuals viewed a staged crime. *Id.* at 561. One half of the participants were shown a lineup containing the criminal; the second half were shown a lineup containing all innocent fillers. *Id.* Even though both groups were told that the criminal might not be present in the lineup, nearly seventy percent of the individuals in the second group identified an innocent filler as the criminal. *Id.*

a problem given that a false identification itself does not necessarily result in conviction.[257] False identifications alone do not raise a concern about miscarriages of justice, "but rather [it is] the *certainty* with which such false identifications are sometimes made."[258] The witness's level of certainty raises a concern because, when considering whether or not to believe a witness, jurors rely heavily on the level of confidence with which the witness gives her testimony.[259] Furthermore, "there is considerable evidence that false identifications are often asserted with as much confidence as are accurate identifications,"[260] and certainty, like memory, is malleable.[261]

The danger of miscarriage of justice resulting from a misidentification is further compounded by the fact that jurors often hold beliefs about memory that are, in fact, contrary to scientific literature.[262] For example, many might believe that a victim to an armed robbery would never forget what the assailant, who held the gun to her head, looked like.[263] As noted above, however, reliability is affected adversely by both stress and the presence of a visible weapon.[264]

Under the current due process test, lower federal and state courts are to evaluate reliability by looking to five factors: (1) the opportunity to view the criminal, (2) the witness's level of attention, (3) the accuracy of the description given by the witness, (4) the witness's level of certainty, and (5) the lapse of time between the crime and the identification.[265] This test, however, "is deeply flawed . . . [for] it also includes some factors that do not actually" measure reliability.[266] For instance,

> three of those factors—the opportunity to view the crime, the witness' degree of attention, and the level of certainty at

257. *See* Gary L. Wells, *The Psychology of Lineup Identifications*, 14 J. APPLIED SOC. PSYCHOL. 89, 90 (1984) [hereinafter Wells, *Lineup Identifications*] ("It is important . . . to keep in mind that a false identification does not automatically convict anyone.").

258. Wells, *Eyewitness Identification*, *supra* note 253, at 564 (citation omitted).

259. Wells, *Lineup Identifications*, *supra* note 257, at 91.

260. *Id.*

261. Wells, *Eyewitness Identification*, *supra* note 253, at 565.

262. *Id.*

263. *See id.* (noting the common belief that those who experience traumatic situations "never forget a face" because of their focus on the incident).

264. *See supra* text accompanying notes 250–252.

265. Neil v. Biggers, 409 U.S. 188, 199–200 (1972).

266. GARRETT, *supra* note 23, at 63.

> the time of the identification—rely on self-reporting by eyewitnesses; and research has shown that those reports can be skewed by the suggestive procedures themselves and thus may not be reliable.[267]

Recognizing the inadequacy of the current due process framework as a measure of reliability, the *Henderson* court proposed a new framework that would examine system and estimator variables when gauging reliability.[268] Rather than assess reliability on the basis of the five *Biggers* factors, the *Henderson* court explained that all relevant system and estimator variables should be considered when there is evidence of suggestion.[269]

The reason why the Supreme Court should have abandoned the current measures of reliability in favor of the system and estimator variables outlined by the *Henderson* court is simple. Due process protections arose out of the Court's concern with ensuring reliability,[270] and the current *Biggers* factors inadequately ensure that an eyewitness's identification testimony is reliable.[271] Furthermore, evaluating the reliability of a potential eyewitness on the basis of the system and estimator variables outlined by the *Henderson* court reflects recent developments in social science and is a more reliable method by which to guarantee reliability.[272] In the face of nearly thirty years of scientific literature, the Court should have redeveloped its due process framework by using factors that better gauge reliability and abandoned the outmoded measures of reliability it now uses.

2. *To Adequately Ensure That Eyewitness Identifications Are Reliable, the* Perry *Court Should Have Included All Suggestive Circumstances Within the Scope of Due Process*

In addition to overhauling the measures of reliability, the Court should have included all suggestive circumstances within the scope of

267. State v. Henderson, 27 A.3d 872, 918 (2011).

268. *Id.* at 919.

269. *Id.* For a defendant to be entitled to a pretrial determination of an identification's reliability, however, the evidence of suggestion must usually be tied to a system variable. *Id.* at 920.

270. *See supra* Part IV.A.

271. *Henderson*, 27 A.3d at 918.

272. *See id.* at 922 (advocating that courts consider variables relating to eyewitness identifications that are generally accepted by the scientific community, and asserting that the new framework will better protect the right to a fair trial).

the due process constraint. In this regard, the *Henderson* court did not go far enough.[273] All suggestive circumstances, whether they are related to a system or estimator variable, have the potential to adversely affect the reliability of an eyewitness identification.[274] Put differently, the effects of suggestion are the same irrespective of whom or what caused the suggestion.[275] The *Perry* Court and the *Henderson* court, however, restricted the potential application of the due process constraint to instances where the police caused the suggestion.[276] Therefore, under either approach, a court will never need to consider whether the effects of suggestive circumstances, which are tied solely to estimator variables, warrant an application of the due process protections.

To restrict the scope of the due process constraint in this manner is to rely heavily upon the ability of the jury to weigh the reliability of an eyewitness's testimony.[277] Jurors, however, are largely unaware of how estimator variables actually affect the reliability of an eyewitness's testimony.[278] What is perhaps worse is that they often hold views that are contrary to scientific findings.[279] Jurors, simply put, place too much faith in eyewitness testimony, especially when that eyewitness is confident in her assertions.[280]

273. The *Henderson* approach requires suggestiveness related to police conduct to trigger the due process constraint. *See id.* at 920 (allowing for a pretrial hearing when a system variable is implicated). That is, if a suggestive circumstance is only suggestive as a result of estimator variables, which are out of law enforcement's control, the court will not apply due process. *Id.*

274. *Id.* at 922.

275. *Id.*

276. Perry v. New Hampshire, 132 S. Ct. 716, 730 (2012); State v. Henderson, 27 A.3d 872, 920 (2011). The *Perry* Court additionally seemed to suggest that the police conduct must be intentionally suggestive. *See Perry*, 132 S. Ct. at 734 (Sotomayor, J., dissenting) (noting that the "police-arranged" requirement "connote[s] a degree of intentional orchestration or manipulation").

277. *See Perry*, 132 S. Ct. at 728 (majority opinion) (explaining that the Court's approach relies heavily upon the role of jurors to weigh eyewitness testimony); *Henderson*, 27 A.3d at 923 (finding that jury instructions are sufficient in instances where the suggestion is tied solely to estimator variables).

278. *See Henderson*, 27 A.3d at 910 (internal quotation marks omitted) (finding "that laypersons are largely unfamiliar with scientific findings).

279. *Id.*

280. *See supra* notes 259–261 and accompanying text; Wells, *Lineup Identifications*, *supra* note 257, at 91 (noting that an eyewitness's confidence is the "primary predictor" of

The *Perry* Court cited to "procedural safeguards," such as the Sixth Amendment right to confront adverse witnesses, as a way to ensure that jurors properly weigh the reliability of eyewitness testimony.[281] Such an argument, however, cannot stand; of the nearly two hundred exonerees misidentified by a witness, "defense lawyers typically did cross-examine eyewitnesses, often aggressively."[282] In defense of its approach, the *Henderson* court suggested that revised jury instructions are sufficient to instruct jurors on how to properly weigh eyewitness testimony when that testimony has been subject to suggestion tied only to an estimator variable.[283] Much like the Supreme Court's reliance on procedural safeguards,[284] any reliance on jury instructions, no matter how informative, is misguided.[285] Jurors place too much faith in the confident eyewitness; are generally unaware of how suggestion affects reliability; and have perceptions that are largely unaffected by either procedural safeguards, such as cross-examinations or jury instructions.[286] Therefore, allowing suggestive eyewitness identification to be introduced at trial because police arrangement is nonexistent is contrary to the very foundation of due process.[287]

V. CONCLUSION

In *Perry v. New Hampshire*, the Court concluded that courts are not required, under the Due Process Clause, to conduct pretrial in-

whether jurors will believe her); Wells, *Eyewitness Identification*, *supra* note 253, at 564 (same).

281. *Perry*, 132 S. Ct. at 728.

282. GARRETT, *supra* note 23, at 48, 54.

283. *See Henderson*, 27 A.3d at 923, 925–26 (finding that jury instructions, not pretrial hearings, were appropriate when estimator variables were involved, and asking that the drafters of revised jury instructions consider both system and estimator variables).

284. *See supra* note 294 and accompanying text.

285. *See* Watkins v. Sowders, 449 U.S. 341, 356 (1981) (Brennan, J., dissenting) ("To expect a jury to engage in the collective mental gymnastic of segregating and ignoring such [identification] testimony upon instruction is utterly unrealistic."); BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 263–64 (1995) (noting that there is little support for the contention that a judge's instructions concerning the reliability of an eyewitness's testimony will aid jurors in weighing such evidence, and that such instructions do not effectively prevent misidentification).

286. *See supra* notes 278–280, 282, 285 and accompanying text.

287. *See supra* Part IV.A.

quiries into the reliability of eyewitness identifications made under suggestive circumstances not arranged by law enforcement.[288] The Court's determination that deterrence was a fundamental aim of the due process constraint was a consequence of the Court's misguided focus on the presence of suggestive, police-arranged procedures in its eyewitness identification jurisprudence.[289] The majority failed to recognize that the constraint arose out of the Court's concern with the reliability of eyewitness identifications and that police arrangement of the identification procedure—present in its eyewitness identification jurisprudence as a result of practical realities—was only discussed insofar as it affected reliability.[290] Aside from avoiding this error in interpretation, the Court should have revised the due process framework to better measure reliability and recognized that the due process constraint ought to apply in all suggestive circumstances.[291]

288. Perry v. New Hampshire, 132 S. Ct. 716, 730 (2011).

289. *See supra* Part IV.A.

290. *See supra* Part IV.A.

291. *See supra* Part IV.B.