

SUPREME COURT OF THE UNITED STATES

Perry v. New Hampshire

565 U.S. 228 (2012) · No. 10-8974 · Decided January 11, 2012

OPINION

GINSBURG, J.

OPINION OF THE COURT [565 U.S. 231] Justice Ginsburg delivered the opinion of the Court. In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which [565 U.S. 232] guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution.

Those safeguards apart, admission of evidence in state trials is ordinarily governed by state law, and the reliability of relevant testimony typically falls within the province of the jury to determine. This Court has recognized, in addition, a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.

An identification infected by improper police influence, our case law holds, is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is “a very substantial likelihood of irreparable misidentification,” *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), the judge must disallow presentation of the evidence at trial.

But if the indicia of reliability are strong enough to outweigh the corrupting *703effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice.¹ Our decisions, [565 U.S. 233] however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array.

When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

I A Around 3 a.m. on August 15, 2008, Joffre Ullon called the Nashua, New Hampshire, Police Department and reported that an African-American male was trying to break into cars parked in the lot of Ullon's apartment building. Officer Nicole Clay responded to the call. Upon arriving at the parking lot, Clay heard what "sounded like a metal bat hitting the ground." App.

37a-38a. She then saw petitioner Barion Perry standing between two cars. Perry walked toward Clay, holding two car-stereo amplifiers in his hands. A metal bat lay on the ground behind him. Clay asked Perry where the amplifiers came from. "[I] found them on the ground," Perry responded. Id., at 39a. Meanwhile, Ullon's wife, Nubia Blandón, woke her neighbor, Alex Clavijo, and told him she had just seen someone break into his car.

Clavijo immediately went downstairs to the parking lot to inspect the car. He first observed that one of the rear windows had been shattered. On further inspection, he discovered that the speakers and amplifiers from his car stereo were missing, as were his bat and [565 U.S. 234] wrench. Clavijo then approached Clay and told her about Blandon's alert and his own subsequent observations.

By this time, another officer had arrived at the scene. Clay asked Perry to stay in the parking lot with that officer, while she and Clavijo went to talk to Blandón. Clay and Clavijo then entered the apartment building and took the stairs to the fourth floor, where Blandon's and Clavijo's apart*704ments were located. They met Blan-dón in the hallway just outside the open door to her apartment.

Asked to describe what she had seen, Blandón stated that, around 2:30 a.m., she saw from her kitchen window a tall, African-American man roaming the parking lot and looking into cars. Eventually, the man circled Clavijo's car, opened the trunk, and removed a large box.² Clay asked Blandón for a more specific description of the man. Blandón pointed to her kitchen window and said the person she saw breaking into Clavijo's car was standing in the parking lot, next to the police officer.

Perry's arrest followed this identification. About a month later, the police showed Blandón a photographic array that included a picture of Perry and asked her to point out the man who had broken into Clavijo's car. Blandón was unable to identify Perry. B Perry was charged in New Hampshire state court with one count of theft by unauthorized taking and one count of criminal mischief.³ Before trial, he moved to suppress Blandon's identification on the ground that admitting it at trial would violate due process.

Blandón witnessed what [565 U.S. 235] amounted to a one-person showup in the parking lot, Perry asserted, which all but guaranteed that she would identify him as the culprit. Id., at 15a-16a. The New Hampshire Superior Court denied the motion. Id., at 82a-88a.

To determine whether due process prohibits the introduction of an out-of-court identification at trial, the Superior Court said, this Court's decisions instruct a two-step inquiry. First, the trial court must decide whether the police used an unnecessarily suggestive identification procedure. *Id.*, at 85a. If they did, the court must next consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable and therefore inadmissible.

Ibid. (citing *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). Perry's challenge, the Superior Court concluded, failed at step one: Blandon's identification of Perry on the night of the crime did not result from an unnecessarily suggestive procedure "manufacture [d]... by the police." App.

86a-87a. Blandón pointed to Perry "spontaneously," the court noted, "without any inducement from the police." *Id.*, at 85a-86a. Clay did not ask Blandón whether the man standing in the parking lot was the man Blandón had seen breaking into Clavijo's car. *Ibid.* Nor did Clay ask Blandón to move to the window from which she had observed the break-in. *Id.*, at 86a.

The Superior Court recognized that there were reasons to question the accuracy of Blandon's identification: The parking lot was dark in some locations; Perry was standing next to a police officer; Perry was the only African American man in the vicinity; and Blandón was unable, later, to pick *705Perry out of a photographic array. *Id.*, at 86a-87a. But "[b]ecause the police procedures were not unnecessarily suggestive," the court ruled that the reliability of Blandon's testimony was for the jury to consider.

Id., at 87a. [565 U.S. 236] At the ensuing trial, Blandón and Clay testified to Blandon's out-of-court identification. The jury found Perry guilty of theft and not guilty of criminal mischief. On appeal, Perry repeated his challenge to the admissibility of Blandon's out-of-court identification.

The trial court erred, Perry contended, in requiring an initial showing that the police arranged the suggestive identification procedure. Suggestive circumstances alone, Perry argued, suffice to trigger the court's duty to evaluate the reliability of the resulting identification before allowing presentation of the evidence to the jury.

The New Hampshire Supreme Court rejected Perry's argument and affirmed his conviction. *Id.*, at 9a-11a. Only where the police employ suggestive identification techniques, that court held, does the Due Process Clause require a trial court to assess the reliability of identification evidence before permitting a jury to consider it. *Id.*, at 10a-11a.

We granted certiorari to resolve a division of opinion on the question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police. 563 U.S. 1020, 131 S. Ct. 2932, 180 L. Ed. 2d 224 (2011).⁴ [565 U.S. 237] II A The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable

reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.

Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 343-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); compulsory process, *Taylor v. Illinois*, 484 U.S. 400, 408-409, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); and confrontation plus cross-examination of witnesses, *Delaware v. Fensterer*, 474 U.S. 15, 18-20, 106 S. Ct.

292, 88 L. Ed. 2d 15 (1985) (per curiam). Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented *706at trial. See *Kansas v. Ventris*, 556 U.S. 586, 594, n., 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009) ("Our legal system... is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses.").

Only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice," *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990) (internal quotation marks omitted), have we imposed a constraint tied to the Due Process Clause. See, e.g., *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed.

2d 1217 (1959) (Due process prohibits the State's "knowin[g] use [of] false evidence," because such use violates "any concept of ordered liberty."). Contending that the Due Process Clause is implicated here, Perry relies on a series of decisions involving police-arranged identification procedures.

In *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), first of those decisions, a witness identified the defendant as her assailant after police officers brought [565 U.S. 238] the defendant to the witness' hospital room. *Id.*, at 295, 87 S. Ct. 1967, 18 L. Ed. 2d 1199. At the time the witness made the identification, the defendant—the only African-American in the room—was handcuffed and surrounded by police officers.

Ibid. Although the police-arranged showup was undeniably suggestive, the Court held that no due process violation occurred. *Id.*, at 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199. Crucial to the Court's decision was the procedure's necessity: The witness was the only person who could identify or exonerate the defendant; the witness could not leave her hospital room; and it was uncertain whether she would live to identify the defendant in more neutral circumstances.

Ibid. A year later, in *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), the Court addressed a due process challenge to police use of a photographic array. When a witness identifies the defendant in a police-organized photo lineup, the Court ruled, the identification should be suppressed only where "the photographic identification procedure was so

[unnecessarily] suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” *Id.*, at 384-385, 88 S. Ct.

967, 19 L. Ed. 2d 1247. Satisfied that the photo array used by Federal Bureau of Investigation agents in *Simmons* was both necessary and unlikely to have led to a mistaken identification, the Court rejected the defendant’s due process challenge to admission of the identification. *Id.*, at 385-386, 88 S. Ct. 967, 19 L. Ed. 2d 1247.

In contrast, the Court held in *Foster v. California*, 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969), that due process required the exclusion of an eyewitness identification obtained through police-arranged procedures that “made it all but inevitable that [the witness] would identify [the defendant].” *Id.*, at 443, 89 S. Ct. 1127, 22 L. Ed. 2d 402. Synthesizing previous decisions, we set forth in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct.

375, 34 L. Ed. 2d 401 (1972), and reiterated in *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977), the approach appropriately used to determine whether the Due Process Clause requires suppression of an eyewitness identification tainted by police arrangement.

The Court emphasized, first, that due process concerns arise only when law enforcement officers *707use an [565 U.S. 239] identification procedure that is both suggestive and unnecessary. *Id.*, at 107, 109, 97 S. Ct. 2243, 53 L. Ed. 2d 140; *Biggers*, 409 U.S., at 198, 93 S. Ct. 375, 34 L. Ed. 2d 401. Even when the police use such a procedure, the Court next said, suppression of the resulting identification is not the inevitable consequence.

Brathwaite, 432 U.S., at 112-113, 97 S. Ct. 2243, 53 L. Ed. 2d 140; *Biggers*, 409 U.S., at 198-199, 93 S. Ct. 375, 34 L. Ed. 2d 401. A rule requiring automatic exclusion, the Court reasoned, would “g[o] too far,” for it would “kee[p] evidence from the jury that is reliable and relevant,” and “may result, on occasion, in the guilty going free.” *Brathwaite*, 432 U.S., at 112, 97 S. Ct.

2243, 53 L. Ed. 2d 140; see *id.*, at 113, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (when an “identification is reliable despite an unnecessarily suggestive [police] identification procedure,” automatic exclusion “is a Draconian sanction,” one “that may frustrate rather than promote justice”). Instead of mandating a per se exclusionary rule, the Court held that the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a “substantial likelihood of misidentification.” *Biggers*, 409 U.S., at 201, 93 S. Ct.

375, 34 L. Ed. 2d 401; see *Brathwaite*, 432 U.S., at 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140. “[R]eliability [of the eyewitness identification] is the linchpin” of that evaluation, the Court stated in *Brathwaite*. *Id.*, at 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140. Where the “indicators of [a witness]’ ability to make an accurate identification” are “outweighed by the corrupting effect” of law enforcement suggestion, the identification should be suppressed.

Id., at 114, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140. Otherwise, the evidence (if admissible in all other respects) should be submitted to the jury.⁵ Applying this “totality of the circumstances” approach, id., at 110, 97 S. Ct. 2243, 53 L. Ed. 2d 140, the Court held in *Biggers* that law enforcement’s use [565 U.S. 240] of an unnecessarily suggestive showup did not require suppression of the victim’s identification of her assailant.

409 U.S., at 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401. Notwithstanding the improper procedure, the victim’s identification was reliable: She saw her assailant for a considerable period of time under adequate light, provided police with a detailed description of her attacker long before the showup, and had “no doubt” that the defendant was the person she had seen.

Id., at 200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (internal quotation marks omitted). Similarly, the Court concluded in *Brathwaite* that police use of an unnecessarily suggestive photo array did not require exclusion of the resulting identification. 432 U.S., at 114-117, 97 S. Ct. 2243, 53 L. Ed. 2d 140.

The witness, an undercover police officer, viewed the defendant in good light for several minutes, provided a thorough description of the suspect, and was certain of his identification. Id., at 115, 97 S. Ct. 2243, 53 L. Ed. 2d *708140. Hence, the “indicators of [the witness’s] ability to make an accurate identification [were] hardly outweighed by the corrupting effect of the challenged identification.” Id., at 116, 97 S. Ct.

2243, 53 L. Ed. 2d 140. B. Perry concedes that, in contrast to every case in the *Stovall* line, law enforcement officials did not arrange the suggestive circumstances surrounding Blandon’s identification. See Brief for Petitioner 34; Tr. of Oral Arg. 5 (counsel for Perry) (“[W]e do not allege any manipulation or intentional orchestration by the police.”). He contends, however, that it was mere happenstance that each of the *Stovall* cases involved improper police action.

The rationale underlying our decisions, Perry asserts, supports a rule requiring trial judges to pre-screen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. We disagree. Perry’s argument depends, in large part, on the Court’s statement in *Brathwaite* that “reliability is the linchpin in determining the admissibility of identification testimony.” 432 U.S., at 114, 97 S. Ct.

2243, 53 L. Ed. 2d 140. If reliability is the linchpin of admissibility [565 U.S. 241] under the Due Process Clause, Perry maintains, it should make no difference whether law enforcement was responsible for creating the suggestive circumstances that marred the identification. Perry has removed our statement in *Brathwaite* from its mooring, and thereby attributes to the statement a meaning a fair reading of our opinion does not bear.

As just explained, *supra*, at 238-239, 181 L. Ed. 2d, at 706-707, the *Brathwaite* Court’s reference to reliability appears in a portion of the opinion concerning the appropriate remedy when the police use an unnecessarily suggestive identification procedure.

The Court adopted a judicial screen for reliability as a course preferable to a per se rule requiring exclusion of identification evidence whenever law enforcement officers employ an improper procedure. The due process check for reliability, Brathwaite made plain, comes into play only after the defendant establishes improper police conduct.

The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, notwithstanding improper police conduct. 432 U.S., at 112-113, 97 S. Ct. 2243, 53 L. Ed. 2d 140.6 Perry's contention that improper police action was not essential to the reliability check Brathwaite required is echoed by the dissent. Post, at 252, 181 L. Ed.

2d, at 715. Both ignore a key premise of the Brathwaite decision: A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances, the Court said, is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. See 432 U.S., at 112, 97 S. Ct. 2243, 53 L. Ed. 2d 140. Alerted to the prospect that identification evidence improperly obtained may be excluded, the Court reasoned, police officers will "guard *709 against unnecessarily suggestive procedures." Ibid. This deterrence rationale is inapposite in cases, like Perry's, in which the police engaged in no improper conduct.

Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970), another decision in the Stovall line, similarly shows that the Court has linked the due process check, not to suspicion of eyewitness testimony generally, but only to improper police arrangement of the circumstances surrounding an identification.

The defendants in Coleman contended that a witness' in-court identifications violated due process, because a pretrial stationhouse lineup was "so unduly prejudicial and conducive to irreparable misidentification as fatally to taint [the later identifications]." 399 U.S., at 3, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (plurality opinion).

The Court rejected this argument. Id., at 5-6, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (plurality opinion), 13-14, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (Black, J., concurring), 22, n. 2, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (Burger, C. J., dissenting), 28, n. 2, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (Stewart, J., dissenting). No due process violation occurred, the plurality explained, because nothing "the police said or did prompted [the witness'] virtually spontaneous identification of [the defendants]." Id., at 6, 90 S. Ct.

1999, 26 L. Ed. 2d 387. True, Coleman was the only person in the lineup wearing a hat, the plurality noted, but "nothing in the record show[ed] that he was required to do so." Ibid. See also Colorado v. Connelly, 479 U.S. 157, 163, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (Where the "crucial element of police overreaching" is missing, the admissibility of an allegedly unreliable confession is "a matter to be governed by the evidentiary laws of the forum,... and not by the Due Process Clause.").

Perry and the dissent place significant weight on *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), describing it as a decision not anchored to improper police conduct. See Brief for Petitioner 12, 15, 21-22, 28; post, at 250-253, 256-258, 181 L. Ed. 2d, at 714-716, 718-719.

In fact, the risk of police rigging was the very danger to which the Court responded in *Wade* when it recognized a defendant's right to counsel at postindictment, police-organized identification procedures. 388 U.S., at 233, 235-236, 87 S. Ct. 1926, 18 L. Ed. 2d 1149. "[T]he confrontation compelled by the State between the accused and the [565 U.S. 243] victim or witnesses," the Court began, "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.*, at 228, 87 S. Ct.

1926, 18 L. Ed. 2d 1149 (emphasis added). "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification," the Court continued, "has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Ibid.*, (emphasis added).

To illustrate the improper suggestion it was concerned about, the Court pointed to police-designed lineups where "all in the lineup but the suspect were known to the identifying witness,... the other participants in [the] lineup were grossly dissimilar in appearance to the suspect,... only the suspect was required to wear distinctive clothing which the culprit allegedly wore,... the witness is told by the police that they have caught the culprit after *710which the defendant is brought before the witness alone or is viewed in jail,... the suspect is pointed out before or during a lineup,... the participants in the lineup are asked to try on an article of clothing which fits only the suspect." *Id.*, at 233, 87 S. Ct.

1926, 18 L. Ed. 2d 1149. Beyond genuine debate, then, prevention of unfair police practices prompted the Court to extend a defendant's right to counsel to cover postindictment lineups and showups. *Id.*, at 235, 87 S. Ct. 1926, 18 L. Ed. 2d 1149. Perry's argument, reiterated by the dissent, thus lacks support in the case law he cites.

Moreover, his position would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications. External suggestion is hardly the only factor that casts doubt on the trustworthiness of an eyewitness' testimony.

As one of Perry's amici points out, many other factors bear on "the likelihood of misidentification," post, at 258, 181 L. Ed. 2d, at 719—for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was [565 U.S. 244] from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness.

Brief for American Psychological Association as Amicus Curiae 9-12. There is no reason why an identification made by an eyewitness with poor vision, for example, or one who harbors a grudge against the defendant, should be regarded as inherently more reliable, less of a “threat to the fairness of trial,” post, at 262, 181 L. Ed. 2d, at 722, than the identification Blandón made in this case.

To embrace Perry’s view would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence. Perry maintains that the Court can limit the due process check he proposes to identifications made under “suggestive circumstances.” Tr. of Oral Arg. 11-14. Even if we could rationally distinguish suggestiveness from other factors bearing on the reliability of eyewitness evidence, Perry’s limitation would still involve trial courts, routinely, in preliminary examinations.

Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do. Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances.

For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned “theft suspect,” or hearing a radio report implicating the defendant in the crime. Or suppose the witness knew that the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might have “suggested” to the witness that the defendant was the person the witness observed committing the crime.

C In urging a broadly applicable due process check on eyewitness identifications, Perry maintains that eyewitness identifications are a uniquely unreliable form of evidence. See Brief for Petitioner 17-22 (citing studies showing that [565 U.S. 245] eyewitness mis-identifications are the leading cause of wrongful convictions); Brief for American Psychological Association as Amicus Curiae 14-17 (describing research indicating that as many as *711one in three eyewitness identifications is inaccurate).

See also post, at 262-265, 181 L. Ed. 2d, at 722-724. We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in recognizing that defendants have a constitutional right to counsel at postindictment police lineups, we observed that “the annals of criminal law are rife with instances of mistaken identification.” *Wade*, 388 U.S., at 228, 87 S. Ct.

1926, 18 L. Ed. 2d 1149. We have concluded in other contexts, however, that the potential unreliability of a type of evidence does not alone render its introduction at the defendant’s trial fundamentally unfair. See, e.g., *Ventris*, 556 U.S., at 594, n., 129 S. Ct. 1841, 173 L. Ed. 2d 801 (declining to “craft a broad exclusionary rule for uncorroborated statements obtained [from

jailhouse snitches],” even though “rewarded informant testimony” may be inherently untrustworthy); Dowling, 493 U.S., at 353, 110 S. Ct.

668, 107 L. Ed. 2d 708 (rejecting argument that the introduction of evidence concerning acquitted conduct is fundamentally unfair because such evidence is “inherently unreliable”). We reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

Our unwillingness to enlarge the domain of due process as Perry and the dissent urge rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. See *supra*, at 237, 181 L. Ed. 2d, at 705.

We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant’s Sixth Amendment right to confront the eyewitness. See *Maryland v. Craig*, 497 U.S. 836, 845, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (“The central concern of the Confrontation Clause [565 U.S. 246] is to ensure the reliability of the evidence against a criminal defendant.”).

Another is the defendant’s right to the effective assistance of an attorney, who can expose the flaws in the eyewitness’ testimony during cross-examination and focus the jury’s attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted,⁷ likewise warn the jury to take care in appraising identification evidence.

See, e.g., *712 *United States v. Telfaire*, 469 F.2d 552, 558-559 (CA DC 1972) (per curiam) (D. C. Circuit Model Jury Instructions) (“If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care.”). See also *Ventris*, 556 U.S., at 594, n., 129 S. Ct.

1841, 173 L. Ed. 2d 801 (citing jury instructions that informed jurors about the unreliability of uncorroborated jailhouse-informant testimony as a reason to [565 U.S. 247] resist a ban on such testimony); Dowling, 493 U.S., at 352-353, 110 S. Ct. 668, 107 L. Ed. 2d 708.

The constitutional requirement that the government prove the defendant’s guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence. State and Federal Rules of Evidence, moreover, permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury.

See, e.g., Fed. Rule Evid. 403; N.H. Rule Evid. 403 (2011). See also Tr. of Oral Arg. 19-22 (inquiring whether the standard Perry seeks differs materially from the one set out in Rule 403). In appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence. See, e.g., *State v. Clopten*, 2009 UT 84, ¶ 33, 223 P.3d 1103, 1113 (“We expect... that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence].”).

Many of the safeguards just noted were at work at Perry’s trial. During her opening statement, Perry’s court-appointed attorney cautioned the jury about the vulnerability of Blandon’s identification. App. 115a (Blandón, “the eyewitness that the State needs you to believe [,] can’t pick [Perry] out of a photo array. How carefully did she really see what was going on?...

How well could she really see him?”). While cross-examining Blandón and Officer Clay, Perry’s attorney constantly brought up the weaknesses of Blandon’s identification. She highlighted: (1) the significant distance between Blandon’s window and the parking lot, *id.*, at 226a; (2) the lateness of the hour, *id.*, at 225a; (3) the van that partly obstructed Blandon’s view, *id.*, at 226a; (4) Blandon’s concession that she was “so scared [she] really didn’t pay attention” to what Perry was wearing, *id.*, at 233a; (5) Blandon’s inability to describe Perry’s facial features or other identifying marks, *id.*, at 205a, 233a-235a; (6) Blandon’s failure to pick Perry out of a photo array, *id.*, at 235a; and (7) [565 U.S. 248] Perry’s position next to a uniformed, gun-bearing police officer at the moment Blandón made her identification, *id.*, at 202a-205a.

Perry’s counsel reminded the jury of these frailties during her summation. *Id.*, at 374a-375a (Blandón “wasn’t able to tell you much about who she saw.... She couldn’t pick [Perry] out of a lineup, out of a photo array.... [Blandón said] [t]hat guy that was with the police officer, that’s who was circling. Again, think about the context with the guns, the uniforms.

Powerful, powerful context clues.”). After closing arguments, the trial court read the jury a lengthy instruction on identification testimony and the factors the jury should consider *713when evaluating it. *Id.*, at 399a-401a.

The court also instructed the jury that the defendant’s guilt must be proved beyond a reasonable doubt, *id.*, at 390a, 392a, 395a-396a, and specifically cautioned that “one of the things the State must prove [beyond a reasonable doubt] is the identification of the defendant as the person who committed the offense,” *id.*, at 398a-399a. Given the safeguards generally applicable in criminal trials, protections availed of by the defense in Perry’s case, we hold that the introduction of Blandon’s eyewitness testimony, without a preliminary judicial assessment of its reliability, did not render Perry’s trial fundamentally unfair. * * * For the foregoing reasons, we agree with the New Hampshire courts’ appraisal of our decisions.

See *supra*, at 235-236, 181 L. Ed. 2d, at 704-705. Finding no convincing reason to alter our precedent, we hold that [16] the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.

Accordingly, the judgment of the New Hampshire Supreme Court is affirmed.. The dissent, too, appears to urge that all suggestive circumstances raise due process concerns warranting a pretrial ruling. See *post*, at 254, 257, 262-265, 181 L. Ed. 2d, at 717, 718, 722-724. Neither Perry nor the dissent, however, points to a single case in which we have required pretrial screening absent a police arranged identification procedure.

Understandably so, for there are no such cases. Instead, the dissent surveys our decisions, heedless of the police arrangement that underlies every one of them, and inventing a “longstanding rule,” *post*, at 254, 181 L. Ed. 2d, at 717, that never existed. Nor are we, as the dissent suggests, imposing a *mens rea* requirement, *post*, at 250, 255, 181 L. Ed. 2d, at 714, 717, or otherwise altering our precedent in any way.

As our case law makes clear, what triggers due process concerns is police use of an unnecessarily suggestive identification procedure, whether or not they intended the arranged procedure to be suggestive.. The box, which Clay found on the ground near where she first encountered Perry, contained car-stereo speakers. App. 177a-178a..

The theft charge was based on the taking of items from Clavijo’s car, while the criminal mischief count was founded on the shattering of Clavijo’s car window.. Compare *United States v. Bouthot*, 878 F.2d 1506, 1516 (CA1 1989) (Due process requires federal courts to “scrutinize all suggestive identification procedures, not just those orchestrated by the police.”); *Dunnigan v. Keane*, 137 F.3d 117, 128 (CA2 1998) (same); *Thigpen v. Cory*, 804 F.2d 893, 895 (CA6 1986) (same), with *United States v. Kimberlin*, 805 F.2d 210, 233 (CA7 1986) (Due process check is required only in cases involving improper state action.); *United States v. Zeiler*, 470 F.2d 717, 720 (CA3 1972) (same); *State v. Addison*, 160 N.H.

792, 801, 8 A.3d 118, 125 (2010) (same); *State v. Reid*, 91 S.W.3d 247, 272 (Tenn. 2002) (same); *State v. Nordstrom*, 200 Ariz. 229, 241, 25 P.3d 717, 729 (2001) (same); *Semple v. State*, 271 Ga. 416, 417-418, 519 S.E.2d 912, 913-914 (1999) (same); *Harris v. State*, 619 N.E.2d 577, 581 (Ind. 1993) (same); *State v. Pailon*, 590 A.2d 858, 862-863 (R.

I. 1991) (same); *Commonwealth v. Colon-Cruz*, 408 Mass. 533, 541-542, 562 N.E.2d 797, 805 (1990) (same); *State v. Brown*, 38 Ohio St. 3d 305, 310-311, 528 N.E.2d 523, 533 (1988) (same); *Wilson v. Commonwealth*, 695 S.W.2d 854, 857 (Ky. 1985) (same).. Among “factors to be considered” in evaluating a witness’ “ability to make an accurate identification,” the Court listed: “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of

attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct.

2243, 53 L. Ed. 2d 140 (1977) (citing *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)). The Court’s description of the question presented in *Brathwaite* assumes that improper state action occurred: “[Does] the Due Process Clause of the Fourteenth Amendment compe[l] the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary.” 432 U.S., at 99, 97 S. Ct.

2243, 53 L. Ed. 2d 140.. See Model Crim. Jury Instr. No. 4.15 (CA3 2009); *United States v. Holley*, 502 F.2d 273, 277-278 (CA4 1974); Pattern Crim. Jury Instr. No. 1.29 (CA5 2001); Pattern Crim. Jury Instr. No. 7.11 (CA6 2011); Fed. Crim. Jury Instr. No. 3.08 (CA7 1999); Model Crim. Jury Instr. for the District Courts No. 4.08 (CA8 2011); Model Crim. Jury Instr.

No. 4.11 (CA9 2010); Pattern Crim. Jury Instr. No. 1.29 (CA10 2011); Pattern Jury Instr., Crim. Cases, Spec. Instr. No. 3 (CA11 2010); Rev. Ariz. Jury Instr., Crim., No. 39 (3d ed. 2008); 1 Judicial Council of Cal., Crim. Jury Instr., No. 315 (Summer 2011); Conn. Crim. Jury Instr. No. 2.6-4 (4th ed. 2007); 2 Ga. Suggested Pattern Jury Instr., Crim. Cases, No. 1.35.10 (4th ed.

2011); Ill. Pattern Jury Instr., Crim., No. 3.15 (Supp. 2011); Pattern Instr., Kan. 3d, Crim., No. 52.20 (2011); 1 Md. Crim. Jury Instr. & Commentary §§ 2.56, 2.57(A), 2.57(B) (3d ed. 2009 and Supp. 2010); Mass. Crim. Model Jury Instr. No. 9.160 (2009); 10 Minn. Jury Instr. Guides, Crim., No. 3.19 (Supp. 2006); N.H. Crim. Jury Instr. No. 3.06 (1985); N.Y. Crim.

Jury Instr. “Identification—One Witness” and “Identification—Witness Plus” (2d ed. 2011); Okla. Uniform Jury Instr., Crim., No. 9-19 (Supp. 2000); 1 Pa. Suggested Standard Crim. Jury Instr. No. 4.07B (2d ed. 2010); Term. Pattern Jury Instr., Crim., No. 42.05 (15th ed. 2011); Model *712Utah Jury Instr. CR404 (2d ed. 2011); Model Instructions from the Vt. Crim.

Jury Instr. Comm. Nos. CR5-601, CR5-605 (2003); W. Va. Crim. Jury Instr. No. 5.05 (6th ed. 2003).