No.

IN THE SUPREME COURT OF THE UNITED STATES

MARTEL VALENCIA-CORTEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether a district court commits error in a federal criminal case by failing to provide a specific eyewitness identification instruction, which requires the jurors to scrutinize relevant factors bearing on the reliability of eyewitness identifications, when identity is the contested issue at trial and there are facts undermining the reliability of the eyewitnesses' identifications.

STATEMENT OF RELATED CASES

- *United States v. Martel Valencia-Cortez*, No. 16CR00730-H, U.S. District Court for the Southern District of California. Judgment entered August 28, 2017.

- *United States v. Martel Valencia-Cortez*, No. 17-50330, U.S. Court of Appeals for the Ninth Circuit. Judgment entered April 24, 2019.

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The Ninth Circuit's decision can be found at *United States v. Valencia-Cortez*, 769 Fed. Appx. 419 (9th Cir. Apr. 24, 2019).

JURISDICTION

The court of appeals filed an amended decision and denied rehearing and rehearing *en banc* on April 24, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On the night of November 15, 2015, Border Patrol agents spotted a group of suspected aliens moving north in a rocky area near the border. As agents were about to apprehend the aliens, Agent Jason Parco claimed that he was struck with a rock. He retaliated by firing six shots. A recording of the communications after the incident indicate that another agent said to Agent Parco: "Your story is you were assaulted, you shot?" Agents arrested 14 aliens, and one of them reported

that he heard agents saying: "Don't worry about it. We'll say there were more people or more rocks thrown." Although he was not apprehended, Border Patrol believed that petitioner was the guide of the group and had tossed the rock. However, twelve of the aliens apprehended did not identify him as someone present, and the two who claimed to see him denied that he had tossed a rock.

The government subsequently obtained an indictment, which was later superseded, that charged petitioner with assault under 18 U.S.C. § 111 and alien smuggling under 8 U.S.C. § 1324. The case proceeded to a jury trial in May of 2017. The government's case was mainly based on the testimony of Agent Parco and the three aliens identified in each of the three § 1324 counts, Rene Vazquez-Becerra, Antelmo Hernandez-Mogollan, and Rey David Martinez-Hernandez.

Agent Parco testified that, earlier in the day on November 15, 2015, he had been shown pictures of petitioner, and *only* petitioner, as a suspected foot guide to watch out for that night. Later that evening, he proceeded to a rocky area by the border in order to intercept any aliens attempting to enter the country illegally. The weather was very poor, including fog, rain, and wind, and therefore visibility was difficult. Agent Parco spotted a group of suspected aliens in the rocky terrain, and he testified that, using night vision goggles and while under stress, he saw the leader of the group, who was wearing a "hoodie," for approximately 15 seconds

and from a distance of about 30 feet. He identified the person as petitioner based on the pictures he had previously seen but did not contemporaneously inform the agents of his identification. While making these observations, he suddenly felt an object, believed to be a rock, hit him in the jaw. In response to the blow, he drew his weapon and repeatedly fired but did not hit anybody. Agent Parco did not see who threw the rock, but he identified petitioner in court as the guide. Although he felt pain, Agent Parco never saw a doctor or went to the hospital.

Vazquez-Becerra testified that he was a Mexican citizen in the group on November 15, and he was going to pay $7,500 to be crossed into the United States. He testified that he walked in the back of the group, and he thought that there were two or three guides. He did not identify petitioner as one of the guides and did not see anybody throw a rock.

Hernandez-Mogollan testified that he was from Mexico and was going to pay $7,000 to be crossed into the United States. Immediately before he heard the shots fired, he saw someone in the group toss something underhanded, but he could not identify the person who did so. When he was initially arrested on November 15, he did not identify petitioner when shown a photo array that included petitioner's picture. Several months later, Border Patrol agents arrested him while he was illegally living in the United States with family members, who

were also present in the country illegally, and he was worried that his loved ones could be deported. After this subsequent arrest, he eventually identified petitioner in a photo array as the guide. He claimed that he did not identify petitioner on November 15 because he was afraid. Although he had been deported on numerous occasions, the government allowed him to live in the United States legally leading up to his testimony and had not charged him with illegal re-entry.

Martinez-Hernandez testified that he was a Mexican citizen and was paying $7,000 to be crossed into the United States. He said that there were two guides of the group on November 15. One of the guides was walking with a young woman. He eventually saw one of the guides toss two rocks. The second rock was larger and he tossed it underhanded. After he was arrested on November 15, he was shown a photo array containing petitioner's picture, but he did not identify him. About a year later, agents arrested Martinez-Hernandez, who had illegally reentered the country and was working at a restaurant. He was again shown a photo array and tentatively identified petitioner's picture as the guide who tossed the rock, but he was not certain given the difficult visibility that night. The government allowed him to live in the United States legally pending his testimony and had not charged him with illegal re-entry.

The government also presented evidence that one of the young women

apprehended in the group on November 15 was petitioner's niece. The government searched the phone that she had in her possession and found a picture of her with petitioner. The photo also included petitioner's brother, who physically resembled petitioner; the government alleged petitioner's brother was also an alien smuggler.

Petitioner's defense was that the government's witnesses had misidentified him and he was not the person who guided the aliens and tossed the rock at Agent Parco. Agent Parco made a quick, cross-racial identification of petitioner as the guide at night, at a distance, in rainy and foggy weather with extremely poor visibility, and with night vision goggles; he also had been shown a picture of petitioner earlier that day and was targeting him, adding a level of suggestiveness, and he made his alleged observation under stress. The two aliens who identified petitioner as the guide (one of the three aliens who testified did not identify him), one of whom also tentatively identified him as the person who tossed the rock, had previously failed to identify him when shown a photo array on the night of the incident. They also failed to provide an in-court identification, had been given significant immigration benefits, and were dealing with the same visibility issues described above on the night in question. Petitioner testified that he was not present on the night in question, and he presented an eyewitness identification expert in support of his defense.

At the jury instruction conference, petitioner requested that the district court give Ninth Circuit Model Instruction 4.11 on factors to consider when evaluating eyewitness identification testimony.[1] The district court rejected his request, explaining that "[t]he Ninth Circuit eyewitness one does not recommend it in the model instructions and recommends that you argue it," but did give a theory of defense instruction simply stating: "It is the defendant's theory of the defense that the government has not proved identification beyond a reasonable doubt." The jury returned guilty verdicts but, with respect to the assault charge, rejected the government's allegation that Agent Parco sustained bodily injury.

On appeal, petitioner raised several contentions, including a claim that the district court erred by failing to give an eyewitness identification instruction. A Ninth Circuit panel rejected his claim, finding that the district court did not "abuse

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[1] Ninth Circuit Model Instruction 4.11 provides: "You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses. In addition to those factors, in evaluating eyewitness identification testimony, you may also consider: (1) the capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of the observation, including lighting and distance; (2) whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness; (3) any inconsistent identifications made by the eyewitness; (4) the witness's familiarity with the subject identified; (5) the strength of earlier and later identifications; (6) lapses of time between the event and the identification[s]; and (7) the totality of circumstances surrounding the eyewitness's identification."

its discretion" in failing to give the instruction because it gave a general witness credibility instruction and the defense was allowed to present an eyewitness identification expert. App. 4. The panel, however, was "troubled" by commentary to Ninth Circuit Model Instruction 4.11 discouraging eyewitness identification instructions, acknowledging that this Court has recognized the importance of eyewitness identification instructions in protecting a defendant's due process rights. App. 4-5. It therefore "encourage[d] the Jury Instructions Committee to reassess their comment as it is inconsistent with legal precedent and growing scientific evidence." App. 5.

The panel was also "troubled" with commentary in the pattern instructions that "seems to suggest that a district court may either given the Model Eyewitness Instruction or allow expert witness testimony, but not both." App. 5-6. As a result, it stated: "Again, because of the particularly unreliable nature of eyewitness identification evidence, we encourage the Jury Instruction Committee to make clear that it is within a court's sound discretion to provide both safeguards if the facts and circumstances of the case so require." App. 6. The Ninth Circuit rejected petitioner's other challenges to his convictions but reversed his sentence due to a Guidelines error. App. 6-10.[2]

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[2] As a result of the error, the district court reduced petitioner's sentence from 87 months to 78 months.

ARGUMENT

The courts of appeals are divided regarding when a district court must give a specific eyewitness identification instruction. Several courts of appeals, including the D.C., First, Sixth, Seventh, and Eighth Circuits, have long required district courts to give eyewitness identification instructions when identification is the crucial issue in the case and there are facts undermining the reliability of the identifications. The Second, Fourth, and Tenth Circuits hold that district court should have some "flexibility," and therefore the failure to give a specific eyewitness identification instruction only constitutes error if the identification defense was not fairly presented to the jury. The Ninth Circuit, standing alone, leaves it to the district court's wide discretion as to whether to give an eyewitness identification instruction, making it virtually impossible to show that a refusal to give such an instruction constitutes error.

Demonstrating the importance of the issue, after announcing an *en banc* opinion concerning eyewitness identification, *see Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3d Cir. 2016) (*en banc*), the Third Circuit recently established a task force to address concerns regarding eyewitness identification instructions. This Court should grant this petition to resolve the conflict, and, consistent with its observations in *Perry v. New Hampshire*, 565 U.S. 228, 245-46 (2012), it should hold that a district court

commits error when it fails to give an eyewitness identification instruction when identification is the crucial issue in the case and there are facts undermining the reliability of the identifications.

The D.C., First, Sixth, Seventh, and Eighth Circuits have long required a specific eyewitness identification instruction when identification is the crucial issue and facts undermine the reliability of the identifications. *See United States v. Tipton*, 11 F.3d 602, 606-07 (6th Cir. 1993); *United States v. Mays*, 822 F.2d 793, 798 (8th Cir. 1987); *United States v. Kavanagh*, 572 F.2d 9, 11-12 (1st Cir. 1978); *United States v. Hodges*, 515 F.2d 650, 652-53 (7th Cir. 1975); *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972); *see also* Seventh Circuit Model Instruction 3.12, comment. The D.C. Circuit first set forth a proposed instruction in *Telfaire*, which these other circuits then required. *See, e.g.*, *Hodges*, 515 F.2d at 653 ("[w]e now adopt what we labeled to be the better practice in [an earlier case], as the required practice in this Circuit"). Eyewitness identification instructions generally advise jurors of relevant factors to consider and provide that "[i]f 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." *Telfaire*, 469 F.2d at 558.

Other circuits have taken a different approach. The Fourth Circuit originally adopted a *Telfaire*-type instruction and required it to be given when

identification was the crucial issue and facts undermined the reliability of the identifications. *See United States v. Holley*, 502 F.2d 273, 274-78 (4th Cir. 1974). Subsequent to *Holley*, the Tenth Circuit stated: "When a cautionary instruction on the possible infirmities of eyewitness testimony is requested and not given, on appeal we will focus on the facts of each case to determine whether the instruction was required to fairly present the case to the jury." *United States v. Thoma*, 713 F.2d 604, 608 (10th Cir. 1983). Similarly, the Second Circuit concluded that the failure to give an eyewitness identification instruction does not constitute error unless the identification defense was not otherwise fairly presented to the jury. *See United States v. Luis*, 835 F.2d 37, 41 (2d Cir. 1987). Based on *Thoma* and *Luis*, the Fourth Circuit stated that *Holley* did not impose a rigid requirement and that it was more persuaded by this purported "flexible" approach. *See United States v. Brooks*, 928 F.2d 1403, 1406-09 (4th Cir. 1991); *see also United States v. Greene*, 704 F.3d 298, 313 (4th Cir. 2013).

Meanwhile, the Ninth Circuit appears to stand alone, essentially vesting a district court with virtually unreviewable discretion as to whether a specific eyewitness identification instruction should be given, making it virtually impossible to show that a district court erred in failing to give one. *See, e.g.*, *United States v. Miranda*, 986 F.2d 1283, 1285-86 (9th Cir. 1993).

This Court's 2012 opinion in *Perry* demonstrates that the Ninth Circuit's

minority approach is flawed. In *Perry*, this Court emphasized that eyewitness identification instructions play a critical role in assuring a defendant's due process rights and approvingly cited *Telfaire* and *Holley*. *See Perry*, 565 U.S. at 245-46 and n.7. In the wake of *Perry*, one judge has explained that "nearly half a century of scientific research teaches that eyewitness testimony can be one of the greatest causes of erroneous convictions[,]" and there are serious "inadequacies [in] standard jury instructions relating to that evidence." *Dennis*, 834 F.3d at 313 (McKee, J., concurring). Judge McKee also pointed out that, in light of *Perry*, various state Supreme Courts, like the New Jersey Supreme Court, have required "enhanced" jury instructions on eyewitness identification. *Dennis*, 834 F.3d at 338. In *Perry*, this Court acknowledged the strides in "scientific research on eyewitness reliability" and "recognized the importance of this body of science and urged more robust jury instructions." *Id.* at 336.

This Court should now address the jury instruction question directly. Consistent with the language in *Perry* and the majority rule in the circuits, this Court should reject the Ninth Circuit's approach and hold that a district court commits error when it refuses a specific eyewitness identification instruction when identity is the crucial issue and factors call into question the reliability of the identifications. An instruction, rather than mere argument or expert testimony offered by the defense, is an essential due process protection. Defense testimony

and argument carry "less weight" than an instruction from the court, which is "viewed as [a] definitive and binding statement[] of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990). Indeed, under the jury instructions in this case, the jury was free to disregard the defense expert, and the government sought to discredit him as a "smooth" talking professor paid by the defense.

Finally, this case is an excellent vehicle for review. Identity was the sole issue at trial. The witnesses' purported identifications of petitioner were plagued with factors demonstrating unreliability. Thus, given the facts of this case, a specific eyewitness identification instruction was required under the majority rule.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

Dated: July 22, 2019

Respectfully submitted,

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