No. __-_____

THE SUPREME COURT OF THE UNITED STATES

CHRISTOPHER RAMIREZ,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. In *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012) the Court held the Fourteenth Amendment right to due process requires exclusion from trial an identification where "the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime," and circumstantial "indicia of reliability are [not] strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances." The Court has not determined whether a faulty identification that results from suggestive state action but also involves non-state action is subject to exclusion under the federal constitution. Whether the trial court should have excluded Carlton Hritsco's identification of Christopher Ramirez where the police conducted two photographic arrays within 24 hours that included photographs of Ramirez, and Hritsco did not identify Ramirez, Hritsco subsequently viewed Ramirez on television as the suspect, and nearly two years later the prosecution conducted an in-court identification during trial where Hritsco identified Ramirez, the defendant?

2. Whether an aggravating circumstance, which is an element of a crime under the Sixth Amendment, that is found by the jury must be stricken if no notice is provided in advance of trial, even where the aggravating circumstance has not been used to enhance the sentence?

LIST OF PARTIES

Petitioner: Christopher Ramirez was the Appellant in the Washington Court of Appeals and the Petitioner in the Washington Supreme Court.

Respondent: The State of Washington was the Respondent in the Washington Court of Appeals and in the Washington Supreme Court.

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PETITION FOR WRIT OF CERTIORARI

Christopher Ramirez respectfully petitions for a writ of certiorari to review the opinion of the Court of Appeals of the State of Washington in *State v. Ramirez*, No. 34872-5-III.

OPINION BELOW

The opinion of the Court of Appeals of the State of Washington is published in part at 5 Wn. App. 2d 118, 425 P.3d 534 (2018). It is also attached as an appendix to this petition at App. 2-38. The Washington Supreme Court denied review at 435 P.3d 266 (2019). A copy of the order denying review is attached to this petition at App. 40.

JURISDICTION

The Washington Supreme Court denied review on March 6, 2019. App. 40. The instant Petition for Writ of Certiorari is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment's due process clause provides, " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; 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 defense."

STATEMENT OF THE CASE

1. Two brothers are killed without witnesses to the crime.

Arturo Gallegos was killed in his bedroom in Spokane Valley, Washington by one gunshot wound to the head; then, his brother, Juan, was killed by ten or more bullets fired in quick

succession. *E.g.*, RP 369, 450-56, 544, 848-88, 895-96.[1] Juan died outside the brothers' apartment. RP 451-52. No one witnessed their deaths or saw the assailants. The murder weapon was never discovered.

2. Two blocks from the apartment complex, Carlton Hritsco converses in the dark with a man he describes as 'Indian or Hispanic looking.'

That night, Carlton Hritsco, who lived two blocks from the brothers' apartment complex, conversed for 15 or 20 minutes with a person described as "Indian or Hispanic looking," 5'8" tall, and 180 pounds, and who called himself "Demon." RP 475-76, 516-18, 522.

3. Within hours, police present Hritsco a photographic array that includes Ramirez, but Hritsco does not identify the man with whom he spoke.

A couple hours after the conversation, the police showed Hritsco photographs of five individuals identified in a database as "Demon," including Christopher Ramirez. RP 476-78, 486,

[1] "RP" refers to the verbatim report of proceedings filed in the Court of Appeals for the State of Washington.

518. Hritsco did not identify anyone. RP 476-78. Later, Hritsco could not recall being shown photographs that night. RP 519-20.

4. The next day, police show Hritsco a second array that includes Ramirez, but Hritsco still does not identify the man with whom he spoke.

Within 24 hours, the police presented Hritsco with a second photographic array that again included Ramirez. RP 949, 1053-56. Hritsco again did not identify Ramirez or any other individual. RP 519.

5. Hritsco saw Ramirez on television, identified as the suspect.

Months later, Hritsco saw Ramirez on the television news as the suspect. RP 519, 1163-64. Ramirez was charged with two counts of premeditated murder in the first degree, RCW 9A.32.030, and one count unlawful possession of a firearm, RCW 9.41.040. CP 1-2, 232-33.[2]

Just days before trial, but two years after Hritsco's conversation, the lead detective and the prosecutor visited Hritsco, who told them he had seen the defendant on television

[2] CP refers to the Clerk's Papers filed in the Washington State Court of Appeals.

and believed him to be the "Indian or Hispanic looking" man he failed to identify in 2014. RP 62; CP 224-26.

6. At trial two years after the conversation, the prosecutor asked Hritsco to identify the defendant.

In court, at trial, and over Ramirez's objection, the State again asked Hritsco if he could identify the person he spoke with on November 1, 2014. RP 47, 48-69, 513-15; CP 66-74, 145-62, 193-96, 218-26. Hritsco then identified the person sitting in the defendant's chair, Ramirez. RP 515, 519-20. Hritsco tried to explain that he recognized Ramirez from television because that image was "updated," but the second photographic array also contained an updated image of Ramirez. RP 519-20, 1153-56.

7. The State added an aggravating circumstance for the first time in its proposed jury instructions.

In its proposed instructions, filed after trial commenced, the State for the first time proposed an aggravating circumstance for multiple victims asking the jury to determine as to each count of murder "whether the following aggravating circumstance exist: There was more than one person murdered and the murders were part of a common scheme or plan or the

result of a single act of the person." CP 390-93. This language was not charged in the information or amended information. CP 1-2, 232-33. This aggravating circumstance appears at RCW 10.95.020(10), which provides enhanced sentences for aggravated murder. The State did not cite either that provision or any part of Chapter 10.95 RCW (Capital Punishment-Aggravated First Degree Murder) in the information. CP 1-2, 232-33. Nevertheless, the special verdicts were submitted to the jury. CP 271, 272.

The jury convicted Ramirez of the two counts of premeditated murder and one count of unlawful possession of a firearm, as well as the aggravating circumstance for each count. CP 275-81. Despite the jury finding on the aggravating circumstances, Ramirez did not receive an enhanced sentence under Chapter 10.95 RCW. CP 304-07, 311-25.

8. Ramirez raised the admission of the tainted identification and the lack of notice of the aggravating circumstance in his direct appeal to the Washington State courts.

Ramirez asked the Washington Court of Appeals to reverse under the Fourteenth Amendment the trial court's

admission of Hritsco's identification, but the court affirmed in the published portion of its opinion. App. 13-18. Ramirez also argued on appeal the aggravating circumstance should be stricken due to insufficient notice under the Sixth Amendment. App. 36; *State v. Ramirez*, Wash. Ct. App. No. 34872-5, App'ts Corrected Op. Br., p.52 (filed Aug. 30, 2017). The Washington State Supreme Court denied Review. App. 40.

REASONS FOR GRANTING THE PETITION

I. Hritsco's identification should have been excluded under the Fourteenth Amendment because the State twice exposed Hritsco to photographs of Ramirez as a possible suspect and also asked Hritsco to make an identification at trial where Ramirez was the defendant.

Federal due process limits admission of identifications infected by improper government action. U.S. Const. amend. XIV; *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

State action irreparably marred Hritsco's identification. First, the police presented two photographic lineups to Hritsco within 24 hours, both of which included photographs of Ramirez,

and Hritsco did not identify Ramirez.[3] *See Young v. Conway*, 698 F.3d 69, 82-84 (2d Cir. 2012) (citing and describing research on repeated exposure); *State v. Henderson*, 208 N.J. 208, 255-56, 27 A.3d 872 (2011) (discussing influence of successive exposure). Research shows nonidentifications, like the two here, correlate with a suspect's innocence, not his guilt. Steven Clark, et al., Regularities in Eyewitness Identification, 32 Law & Hum. Behav. 187, 211 (2008).

Law enforcement also failed to use a double-blind, or even blind, procedure. National Academy of Sciences, Identifying the Culprit: Assessing Eyewitness Identification, pp.104, 106-07 (2014), https://www.nap.edu/read/18891/chapter/8#110 (discussing suggestiveness where non-blind procedures are used). The police investigating the case acted as administrators of the array. Thus, they knew who the suspect was and the witness knew the suspect was believed to be in the array.

[3] Research shows nonidentifications, like the two here, correlate with a suspect's innocence, not his guilt. Steven Clark, et al., *Regularities in Eyewitness Identification*, 32 Law & Hum. Behav. 187, 211 (2008).

Scientists also agree memories fade with time. *Henderson*, 208 N.J. at 267. While the first identification procedure was conducted within hours of Hritsco's conversation, the police performed a second array nearly 24 hours later. This lapse in time further increases the risk of misidentification. *Id.*

Next, the State asked Hritsco to identify Ramirez in court, while Ramirez was seated as the defendant at trial almost two years after Hritsco's conversation and following Hritsco's exposure to Ramirez as a suspect in the media. Research shows that out-of-court identification procedures can irreparably taint the reliability of an in-court identification, even where (1) the out-of-court identifications resulted in no identification or a misidentification of a filler and (2) the out-of-court identifications are admissible under *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). *See Young*, 698 F.3d at 82-84.

As the Connecticut Supreme Court recently found, there could hardly be a more "suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person who the state has accused of

committing the crime, and then asking the witness if he can identify the person who committed the crime." *State v. Dickson*, 322 Conn. 410, 423-24, 141 A.3d 810 (2016).

State action created a "substantial likelihood of misidentification." *Perry*, 565 U.S. at 239 (quoting *Biggers*, 409 U.S. at 201; citing also *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). Excluding the identification would serve the deterrence rationale by alerting police to the prospect that successive photographic lineups are unnecessarily suggestive. *Id.* at 241-42.

Independent circumstances do not indicate Hritsco's belated identification was reliable. Hritsco's identification was not corroborated by the description he provided. *Brathwaite*, 432 U.S. at 114 (accuracy of prior description is one of the factors analyzed to determine whether reliability outweighs police suggestiveness). Hritsco reported he spoke with a 5'8" Indian or Hispanic-looking man, who called himself "Demon," had long, slicked-back hair, scars or acne, and weighed 180 pounds. RP 476, 516-18, 522. Ramirez, on the other hand, is 6' tall and weighs 220 pounds; he does not have scars, acne, or long,

slicked-back hair. RP 463-64, 469, 1069; Ex. 115. And Ramirez was one of many local men who used the nickname "Demon." RP 51, 385, 441.

The admission of Hritsco's identification violated due process, requiring reversal because the State cannot demonstrate the identification evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State's evidence connecting Ramirez to the murders was remarkably thin. No one saw Ramirez at his uncles' apartment complex on November 1. The murder weapon was not located. There were at least four other people known to Spokane police as "Demon." Moreover, the State's only evidence supporting motive or premeditation was a four-month-old text message containing, at best, a cryptic message and which was followed by months of innocuous messages. Because its other evidence was weak, the State conceded that Hritsco was a "critical witness" and the court's exclusion of his placement of Ramirez near the scene of the crimes on November 1 would be a "significant blow to the State's case." RP 62-63. Because admitting the tainted identification

was not harmless beyond a reasonable doubt, if the Court holds the trial court erred by failing to exclude the identification evidence, the convictions should be reversed.

II. A criminal defendant cannot be convicted of an element, including an aggravating circumstance, of which no notice is provided.

The State did not charge an aggravating circumstance, but Ramirez was convicted of two. The information does not contain the citation or language of any of the aggravating circumstances listed at RCW 10.95.020. CP 232-33 (amended information, citing only Ch. 9.94A RCW); *see* CP 1-2 (information, same). Moreover, no one seemed aware the State would seek conviction under Chapter 10.95 RCW: Ramirez was not represented by death-penalty qualified counsel; the words "aggravated murder" were never used; the prosecution did not seek a sentence under Chapter 10.95 RCW, and the court did not discuss one. Yet, the jury was instructed on, and found, an aggravating circumstance at RCW 10.95.020(10) for each count. CP 271-72, 276, 278.

The prosecution cannot seek enhanced penalties unless notice is set forth in the indictment. *Hagner v. United States*,

285 U.S. 427, 433, 52 S. Ct. 417, 419, 76 L. Ed. 861 (1932); *see State v. Recuenco*, 163 Wn.2d 428, 440-41, 180 P.3d 1276 (2008) (to ensure due process, notice must be provided prior to opening statements of the trial).

Notice is critical to an accused person's opportunity to prepare an adequate defense and the right to decide whether to enter into a plea agreement to a lesser charge if one is offered. *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012) (relying on U.S. Const. amend. VI).

Ramirez was charged with premeditated first degree murder, not with aggravated murder. Ramirez received no notice of the prosecution's intent to seek an aggravated murder conviction under Chapter 10.95 RCW. The information and amended information do not provide the statutory citation for the aggravating circumstance ultimately submitted to the jury. *Compare* CP 1-2 (information), 232-33 (amended information) *with* CP 271-72 (jury instructions for aggravating circumstance to counts one and two). At the State's request, after trial commenced, the jury was directed to consider whether "There was more than one person murdered and the murders were a

part of a common scheme or plan or the result of a single act of the person." CP 271-72; CP 390-93; RP 228 (jury panel sworn Oct. 5, 2016). This language mirrors the aggravating circumstance found at RCW 10.95.020(10). Yet, that language is not in the amended information or the initial information. CP 1-2, 232-33. There, the State simply stated that each murder "was part of a common scheme or plan" without citation to any aggravating factor or circumstance. CP 1-2, 232-33. The "common scheme or plan" language, accordingly, indicates the basis for joinder of the charges. *See* Wash. CrR 4.3 (two or more offenses may be joined when part of a single scheme or plan).

Although the language of RCW 10.95.020(10) was submitted to the jury, the records indicate the prosecution did not in fact intend to prosecute Ramirez for aggravated murder as the State never cited to Chapter 10.95 RCW, never uttered the words "aggravated murder," did not seek a sentence under Chapter 10.95 RCW, and actually sought and received a sentence under the Sentencing Reform Act (SRA), Chapter 9.94A RCW. P 306 (State's sentencing brief calculating offender score and sentence under SRA and citing to the SRA); CP 311-25

(judgment and sentence cites SRA and sentences Ramirez to term of months sentence). The jury instructions were the only documents that reflected the aggravating factor at RCW 10.95.020(10).

There was no basis upon which to submit aggravating factors from RCW 10.95.020 to the jury. The aggravating circumstance should be stricken as a violation of the Sixth Amendment.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted this 31st day of May, 2019.

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