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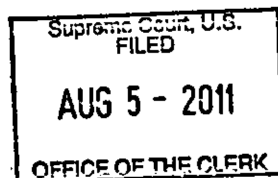
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No. 10-8974

IN THE

Supreme Court Of The United States

BARION PERRY,

Petitioner,

v.

NEW HAMPSHIRE,

Respondent.

On Writ of Certiorari
to the Supreme Court of New Hampshire

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF PETITIONER, SUPPORTING REVERSAL

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Wisconsin v. DuBose,
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Edwin M. Borchard, *Convicting the Innocent* (1932) 6

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Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal,* 79 Ky. L.J. 259 (1991) 13

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Gary L. Wells & Donna M. Murray, *What Can Psychology Say, About the Neil v. Biggers Criteria for Judging Eyewitness Accruacy?*, 63 J. Applied Psychol. 347 (1983) 12

Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol. Pub. Pol'y & L. 765 (1995) 12

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INTEREST OF *AMICUS CURIAE* [1]

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The sixty-six current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, and New Zealand.[2] The

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1 Pursuant to Rule 37.3, a letter of consent from each party accompanies this filing. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

2 The member organizations include the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware),

Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented. Network members pioneered the post-conviction DNA model that has to date exonerated nearly 300 innocent persons, and they have served as counsel in most of these cases.

The vast majority of individuals exonerated by DNA testing were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. Many of those misidentifications were made in the context of suggestive behavior by a third party -- typically by law enforcement, but often by other sources, such as family, friends, and the media. As a result, in order to minimize the risk of wrongful convictions based on eyewitness misidentifications, the Network has a compelling interest in ensuring that

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Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

the Fifth and Fourteenth Amendment Due Process Clauses guard against the use at trial of any suggestive identification that is so unreliable as to create a significant risk of misidentification.

SUMMARY OF ARGUMENT

Decades ago, this Court anticipated what the recent flood of DNA exonerations would ultimately confirm: eyewitness identifications infected by suggestion present a unique threat to the truth-finding function of the trial process. Despite the demonstrated unreliability of such identifications, lay jurors often nonetheless credit eyewitnesses who turn out to be wrong, resulting in miscarriages of justice. Responding to this unique threat, the Court imposed due process limitations on the use of such evidence, holding in a series of cases that eyewitness testimony infected by suggestion will not be admissible in criminal trials absent an independent showing of reliability.

The narrow question before the Court is whether these due process protections apply in cases where the suggestive circumstances were not intentionally orchestrated by police. Because suggestive circumstances pose the same threat to the fairness of trial regardless of who orchestrates them, the Court should answer with a resounding "yes." As this Court noted many years ago, it is not the source of the suggestive circumstance that creates the due process concern but rather "[i]t is *the likelihood of misidentification* which violates a defendant's right to due process." *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (emphasis added). "[R]eliability," the Court later reiterated in *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977), "is the linchpin in determining the *admissibility* of

identification testimony." 432 U.S. at 114 (emphasis added).

As we discuss below, the due process touchstone should remain reliability, as the constitutional concern has always been that identifications that emanate from suggestive circumstances undermine the accuracy and fairness of the *trial* process -- not whether police wrongdoing has occurred before trial. That is enough to resolve the narrow question presented. But because the Court has not addressed the issue recently, and because it will likely need to make some mention of the reliability analysis in remanding this case, *amicus* writes separately to alert the Court to an analytical problem in the lower courts that, when combined with recent advances in behavioral science research, has frequently distorted the due process reliability analysis in ways this Court never could have intended.

In its decision in *Manson*, the Court identified a set of reliability factors for courts to consider in deciding whether an eyewitness identification that was the product of suggestive circumstances should be admitted, including the witness's degree of attention, opportunity to view the perpetrator, level of certainty, and the time between the crime and the identification. *Manson*, 432 U.S. at 114. The Court expressly labeled these factors as illustrative and non-exclusive, and there is no indication the Court intended them to be applied without regard to advances in scientific research.

Nonetheless, in the past decades, many courts have mistakenly treated the reliability factors

discussed in *Manson* as if they were frozen in time. Those courts have forgotten that this Court's focus in *Manson* was on reliability, and they have ignored a host of significant scientific advances that have demonstrated flaws in some of the factors listed by *Manson* and identified other factors that could greatly aid the reliability analysis.

This Court did not intend such a result and should thus make clear that courts applying the *Manson* reliability factors must not lose sight of their fundamental purpose: to prevent the admission of an identification emanating from circumstances so suggestive as to create a substantial likelihood of a miscarriage of justice. On this point, overall reliability is the key, and courts should determine the admissibility of suggestive identifications against that standard.

ARGUMENT

I. This Court Has Long Recognized the Significant and Unique Danger that the Admission Of Unreliable Eyewitness Testimony Poses For the Criminal Justice System Generally and Criminal Trials In Particular

The Court has long recognized the significant and unique dangers that the admission of unreliable eyewitness testimony can pose for the criminal justice system. Forty-five years ago, long before the era of exculpatory DNA evidence, this Court described "the annals of criminal law" as "rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Indeed, as early as 1932, Yale law professor Edwin Borchard studied 65 wrongful conviction cases and

found that "the major source of these tragic errors is the identification of the accused by the victim." *See* Edwin M. Borchard, *Convicting the Innocent*, xiii (1932). By the time of the Court's decision in *Wade,* "[t]he vagaries of eyewitness identification" were already "well-known." *Wade*, 388 U.S. at 228.

This Court also fully understood that suggestive circumstances are the primary cause of this problem. As the Court explained in *Wade*, "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor." *Id.* at 229 (quoting Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 26 (1965)). Professor Borchard likewise found in his study that a major factor in misidentifications is "the desire . . . to support, consciously or unconsciously, an identification already made by another." Borchard, *Convicting the Innocent*, xiii (1932). So apparent to the Court was the unique prevalence and danger of suggestive identifications that, in *Stovall* v. *Denno,* 388 U.S. 293, 301-02 (1967), it held that a defendant could allege that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." In a series of subsequent cases, the Court re-affirmed that the admission at trial of suggestive identifications can potentially violate a defendant's due process rights. *See, e.g., Simmons v. United States*, 390 U.S. 377, 384 (1968); *Foster v. California*, 394 U.S. 440, 442 (1969); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Neil v. Biggers*, 409 U.S. 188 (1972); *Manson v. Braithwaite*, 432 U.S. 98 (1976).

And this Court has long been clear as to the reason suggestive identifications pose a threat to

due process. As the Court put it in *Biggers*, "[i]t is *the likelihood of misidentification* which violates a defendant's right to due process." 409 U.S. at 198 (emphasis added). "[R]eliability," the Court later reiterated in *Manson*, "is the linchpin in determining the *admissibility* of identification testimony." 432 U.S. at 114 (emphasis added). What undergirds the Court's due process concerns, in other words, is not the *act* of a suggestive identification, but rather its *consequences* -- *i.e.*, the specter of a misidentification *at trial* and its corrosive effect on the fairness of that trial. Accordingly, this Court has made clear that "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *See id.* at 113 n.13. Rather, it is the subsequent *admission at trial* of such an identification that violates the Constitution. The admission of an identification in a criminal trial, of course, is state action subject to the Due Process Clause. Nowhere in any of its opinions has the Court ever indicated that the admission of a suggestive and unreliable identification would violate due process only if the suggestive circumstances had been orchestrated by law enforcement.

II. The DNA Exonerations Have Confirmed This Court's Concerns About the Unique Dangers Posed By Unreliable Eyewitness Testimony

In recent years, the spate of wrongful convictions exposed by DNA evidence and other means has borne out the Court's long-held concerns about the reliability of eyewitness identification

evidence in general and suggestive identifications in particular. In addition, these exonerations have further demonstrated that the cause of a suggestive identification is irrelevant to whether it contributes to an unfair trial and a wrongful conviction.

According to one study, eyewitness misidentification testimony contributed to the underlying convictions in 76% of the first 250 post-conviction DNA exonerations that occurred in the United States since 1989.[3] Another study of all exonerations from 1989 through 2003 (both DNA and non-DNA) found that 64% of the wrongful convictions involved at least one mistaken identification. *See* Samuel R. Gross *et al.*, *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542 (2005) ("The most common cause of wrongful convictions is eyewitness misidentification."). And in its 1996 study of 28 DNA exonerations, the Department of Justice found that, in a majority of the cases, eyewitness misidentifications served as "the most compelling evidence" at trial. *See* U.S. Dep't of Justice, Nat'l Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Pub. No. NCJ 161258, 24 (1996), https://www.ncjrs.gov/pdffiles/dnaevid.pdf.

To be sure, suggestive police procedures did produce many or most of these eyewitness misidentifications. But as some of the recent DNA exonerations demonstrate, other sources, such as family, friends, and media reports, can produce

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[3] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 9 (2011).

equally pernicious contamination of eyewitness memory -- with an equally corrosive effect at trial.

Take the case of Michael Blair. In 1994, a Texas jury convicted Blair of murdering a seven-year-old girl and sentenced him to death. Three eyewitnesses told police they saw Blair on the day of the victim's disappearance in the park where the victim had last been seen. But by the time the witnesses identified Blair, his picture had already appeared in the news media. In fact, two of these witnesses testified that they identified Blair as the man they had seen in the park only *after* they saw his picture on television. Blair's appearance in the media thus may have influenced the witnesses in identifying Blair as their attacker. Nevertheless, these eyewitness identifications served as key evidence in the prosecution's case, and they were so powerful that it took the jury just 27 minutes to convict Blair. Blair was eventually exonerated after a post-conviction DNA analysis excluded him as the source of biological material found under the victim's fingernails.[4]

The prodding of friends and family members can also produce a suggestive identification, as the wrongful rape conviction of Billy James Smith demonstrates. A man with a knife approached the victim in the laundry room of an apartment building and dragged her into a grassy field near the complex. The perpetrator put a hat over his face and proceeded to rape the victim. After the victim told her boyfriend of the rape, the boyfriend thought the perpetrator could have been Smith,

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[4] *Know the Cases: Michael Blair*, available at http://www.innocenceproject.org/Content/Michael_Blair.php (last visited Aug. 2, 2011).

and went down to Smith's apartment. When Smith appeared on the balcony, the victim identified him as the attacker. The supposition by the victim's boyfriend that Smith was the culprit, and his subsequent confrontation with Smith in view of the victim, suggested to the victim that it was indeed Smith who had raped her. Smith was convicted and sentenced to life in prison, largely on the basis of the victim's testimony. DNA testing performed on the rape kit in 2006 showed that the semen was not Smith's. Smith ultimately served nearly 20 years for a rape he did not commit.[5]

As these DNA exonerations demonstrate, suggestive identifications can have a variety of sources other than law enforcement. But no matter the source, the effects of suggestive identifications are the same: an increased risk of an irreparable mistaken identification and the very real potential for a wrongful conviction. It is precisely because of this concern for evidentiary reliability -- a concern that is implicated by suggestive identifications of all types -- that this Court has repeatedly recognized that the admission at trial of a suggestive identification can violate a defendant's due process rights. This Court should now make clear what has long been implicit from its decisions and what two decades of exonerations have conclusively proven: that the admission at trial of a suggestive identification can amount to a due process violation even if the suggestive circumstances are not orchestrated by law enforcement.

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[5] *Know the Cases: Billy James Smith*, available at http://www.innocenceproject.org/Content/Billy_James_Smith.php (last visited Aug. 2, 2011).

III. In Reaffirming *Manson*'s Continuing Importance To the Fundamental Fairness Of Criminal Trials, the Court Should Act To Ensure That the Due Process Analysis Reflects the Significant Development Of Scientific Knowledge Over the Past Three Decades

As noted above, this Court should reaffirm that *Manson*'s due process concerns apply any time the prosecution offers unreliable eyewitness testimony tainted by suggestion at trial, and not simply when that evidence is the product of intentional police misconduct. In so holding, and remanding to the lower court to conduct the required reliability analysis, this Court should provide some guidance as to the nature of the gate-keeping assessment.

A. Behavioral Science Research Over the Past Thirty-Five Years Has Proven That the *Manson* Reliability Test Is Not Currently Meeting the Objectives the Court Set For It

Guidance on remand is necessary because, in the decades since this Court last addressed the issue, the *Manson* reliability test has not met the objectives the Court set for it. A part of the problem has been a misplaced focus by lower courts on police misconduct -- an error the Court's decision in this case should bring to an end. However, some of the lower court confusion has stemmed from a faulty and sometimes reflexive adherence to the list of non-exhaustive factors that *Manson* set forth as

relevant to the reliability determination. Such a reflexive analysis diverts focus from the ultimate question of reliability. More fundamentally, it ignores the past thirty-five years of scientific research, which has identified problems when the *Manson* factors are considered without separating out the corrupting influence of suggestion.

Many empirical studies analyzing the *Manson* factors have concluded that some of them have little or no correlation to the accuracy of an identification.[6] For example, the factor upon which juries place the greatest weight is witness certainty. Cutler & Penrod, *Mistaken Identification, supra* n.6, at 181-209. But the vast majority of studies have confirmed that little or no correlation exists between a witness's certainty and the accuracy of the identification. Researchers have also characterized three of the four remaining *Manson* factors as subjective "self report" variables recalled by the witness. Since a suggestive identification procedure can contaminate a

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[6]*See, e.g.*, Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*, 24 Law & Hum. Behav. 581 (2000); Gary L. Wells & Amy L. Bradfield, *Good, You Identified the Suspect: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360, 374-75 (1998) [hereinafter *Good, You Identified the Suspect*]; Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 Psychol. Pub. Pol'y & L. 765, 785 (1995); Gary L. Wells & Donna M. Murray, *What Can Psychology Say, About the Neil v. Biggers Criteria for Judging Eyewitness Accruacy?*, 63 J. Applied Psychol. 347, 347 (1983). *See generally* Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, And The Law* (1995) [hereinafter *Mistaken Identification*].

witness's memory of the event, these "self report" variables often do not accurately reflect the actual circumstances at the time of the crime. Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 Ark. L. Rev. 231, 265 (2000); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky. L.J. 259, 276-79 (1991).

For example, in an important study published in 1998, subjects viewed a security video and tried to identify the gunman from a photo spread. The actual gunman was not in the photo spread, and all of the eyewitnesses made false identifications. Following the identification, witnesses were given confirming feedback ("good you identified the actual suspect"), disconfirming feedback ("Actually, the suspect is number __"), or no feedback. The type of feedback produced strong effects on the witness' retrospective reports of (a) their certainty, (b) the quality of the view they had, and (c) the clarity of their memory. Those witnesses who were merely told "good, you identified the actual suspect" became even more certain of their (false) identification, remembered having had a better view, and became more confident in the strength of their memories.[7]

The proven tendency of witnesses subjected to suggestive circumstances to artificially inflate their opportunity to observe, the degree of attention they paid, and their level of certainty creates a profound problem for courts attempting to assess

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[7] *Good, You Identified the Suspect*, 83 J. Applied Psychol. at 374-75.

the strength of those self-reported "reliability factors." That problem becomes even worse when combined with *Manson*'s directive to "weigh" the corrupting effects of suggestive identification circumstances against those same reliability factors. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

The Court's balancing directive appears to proceed from the assumption that a separate assessment of reliability can somehow mitigate the reliability concerns inherent in suggestive circumstances. But in reality those very same suggestive circumstances distort the reliability factors. To put it simply, suggestive circumstances will often make an identification seem reliable when it is not, because, for example, a witness who is told he picked the "right" person not only becomes more confident, but also "remembers" having had a better view and having paid more attention to the perpetrator. Thus, this scientific confound, when combined with the *Manson* balancing test, makes it more likely an identification that is the product of suggestive circumstances will be regarded as more reliable under the *Manson* test -- a truly perverse outcome.

B. Any Guidance On Remand About the Appropriate Reliability Analysis Should Remain Cognizant Of the Changed Scientific Landscape and Of Corresponding Renovations By Modern Courts To the Legal Architecture Of *Manson*

Amicus recognizes that this case may not be the appropriate vehicle for fully exploring the

Manson reliability test in light of the current science. But it is essential that any decision from this Court recognizes the undisputed scientific fact that certain of the *Manson* factors may have an inconclusive, misleading or even negative impact on the overall reliability analysis unless considered outside the corrupting influence of suggestion.

To be sure, the due process analysis must still begin from *Manson*'s bedrock reliability principle. Some modern courts have rightly applied that test using all of the factors that scientific research has shown to be relevant, including the opportunity to observe, attention paid, distance, differences between the initial description and the characteristics of the defendant, the time elapsed between the incident and the first identification procedure, any other witness or event variable that affects reliability, and evidence about identification procedures and other potential sources of suggestion or confirming feedback. *See, e.g.*, *Kansas v. Hunt*, 69 P.3d 571, 576 (Kan. 2003) (adopting Utah Supreme Court's refined analysis of *Manson* factors as explained in *Utah v. Long*, 721 P.2d 483 (Utah 1986)).

This Court should encourage the state court in this case to take such a modern approach to its analysis on remand. For example, the state court on remand may find particularly pertinent Professor Geoffrey Loftus's 2005 study regarding the ability of eyewitnesses to identify the faces of strangers from great distances, as the evidence in Mr. Perry's case demonstrated that the witness viewed the culprit from a window two or three

stories above the parking lot.[8] As that study and the exemplars produced by Professor Loftus for this case suggest, it may not even be possible to identify a stranger from such a great distance, fundamentally undermining, if not destroying, the reliability of the identification in this case.[9]

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[8]Geoffrey R. Loftus & Erin M. Harley, *Why Is It Easier to Identify Someone Close Than Far Away?*, 12 *Psychonomic Bull. & Rev.* 43 (2005). In the study, Loftus and Erin Harley, PhD, a postdoctoral fellow at the University of California, Los Angeles, conducted a series of experiments with participants who had 20/20 vision or corrected 20/20 vision. They presented participants with small, unrecognizable images of famous people like Julia Roberts, Michael Jordan and George W. Bush, and gradually enlarged the images until the participants could identify each person. The researchers then recorded the size at which each participant recognized the celebrity and then converted this size to a corresponding real-life distance. In another part of the study, Loftus and Harley started with blurred images of the celebrities and then gradually clarified them until the participants could recognize them. The researchers then recorded the amount of blurring that the made the face recognizable. Comparing the relationship between losses in clarity due to size or blurriness allowed Loftus to develop a formula to approximate the amount of detail people who have 20/20 vision lose at a range of distances in normal daytime light.

[9] For purposes of this case, Professor Loftus created two sets of images of the actor Will Smith. The first set consists of three color photographs that approximate how Smith would have looked to the *Perry* witness from her apartment window during daylight hours if Smith were standing at three different distances from her window: (1) 45.9 feet, which is the distance from the witness's apartment that the closest car in *Perry* could have been parked; (2) 94.4 feet, which is the distance from the witness's apartment to the middle of the parking lot; and (3) 182.9 feet, which is the distance from the witness's apartment to the end of the parking lot. *See* Br. for Pet. at 2-5. These images are attached at Exhibit 1. Of

This Court's own analysis need not address these issues at all, but it is critical that it permit the state courts on remand to address them by conducting a full-throated reliability analysis. It is also imperative that this analysis is sensitive to the recent efforts of many lower courts to supplement *Manson's* constitutional protections in order to provide additional safeguards against the danger of wrongful convictions. For example, even where the identification is admitted before the fact-finder, as it will be in most cases, courts have used state evidentiary rules and/or supervisory powers to require carefully-tailored and strongly-worded jury instructions and/or the admissibility of expert testimony concerning modern scientific knowledge that is beyond the ken of the lay juror. *E.g.*, *Brodes v. Georgia*, 614 S.E.2d 766, 769 (Ga. 2005) (advising trial courts to refrain from providing instruction authorizing jurors to consider witness's level of certainty as factor in deciding reliability of identification); *Massachusetts v. Santoli*, 680 N.E.2d 1116 (Mass. 1997) (holding eyewitness jury instructions cannot permit consideration of strength of identification); *Tennessee v. Copeland*, 226 S.W.3d 287, 299 (Tenn. 2007) (finding trial court abused its discretion by excluding expert testimony regarding cross-racial identifications and confirming feedback and noting there are now "literally hundreds of articles in scholarly, legal and scientific journals" that "detail the extensive

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course, the witness identified Perry at night, albeit in a lighted parking lot, so Professor Loftus also recreated black and white images of how Smith would have looked to the witness from the same three distances, which are attached at Exhibit 2.

amount of behavioral science research" in the eyewitness identification field); *New Jersey v. Romero*, 922 A.2d 693, 703 (N.J. 2007) (approving instruction to jurors that an eyewitness' "level of confidence, standing alone, may not be an indication of the reliability of the identification"); *Wisconsin v. DuBose*, 699 N.W.2d 582, 596-97 (Wis. 2005) (holding that evidence obtained from a showup will not be admissible unless, based on the totality of the circumstances, the showup was necessary).

Decisions like these demonstrate that, even when identifications are admitted, courts around the country are arming jurors with the knowledge gained from peer-reviewed behavioral science research. Of the various factors related to the witness or event itself, the cross-racial nature of the identification (in which the witness is of one race and the culprit is of another) is perhaps the one that courts have most often recognized as requiring a special instruction. *See, e.g., New Jersey v. Cromedy*, 727 A.2d 457 (N.J. 1999).[10] Such instructions can reduce the risk of error, a risk exemplified by the fact that, in 66 of the first 216 wrongful convictions overturned by DNA testing, cross-racial eyewitness identification was used as evidence to convict an innocent defendant.[11]

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[10] In *Cromedy*, the New Jersey Supreme Court reversed a rape and robbery conviction because the trial court failed to instruct the jury to consider the cross-racial nature of the identification. On remand, DNA testing exonerated Mr. Cromedy. *See Know the Cases: McKinley Cromedy*, http://www.innocenceproject.org/Content/McKinley_Cromedy.php (last visited Aug. 2, 2011).

[11] *Cross-racial Identification and Jury Instruction*, Innocence Blog (May 20, 2008 1:30pm)

Of the factors relating to the circumstances leading to the identification, some courts have recognized the scientific research showing that police should warn the witness that the real culprit may or may not be in the lineup or photo array. *Connecticut v. Ledbetter*, 881 A.2d 290, 316 (Conn. 2005) (exercising supervisory authority to require instruction to jury in cases where police fail to provide such warnings to witnesses). The research has shown these warnings are critical, as they help to reduce relative judgments, in which the witness selects the person who looks "most like" the culprit.[12]

As these courts have recognized, providing jurors with scientifically sound information is entirely consistent with *Manson*'s objective of ensuring that reliability is the linchpin for assessing the admissibility of an identification. In fact, *Manson* fully anticipated that the lower state and federal criminal justice systems would act as laboratories in this fashion, supplementing the constitutional baseline as scientific knowledge advanced. *See Manson v. Brathwaite*, 432 U.S. 98,

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http://www.innocenceproject.org/Content/Crossracial_identification_and_jury_instruction.php.

[12] *See generally*, Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & Hum. Behav. 283 (1997). In one study, for example, 54% of eyewitnesses were able to identify the actual culprit from a 6-person culprit-present lineup and 21% made no identification. When the culprit was removed without replacement (making it a 5- person culprit-absent lineup), however, the rate of no identification rose only to 32%, with the other 68% of the eyewitnesses mistakenly identifying someone from the five remaining members of the lineup. Gary L. Wells, *What Do We Know About Eyewitness Identification?*, 48 Am. Psychologist 553 (1993).

117 (1977). This Court's due process decisions, by making reliability the linchpin and by acknowledging the unique role of misidentifications in producing miscarriages of justice, sparked a generation of jurisprudence dedicated to remedying the problem.

The work continues. Most importantly, on June 18, 2010, Special Master Geoffrey Gaulkin, upon the direction of the New Jersey Supreme Court, issued an extensive report after a ten-day evidentiary hearing devoted to the following issue:

> "whether the assumptions and other factors reflected in the two-part *Manson[v. Brathwaite*] test, as well as the five factors outlined in th[at] case[] to determine reliability, remain valid and appropriate in light of recent scientific and other evidence."

Geoffrey Gaulkin, *Report of the Special Master, New Jersey v. Henderson*, Case No. A-8-08 at 3 (June 18, 2010).[13]

The *Henderson* Report identified a number of "renovations to the legal architecture of *Manson*" that can help to ensure that the reliability analysis takes full advantage of the current state of scientific knowledge. *Id.* at 84-86. The Report most importantly concluded that any application of the *Manson* "weighing" process should take into account that the factors identified by the Court are

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[13]Available at http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20(00621142).PDF (quoting New Jersey Supreme Court orders).

sensitive to the manner in which the corrupting influence of suggestion can actually skew the reliability factors identified by the Court. *Id.* at 78-79. It also encouraged courts to consider other reliability factors whose importance has been demonstrated by the science. *Id.* at 84-86.

Amicus applauds this development and others like it, and encourages the Court to use its decision in this case to foster such developments, which improve the accuracy and fairness of our criminal justice system.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of New Hampshire should be reversed.

Respectfully submitted,

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EXHIBITS

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Photo A

Photo B

Photo C

EXHIBIT 2

Photo D: Will Smith's face as it would appear to the *Perry* witness during evening hours if Smith were standing 45.9 feet from the witness's apartment window, which is the approximate distance from the witness's apartment that the closest car in *Perry* could have been parked:	**Photo E:** Will Smith's face as it would appear to the *Perry* witness during evening hours if Smith were standing 94.4 feet from the witness's apartment window, which is the approximate distance from the witness's apartment to the middle of the parking lot:	**Photo F**: Will Smith's face as it would appear to the *Perry* witness during evening hours if Smith were standing 182.9 feet from the witness's apartment window, which is the approximate distance from the witness's apartment to the end of the parking lot:

Photo D

Photo E

Photo F