Docket No.

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 2024

DARRELL BLOUNT,

Petitioner,

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;
THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER WAS DENIED A FAIR TRIAL BY THE ADMISSION OF EVIDENCE OF AN UNRELIABLE SHOW-UP IDENTIFICATION IN VIOLATION OF HIS RIGHT TO DUE PROCESS.

II. WHETHER THE EXCLUSION AT TRIAL OF PETITIONER'S EYEWITNESS IDENTIFICATION EXPERT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE.

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Petitioner Darrell Blount respectfully asks the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on November 5, 2024, in the captioned matter.

CITATIONS OF OPINIONS AND ORDERS

The unreported opinion of the United States Court of Appeals for the Third Circuit, affirming the denial of Petitioner's Application under 28 U.S.C. § 2254 is attached as Exhibit A.

BASIS FOR JURISDICTION

Petitioner petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed on November 5, 2024. Jurisdiction to review such judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law ....

The Sixth Amendment to the United States Constitution provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Procedural History

On February 4, 2011, Petitioner Darrell Blount was convicted by a jury in a New Jersey state court of first-degree robbery, in violation of N.J.S.A. 2C:15-1, second-degree possession of a weapon for an unlawful purpose, in violation of N.J.S.A. 2C:39-4A, and third-degree unlawful possession of a weapon, in violation of N.J.S.A. 2C:39-5B. On June 17, 2011, the court sentenced Blount as a persistent offender (N.J.S.A. 2C:43-7.1(a)) to life without parole, with a concurrent five-year sentence. (ECF #6-3) (Judgment of Conviction).

On January 10, 2019, Blount filed a timely petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF #1), which the district court denied on March 17, 2022 (A28).

Petitioner filed a timely notice of appeal which the Third Circuit treated as a request for issuance of a certificate of appealability. On May 17, 2023, the Third Circuit issued a certificate of appealability (A56) limited to the issues briefed below.

On November 5, 2024, the Third Circuit issued an unreported decision affirming the judgment below. In particular, the Court of Appeals held that the trial court had properly permitted the State to introduce at trial an admittedly impermissibly suggestive show-up identification of Petitioner and that the trial court had not erred by prohibiting Petitioner from introducing expert testimony on the question of the reliability of eyewitness identification evidence.

Factual Background

On April 17, 2007, between 9:45 and 10:00 a.m., a black male entered Andy's Twin Boro Liquor Store in Roselle Park, New Jersey. (ECF #6-34) (15T41:3-8). The individual approached the counter, asked the clerk for a six-pack of beer, then pulled a handgun when the clerk's back was turned and demanded money from the register. (ECF #6-34) (15T46:19 to 50:18). The clerk refused to comply and hit the panic alarm button; the individual then fled the store. (ECF #6-34) (15T50:20 to 53:10). The clerk followed the individual outside and observed him getting into a silver Dodge Neon. (ECF #6-34) (15T56:2-4). The clerk took down the license plate. (ECF #6-34) (15T56:6-7).

When the responding Roselle Park police officer arrived at the liquor store, he observed that the clerk was very excited and nervous. (ECF #6-34) (15T128:17-128:22). After the clerk calmed down, he provided the officer with the license plate number and a description of the suspect: 5'8" to 5'10", medium build, and approximately 30-40 years old, wearing blue pants, a green shirt, and a hat. (ECF #6-34) (15T129 to 130). The clerk did not tell the police that the suspect had facial hair. (ECF #6-24 (15T89:7-14).

The police ran the plate and discovered that the Dodge Neon was registered to Petitioner's sister, Suzette Bethea ("Suzette"), who lived in Edison, New Jersey. (ECF #6-34) (15T146). Before 10:55 a.m., an Edison Police officer located the Dodge Neon at Western Forbes Court in Potter's Crossing. (ECF #6-34) (15T98:19-25). No one was in the vehicle. (ECF #6-34) (15T112). The Roselle Park Police informed the Edison Police that the suspect was a black man wearing a green shirt and blue jeans. (ECF #6-34) (15T111:13-24). After 10-15 minutes, the Edison police officer observed Petitioner enter the vehicle and drive away. (ECF #6-34) (15T99 to 100; 114).

At 10:55 a.m., the Edison Police pulled over the Dodge Neon and arrested Petitioner. (ECF #6-34) (15T101 to 104). The Edison Police searched the vehicle and found a green shirt, a blue bag, and a green towel covering a black BB gun. (ECF #6-34) (15T118:11-21). No fingerprints were found on the BB gun. (ECF #6-35) (16T30).

Roselle Police Officer Richard Cocca drove the clerk to Edison to identify the suspect. Officer Cocca told the clerk that the suspect and the vehicle were being detained and that they were driving to the scene so that the clerk could "make a positive I.D. of the [suspect] and vehicle." (ECF #6-35) (16T5:11-18).

When Officer Cocca arrived at the scene of the arrest, a crowd had formed around the vehicle and there were at least five police cars and ten officers on the scene, some with tactical rifles. (ECF #6-34) (15T119 to 120) (ECF # 6-35) (16T17:14-19). Officer Cocca testified that the street was blocked off and it was a "hostile" scene with residents unhappy with the police presence. (ECF #6-35) (16T17). Because of the situation, Officer Cocca was told that the "Edison [Police] wanted [Cocca] to kind of get out of there as quickly as possible." (ECF #6-35) (16T19:5-9).

Officer Cocca assisted the clerk out of the back of the police car. (ECF #6-35) (16T20). Petitioner was removed from a patrol car in handcuffs and flanked by two police officers. (ECF

#6-34) (15T87). The individuals who witnessed this one-on-one confrontation did not testify consistently about the distance between the clerk and Blount at the time of the show-up: Officer Cocca testified that the Clerk was ten feet away (ECF #6-35) (16T20:9-12) and another officer testified that the clerk was 25-30 feet away. (ECF #6-36) (17T71:25-72:2). The clerk testified that, at first, he was too far away and could not recognize Petitioner so the police brought him closer. (ECF #6-34) (15T87:11-19). The clerk estimated that he was 14 feet away from Petitioner at the time he identified him. (ECF #6-34) (15T88:7-11).

Petitioner's sister, Suzette Bethea, testified at trial that, at the time of the incident, she lived in Edison, New Jersey with her brother Petitioner Darrell Blount, her 22-year-old son James Bethea ("James"), and her two younger children. (ECF #6-36) (17T5-6). She had last seen the Dodge Neon the night before the incident at around 6:00-7:00 p.m. (ECF #6-36) (17T7-10). On the day of the robbery, Suzette had planned to run errands and return home by 11:00 a.m. Shortly after 10:00 a.m., Suzette noticed that the Dodge Neon was not where it was parked the night before and she assumed that James had taken the car without her permission, as he had done in the past. (ECF #6-36) (17T9-11). Petitioner never would take Suzette's car without her permission. (ECF #6-36) (17T11:16-18). Suzette suspected that James drove her car to Potter's Crossing, a housing development close to her home. (ECF #6-36) (17T9:12-13). She asked Petitioner to walk to Potter's Crossing to get her car. (ECF #6-36) (17T10:5-15:23). Suzette testified that Petitioner was home with her all morning. (ECF #6-36) (17T26). She also testified that James was clean shaven. (ECF #6-36) (17T18:4-16).

At the time of Blount's trial in 2011, James was serving a prison sentence for a 2008 robbery in which he had used his mother's car and a BB gun. (ECF #6-36) (17T84-88). James admitted that his own car was not working in 2007, and that he would use his mom's car. (ECF

#6-36) (17T80:6-18). James could not say with certainty if he was home on the date of the robbery. (ECF #6-36) (17T83:7-13). James denied that he committed the robbery with which Petitioner had been charged (ECF #6-36) (17T92:1-3), but acknowledged that if he were to admit that he was involved in the Roselle Park robbery, he would be exposed to additional prison time. (ECF #6-36) (17T105:18-22).

REASONS CERTIORARI SHOULD BE GRANTED

Petitioner Darrell Blount was convicted and sentenced to a term of life without parole based upon eyewitness identification testimony that was undisputedly the result of an impermissibly suggestive show-up procedure: The witness was told that he was being transported to the scene of a suspect's arrest "to make a positive identification" of a suspect "who matched the description" given by the witness; at the show-up, Petitioner was displayed to the witness alone, handcuffed, surrounded by police officers, and next to the silver Dodge Neon the witness had seen fleeing the scene of the crime. In the words of the United States Supreme Court, "[t]he suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact 'the man,'" and the admission of such tainted evidence at trial violated Petitioner's federal constitutional right to due process. *Foster v. California*, 394 U.S. 440 (1969). The trial court's ruling that the show-up identification, though impermissibly suggestive, nevertheless was reliable, was contrary to, and constituted an unreasonable application of, clearly established federal law and an unreasonable determination of the facts based upon the evidence.

With the admission of the impermissibly suggestive show-up identification, Petitioner's defense at trial was misidentification and third-party guilt. Nevertheless, the trial court precluded Petitioner from introducing expert testimony on human memory to challenge the reliability of the show-up identification. As this Court has clearly established, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment ... or in the Compulsory Process or Confrontation

clauses of the Sixth Amendment, ... the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (*quoting California v. Trombetta*, 467 U.S. 479, 485 (1984)), which includes the right to challenge the reliability of the prosecution's evidence, *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) ("The Constitution ... protects a defendant against a conviction based on evidence of questionable reliability ... by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit."). *See also Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (holding that the constitutional right to present a defense includes "the right to put before a jury evidence that might influence the determination of guilt"). Here, the trial court's refusal to allow Petitioner to introduce expert testimony relevant to the jury's assessment of the credibility of the identification obtained from the prosecution's impermissibly suggestive show-up procedure, denied Petitioner the means to persuade the jury that it should reject the prosecution's show-up identification evidence, contrary to *Crane*.

I. PETITIONER WAS DENIED A FAIR TRIAL BY THE ADMISSION OF UNRELIABLE IDENTIFICATION TESTIMONY IN VIOLATION OF HIS RIGHT TO DUE PROCESS.

It is clearly established federal law that an identification procedure that is unnecessarily suggestive and creates a substantial risk of misidentification violates due process. *Manson v. Brathwaite*, 432 U.S. 98, 107 (1977). This Court has recognized that a "show-up" identification procedure, where a single individual arguably fitting a witness's description is presented to that witness for identification, is inherently suggestive because, by its very nature, it implies that the police think they have caught the perpetrator of the crime. *Stovall v. Denno*, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned.").

Although unnecessary suggestiveness alone does not require the exclusion of an eyewitness identification, *Neil v. Biggers*, 409 U.S. 188, 201 (1972), it is the touchstone against which other factors must ultimately be weighed. That is, the test for determining whether introduction of such evidence violates due process is "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199. Under federal constitutional law, the trial court must consider:

> [T]he 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. *Against these factors is to be weighed the corrupting effect of the suggestive identification itself.*

Manson, 432 U.S. at 114 (emphasis added). Thus, a court must first ascertain whether the identification procedure was impermissibly suggestive, and, if so, whether it nevertheless was reliable:

> 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 effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

Perry v. New Hampshire, 565 U.S. 228, 232 (2012). Thus, it is not sufficient for a court simply to examine the *Manson* factors; rather, they must be weighed against the impermissible suggestiveness that gave rise to their consideration in the first instance.

In *Foster v. California*, 394 U.S. 440 (1969), this Court held that the defendant's right to due process was violated by the admission into evidence 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. The Supreme Court explained:

> [T]his case presents a compelling example of unfair lineup procedures. In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber.... When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness. This Court pointed out in *Stovall* that "the practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." 388 U.S. at 302. Even after this the witness' identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup.... This finally produced a definite identification.
>
> The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact "the man." In effect, the police repeatedly said to the witness, "This is the man." This procedure so undermined the reliability of the eyewitness identification as to violate due process.

Id., 394 U.S. at 442-43.

Here, the state court's determination that the impermissibly suggestive show-up procedure utilized by the police resulted in a reliable identification involved an unreasonable application of *Foster v. California* and constituted an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Although the state court addressed some of the indicia of reliability required by Supreme Court precedent, it also considered irrelevant indicia and, ultimately, failed to weigh "[a]gainst these factors ... the corrupting effect of the suggestive identification itself." *Manson*, 432 U.S. at 114.

Objectively, the corrupting effect of the circumstances of the show-up in this case – not least of which was the police officer's actually directing the witness that the show-up was needed "to make a positive identification," (ECF #6-20) (1T9:1-7) – were overwhelming and created a substantial likelihood of misidentification. At the conclusion of the *Wade* hearing, the trial court found that the show-up procedure was improperly suggestive for at least two reasons:

> One, of course, is the statement that Detective Cocca made.... [I]t was either we have the suspect and you have to ID him, and he matches a description,

> or you just have to identify this person as the person who committed the crime. In any event, that is obviously impermissibly suggestive as well as, of course, he's in handcuffs surrounded by the Edison Police when [the witness] is brought to make the identification.

(ECF #6-21) (2T45:9-18) (*Wade* Hearing). Indeed, as in *Foster,* the totality of the circumstances of the show-up made it inevitable that the witness would identify Petitioner as the perpetrator:

- The witness was in the liquor store with the perpetrator for less than two minutes, during some portion of which the witness' back was turned to the perpetrator and then a gun was pointed at his head (ECF #6-21) (2T11:9 to 12:6);

- The witness and the perpetrator were face-to-face for mere seconds, practically "instantaneous" (ECF #6-21) (2T15:19-23), and then he only saw the perpetrator's back (ECF #6-21) (2T17:10-13);

- The show-up was conducted almost two hours after the witness first saw the perpetrator for only a few minutes while the suspect was pointing a gun at the clerk (ECF #6-20) (1T30:12-14); (ECF #6-21) (2T11);

- The Roselle Park Police officer who transported the witness from Roselle Park to Edison told the witness that "Edison had a suspect matching the description in a suspect vehicle detained at the time at an address in Edison," and asked the witness to come with them "to Edison to make a positive I.D. of the suspect." (ECF #6-20) (1T9:1-7);

- When the witness arrived at the scene of Petitioner's arrest, it was cordoned off with police vehicles lined up on both sides of street (ECF #6-20) (1T31:5-9);

- The witness had to drive past Edison police cars to get to show-up (ECF #6-20) (1T31:23-32:1);

- Approximately 10 Edison police officers were present at the scene of the show-up (ECF #6-20) (1T33);

- Several police officers had automatic weapons (ECF #6-20) (1T36);

- The Roselle Park police officer told the witness that "he's going to have to make an I.D. of a possible suspect." (ECF #6-20) (1T12:1-8);

- When the witness arrived, the police officer told the victim to stay in the car because it was a "hostile scene" and the show-up had to occur fast because the Edison police wanted them to "get out of there as quickly as possible" (ECF #6-20) (1T35:6-17);

- Petitioner was sitting in the back of an Edison police cruiser when the witness arrived (ECF #6-20) (1T33);

- The suspect vehicle was surrounded by police cars with the doors open and visible to the witness. (ECF #6-20) (1T32:4-11);

- Petitioner was removed from the back of the police cruiser in handcuffs and then turned toward the witness (ECF #6-20) (1T37:24-38:1);[1]

- The witness was flanked by two Roselle Park police officers (ECF #6-21) (2T24:24-2T25:7); and

- According to the witness, when Petitioner was presented to him for identification, Petitioner was surrounded by police officers (ECF #6-21) (2T27:3-6), and the witness was asked by the police officer next to him: "[T]his is the person?" (ECF #6-21) (2T25:18-24).

The inevitably of the show-up identification is corroborated by the witness' own later testimony regarding the suspect. Specifically, despite testifying at the *Wade* hearing that he was certain of his identification,[2] without the benefit of a suggestive show-up, the witness was not able to identify Petitioner at the *Wade* hearing. (ECF #6-21) (2T29:2-10).

The state trial court, while correctly finding that the identification was impermissibly suggestive, unreasonably ruled that the identification still was reliable, because it failed to weigh the corrupting effect of the improperly suggestive procedure. For example, the state trial court's

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[1] There was inconsistency in the police officers' testimony as to whether Petitioner was removed from the patrol car in the presence of the witness. One Edison police officer testified that Petitioner was in the patrol car when the witness arrived (ECF #6-20) (1T33:21-24), and another testified that Petitioner was removed from the patrol car, in handcuffs, before the witness arrived for the show-up and placed next to the patrol car, because removing the suspect from the police car in the witness' presence would give "the impression that, yes, that was the person." (ECF #6-21) (2T34:13-21).

[2] Police did not ask the witness, at the time of the show-up, to quantify his degree of certainty in his identification but, at the *Wade* hearing, the prosecutor asked the witness a leading question: "You don't have any doubt in your mind that the person you identified in Edison was the person who tried to rob you earlier that day, do you?" and the witness responded "No." (ECF #6-21) (2T28:12-15). This was one indicum relied upon by the state court in finding that the identification was reliable. Yet, in addition to all of the other circumstances listed above that made the show-up impermissibly suggestive, immediately after identifying Petitioner at the show-up, the police then showed the witness "stuff in the car, the gun, and the blue bag" (ECF #6-21) (2T26:3-4) which unavoidably would have influenced (and tainted) the witness' later expression of certainty in his identification of Petitioner.

ruling was based on the witness' ability to provide the police with a description of the vehicle that was "exactly on point." (ECF #6-21) (2T46-48). Yet, automobiles are not human faces and, in any event, the witness' description of the suspect was not "exactly on point." After being held at gun point, the witness told the police that the suspect did not have facial hair (ECF #6-20) (1T44:24-45:3) but, as Officer Cocca testified at the *Wade* hearing, Petitioner had "both a beard and mustache," as confirmed by his contemporaneous booking photo. (ECF #6-20) (1T41:5-18). The state trial court dismissed this discrepancy because, in its view, Petitioner's facial hair – which the trial court acknowledged was visible in Petitioner's booking photo – was not "significant" because it looked like a few days' growth and did not "look like what we talk about when we say a beard." (ECF #6-21) (2T47:8-17). Moreover, there was no urgency that prevented the police from using a more reliable identification procedure than an on-scene, one-on-one show-up procedure. *cf. Stovall*, 388 U.S. at 302 (holding that a show-up did not violate defendant's due process rights when the only witness who could identify or exonerate him was in the hospital near death). As a result, the state court's factual determination regarding reliability was both erroneous and objectively unreasonable based upon the evidence presented at the *Wade* hearing, and failed to apply the standard set forth in *Foster*, which required a weighing of the indicia of reliability against the impermissible suggestiveness of the show-up procedure itself.

Habeas relief has been granted in similar circumstances relying on *Foster*. For example, in *Webb v. Havener*, 549 F.2d 1081 (6th Cir. 1977), the Sixth Circuit held that a petitioner was entitled to habeas relief where the only evidence of his having committed the robbery for which he was convicted was identification testimony obtained through highly suggestive police procedures:

> Although the role of the federal courts considering petitions for habeas is not to resolve conflicts in the evidence presented at trial, in this case the

> identification testimony was the only evidence connecting Webb with the armed robbery. This identification was made under circumstances so suggestive that its reliability is seriously impaired even without discrepancies. By asking the witnesses to wait at the station while the officers left to bring in another suspect, the police unavoidably suggested to the witnesses that Webb, the man with whom the officers returned, was the man whom they should identify. There was no necessitous circumstance here, as there was in *Stovall*, that justified a hurried confrontation. No explanation was offered why a lineup was not arranged, and why the witnesses were not separated at the time each made his identification. We conclude, therefore, that, because the station-house identification was unreliable and because it was unnecessarily so, its admission at trial denied Webb the due process of law....
>
> Simply stated, no reasonable jurist would conclude, in light of the totality of these circumstances and the overwhelming suggestiveness of the show-up, that the witness' identification of Petitioner was anything other than inevitable. Therefore, the trial court's decision that the show-up identification was reliable constituted an unreasonable determination of the facts in light of the evidence presented in the state court proceeding…

Id. at 1086-87 (*citing Foster, supra*). *See also Velez v. Schmer*, 724 F.2d 249, 251 (1st Cir. 1984) ("Necessity must be measured in terms of the cost of a fairer procedure.... The district court's litmus, that the police 'needed to know right away,' so as to abandon, or continue their search, with no specialized need appearing, would excuse any show-up."). The Third Circuit's decision affirming the denial of Petitioner's habeas petition is contrary to these prior precedents.

Simply stated, no reasonable jurist would conclude, in light of the totality of the circumstances and the overwhelming suggestiveness of the show-up, that the witness' identification of Petitioner was anything other than inevitable. Therefore, the trial court's decision that the show-up identification was sufficiently reliable to be admitted at trial constituted an unreasonable determination of the facts in light of the evidence presented in the state court proceeding and involved an unreasonable application of *Foster v. California*.

II. THE EXCLUSION OF PETITIONER'S IDENTIFICATION EXPERT DENIED PETITIONER A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE AND A FAIR TRIAL.

Petitioner also argued on appeal that he is entitled to a new trial because the trial court precluded him from introducing expert testimony on human memory to challenge the reliability of the State's show-up identification. It is clearly established federal constitutional law that a criminal defendant must be granted "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (recognizing criminal defendant's constitutional right to a meaningful opportunity to present a complete defense). A meaningful opportunity to present a complete defense includes the right to challenge the reliability of the prosecution's evidence by presenting evidence of defendant's own. *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) ("The Constitution ... protects a defendant against a conviction based on evidence of questionable reliability ... by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.").

Here, the trial court's refusal to allow Petitioner to introduce expert testimony on the credibility of the prosecution's identification evidence, and other factors affecting the accuracy of human memory, denied Petitioner the evidentiary means to persuade the jury that it should reject the prosecution's identification evidence as unworthy of credit. As such, the court denied Petitioner a meaningful opportunity to present a complete defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth

Amendment ... or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, ... the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (*quoting Trombetta*, 467 U.S. at 485)); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (holding that the constitutional right to present a defense includes "the right to put before a jury evidence that might influence the determination of guilt").

In *Crane v. Kentucky*, 476 U.S. 683 (1986), this Court reversed the defendant's conviction where the trial court erroneously excluded evidence regarding the circumstances under which the defendant's confession was given, on the erroneous basis that it (the trial court) already had decided the issue of voluntariness of the defendant's confession:

> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *United States* v. *Cronic*, 466 U.S. 648, 656 (1984).

Id., 476 U.S. at 690-91. The Court held that the state court's ruling "deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense" because the evidence regarding voluntariness was "highly relevant to the confession's reliability and credibility" and, thus, central to the defense. *Id.* at 687-91. *See also Holmes v. South Carolina*, 547 U.S. 319 (2006) (recognizing that the constitutional right to present a defense "is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.") (internal citations omitted); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) ("Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a

witness to take the stand, but arbitrarily excludes material portions of his testimony."); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973) (reversing conviction, holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process, and that defendant should have been permitted to introduce in his defense exculpatory hearsay evidence which bore "assurances of trustworthiness").

This case is indistinguishable from *Crane* on the facts and the law. Petitioner's defense was misidentification. Nevertheless, the trial court denied him the opportunity to introduce competent and relevant expert testimony at trial to challenge the reliability of the State's identification evidence, which the jury could have relied upon to discredit the prosecution's eyewitness identification evidence. The indispensable probative value of expert testimony regarding the shortcomings of eyewitness identification evidence cannot be disputed because it is well understood that the dangers of eyewitness misidentification are counterintuitive to laypersons. The Third Circuit itself has recognized that the exclusion of defense expert testimony on the reliability of human memory can constitute reversible error, particularly when the defense is misidentification:

> This case was primarily about the accuracy and reliability of the identifications. The District Court's rulings ... significantly undermined Brownlee's ability to challenge effectively the witnesses' certainty and confidence in their identifications -- a point the Government used to its benefit both in presenting testimony and arguing to the jury in its closing at trial....
>
> It is widely accepted by courts, psychologists and commentators that "[t]he identification of strangers is proverbially untrustworthy." Felix Frankfurter, *The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* 30 (Universal Library ed., Grosset & Dunlap 1962) (1927) ("What is the worth of identification testimony even when uncontradicted? ... The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent-not due to the brutalities of ancient criminal procedure."); *see also*

United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (stating that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification"); C. Ronald Huff *et al.*, *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinq. 518, 524 (1986) ("the single most important factor leading to wrongful conviction in the United States ... is eyewitness misidentification"). The recent availability of post-conviction DNA tests demonstrate that there have been an overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications. In 209 out of 328 cases (64%) of wrongful convictions identified by a recent exoneration study, at least one eyewitness misidentified the defendant. Samuel R. Gross *et al.*, *Exonerations in the United States: 1989-2003* 95 J. Crim. L. & Criminology 523, 542 (2004). In fact, "mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined." A. Daniel Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?*, 42 Canadian Psychology 92, 93 (May 2001). "[E]yewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, *is among the least reliable forms of evidence*." *Id*. (Emphasis added.)

Even more problematic, "jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." Rudolf Koch, Note, *Process v.* Outcome*: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 Cornell L. Rev. 1097, 1099 n.7 (2003). Thus, while science has firmly established the "inherent unreliability of human perception and memory," *id*. at 1102 (internal quotations omitted), this reality is outside "the jury's common knowledge," and often contradicts jurors'' "commonsense" understandings, *id*. at 1105 n.48 (internal quotations omitted). To a jury, "there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says[,] 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981) (Brennan, J., dissenting) (emphasis in original).

Faced with "[t]he tragic irony of eyewitness testimony," Koch, *Process v. Outcome, supra*, at 1098 n.6 (quoting Lawrence Taylor, *Eyewitness Identification* 1 (1982)), and no physical scientific means of exonerating himself, sought to present expert scientific evidence to establish the inherent unreliability of human perception and memory by demonstrating that the correlation between confidence and accuracy is weak. Federal Rule of Evidence 702 "authorizes the admission of expert testimony so long as it is rendered by a qualified expert and is helpful to the trier of fact." *DeLuca v. Merrell Dow Pharm., Inc.*, 911 F.2d 941, 954 (3d Cir. 1990). Application of this Rule to Dr. Schooler's proposed testimony required the District Court to apply *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). There we recognized that Rule 702 may permit a defendant "to adduce, from

> an expert in the field of human perception and memory, testimony concerning the reliability of eyewitness identifications." *Id*. at 1226.
>
> * * *
>
> .... Given that "witnesses ofttimes profess considerable confidence in erroneous identifications," expert testimony was the only method of imparting the knowledge concerning confidence-accuracy correlation to the jury. Due to the nature of the Government's evidence and Brownlee's defense (mistaken identity), the primary issue before the jury was the reliability of the Government's four eyewitnesses. "[I]t would seem anomalous to hold that the probative value of expert opinion offered to show the unreliability of eyewitness testimony so wastes time or confuses the issue that it cannot be considered even when the putative effect is to vitiate the [primary] evidence offered by the government." *Downing*, 753 F.2d at 1243. In light of these considerations, we hold it was wrong to exclude expert testimony regarding the reliability of the very eyewitness identification evidence on which Brownlee was convicted, and remand the case for a new trial.

United States v. Brownlee, 454 F.3d 131, 141-44 (3d Cir. 2006). *See also United States v. Mathis*, 264 F.3d 321, 340 (3d Cir. 2001) ("Similar to other types of expert witnesses, ... experts who apply reliable scientific expertise to juridically pertinent aspects of the human mind and body should generally, absent explicable reasons to the contrary, be welcomed by federal courts, not turned away.... Like more typical sorts of expert witnesses, Dr. Loftus attempted to provide information that, if itself deemed credible, might cause the jury to evaluate Sergeant Gubbei's testimony in a different light."). Where, as here, a trial court's exclusion of expert testimony denies the defendant a meaningful opportunity to present a defense, it is an error of federal constitutional magnitude.

The state trial court here repeatedly explained in its ruling that it (the court) already had determined that the identification was reliable and that, therefore, it would be improper to permit Petitioner to introduce expert evidence challenging the reliability of the identification. *See* ECF #6-24 (5T13-24 to 14:7) ("Further, it must also be noted that the reliability of the eyewitness identification ... in this case, has been ruled on by Judge Span. Testimony was taken ... during the pretrial *Wade* hearing and Judge Span ... ruled that the identification made was reliable under

controlling law."); 5T15-3 ("However, the jury is charged with determining the credibility of this witness, not an adverse expert. Having an expert give his opinion on such issues could impinge on the jury's function. This court already ruled that the identification being reliable [sic] ... and there's no additional information that the expert could provide regarding this matter ...."). As in *Crane*, however, it is irrelevant that the trial court had made a threshold determination, in its role as gatekeeper, that the eyewitness identification was sufficiently reliable to be *admissible*. As this Court explained in *Crane*:

> The holding below rests on the apparent assumption that evidence bearing on the voluntariness of a confession and evidence bearing on its credibility fall in conceptually distinct and mutually exclusive categories. Once a confession has been found voluntary, the Supreme Court of Kentucky believed, the evidence that supported that finding may not be presented to the jury for any other purpose. This analysis finds no support in our cases, is premised on a misconception about the role of confessions in a criminal trial, and, under the circumstances of this case, contributed to an evidentiary ruling that deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense.

Crane, 476 U.S. at 687. Here, too, the trial court's misconception of the limits of its own gatekeeping role resulted in a ruling that was objectively wrong as a matter of clearly established federal constitutional law: A trial court's threshold admissibility determination does not trump a defendant's right to present expert testimony regarding the fallibility of human memory that a jury might credit in assessing the improperly suggestive identification procedure utilized by the police, or the indicia affecting the reliability of eyewitness identifications, thereby reducing the weight the jury gives to such identification evidence and creating a reasonable doubt regarding the defendant's guilt. Indeed, it is the very admission of such evidence that gives rise to a defendant's need to present a complete defense rebutting it. Therefore, the state court's exclusion of Petitioner's eyewitness identification expert testimony was an objectively unreasonable application of, and contrary to, clearly established federal constitutional law as determined by the

United States Supreme Court. *Crane*, 476 U.S. at 688 ("In laying down these rules the Court has never questioned that 'evidence surrounding the making of a confession bears on its credibility' as well as its voluntariness.... As the Court noted in *Jackson [*v. *Denno*, 378 U.S. 368 (1964)], because "questions of credibility, whether of a witness or of a confession, are for the jury," the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial.").

Undoubtedly, there is *a lot* of old case law in the federal reporters that minimizes the risk of conviction of black men as the result of misidentification by victims who are certain that they have fingered the correct suspect, by suggesting – as the trial court ruled here – that jurors intuitively understand the problems associated with eyewitness identification evidence and that an expert witness's explication of the science of human memory would not help. This antiquated judicial worldview is belied by reality. *See Phillips v. Allen*, 668 F.3d 912, 916 (7th Cir. 2012) (recognizing that "nothing is obvious about the psychology of eyewitness identification" and that "most people's intuitions on the subject of identification are wrong"); *see also* "Race and Wrongful Conviction," The Innocence Project ("Intentionally suggestive witness identifications occur twice as frequently in the cases of Black and Latinx exonerees as they do in the cases of white exonerees.") (*available at* https://innocenceproject.org/race-and-wrongful-conviction/); "Race and Wrongful Convictions," National Registry of Exonerations (Sep. 2022) ("The leading cause of these false convictions [of black men] was mistaken eyewitness identifications (101/128)—a notoriously error-prone process when white Americans are asked to identify Black strangers.") (*available at* https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf); "To Err is Human: Using Science to Reduce Mistaken Eyewitness Identifications Through Police Lineups," National Institute of Justice Journal (Jun 14, 2012) ("Nationwide,

mistaken eyewitness identifications have played a role in 75 percent of convictions later overturned because of DNA evidence") (*available at* https://nij.ojp.gov/topics/articles/err-human-using-science-reduce-mistaken-eyewitness-identifications-through-police). In this regard, arguments by counsel are not evidence, counsel's questions are not evidence, jury instructions are not evidence, and none is a substitute for actual (expert) evidence to which defense counsel can point a jury, as required by the Sixth Amendment. *Taylor v. Illinois,* 484 U.S. 400, 409 (1998) (recognizing that a central component of a defendant's right to present a defense is the right to offer the testimony of witnesses, a right grounded in the Sixth Amendment). As the Sixth Circuit has held:

> The Dissent counters by arguing that eyewitness identification experts are not necessary because cross-examination and jury instructions should be the tools used in a trial to discredit and flush-out eyewitness testimony. Unfortunately, the Dissent's homage to trial procedures does not extend to expert witness testimony. The same argument can be made for the admission of expert testimony: cross-examination and jury instructions can be used to question the qualifications of the proffered expert, undermine the basis of the expert's theories, explain the limits of social science's validation studies and pick apart research methods. The only reason given by the Dissent for why cross-examination and jury instructions can serve these goals for eyewitness testimony, but not for expert testimony, is that the jury may take the expert's testimony as "scientifically irrefutable truth." The Dissent's selective faith in the collective intelligence, common sense and decision-making ability of the jury is disheartening, and is also inconsistent with the Dissent's deference to the jury on other matters, including judging the credibility of eyewitness identifications.

United States v. Smithers, 212 F.3d 306, 316 (6th Cir. 2000). Thus, a defendant is denied a *meaningful* opportunity to defend himself if he is not permitted to introduce expert evidence at trial that his attorney can use to persuade a jury that reasonable doubt exists with respect to the "reliability and credibility" of the prosecution's eyewitness identification evidence. *Ferensic v. Birkett*, 501 F.3d 469, 477 (6th Cir. 2007) (holding that defendant had been denied meaningful opportunity to present a defense where state trial court excluded expert testimony on eyewitness identification, recognizing that expert "would have informed the jury of *why* the eyewitnesses'

identifications were inherently unreliable. This would have been a scientific, professional perspective that no one else had offered to the jury....” and rejecting argument that defense “counsel argued to the jury on multiple occasions that eyewitness identifications were inherently unreliable.....” because “the jury was explicitly instructed, as it always is, that arguments by counsel are not evidence” and that “[w]ithout [expert] testimony there was no evidence to support counsel's argument.”); *see also id.* at 481-82 (“We agree with the district court that ‘other means’ of attacking eyewitness identifications do not effectively substitute for expert testimony on their inherent unreliability.”).

In sum, Petitioner established that he was deprived of the opportunity to present evidence at trial, that evidence would have been material and favorable to his defense, and the deprivation was disproportionate to any legitimate evidentiary or procedural purpose. *Rock v. Arkansas*, 483 U.S. 44, 56 (1987). The state court’s ruling prohibiting Petitioner from introducing expert testimony regarding the reliability of eyewitness identification evidence, thereby denying Petitioner a meaningful opportunity to present a defense, was legal error, and resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. Therefore, the Court should issue a writ of certiorari to review these errors.

CONCLUSION

For these reasons, Petitioner Darrell Blount respectfully asks the Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,

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Dated: January 29, 2025

EXHIBIT A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1793

DARRELL BLOUNT,
Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;
THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-19-cv-00409)
District Judge: Honorable John Michael Vazquez

Submitted Under Third Circuit LAR 34.1(a)
November 1, 2024

Before: HARDIMAN, PHIPPS, and FREEMAN, *Circuit Judges*.

(Filed: November 5, 2024)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

HARDIMAN, *Circuit Judge*.

Darrell Blount appeals the District Court's order denying his petition for a writ of habeas corpus. He challenges his conviction by a New Jersey state court, arguing that two of its evidentiary rulings violated his constitutional rights. We will affirm.

I[1]

In 2007, a man robbed a liquor store. According to the store's cashier, he was carrying a blue bag and wearing a green shirt, blue jeans, and a black hat. The robber, who appeared to be forty to forty-five, stood between five feet, eight inches and five feet, ten inches tall, had a medium build, and was African American. After walking around the store for two or three minutes, he asked the cashier for a six-pack of beer. When the cashier turned to retrieve the beer, the man pulled out what appeared to be a black, partially plastic handgun and demanded money from the register. The cashier refused. Instead, the cashier clicked a panic alarm button and then gave chase when the man fled from the store. The cashier noted that the man drove a silver Dodge Neon, recorded its license plate number, and reported the details to the police when they arrived on the scene.

The Dodge Neon was registered to Blount's sister, Suzette Bethea. When police arrived at her apartment complex, they found the car parked nearby. Shortly after police arrived at the complex, Blount entered the silver Dodge Neon and drove away. He didn't

[1] The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253.

get far. Police quickly stopped the vehicle, arrested Blount, and visually inspected the vehicle. On the seats and floor of the vehicle, they found a green shirt, a black hat, a blue bag, and what looked like a handgun.

Less than two hours after the robbery, police brought the cashier to the scene of the arrest to see if he could identify the man who robbed him. Upon the cashier's arrival at the scene, police removed a handcuffed Blount from the back of a police car. In the presence of a small crowd of agitated residents and several armed police officers, the cashier immediately identified Blount as the robber. Witnesses disagree about the distance between Blount and the cashier at the time of the identification—the cashier estimated 14 feet, one officer estimated 25 to 30 feet, and another officer estimated 10 feet. An officer present at the scene testified at trial that the cashier expressed "absolutely no doubt" when making the identification, stating "That's him." Dist. Ct. Dkt. No. 6-35, at 4.

The state trial court issued two pretrial evidentiary rulings related to this "show-up" identification.[2] Following a *Wade* hearing,[3] the court denied Blount's motion to exclude the identification on due process grounds. Although the court agreed with Blount

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[2] A "show-up" describes a procedure in which "a single individual arguably fitting a witness's description is presented to that witness for identification." *United States v. Brownlee*, 454 F.3d 131, 138 (3d Cir. 2006).

[3] *See United States v. Wade*, 388 U.S. 218 (1967). "A *Wade* hearing occurs when a question arises concerning an identification procedure that has possibly violated a constitutional right." *United States v. Stevens*, 935 F.2d 1380, 1386 n.3 (3d Cir. 1991) (quoting Note, *Twenty-Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 Hofstra L. Rev. 583, 600 n.160 (1987)).

that police used suggestive procedures, it concluded that the cashier's identification satisfied due process because it had sufficient indicia of reliability. The court then granted the State's motion to exclude testimony from Blount's eyewitness reliability expert, Dr. Steven Penrod. It concluded that the expert's proposed testimony was within the "ken of the average juror" and therefore inadmissible at trial. Dist. Ct. Dkt. No. 6-24, at 8–9.

At trial, Blount challenged the reliability of the cashier's identification and introduced evidence of third-party guilt. Blount's sister testified that her son James previously had access to the Dodge Neon and sometimes drove it without her permission. She testified that sometime on the morning of the robbery, she noticed her car was missing from in front of her home and suspected her son, who lived with her at the time, had taken the car without permission. According to her testimony, she asked Blount, who also lived with her at the time, to retrieve the car from a nearby location her son frequented. In 2007, James was 18 years old and stood six feet, two inches tall. James testified that although he committed a robbery with a BB gun and the vehicle in 2008, he did not commit the robbery at issue.

A jury convicted Blount on three counts. The court sentenced him to life without parole on the robbery and possession of a weapon for an unlawful purpose convictions and to five years for the unlawful possession of a handgun conviction, to run concurrently with the life sentence. The Appellate Division of the New Jersey Superior Court affirmed Blount's convictions, and the New Jersey Supreme Court denied review. After unsuccessfully seeking postconviction relief in state court, Blount petitioned for habeas

relief under 28 U.S.C. § 2254. The District Court denied relief.

We issued a certificate of appealability to address two of Blount's claims: (1) "that the admission at trial of the show-up identification violated his Constitutional rights," and (2) "that the exclusion of expert witness testimony concerning eyewitness testimony violated his rights." App. 56–57.

II

Blount claims that the admission of the show-up identification denied him due process of law. Because the parties agree that this issue was adjudicated on the merits in state court, Blount must show that the Appellate Division's decision: (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The Supreme Court has developed a two-step test for determining whether the suggestive nature of an identification requires its suppression at trial. Courts first ask whether the procedures were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil v. Biggers*, 409 U.S. 188, 196–97 (1972) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)). If so, then courts consider "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Id.* at 199. Five factors inform this latter inquiry: "[1] the opportunity of the witness to view the criminal at the

time of the crime, [2] the witness' degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

Blount claims that the Appellate Division's determination was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). We disagree. The Appellate Division recounted the trial court's analysis, which "thoroughly addressed the five *Manson*/*Madison* reliability factors." App. 17. The Appellate Division emphasized that "the victim had the composure to push the panic alarm, run after defendant, get an accurate description of the vehicle, and write down the license plate number." App. 16. It also observed that "the show-up occurred within two hours of the incident, the victim immediately identified defendant without any uncertainty, the distance discrepancy between the victim and defendant at the show-up was minor, and nothing obstructed [the victim's] view of defendant." *Id.* And although the cashier failed to identify the defendant's facial hair, the trial court considered this oversight "insignificant" because the defendant's facial hair "looked like a few day's [sic] growth." *Id.* Given all this evidence, Blount cannot show that the Appellate Division made an "unreasonable determination" concerning the reliability of the cashier's identification. 28 U.S.C. § 2254(d)(2).

Blount further claims that the Appellate Division "failed to weigh '[a]gainst these factors . . . the corrupting effect of the suggestive identification itself.'" Blount Br. 17

(alteration in original) (quoting *Manson*, 432 U.S. at 114). This failure, Blount claims, is "an unreasonable application of" Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Not so. The balancing of the *Manson* factors against the inherent suggestiveness of the show-up identification is another way of describing the "central question" in this type of case, which requires a "totality of the circumstances" inquiry. *Neil*, 409 U.S. at 199. The state courts answered that question here: as approved by the Appellate Division, the trial court "agreed that the identification was impermissibly suggestive[,] . . . weigh[ed] the totality of the circumstances and appl[ied] the five-factor *Manson*/*Madison* reliability test." App. 16. And we see nothing in the record that would lead us to conclude that the Appellate Division performed this analysis unreasonably. So the admission of the cashier's identification of Blount was not "an unreasonable application of[] clearly established Federal law." 28 U.S.C. § 2254(d)(1).

III

Blount next claims that the exclusion of expert testimony violated his right to present a complete defense. The State urges us to apply deference under 28 U.S.C. § 2254(d), insisting that the Appellate Division adjudicated Blount's Sixth Amendment claim on the merits. Blount counters that the Appellate Division overlooked his Sixth Amendment argument, thereby mandating de novo review. We need not resolve this dispute over the standard of review because Blount's petition fails even under de novo review. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (cleaned up). But states retain "broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (citation omitted). To show that exclusion of evidence violated his right to present a complete defense, a criminal defendant must establish that: "(1) he was deprived of the opportunity to present evidence in his favor; (2) the excluded testimony would have been material and favorable to his defense; and (3) the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purposes." *United States v. Cruz-Jiminez*, 977 F.2d 95, 100 (3d Cir. 1992). In this inquiry, "[e]vidence is material only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* (cleaned up).

Blount fails to show a "reasonable likelihood" that the excluded testimony "could have affected the judgment of the trier of fact." *Id.* (cleaned up). At trial he presented much of the same fact evidence he advanced during the *Wade* hearing through witness testimony and cross-examination. The proffered expert testimony did not address the facts of this case. For instance, the expert described scientific studies calling into question the reliability of cross-racial identifications, but he did not state whether the cashier was of a different race than Blount or explain how those scientific studies otherwise bear on

the cashier's identification. Similarly, the expert described studies suggesting "weapon focus" can lead to unreliable identifications, but he did not opine about the effect of that phenomenon on the cashier's identification here. Finally, the expert's testimony would not have strengthened Blount's third-party guilt defense, which ran headlong into the cashier's description of a perpetrator who was two decades older and several inches shorter than Blount's nephew, James. Because it was unlikely that the proffered expert testimony would have moved the needle in Blount's favor, we hold that it was not material evidence favorable to his defense. *See id.*

Nor has Blount shown that the trial court's exclusion of the expert's testimony was "arbitrary or disproportionate to any legitimate evidentiary or procedural purposes." *Id.* The trial court offered several reasons for its decision, including: (1) "defense counsel ha[d] the opportunity to vigorously cross-examine the witness regarding the identification;" (2) the expert's report provided "very little in the way of specifics in regard to [Blount's] case" with "no indication" that his "findings [were] applicable to the facts of this case;" and (3) the expert's testimony impinged on the jury's role to determine witness credibility, after the victim "ha[d] already been ruled reliable" by the trial court. Dist. Ct. Dkt. No. 6-24, at 7–8.

This layered decision hardly resembles the "rare[]" evidentiary rulings that the Supreme Court has found to violate the defendant's rights in past cases. *Jackson*, 569 U.S. at 509. Blount claims that one such case—*Crane v. Kentucky*, 476 U.S. 683 (1986)—is "indistinguishable" from his case "on the facts and the law." Blount Br. 29.

Not so. In *Crane*, the state court prohibited the defendant from presenting evidence of his confession's unreliability after it had deemed the confession voluntary. 476 U.S. at 684. The Supreme Court held the exclusion unconstitutional because "the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial." *Id.* at 688. Unlike Crane, Blount fully challenged the reliability of the cashier's identification at trial. He merely could not supplement that evidence with testimony from an eyewitness reliability expert.[4]

IV

The New Jersey state court's admission of the cashier's identification did not surmount AEDPA's stringent standard of review. And its exclusion of expert testimony did not violate the Sixth Amendment. Accordingly, we will affirm the District Court's order denying Blount's petition for a writ of habeas corpus.

[4] Judge Freeman would resolve Blount's exclusion-of-expert-testimony claim on materiality only. She does not join the conclusion that Blount failed to establish that the state court's exclusion of this evidence was not arbitrary or disproportionate to any legitimate evidentiary or procedural purposes.