No. 16-866

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT,

Petitioner,

v.

ANDREW DICKSON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Connecticut

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

INTRODUCTION

Respondent Andrew Dickson was convicted of two offenses after an eyewitness identified him as the perpetrator for the first time at trial. On appeal, the Connecticut Supreme Court held that first-time in-court identifications violate due process where, as here, the perpetrator's identity is disputed and the prosecution has not established that the witness could identify the defendant outside the highly suggestive setting of a courtroom. The Connecticut Supreme Court also held—even though "the state had not advanced" the argument, Pet. 11—that "any due process violation [in Dickson's case] was harmless beyond a reasonable doubt." Pet. App. A81. It therefore affirmed his convictions.

The State now seeks review of the Connecticut Supreme Court's constitutional analysis without directly discussing its harmless error holding. If the State were to place Dickson in a position such that this Court's review could entitle him to a new trial, he stands ready to argue that the eyewitness's identification of him violated due process (1) for the reasons set forth by the Connecticut Supreme Court and (2) for the narrower reason that in-court identifications preceded by failed out-of-court procedures are presumptively unreliable. If, however, this Court's review could not affect the judgment of conviction, the procedural posture of this case makes certiorari inappropriate.

STATEMENT OF THE CASE

A. Factual Background

In January 2010, Albert Weibel responded to a Craigslist post offering a vehicle for sale and arranged to meet the seller in Bridgeport, Connecticut. It turned out that the "seller" was Akeem Lyles, who had created the advertisement to lure a victim to ambush and rob.

Weibel arrived at the prearranged location with a friend and parked his truck. He left his friend in the truck and walked down an alley to meet Lyles, who promptly held a gun to Weibel's head and demanded money. Weibel saw that Lyles was accompanied by two armed men. While Lyles went to the truck to confront Weibel's friend, his two accomplices continued to threaten and demand money from Weibel, who covered his head as the two men beat him.

Lyles and one accomplice then fled, but the third man stayed behind. He held Weibel against a dumpster and said, "You're a dead man." He shot Weibel in the neck and leg before fleeing. Weibel survived.

In the ensuing investigation, Weibel told police he had been attacked by three black men. But because he had neither met nor seen any of them before, he was unable to point the police toward any particular suspects.

Several months later, Lyles was arrested and prosecuted for a different robbery. Tr. 41-43 (Sept. 6, 2012). Seeking leniency in sentencing, he implicated Dickson as an accomplice to the January 2010 robbery and offered

to testify against him. Tr. 29-31 (Sept. 5, 2012). Lyles did not implicate his cousin, who was the only other person with access to the email account used to lure Weibel to the scene of the robbery. *Id.* at 36-37. Nor did he provide the police with information about another man who had acted as his accomplice in other robberies. Tr. 42-43 (Sept. 6, 2012).

The police contacted Weibel and showed him several photo arrays. Weibel successfully identified Lyles as one of his assailants. But even though the police gave Weibel "[a]s much time as [he] needed" to examine an array containing Dickson's mugshot, he did not identify Dickson as one of the perpetrators. Tr. 47-49 (Sept. 4, 2012). Weibel's friend "was not able to identify" Dickson either. Pet. App. A5 n.4.

The police nonetheless arrested Dickson and charged him with attempted murder, first-degree assault, first-degree robbery, and conspiracy to commit robbery.

B. Procedural History

1. Dickson filed a motion in limine arguing that the Due Process Clause precluded Weibel from identifying him for the first time in court. He argued that such in-court identification procedures "single out the defendant as the person the witness is asked to identify" and thus are "unnecessarily suggestive and unreliable." Def.'s Mot. 1 (Aug. 31, 2012). On the first day of trial, the court denied the motion. Tr. 3-5 (Sept. 4, 2012).

During trial, the State called Weibel to the stand. Testifying almost three years after the robbery, he acknowledged that the alley where he was attacked had been dark, that he had mostly noticed his assailants' size and skin color, and that he had been unable to identify Dickson in the pretrial array. Tr. 30-42 (Sept. 4, 2012). The prosecutor then asked Weibel to identify his assailant. He pointed toward Dickson, who was seated at the defense table and was the only black man in the courtroom aside from a uniformed court marshal.

In exchange for a reduced sentence, Lyles also testified for the State. Tr. 91-92, 114-16 (Sept. 4, 2012). He explained that he had known Dickson for many years, and he identified him in court as his accomplice. *Id.* at 98-99.

The defense maintained that Dickson had not been involved in the crime in any way. His mother and aunt both testified that he had been at a local bar with his family that evening, watching a football game. Tr. 70-77, 137-44 (Sept. 6, 2012).

After deliberating for four days, the jury acquitted Dickson of attempted murder and robbery but found him guilty of first-degree assault and conspiracy to commit robbery. He received a sentence of twenty-five years in prison followed by ten years of special parole.

2. Dickson challenged his conviction on several grounds, including that the trial court had violated his right to due process by allowing the prosecution to elicit the in-court identification from Weibel. Pet. App. A1, A6.

The Connecticut Appellate Court affirmed. As is relevant here, it declared itself bound by *State v. Smith*, 512 A.2d 189 (Conn. 1986), in which the Connecticut Supreme Court had held that the Due Process Clause never requires special protections for eyewitness identifications made for the first time in the courtroom. Pet. App. A8-A9. The appellate court, however, expressed doubts about *Smith*, noting that the Connecticut Supreme Court had not yet reexamined that case "in view of the scientific advances" that "call[] into question many previously prevalent assumptions in eyewitness identification cases." *Id.* A11 n.7.

3. The Connecticut Supreme Court granted review. After examining changes in the law and science since 1986,[1] the court overruled *Smith*.

The Connecticut Supreme Court began by noting that *Manson v. Brathwaite*, 432 U.S. 98 (1977), and *Neil v. Biggers*, 409 U.S. 188 (1972), establish a due process framework for evaluating the admissibility of identifications arising from suggestive out-of-court procedures. Under *Manson* and *Biggers*, judges must (1) assess whether the out-of-court identification was made under unnecessarily suggestive circumstances and, if so, (2) exclude the identification, and forbid any subsequent in-court

[1] *See, e.g.*, *State v. Guilbert*, 49 A.3d 705, 715-32 (Conn. 2012) (recognizing a "near-perfect scientific consensus" about the "fallibility" of eyewitness identifications and holding that defendants may present relevant expert testimony on factors that adversely affect witnesses' ability to accurately identify suspects); *State v. Ledbetter*, 881 A.2d 290, 314-18 (Conn. 2005) (highlighting social science research about eyewitness testimony in requiring jury instructions in cases presenting a "significant risk of misidentification"), *cert. denied*, 547 U.S. 1082 (2006).

identification, unless the witness can reliably identify the defendant as the perpetrator. Pet. App. A34.

Joining several federal courts of appeals, the Connecticut Supreme Court held that the *Manson*/*Biggers* framework governs in-court identifications like the one in Dickson's case. Applying the first step of that framework, the Connecticut Supreme Court reasoned that in-court identifications are equally, if not more, suggestive than the out-of-court identification procedures that trigger due process scrutiny. Pet. App. A38-A40. In particular, in-court identifications operate much like impermissibly suggestive showups because the witness can easily identify the defendant by position in the courtroom and by physical characteristics. *Id.* A38-A39, A70.

Proceeding to the second step of the *Manson*/*Biggers* framework, the court held that if the prosecution cannot show that the witness can identify the defendant in a nonsuggestive setting, it may not ask that witness to identify him at trial. Pet. App. A72. Allowing the prosecution to do so would create a constitutionally unacceptable risk that the eyewitness will misidentify the defendant as the perpetrator. *Id.* A60-A67, A70.

The Connecticut Supreme Court considered the in-court identification procedure in Dickson's case particularly troubling because Weibel had previously failed to identify him in a nonsuggestive photo array but had "no difficulty doing so when the defendant was sitting next to defense counsel in court [as] one of only two African-American males in the room." Pet.

App. A40. The court stressed that due process does not allow the State to conduct a highly suggestive identification procedure after "a fair procedure failed to produce the desired result." *Id.* A57.

The State never argued that Weibel's identification was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 24 (1967). Pet. 11. The Connecticut Supreme Court nonetheless held any error to be harmless under that standard and affirmed the judgment of conviction. Pet. App. A81, A91. Because Lyles's testimony had largely been corroborated and because Dickson's mother and aunt—testifying nearly three years after the fact—could not say exactly what time Dickson had arrived at the bar, the court concluded that the jury would have returned a guilty verdict even without Weibel's in-court identification. *Id.* A89-A91.

4. Dickson moved for reconsideration of the harmless error holding. He argued that Weibel's identification could not have been harmless because it was the only evidence linking him to the robbery other than the testimony Lyles gave in hopes of a lighter sentence. Def./Appellant's Mot. for Recons. 2, 6 (Sept. 15, 2016). The State had not presented any forensic evidence of his involvement, nor had it conclusively disproved his alibi. *Id.* While the State disputed the Connecticut Supreme Court's due process analysis, it did not defend the court's *Chapman* holding.

The Connecticut Supreme Court denied Dickson's motion.

ARGUMENT

I. The fact that the State prevailed in the Connecticut Supreme Court creates a serious obstacle to certiorari.

The State acknowledges that its petition comes to this Court in an unusual posture. Pet. 36-39. After all, the State prevailed before the Connecticut Supreme Court, and jurisdictional and prudential limitations generally prevent this Court from "consider[ing] cases at the request of a prevailing party." *Camreta v. Greene*, 563 U.S. 692, 703-04 (2011).

The State initially gestures at one means of overcoming this problem before focusing on a second theory. The first approach would place this case in a posture such that the Court could grant certiorari. But the second theory would not allow the Court to grant review.

A. If Dickson could receive a new trial as a result of this Court's review, there would be no barrier to certiorari.

First, the State notes that it did "not advance[]" any argument below that the error in allowing Weibel to identify Dickson at trial "was harmless beyond a reasonable doubt." Pet. 11. And the State offers no defense of the Connecticut Supreme Court's harmless error holding in its petition for certiorari. These actions may be intended to suggest that were this Court to grant certiorari and hold that Weibel's identification violated the Due Process Clause, the State would forgo reliance on the harmless error doctrine and agree that Dickson's conviction should be reversed. If the State is willing to unambiguously represent as much in its reply brief, then neither

jurisdictional nor prudential concerns would stand in the way of review here. This case would be like any other criminal case in which a defendant's conviction has been overturned because of a constitutional violation and the prosecution seeks this Court's review of the constitutional holding.[2]

B. If Dickson could not receive a new trial as a result of this Court's review, then Article III and prudential considerations would prevent this Court from granting certiorari.

The State secondly urges this Court to grant review on the theory that the Connecticut Supreme Court's due process analysis constitutes a "declaratory judgment against the state." Pet. 30. This theory is unsound. If the State is unwilling (or unable) to guarantee that Dickson would receive a new trial if this Court were to hold that Weibel's identification violated due process, then the Connecticut Supreme Court's analysis alone does not give this Court the authority to grant certiorari.

1. Article III

The State focuses in its petition on how the Connecticut Supreme Court decision affects its interest in enforcing its criminal laws. Pet. 36. But to satisfy Article III's "case-or-controversy" requirement, "the opposing party

[2] The State has the "burden of demonstrating" that a federal constitutional error is harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 295-96 (1991); *see also Chapman v. California*, 386 U.S. 18, 24 (1967). It follows that at least where, as here, the harmlessness of the error is debatable, the State may renounce any reliance on the harmless error doctrine. Alternatively, the State could resolve the procedural problem here by representing in its reply brief that if this Court grants certiorari and holds that Weibel's identification violated the Due Process Clause, the State will dismiss the indictment without prejudice. In that circumstance, Dickson would agree to waive any double jeopardy protection against being re-tried on the charges on which he was convicted. *Cf. United States v. Kington*, 835 F.2d 106, 108-09 (5th Cir. 1988) (accepting a similar arrangement made to enable appellate review).

also must have an ongoing interest in the dispute." *Camreta*, 563 U.S. at 701-02. This "stake in preserving" the lower court's challenged holding must arise from "a sufficient likelihood that [the party] will again be wronged in a similar way." *Id.* at 702-03 (citation omitted). Applying that test in *Camreta*, this Court held that a case or controversy had ceased to exist because the respondent was "no longer in need of any protection from the challenged practice." *Id.* at 710-11.

The State contends that two possible scenarios give Dickson a sufficient stake in preserving the Connecticut Supreme Court's due process pronouncements to create jurisdiction here. But the chance, as the case stands now, that either of these scenarios will come to pass is too remote and speculative to satisfy Article III.

a. The State argues that Dickson has a sufficient interest because, after serving his twenty-five-year sentence, he could "again [be] prosecuted in Connecticut courts" for some future crime. Pet. 36 n.9. If that case also involved a first-time in-court identification, the argument goes, he would benefit from this Court's preserving the Connecticut Supreme Court's due process holding.

That interest is insufficient to satisfy Article III. The possibility of future prosecution for an as-yet uncommitted crime is mere "speculation and conjecture" that does not give a litigant enough of a stake to maintain a case or controversy. *O'Shea v. Littleton*, 414 U.S. 488, 493-97 (1974). Article III

demands more than "general assertions or inferences that in the course of their activities [persons] will be prosecuted for violating valid criminal laws." *Id.* at 497. Indeed, the Court "assume[s] that [persons] will conduct their activities within the law and so avoid prosecution and conviction." *Id.* Consequently, the remote possibility that Dickson may ultimately be released, arrested, prosecuted, and subjected to another potentially unconstitutional first-time in-court eyewitness identification does not give him the ongoing, adverse interest required by Article III. If this were sufficient, *all* Connecticut residents would have an interest in this case.

b. Similarly speculative is the State's assertion that Dickson has a sufficient stake in the case because he might "succeed[] in his current habeas petition claiming ineffective assistance of trial counsel." Pet. 36 n.9. This Court has taken "judicial notice" of the fact that writs of habeas corpus are rarely granted. *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990). The prospect that a defendant might "eventually" obtain post-conviction relief—and thereby be subject to a given procedure at a new trial—"is too speculative" to satisfy Article III. *Id.* at 156-57.

2. Prudential Considerations

Even if this Court had jurisdiction to review the Connecticut Supreme Court's due process analysis without the possibility of affecting Dickson's conviction, the prudential rule barring petitions by prevailing parties would still stand in the way of granting certiorari here. "[E]ven when the

Constitution allow[s it] to do so," this Court "generally decline[s] to consider cases at the request of a prevailing party." *Camreta*, 563 U.S. at 703-04. This rule of "judicial policy," *id.* at 703, focuses the Court's energies on affecting outcomes rather than merely opining on a lower court's "use of analysis that may have been adverse to [a] State's long-term interests," *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam). This Court "reviews judgments, not opinions." *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., respecting the denial of certiorari) (citation omitted). Its "resources are not well spent superintending each word a lower court utters en route to a final judgment in the petitioning party's favor." *Camreta*, 563 U.S. at 704.

The State nonetheless argues that "[u]nder this Court's decision in *Camreta*, the state's victory [below] does not preclude review of the Connecticut Supreme Court's" holding. Pet. 30 (citation omitted). The State is wrong.

Camreta's exception to the general policy against granting petitions from prevailing parties applies only to "one special category of cases": those involving qualified immunity. 563 U.S. at 709. When a federal court of appeals holds that a state actor violated the Constitution but grants the actor qualified immunity, it produces a constitutional rule that—absent this Court's ability to review the rule at the prevailing party's request—may effectively be insulated from review. This is because qualified immunity

would automatically apply to all cases in that jurisdiction's appellate pipeline and to any others that arose before the date of that decision. And state actors in that circuit would in effect be unable to challenge the new rule in future cases because they would be bound to conform their actions to it or else risk damages. Furthermore, when one circuit holds that a right is not clearly established, others are likely to reach the same conclusion, creating the same problem across jurisdictions.

The harmless error doctrine in criminal cases does not similarly threaten to shield new constitutional rules from this Court's review. When an appellate court holds that a law enforcement or prosecutorial practice is unconstitutional but deems the error harmless, there may be other cases in the appellate pipeline in which a reviewing court will conclude that the error is not harmless. Indeed, there may be such cases in the Connecticut pipeline.[3]

More fundamentally, if a question of criminal procedure is important enough to merit this Court's review, that same question will likely arise in other jurisdictions and make its way to this Court in a traditional posture. For example, if another jurisdiction rejects the constitutional argument the Connecticut Supreme Court accepted here, the losing defendant may seek certiorari in this Court, setting up a case in which the parties are fully

[3] As the State notes, two cases involving in-court identifications like the one in Dickson's case are working their way through Connecticut courts. Pet. 38; *see State v. Collymore*, 153 A.3d 1288, 1288-89 (Conn. 2017) (mem.) (granting review); Consolidated Reply and Supplemental Brief of the Defendant-Appellant at i, *State v. Torres*, No. A.C. 39796 (Conn. App. Ct. Nov. 28, 2016). It remains to be seen whether any error in either case will be deemed harmless.

adverse. *See, e.g.*, *United States v. Thomas*, 849 F.3d 906, 910-11 (10th Cir. 2017). And, of course, if another jurisdiction were to adopt the rule embraced by the Connecticut Supreme Court and then hold that introduction of the identification was *not* harmless, the prosecutor could seek review. That case would also feature fully adverse parties.[4]

Extending *Camreta*'s prevailing-party exception to criminal cases like Dickson's would be improper for another reason. When, as in *Camreta*, a plaintiff who brought a civil rights lawsuit finds herself defending a constitutional ruling in this Court, she is continuing a legal process she initiated. In a criminal prosecution, by contrast, the state brings the defendant into court, seeking to deprive him of his liberty. Once that deprivation is no longer at stake, it would be unfair to allow the state to foist an obligation upon the defendant to litigate issues that cannot affect his conviction or sentence.

Finally, allowing review in criminal cases where a harmless error holding prevents this Court's decision from affecting the outcome would raise the specter of certiorari in a host of analogous contexts in which "it is established that the prevailing party may not appeal," *Camreta*, 563 U.S. at 717 (Kennedy, J., dissenting). For example, prosecutors could seek review

[4] In the federal system and in many states, interlocutory appeals provide another means by which this Court could ultimately review decisions announcing rules of constitutional criminal procedure. *See, e.g.*, 28 U.S.C. § 1292(b) (providing the federal courts of appeals with jurisdiction to review interlocutory appeals); Pa. R. App. P. 311(d) (allowing the state to "take an appeal as of right from an order" that will "substantially handicap the prosecution").

when a court holds that a type of search is constitutionally defective but that the good-faith exception to the exclusionary rule obviated the need for suppressing the evidence obtained, *see Illinois v. Krull*, 480 U.S. 340, 349-57 (1987); when a court holds that a police department's search procedure is unreasonable but that the evidence procured was admissible based on the inevitable discovery doctrine, *see Nix v. Williams*, 467 U.S. 431, 441-48 (1984); or when a court holds that a certain type of out-of-court statement is "testimonial" under the Confrontation Clause but admissible in the case at hand because the defendant had a prior opportunity for cross-examination or forfeited his right to confrontation, *see Crawford v. Washington*, 541 U.S. 36, 62, 68 (2004). There is no good reason to open the door to such petitions and thereby force criminal defendants to litigate issues (even if only in responsive briefing at the certiorari stage) that will not affect their convictions.

* * *

The State takes *Camreta* as its polestar. But its analogy to that case is flawed at every level. Unless the State can guarantee Dickson a new trial in the event this Court holds that his due process rights were violated, this case—like that one—no longer presents a live controversy.

II. The Connecticut Supreme Court's due process analysis is correct.

The Due Process Clause demands "fundamental fairness." *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). Applying that test, this Court has held that courts may not allow juries to be exposed to state orchestrations that

"combine[] the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence." *Jackson v. Denno*, 378 U.S. 368, 384 n.11 (1964) (citation omitted) (coerced confessions); *see also Deck v. Missouri*, 544 U.S. 622, 627, 630 (2005) (visible shackling of defendants). In the context of state-generated eyewitness identifications, this principle protects the accused from the "primary evil" of a wrongful conviction caused by misidentification. *See Neil v. Biggers*, 409 U.S. 188, 198 (1972).

This Court has established a two-part framework for assessing whether an *out-of-court* identification poses such a risk of misidentification that the Due Process Clause bars the prosecution from introducing it at trial or eliciting a subsequent in-court identification. Under *Manson v. Brathwaite*, 432 U.S. 98 (1977), and *Biggers*, courts first ask whether the out-of-court identification took place under circumstances that were "unnecessarily suggestive" and thus created a "substantial likelihood of irreparable misidentification." *Biggers*, 409 U.S. at 197-98 (citation omitted). If so, courts may admit the identification only if "under the 'totality of the circumstances' the identification was reliable." *Manson*, 432 U.S. at 106 (citation omitted).

Logic and common sense dictate that the *Manson*/*Biggers* framework applies to *in-court* identifications even when not preceded by unnecessarily suggestive out-of-court identifications. Applying that framework, the

Connecticut Supreme Court correctly held that the prosecution may not ask a witness to identify the defendant at trial without first showing that the witness is able to identify him in a nonsuggestive procedure.

A. Courts must prescreen in-court identifications for reliability when the perpetrator's identity is an issue at trial.

The State argues that absent an unnecessarily suggestive pretrial procedure, the Due Process Clause does not require judicial prescreening of in-court identifications. Pet. 20. The Connecticut Supreme Court correctly rejected that argument.

1. The *Manson*/*Biggers* framework applies to cases like Dickson's because (a) in-court identifications are inherently suggestive and (b) conducting an identification for the first time at trial is unnecessary.

a. As the State acknowledges, Pet. 22, courtroom identification procedures highlight the person the prosecution believes to be guilty and thus "increase the likelihood of misidentification," *Biggers*, 409 U.S. at 198. Indeed, as the Connecticut Supreme Court noted, it is difficult to imagine "a *more* suggestive identification procedure" than asking the witness to identify the perpetrator from the stand. Pet. App. A38.

The inherent suggestiveness of the courtroom environment results from several factors. Virtually all witnesses will know that the person seated next to defense counsel is the defendant—that is, the person the prosecution believes committed the offense. Even if the defendant is seated elsewhere, all eyes are likely to be on him, guiding the witness's attention in his direction.

In this way, in-court identifications are comparable to "showups" where the witness is presented with only one suspect. *Commonwealth v. Crayton*, 21 N.E.3d 157, 166 (Mass. 2014). Showup procedures have been "widely condemned" as highly suggestive. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). And in the high drama of a courtroom, a witness is even more likely than in the usual showup to feel pressured to make a positive identification—or embarrassed if she cannot. She is likely to identify the defendant even if she does nothing more than guess.

b. It is also unnecessary to ask a witness to identify the defendant for the first time at trial. Photo arrays provide an easy (and far less suggestive) way to elicit pretrial identifications. While creating such arrays may have been difficult "when travel was by foot or by horse[and] communications were by post," Pet. App. A64, digital photography and devices such as iPads have made generating effective arrays easier than ever before, Nat'l Acad. of Scis., Identifying the Culprit: Assessing Eyewitness Identification 23-24 (2014) (noting widespread use of computer databases to construct photo arrays). *Cf. Missouri v. McNeely*, 133 S. Ct. 1552, 1561-63 (2013) (relying on new technologies in construing the Fourth Amendment's warrant requirement).

If, as the State protests, a photo array is insufficient because a particular witness needs to "observe the defendant in all dimensions," Pet. 28, then law enforcement can arrange a nonsuggestive out-of-court

lineup. And even if the state "could not locate [a] witness prior to trial," *id.* (citation omitted), the prosecution may obtain a recess to allow for an out-of-court photo array or lineup. Pet. App. A71.

2. Despite the straightforward logic of applying *Manson* and *Biggers* in this context, the State argues that due process does not require courts to prescreen proposed identifications. None of the State's arguments is availing.

a. Contrary to the State's assertion, Pet. 20-21, this Court's decision in *Perry v. New Hampshire*, 565 U.S. 228 (2012), does not shield in-court identifications like the one in Dickson's case from prescreening. In *Perry*, an eyewitness spontaneously identified the defendant as the culprit while the defendant stood next to a police officer at the crime scene. *Id.* at 234. The Court held that the Due Process Clause did not require prescreening for that identification because "the suggestive circumstances were not arranged by law enforcement officers." *Id.* at 232-33. Without "the presence of state action," the Court reasoned, a prescreening requirement would not deter states from arranging suggestive identification procedures. *Id.* at 233, 241-42.

In-court identifications are not like the spontaneous identification in *Perry*. To produce an in-court identification, a state actor—the prosecutor—calls the witness to the stand, ensures the defendant is in the courtroom, and asks the witness to identify the perpetrator. Prescreening such identifications can thus influence state actors' decisions by encouraging prosecutors to employ less suggestive, and more reliable, identification procedures.

b. The State is also incorrect that "trial protections" such as juror observation, cross-examination, and jury instructions, Pet. 23, negate the need for judicial prescreening to protect against misidentifications in the courtroom. If they could, there would *never* be a reason to prescreen in-court identifications. Yet this Court has already held that after a witness identifies a suspect in an unnecessarily suggestive out-of-court procedure, any subsequent in-court identification must be prescreened. *Biggers*, 409 U.S. at 198-200. In so holding, the Court has recognized that once a certain risk of misidentification is present, the Due Process Clause requires more than ordinary trial protections to guard against wrongful conviction. *See Foster v. California*, 394 U.S. 440, 442 n.2 (1969).

Even if precedent did not foreclose the State's argument, it would still be clear that trial protections besides prescreening cannot counteract the risk of wrongful conviction when a testifying witness misidentifies a defendant as the perpetrator.

To start, the state amici assert that jurors can "observe the witness's demeanor" while he makes an in-court identification. Br. of Amici Curiae State of Michigan et al. in Supp. of Pet'r 18. That hardly solves the problem. Jurors are more likely to believe witnesses who deliver their testimony with confidence. And while an eyewitness's confidence correlates with the accuracy of an identification made under "pristine" (that is, entirely nonsuggestive) circumstances—such as those required by Connecticut law, *see* Conn. Gen.

Stat. Ann. § 54-1p—this correlation dissipates in non-pristine settings. John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. Pub. Int. 10, 14-17, 52 (2017). Non-pristine procedures can "inflate[] witnesses' ratings of confidence" and distort their memory of the original observation and the conditions under which it occurred. Elizabeth F. Loftus et al., Eyewitness Testimony: Civil and Criminal § 3-12, at 70 (5th ed. 2013). And in-court identifications, by their nature, cannot be pristine. *Commonwealth v. Collins*, 21 N.E.3d 528, 534-35 (Mass. 2014). As a result, the jury cannot determine whether a testifying witness's confidence stems from accuracy or the suggestiveness of the courtroom environment.

For the same reason, expert evidence, lawyers' arguments, and jury instructions on the shortcomings of eyewitness identifications will have little effect on jurors' assessment of their accuracy. *State v. Lawson*, 291 P.3d 673, 695 (Or. 2012); Kristy A. Martire & Richard I. Kemp, *The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony*, 33 Law & Hum. Behav. 225, 225, 233 (2009). Eyewitness testimony offered with a potentially inflated sense of confidence is likely to be believed whether or not jurors are told the testimony should be viewed with caution.

Witness overconfidence poses similar problems for cross-examination. Adversarial questioning is effective at exposing equivocation or falsity but

toothless when it comes to "countering sincere but mistaken beliefs." Pet. App. A61-A62 (quoting *State v. Guilbert*, 49 A.3d 705, 725 (Conn. 2012)); *see also* Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 773-74 (2007). This Court has recognized as much, holding that cross-examination can be an insufficient method of testing the "accuracy and reliability" of identification evidence. *United States v. Wade*, 388 U.S. 218, 235 (1967). In fact, cross-examination often exacerbates the problem because an eyewitness's anticipating and preparing for cross-examination have been shown to further inflate her confidence. *See* Wixted & Wells, *supra*, at 18.

c. The State's last recourse is tradition. The State protests that "[f]irst time in-court identifications have been admissible without prescreening from the origins of our common law." Pet. 25. But a trial practice's common-law pedigree alone cannot insulate it from constitutional scrutiny. To the contrary, "[i]t is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017).

Gideon v. Wainwright, 372 U.S. 335 (1963), is perhaps the most prominent example. For hundreds of years, our legal system deemed representation in a felony case "not . . . essential to a fair trial." *Betts v. Brady*, 316 U.S. 455, 471 (1942). But scholarship and experience eroded this assumption. *See, e.g.*, Yale Kamisar, Betts v. Brady *Twenty Years Later: The*

Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219, 225-30, 246-60 (1962). The Court then corrected course and held that criminal defendants "cannot be assured a fair trial unless counsel is provided." *Gideon*, 372 U.S. at 342-45.

Other examples abound. Prosecutors for decades were permitted to argue that a defendant's refusal to testify was probative evidence of guilt. But upon realizing that such silence was inherently ambiguous and too often used to convict the "entirely innocent," this Court held that the Fifth Amendment prohibited the practice. *Griffin v. California*, 380 U.S. 609, 612-15 (1965). Similarly, rules of evidence long forbade criminal defendants from testifying in their own defense or presenting accomplice testimony because both were deemed inherently untrustworthy. *See Ferguson v. Georgia*, 365 U.S. 570, 573 (1961); *Washington v. Texas*, 388 U.S. 14, 21-22 (1967). The Court recognized the error of this view and refused to be bound by the "dead hand of the common-law rule of 1789." *Washington*, 388 U.S. at 21-22 (citation omitted); *accord Ferguson*, 365 U.S. at 596.

Scientific developments can also expose constitutional infirmities in longstanding practices. At common law, for example, capital punishment could theoretically be imposed on anyone over the age of seven. *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989). But scientific evidence regarding minors' psychological and neurological characteristics recently led the Court to hold that the Eighth Amendment forbids capital punishment for defendants who

were under eighteen at the time of their crimes. *Roper v. Simmons*, 543 U.S. 551, 569-71, 574 (2005).

A similar arc of learning and experience exists here. Until recently, we were unaware of just how dramatically courts and jurors were prone to overestimate the reliability of eyewitness testimony—and how often such testimony contributed to wrongful convictions. No longer. *See, e.g.*, Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 48-50 (2012) (noting that more than three-fourths of the first 250 DNA exonerees had been misidentified by eyewitnesses). Having become "aware of the danger of erroneous eyewitness identifications," *United States v. Greene*, 704 F.3d 298, 306 (4th Cir.), *cert. denied*, 134 S. Ct. 419 (2013), the Connecticut Supreme Court properly held that an identification like that in Dickson's case—"however traditional it may be"—requires judicial prescreening for reliability. Pet. App. A64 (emphasis omitted) (citation omitted).

B. When the prosecution fails to show that a witness can identify the defendant in a nonsuggestive setting, it may not ask the witness to do so at trial.

The State argues that even if the *Manson*/*Biggers* framework applies here, the Connecticut Supreme Court improperly adopted a "rule of automatic exclusion, regardless of reliability, in any case where identification is contested." Pet. 14; *see id.* at i (second question presented). This argument

mischaracterizes the Connecticut Supreme Court's rule and overstates its consequences.

1. The Connecticut Supreme Court's opinion does not announce a "rule of automatic exclusion." Instead, it merely establishes the *process* the State must follow to demonstrate that an in-court identification is admissible under *Manson* and *Biggers*. In such a case, the prosecution must show either (a) that the witness knew the defendant before the crime or (b) that the witness successfully "identif[ied] the defendant in a nonsuggestive out-of-court procedure." Pet. App. A42 n.11, A70-A71. So long as the prosecution makes one of these two showings, it may ask its witness to identify the defendant from the stand. *Id.* A71-A73. There is no "exclusion."

To be sure, if the prosecution cannot make either showing, the State may not arrange an in-court identification. Pet. App. A72. But contrary to the State's argument, Pet. 26, the *Manson*/*Biggers* totality-of-the-circumstances test does not forbid courts from holding that certain subsets of circumstances categorically generate unduly unreliable identifications. For example, courts have held that a prosecutor's verbally or physically directing a testifying witness to the defendant is so likely to lead to irreparable misidentification as to require exclusion. As the Fourth Circuit has explained, the "law is plain: A prosecutor cannot point to the defendant . . . and then elicit [an] identification." *Greene*, 704 F.3d at 311.

This approach is typical of how other constitutional rules that depend on the totality of the circumstances operate in practice. The Confrontation Clause's applicability to statements generated during interrogations, for example, turns on the totality of the circumstances. *See Michigan v. Bryant*, 562 U.S. 344, 359-70 (2011). But statements obtained during *stationhouse* interrogations are considered per se testimonial. *Crawford v. Washington*, 541 U.S. 36, 52-53 (2004). Similarly, whether a suspect is in "custody" under *Miranda v. Arizona*, 384 U.S. 436 (1966), depends on the "totality of circumstances." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam). But "courts almost universally have held that when police officers use handcuffs, point their guns at a suspect, or place a suspect in a cruiser, they have rendered him in 'custody' for purposes of *Miranda*." Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 Fordham L. Rev. 715, 719 & n.33 (1994) (collecting case law).

The State is also wrong that the Connecticut Supreme Court's rule operates "regardless of reliability," Pet. at i, 14. Reliability is the touchstone of the rule. The court's opinion isolates a subset of identifications that are necessarily unreliable: those generated when the prosecution asks a witness who neither knows nor has demonstrated an ability to reliably identify the alleged perpetrator to identify the perpetrator at trial.

2. The State objects that the Connecticut Supreme Court's rule will "impair[] . . . its ability to enforce its criminal laws." Pet. 36. In fact, the

practical consequences of the rule for law enforcement are modest. Whenever the perpetrator's identity is not in dispute or the State shows that its witness can reliably identify the defendant in a nonsuggestive setting, the State can ask the witness to do so in court. *See* Pet. App. A70-A71. Even when an in-court identification is not allowed, the prosecutor may still "question the eyewitness" at trial "about his observations of the perpetrator at the time of the crime, including his observations of the perpetrator's height, weight, sex, race, age[,] and any other characteristics that the eyewitness was able to observe." *Id.* A57. All that the Connecticut Supreme Court's rule precludes are identifications that are so unreliable that they give rise to a substantial risk of wrongful conviction—an outcome the State should welcome rather than resist.

III. The in-court identification here violated due process for the narrower reason that it was preceded by a failed pretrial identification.

Weibel's in-court identification was particularly problematic because he "was unable to identify [Dickson] in a photographic array[] but had absolutely no difficulty doing so when the defendant was sitting next to defense counsel in court." Pet. App. A40. This makes this case a poor vehicle to resolve the questions the State presents. If this Court were to grant certiorari, it could decide the case without addressing whether *all* first-time in-court identifications must be prescreened. It could instead hold that proposed in-court identifications preceded by failed out-of-court procedures

are presumptively unreliable and that the State did not overcome that presumption here.

A. In-court identifications preceded by failed out-of-court procedures are presumptively unreliable.

This Court has already held that the Due Process Clause requires courts to prescreen an in-court identification when state actors have arranged an unnecessarily suggestive pretrial identification procedure. Such a procedure creates a "very substantial likelihood of irreparable misidentification" because a witness will "retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of [any] subsequent . . . courtroom identification." *Simmons v. United States*, 390 U.S. 377, 383-84 (1968). Given that risk, the Due Process Clause prohibits the prosecution from later asking the witness to identify the defendant at trial unless the court finds that the witness can do so reliably. *Id.* at 384; *see Foster v. California*, 394 U.S. 440, 442-43 (1969).

Failed out-of-court identification procedures create the same risk of misidentification as do unnecessarily suggestive ones. When an eyewitness fails to identify the defendant in a nonsuggestive context, the prosecution is placed on notice that the witness's capacity to provide an accurate and reliable identification is questionable at best. The prosecution may not, consistent with fundamental fairness, then arrange for that witness to try again in the highly suggestive courtroom setting. As the Connecticut Supreme Court put it: "The state is not entitled to conduct an unfair

procedure merely because a fair procedure failed to produce the desired result." Pet. App. A57.

What is more, this Court has indicated that the Due Process Clause reflects concern with the priming effect that prior exposure to the defendant's image has on an eyewitness. In *Foster*, the eyewitness was initially unable to identify the defendant in lineup and showup procedures but identified the defendant at a second lineup a week later and at trial. 394 U.S. at 441-42. The Court held that the witness's repeated exposure to the defendant "so undermined the reliability of the eyewitness identification as to violate due process." *Id.* at 443; *see also United States v. Emanuele*, 51 F.3d 1123, 1127-32 (3d Cir. 1995) (holding that a witness who had been unable to identify the defendant in a pretrial photo array should not have been permitted to identify him in court after the witness saw him in suggestive circumstances outside the courtroom).

A rich body of social science confirms the pernicious effects of priming in this context. "Each effort to test an eyewitness's memory will reshape that memory." Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 485 (2012). Therefore, in a phenomenon known as mugshot exposure, a witness previously exposed to a suspect's image is much more likely to identify that suspect as the perpetrator at a later date. *See Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 327-28 (3d Cir. 2016) (en banc) (McKee, C.J., concurring); *see also* Nancy K. Steblay & Jennifer E. Dysart, *Repeated*

Eyewitness Identification Procedures with the Same Suspect, 5 J. Applied Res. Memory & Cognition 284, 285-86 (2016). Indeed, once a witness has been exposed to a defendant's mugshot, "it is impossible to determine whether a subsequent identification is based on the observation of the initial incident or on the subsequent viewing of the suspect." Mass. Supreme Judicial Court Study Grp. on Eyewitness Evidence, Report and Recommendations to the Justices 77-78 (2013), https://tinyurl.com/guwcqzl. This problem is magnified when the subsequent identification procedure is as suggestive as a courtroom identification.

In short, an in-court identification following a failed out-of-court procedure presumptively creates a substantial risk of misidentification on par with the risk arising from unnecessarily suggestive out-of-court procedures. Where the prosecution cannot rebut this presumption, the Due Process Clause precludes it from orchestrating an in-court identification.

B. The circumstances of Weibel's identification heightened, rather than alleviated, its presumptive unreliability.

The State has presented no reason why Weibel's presumptively unreliable identification of Dickson should have been allowed in this case. In fact, the record provides a host of reasons to doubt Weibel's ability to accurately identify his assailant for the first time at trial.

1. The circumstances surrounding Weibel's original observations of "the criminal at the time of the crime," *Neil v. Biggers*, 409 U.S. 188, 199 (1972), call into question his ability to correctly perceive and later identify

the perpetrator. Weibel was ambushed in the dark by three assailants. Tr. 29-31 (Sept. 4, 2012). Asked what he had noticed about them, he responded that he mostly noted their size and skin color. *Id.* at 32-33. Moreover, Weibel is white and Dickson is black, Pet. App. A28-A29, and cross-racial identifications have long been known to be less reliable than same-race identifications, *see State v. Henderson*, 27 A.3d 872, 917, 926 (N.J. 2011); Christian A. Meissner et al., *Memory for Own- and Other-Race Faces: A Dual-Process Approach*, 19 Applied Cognitive Psychol. 545, 545 (2005).

Also undercutting the accuracy of Weibel's identification is the fact that he was threatened, beaten, and shot by the perpetrator. Tr. 31-35 (Sept. 4, 2012). High levels of stress during memory formation have been shown to interfere with a witness's ability to identify an assailant. *See* Nat'l Acad. of Scis., Identifying the Culprit: Assessing Eyewitness Identification 94-96 (2014). And having a firearm brandished in his face can especially impede an eyewitness's ability to recognize the perpetrator in a subsequent identification procedure. *See United States v. Greene*, 704 F.3d 298, 308 (4th Cir.), *cert. denied*, 134 S. Ct. 419 (2013).

2. The circumstances in the courtroom made it even more unlikely that Weibel's identification of Dickson was reliable. For one thing, the longer it has been since the original observation, the less likely an eyewitness will be to correctly identify the perpetrator. *See Biggers*, 409 U.S. at 199-201; Nat'l Acad. of Scis., *supra*, at 98. By the time the prosecution called Weibel to the

stand, nearly three years had passed since the crime. Pet. App. A2; Tr. 1 (Sept. 4, 2012).

Most importantly, when the prosecution asked Weibel to identify the culprit, Dickson was seated at defense counsel's table and was the only black man in the courtroom not wearing a court marshal's uniform. Pet. App. A29. It is likely that, when the prosecutor asked Weibel to identify his assailant, all eyes went straight to Dickson.

All told, the circumstances here "so undermined the reliability of the eyewitness identification as to violate due process." *Foster*, 394 U.S. at 443.

CONCLUSION

If this Court's holding that Weibel's identification violated due process would not entitle Dickson to a new trial, the State's petition for a writ of certiorari should be denied. If, however, a decision by this Court could entitle him to a new trial, then Dickson is prepared to argue that the identification violated due process.

Respectfully submitted,

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