No. 10-8974

In The Supreme Court of the United States

BARION PERRY,

Petitioner,

v.

NEW HAMPSHIRE,

Respondent.

On Writ Of Certiorari To The New Hampshire Supreme Court

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys and their clients to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. Founded in 1958, NACDL has more than 12,500 members nationwide – joined by ninety state, local, and international affiliate organizations with another 35,000 members. Its membership, which includes private criminal defense lawyers, public defenders, and law professors, is committed to preserving fairness within America's criminal justice system.

SUMMARY OF ARGUMENT

The New Hampshire courts deprived Petitioner of due process when, based solely on the absence of improper state action, they categorically refused to consider whether the suggestive circumstances of his

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3(a).

pre-trial identification created a very substantial likelihood of misidentification. Due process is concerned with the fairness and integrity of judicial proceedings and, in furtherance of that concern, requires special attention to certain limited categories of cases where the risk of an erroneous conviction is especially acute. Suggestive identifications, regardless of the cause of the suggestiveness, are one of those limited categories: experience shows that they present a particularly grave danger of producing an unfair trial. In such cases, a *per se* rule that precludes judicial scrutiny of the risk of misidentification before evidence of the identification is admitted, based solely on the presence of a single circumstance – the presence or absence of improper state action – rather than the Court-mandated analysis of the totality of the circumstances, cannot comport with due process. Improper state action does not necessarily have a greater impact on the reliability of the identification than any other factor, and "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1976).

As discussed in Point I, suggestiveness may imperil the reliability of an identification regardless of whether it arises from improper state action or another source. A suggestive identification is one in which the circumstances surrounding the identification prompt the witness to conclude that "this is the man" – that the individual being viewed is the one who committed the crime. Identifications made under

such circumstances present a heightened risk of unreliability for at least three reasons. First, witnesses who make identifications under suggestive circumstances are apt to remember the face they are seeing at the time of the identification as the face of the person who committed the crime. Second, they are likely to become hardened in their conviction that they identified the right person and their level of certainty may increase. Third, as a result, it is difficult to cross-examine such witnesses effectively and expose the insidious and often subtle effects of the suggestiveness. The rule this Court previously developed requiring suggestive identifications to be examined for reliability is designed to ensure that unreliable identifications do not reach the jury and fatally undermine the fairness of the trial.

Given that the core objective of the due process protections is to avoid erroneous deprivations of life and liberty at trial, not to regulate state conduct outside the courtroom and before trial, the New Hampshire Supreme Court's rule is ill-designed to advance that end. Suggestive identifications caused by inadvertent state action (as was the case with Petitioner) or by other factors (such as the media or a private investigator) may be equally or even more suggestive than those caused by improper or unnecessary state action and create all the same risks to the integrity of the fact-finding process. While the Court first developed this analysis in cases where the suggestiveness of the identification was the result of deliberate, or at least unnecessary, choices made by

law enforcement – who are ordinarily responsible for identifying the perpetrator – that factor should not be dispositive to the reliability analysis.

As shown in Point II, suggestive identifications are just one of a number of contexts where conditions present a heightened risk of erroneous fact-finding at trial and where, therefore, due process requires measures to protect the integrity of that process. Other examples include cases involving substantial pre-trial publicity unfavorable to the defendant, and cases involving communications with jurors outside the courtroom concerning the subject matter of the trial. In such cases, the issue is whether the jurors will be able to reach their verdict solely on the basis of the competent evidence and arguments presented at trial. Due process requires that jurors be protected from external influences that may impair that ability, regardless of whether private or public actors are responsible for those influences. Exactly the same considerations should apply here.

ARGUMENT

I. THE DUE PROCESS CLAUSE'S PROTECTIONS AGAINST SUGGESTIVE IDENTIFICATIONS SHOULD NOT DEPEND ON WHETHER THE SUGGESTIVENESS WAS THE RESULT OF IMPROPER STATE ACTION

It is elementary that the "function of legal process, as that concept is embodied in the Constitution,

and in the realm of factfinding, is to minimize the risk of erroneous decisions" and that the "quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Heller v. Doe*, 509 U.S. 312, 332 (1993) (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979)). The need to minimize the risk of error is never more acute than in criminal trials, where the defendant's liberty interest is "almost uniquely compelling." *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985) (adding that "the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern"). Due process safeguards exist in large part to "enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* at 81. In sum, a central focus of due process is to protect the integrity of the fact-finding process, *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (citation omitted), and to protect a "criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom," *Estes v. Texas*, 381 U.S. 532, 593 (1965) (Harlan, J., concurring).

In this context, this Court has recognized that "suggestive" identifications present a particularly severe risk of unreliability, and therefore create a special due process concern when they are admitted at trial. Indeed, according to at least one scientific study cited by the Court, "'[t]he influence of improper suggestion upon identifying witnesses probably

accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined.'" *United States v. Wade*, 388 U.S. 218, 228-29 (1967) (citing Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 26 (1965)); *see also Brathwaite*, 432 U.S. at 112 (noting that suggestion exacerbates the effect of other circumstances that impair the reliability of identifications). As a result of these concerns, the Court mandated that before a suggestive identification may be admitted, a trial court must assess the particular reliability of the identification in the totality of the circumstances. *See Neil v. Biggers*, 409 U.S. 188, 199 (1972).

While this Court has never precisely defined what makes an identification "suggestive," its usage in the seminal eyewitness identification cases shows that the term refers to circumstances that prompt the witness to infer "that's the man" – *i.e.*, that the person she is viewing committed the crime. *See Wade*, 388 U.S. at 236 (observing that the "accused's fate" may be determined, not in the courtroom, but at the suggestive pre-trial confrontation that causes the witness to say "that's the man"). This definition accords with ordinary usage and with references to "suggestion" by this Court in other contexts and by other courts in identification cases.[2]

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[2] *See, e.g.*, *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting) ("studies show that children are substantially more vulnerable to suggestion than adults," with potential

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The potential for suggestiveness arises because there are three stages to an identification: an initial act of witnessing the crime; a subsequent pre-trial viewing of the defendant, who may or may not be the same person seen committing the crime; and the admission of identification evidence at trial, either of the pre-trial identification or an in-court identification (or both). When the middle stage is suggestive, it can lead to several types of concerns about the resulting identification evidence.

First, when the circumstances of the later viewing themselves convey the suggestion or inference that the individual is the perpetrator, it has the power to alter the witness's memory from the initial stage in a way that renders his subsequent identification inaccurate. This Court has specifically recognized the danger that a witness exposed to a suggestive viewing may unconsciously transfer his memory of

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impairment of the reliability of their testimony); *Rock v. Arkansas*, 483 U.S. 44, 60-61 (1987) (discussing measures courts may take to diminish the impact of "suggestion" on the accuracy of hypnotically-refreshed testimony); *Thigpen v. Cory*, 804 F.2d 893, 896 (6th Cir. 1986) (an "individual's appearance in a line-up suggests to a witness that the person is in police custody for some reason" and "is likely to associate that person with the crime to some degree in the witness' mind"); *Green v. Loggins*, 614 F.2d 219, 222 (9th Cir. 1980) (risk of "suggestiveness" is diminished when circumstances do not give the witness any "indication . . . that 'this is the man'"); *see also* Webster's II New College Dictionary (1995), at 1103 (defining "suggestive" as "[t]ending to suggest thoughts or ideas" or "[c]onveying a suggestion or hint: indicative").

the defendant's face from the suggestive identification onto his memory of the face of the perpetrator, increasing the risk of a subsequent misidentification. *See Simmons v. United States*, 390 U.S. 377, 383-84 (1968) (noting, after describing several hypothetical circumstances that were suggestive, that "[r]egardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification") (footnote and citation omitted).

Second, suggestive circumstances influence a witness's views concerning an identification. They may harden the witness's conclusion that the defendant is the perpetrator. *See, e.g., Wade*, 388 U.S. at 229 ("'[i]t is a matter of common experience that, once a witness has picked out the accused . . . , he is not likely to go back on his word later on. . . .'") (footnote and citation omitted). They also may inflate a witness's certainty concerning an identification, even when that identification is incorrect.

Finally, the insidious effect of suggestiveness is difficult to expose through the usual tools available to the defense at trial, such as cross-examination. Even if the cross-examiner is aware of all the suggestive circumstances that were present and is able to question the witness in a way that draws those circumstances out, it is difficult for a jury to evaluate the typically subtle effects of suggestiveness, particularly

when the witness comes across as credible because she truly believes, incorrectly, that the person she identified is the perpetrator. *Watkins v. Sowders*, 449 U.S. 341, 356-57 (1981) (Brennan, J., dissenting) (explaining that cross-examination cannot protect the accused in suggestive identification circumstances because "the jury is likely to give the erroneously admitted evidence substantial weight, however skillful the cross-examination").

Serious as these concerns were when the Court first recognized them, they are even more grave today given the accumulation of research that documents the extreme risk of misidentification and the concomitant risk of erroneous deprivation of life and liberty arising from suggestive identifications. *See* Petr. Br. at 17-22; Amicus Br. of Innocence Network at 11-14. These more recent studies confirm that there is a heightened risk that a jury will not properly weigh the reliability of identification evidence that has potentially been influenced by suggestive circumstances surrounding the identification.

The New Hampshire Supreme Court's test, which focuses on whether the suggestiveness of an identification arose from "improper state action," artificially curtails the due process inquiry. JA 10a (citing *State v. Addison*, 160 N.H. 792, 801 (Oct. 19, 2010)); *see also id.* at 9a (citing *Addison*, 160 N.H. at 800 (stating that the first step is to determine "whether the identification procedure was impermissibly or unnecessarily suggestive") and citing *State v. King*, 156 N.H. 371, 374 (2007)). It does not address the core due process concern of reliability; it leads to

inconsistent application; and it does not fit the nature of the rights at stake.

To begin with, none of the dangers associated with suggestive identifications turn on the existence of improper state action – or state action at all, for that matter. While this Court made its seminal pronouncements on suggestive identifications in cases where the suggestiveness arose directly from the identification procedures employed by the police, that was surely a reflection of the typical factual scenario,[3] not the internal logic of the doctrine. After all, the reliability of the identification itself – which is the "linchpin in determining the admissibility of identification testimony," *Brathwaite*, 432 U.S. at 114 – has nothing to do with whether the suggestiveness derives from actions of law enforcement or not. *See Simmons*, 390 U.S. at 383-84 (suggestive identifications potentially reduce the reliability of trial testimony "[r]egardless of how the initial misidentification comes about"); *see also* O. Raban, On Suggestive and Necessary Identification Procedures, 37 Am. J. Crim. L. 53, 61 (Fall 2009) (after *Biggers* and *Brathwaite*, "whether necessitated by circumstances or completely gratuitous, the Due Process question remained the

[3] There can be little doubt that identifications orchestrated by law enforcement constitute the vast majority of all pre-trial identifications. After all, it is law enforcement that typically gathers evidence after a crime occurs in order to identify the perpetrators and, as part of that evidence-gathering process, has the power to provide eye witnesses to the crime with a later opportunity to view potential suspects.

same – namely, whether the identification was reliable"). It is difficult to understand, for example, why a private investigator, or a media campaign that saturated a market with images of the defendant identified as the perpetrator of a crime, could not have an equally suggestive influence over a witness as a state-orchestrated line-up.

In particular, the focus on whether any state action was "improper" is utterly irrelevant to the question of whether an identification is suggestive. Here, for example, the scene that the witness viewed was of Petitioner standing next to one of the responding officers in the parking lot where the car was burglarized, after Petitioner was directed to remain with another officer. JA 43a, 48a-49a. In *United States v. Wade*, the witness was inadvertently able to observe the defendant standing in the custody of police officers in a hallway just before the "official" line-up occurred. 388 U.S. at 234. In each of these situations, the "message" being conveyed that the defendant was under suspicion – and even that the police believed he was the perpetrator – may have been *more* powerful than that created by an impermissibly suggestive line-up. When the defendant is already being implicated in the crime, it should make little difference to the *Biggers* analysis or due process whether law enforcement was *trying* to create a suggestive scenario. *See, e.g., Wade*, 388 U.S. at 229 ("[S]uggestion can be created intentionally or unintentionally in many subtle ways.").

An analogous situation arose in *Rock v. Arkansas*, 483 U.S. 44 (1987), which considered a defendant's due process challenge to a state law that categorically prohibited her from introducing her own hypnotically-refreshed testimony in her criminal trial. The Court acknowledged that the subjects of hypnotic treatment are prone to suggestion (and, in addition, may undergo "'memory hardening,' which gives [them] great confidence in both true and false memories, making effective cross-examination more difficult"), such that state statutes barring or limiting such testimony are aimed at protecting a legitimate interest in the reliability of the evidence at trial. *Id.* at 60. Nevertheless, the Court concluded that the prohibition adopted by the State of Arkansas was unduly broad and arbitrary, since not all such testimony is unreliable. *Id.* at 60-61. The Court concluded that reliability must be judged in the individual case based on all the traditional factors.[4] Thus, in the context of evidence

[4] As this example suggests, many procedural and evidentiary rules function as a hedge to avoid a due process violation: if applied vigilantly, they protect the trial from being tainted by the introduction of evidence so unreliable that it offends due process. Another example is the requirement that the trial court serve as a gatekeeper testing the reliability of proposed expert evidence. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-91 (1993) (trial judges must ensure reliability of expert testimony). Amicus submits that if the Rules of Evidence did not require courts to exclude sufficiently unreliable expert evidence, at a certain threshold due process would require such exclusion. Indeed, the Court made a similar observation in the confrontation clause context in *Bruton v. United States*, 391 U.S. 123, 136 n.12 (1968), where it observed that

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procured by suggestive means, *Rock* shows that courts must apply procedures that balance the need to screen out potentially unreliable evidence against the possibility that the evidence at issue may be reliable despite its suggestiveness; that this screening cannot be done with sweeping, mechanically-applied rules; and, most significantly for the instant case, that the same dangers of unreliable suggestiveness can be equally present whether or not a state actor is responsible.

Finally, as Petitioner explains, whether there was any improper state action speaks to the wrong issue. *See* Petr. Br. at 23-27. The focus of the due process analysis is the reliability of the evidence presented at trial, not the deterrence of inappropriate police conduct. The conducting of even an intentionally suggestive identification procedure, by itself, does not result in a constitutional violation. *See Brathwaite*, 432 U.S. at 113 n.13 ("Unlike a warrantless search, a suggestive pre-indictment identification does not in itself intrude upon a constitutionally protected interest. Thus, considerations urging the exclusion of evidence deriving from a constitutional violation do not bear on the instant problem.").[5] Rather, it is the admission

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"the reason for excluding this evidence [the confession of the petitioner's co-defendant] as an *evidentiary* matter also requires its exclusion as a *constitutional* matter" (emphasis in original).

[5] It is for this reason that any reliance on *Colorado v. Connelly*, 479 U.S. 157 (1986), is misguided, as persuasively explained in Petitioner's brief at 29-33.

into evidence of a suggestive and unreliable identification that constitutes the violation. *Id.* at 112 (holding that the "concern" is "that the jury not hear eyewitness testimony unless that evidence has aspects of reliability").

The New Hampshire Supreme Court's rule fails to comport with due process because (i) it does not make reliability the linchpin in determining the admissibility of the identification evidence, and (ii) it does not require the trial court to consider the totality of the circumstances or weigh the effect of the suggestiveness against the reliability of the identification. *See Brathwaite*, 432 U.S. at 114. All of the factors bearing on the reliability of the suggestive identification drop out of the New Hampshire Supreme Court's analysis because it elevates a single consideration – whether "improper state action" was present – as a prerequisite for any further due process protection. That procedure is incompatible with this Court's prior rulings, the policies behind those rulings, and logic.

Furthermore, there should be no concern that applying a *Biggers* analysis to non-state-orchestrated identifications will prove overly burdensome to trial courts. Far from opening the flood gates, Amicus submits that the cases where suggestiveness arises independently of any state action (*e.g.*, pre-trial publicity) or as a result of inadvertent state action (as is the situation with respect to Petitioner) will be few and far between. It is also important to consider that the rule Petitioner is requesting – requiring trial courts to perform the *Biggers* analysis in the uncommon

circumstance of a suggestive identification that was not caused by improper state action – is a relatively simple exercise in a discrete and limited number of cases. The rule would not result in the *per se* exclusion of a category of evidence, or even mandate a pretrial reliability hearing. Rather, the trial court would merely need to assess, before identifications that are shown to be made under suggestive circumstances are admitted into evidence, whether such identifications are so unreliable as to create "'a very substantial likelihood of irreparable misidentification.'" *Biggers*, 409 U.S. at 197 (quoting *Simmons*, 390 U.S. at 384).

II. IN OTHER CIRCUMSTANCES WHERE THE RELIABILITY OF THE FACT-FINDING PROCESS IS AT HEIGHTENED RISK, THIS COURT HAS IMPOSED DUE PROCESS SAFEGUARDS WITHOUT REGARD TO WHETHER THE RISK IS CAUSED BY IMPROPER STATE ACTION

This Court has recognized a variety of other circumstances that pose a risk to the integrity of the fact-finding process and the reliability of the evidence presented to the jury. In each of these circumstances, it has fashioned rules in the name of due process designed to prevent the tainting of the jury with prejudicial information or evidence that is unreliable or incompetent. *See Bruton v. United States*, 391 U.S. 123, 132 n.6 (1968) ("An important element of a fair

trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence."). In none of these contexts, however, has the due process analysis turned on the existence of improper state action.

For example, in cases involving prejudicial pretrial publicity, the key factor the Court has considered is whether the *effect* of the publicity has so contaminated the jury that it can no longer fairly and impartially consider the evidence of guilt or innocence. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (considering whether there is a reasonable likelihood that prejudicial news prior to trial prevented a fair trial); *Estes*, 381 U.S. at 546-47; *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). The test is whether the jury's verdict "will be induced only by evidence and argument in open court, and not by *any* outside influence, whether of private talk or public print." *Skilling v. United States*, ___ U.S. ___, 130 S. Ct. 2896, 2913 (2010) (emphasis supplied) (citing *Patterson v. Colorado ex rel. Att'y Gen. of Colo.*, 205 U.S. 454, 462 (1907)). The *causes* of the publicity are beside the point; the issue is the impact the publicity will have on the jury.

For example, in *Rideau*, although the prejudicial publicity (the broadcast of an interview with the defendant on local television) was carried out with the active cooperation and participation of local law enforcement officers, the Court expressly held that "the question of who originally initiated the idea of

the televised interview is, in any event, a basically irrelevant detail." 373 U.S. at 726. What was relevant was that for members of the local venire pool, the televised "spectacle" of the interview to which they were pervasively exposed made fair and objective consideration of the evidence presented at trial impossible.

Similarly, in *Estes*, where the Court criticized the use of cameras in the courtroom during a criminal trial on due process grounds, one of the key reasons was the probable detrimental effect on the quality of witness testimony. In language highly reminiscent of its analysis of suggestiveness in the identification cases, the Court noted that the impact on a witness of knowing he is being viewed by a vast audience is that "memories may falter," "accuracy of statement may be severely undermined," and a "natural tendency toward overdramatization" may occur. 381 U.S. at 546; *see also id*. at 591 (Harlan, J., concurring) (describing how, under the glare of intense public interest, the "timid" witness may become more timid, and the "cocky" witness more cocky). These possibilities were viewed as carrying "grave potentialities" for casting doubt on the integrity of the fact-finding process. *Id*. at 592. Again, the baleful effect of media coverage did not derive from any state action, proper or improper.

Due process also bars communications with jurors made in circumstances that may influence their impartiality, regardless of whether such communications arise from improper state action. For

example, in *Remmer v. United States*, 347 U.S. 227, 229 (1954), the Court held that "[i]n a criminal case, any private communication . . . , directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . ." The analysis does not depend on whether the jury became tainted due to the conduct of public or private actors. The due process protections were aimed at ensuring that the jury would be able to do its job fairly, regardless of the cause of the taint. Due process has exactly the same aim here.

Even when the influence that taints the jury's deliberations *is* caused by improper state action, the Court has made clear that the origin of the taint is not the core due process concern. For instance, in *Turner v. Louisiana*, 379 U.S. 466, 468 (1965), two deputy sheriffs who were the two principal witnesses for the prosecution were in "close and continual association" with the jurors during the trial. In overturning the conviction on due process grounds, the Court noted that "[i]t would have undermined the basic guarantees of trial by jury to permit this kind of association between the jurors and two key prosecution witnesses who were *not* deputy sheriffs." *Id.* at 474 (emphasis in original). The point was that "minimal standards of due process" require a verdict to be based upon the evidence developed at the trial, *id.* at 472-73, not impressions of witness credibility that the jurors developed outside the trial. The due process protections, therefore, are the same regardless of

whether the persons who had improper contacts with the jury are state actors.[6]

In short – and in contrast to the premise of the New Hampshire rule at issue in this case – in various situations where there is a heightened risk of unfairness at trial, due process requires measures sensitively designed to ensure the quality of the fact-finding at trial, not to regulate state conduct before trial.

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[6] The imperative to ensure that jurors decide cases based on reliable and competent evidence, rather than other, external factors, similarly motivates the Court's due process decisions curtailing the practice of making defendants appear at trial in shackles. In *Deck v. Missouri*, 544 U.S. 622, 629 (2005), the Court held that due process "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination . . . that they are justified by a state interest specific to a particular trial." Among the principles underlying this holding is the recognition that "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Id.* at 630; *Illinois v. Allen*, 397 U.S. 337, 344 (1970) ("the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant"); *see Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (noting, in holding that due process prohibits requiring defendants to be tried wearing prison clothes, that "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment" and is "likely to be a continuing influence throughout the trial"). Although these considerations may in a specific case yield to countervailing interests such as security, it is clear that the trial court must undergo an assessment of the relevant circumstances to determine whether the state's need is great enough to overcome the interest in an untainted jury. *See Deck*, 544 U.S. at 629, 634-35.

CONCLUSION

For all the foregoing reasons, the Court should vacate the decision of the New Hampshire Supreme Court and remand the case for proceedings consistent with a holding that the due process clause does not require a criminal defendant to show improper state action by the police in order to challenge the admissibility of an identification arising from suggestive circumstances.

Respectfully submitted,

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