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# *Perry* reaffirms court's narrow conception of due process clause

The problem of faulty eyewitness identifications in criminal trials is well-established. Nationally, about 75 percent of convictions overturned due to DNA evidence have involved eyewitness identifications. In half of those cases, the eyewitness testimony was not corroborated by confessions, forensic evidence or informants. And 36 percent of these defendants were misidentified by more than one eyewitness. In fact, it has been estimated that about 7,500 of every 1.5 million annual convictions in America may be based on misidentifications.

For these reasons, criminal defense lawyers eagerly anticipated the U.S. Supreme Court's recent decision in *Perry v. New Hampshire.* No. 10-8974 (decided Jan. 11, 2012). As it turned out, they shouldn't have. The court refused to hold that the due process clause required the trial judge to inquire into the reliability of all unnecessarily suggestive identification procedures. Instead, it held that only those faulty procedures arranged by law enforcement officials required judicial scrutiny. *Perry* not only reaffirms the narrow set of identification procedures that can be constitutionally challenged; it also reaffirms the court's narrow view of the reach of the due process clause in general.

*Perry* arose as follows. In the early morning hours, an apartment-dweller called the Nashua (N.H.) Police Department to report that a man was trying to break into cars in the building parking lot. When police arrived at the scene, they found Barion Perry in the parking lot holding car stereo amplifiers. While an officer questioned him, another officer went to talk to the woman who had called in the report. When that officer asked the complainant for a description of the suspect, she pointed out her kitchen window and identified Perry, who at that time was standing next to a police officer. Perry was arrested and charged with theft.

Prior to trial, Perry moved to suppress the identification. He contended that the identification — tantamount to a one-person "show-up" — was a violation of due process. He argued that since reliability is the "linchpin" of a proper identification, a court must vet all unnecessarily suggestive identifications to insure that the due process clause is not violated.

The prosecution responded that the police did not in any way arrange the identification procedure in this case. And without some police misconduct or overreaching, there can be no due process violation, regardless of how suggestive the identification procedure is.

In an 8-1 decision, the Supreme Court agreed with the prosecution's argument for this narrow interpretation of the due process clause. The court held that unfairness alone does not trigger due process concerns; rather, the unfairness must be triggered by some culpable state action: "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." (Slip op., 15)

The roots of this narrow view of due process can be found in a confession case, *Colorado v. Connelly* 479 U.S. 157 (1986). Connelly contended that his mental illness produced "voices" that compelled him to confess without any police inducement; since his confession was thus involuntary, he argued, it should consequently be suppressed under the due process clause.

The Supreme Court disagreed, holding that some objectionable police conduct was a sine qua non for a violation of the due process clause. *Connelly* held that where the "crucial element of police overreaching" is missing, the admissibility of an alleged unreliable confession is "a matter to be governed by the evidentiary laws of the forum ... and not by the due process clause." At 163, 167 (cited in *Perry,* slip op. 12).

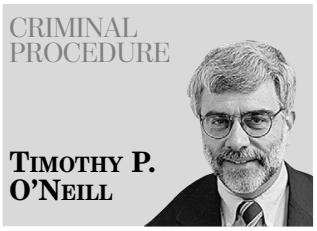
A pointed dissent was filed in *Connelly* by Justice William Brennan, joined by Justice Thurgood Marshall. The dissent accused the majority of misreading precedent in reaching the conclusion that a confession could never be involuntary under the due process clause without some police overreaching. Brennan argued that, if the circumstances are egregious enough, a "true commitment to fundamental fairness" mandated by due process means that a violation can occur even without police misconduct.

*Perry* reaffirms *Connelly* and rejects the views of Brennan and Marshall. *Perry* stresses that the Supreme Court's due process review of unnecessarily suggestive identifications comes into play only "when the police use an unnecessarily suggestive identification procedure." (Slip op. 10-11). For possibly suggestive identifications obtained without police overreaching, the defense may attack their reliability by utilizing the normal tools of trial such as cross-examination, closing argument and jury instructions.

In one sense, *Perry* simply reaffirms the court's narrow conception of the due process clause established in *Connelly* a quarter century ago. In doing so, the Supreme Court has essentially sent the problem of identifications back to the states. And, it bears mention, states such as New Jersey are establishing novel and exciting new ways of preventing bad identifications from convicting the innocent. (See, e.g., my column of Oct. 14, 2011, discussing *State v. Henderson,* 27 A.3d 872 (2011)).

Yet the most significant point that might come out of the 8-1 decision in *Perry* is the solo dissent filed by Justice Sonia Sotomayor. Sotomayor wrote a spirited attack on the majority's crabbed view of due process. She cogently sets out an argument for a due process clause far more powerful than the majority's version. This opinion suggests that criminal defendants may have found a passionate advocate not seen since the days of Brennan and Marshall. Her work bears watching.

The Illinois Supreme Court, of course, is free to adopt a more expansive view of due process under the Illinois Constitution. ILL. CONST. 1970, Art. 1, Sec. 2. And it has done so in the past. See *People v. Washington.* 171 Ill.2d 475 (1996) (rejecting *Herrera v. Collins.,* 506 U.S. 390 (1993) on examining free-standing claims of innocence); *People v. McCauley,* 163 Ill.2d 414 (1994) (rejecting *Moran v. Burbine.* 475 U.S. 412 (1986) on police interrogation). Sotomayor's dissent has provided defense attorneys with a blueprint for such a challenge.

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