No. 19-5334

IN THE SUPREME COURT OF THE UNITED STATES

MARTEL VALENCIA-CORTEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in giving a jury instruction on the credibility of witnesses that did not include specific instruction about the reliability of eyewitness-identification testimony.

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OPINION BELOW

The order and amended opinion of the court of appeals (Pet. App. 1-10) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 419.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2019. The petition for a writ of certiorari was filed on July 22, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of assault on a federal officer with a deadly weapon, in violation of 18 U.S.C. 111, and three counts of bringing aliens into the United States for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii). Judgment 1. He was sentenced to 87 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed petitioner's convictions. Pet. App. 3-10.

1. On November 15, 2015, petitioner led a group of more than a dozen Mexican nationals into the United States. Presentence Investigation Report (PSR) ¶ 9. The aliens lacked authorization to enter the United States and all but one, who was petitioner's niece, paid several thousand dollars to be smuggled into the country. PSR ¶ 14; C.A. E.R. 250-255; C.A. S.E.R. 287, 354.

That night, Border Patrol agents were patrolling a desolate route in the Carries Mountains in California that petitioner had used to smuggle aliens into the United States before. C.A. S.E.R. 125-130, 163-166.[1] The agents were on the lookout for smugglers due to inclement weather, which provides cover. Id. at 137-138. Using night-vision goggles from a distance of 20 to 30 feet away, Border Patrol Agent Jason Parco observed petitioner leading the

[1] Between 1999 and 2015, petitioner had been apprehended by the Border Patrol more than 35 times and was convicted twice for alien smuggling. C.A. S.E.R. 2.

group. Id. at 178, 200-201, 206-207; PSR ¶ 10. Agent Parco recognized petitioner and told another agent that petitioner was the individual leading the group. PSR ¶ 12. Shortly after spotting petitioner, Agent Parco was hit in the jaw by a softball-sized rock. C.A. S.E.R. 215, 225-226. Although petitioner absconded back to Mexico, the Mexican nationals he was leading were apprehended, and several of them identified their guide as the one who threw the rock. C.A. E.R. 249-255. In March 2016, petitioner was arrested. PSR ¶ 15.

2. At trial, the government presented testimony from some of the smuggled aliens and from several Border Patrol agents, including Agent Parco. Two of the aliens testified that although they had not identified petitioner when they were first arrested, they had later identified him from a six-pack photo lineup. See C.A. S.E.R. 324-328, 422-425. The first witness explained that he had recognized petitioner as the foot guide in the original photo array when he was arrested, but he "was afraid" to make an identification because he had previously been kidnapped by smugglers and did not want "to get into trouble." Id. at 324-325, 328; see id. at 33, 328 (testimony that aliens understood "to never say who [the guide] was"). The second witness testified that he recognized petitioner "[a] little" when he was first shown the photo lineup, but that he did not identify petitioner at that time "[o]ut of fear." Id. at 422-423, 436. He subsequently picked petitioner's photo out of two different six-pack photo lineups,

each of which contained a different photo of petitioner. Id. at 34, 423-428.

Petitioner's defense case included testimony from an expert on eyewitness identification. C.A. S.E.R. 377-421. Petitioner also testified in his own defense. C.A. E.R. 63-71.

After the close of evidence, the district court instructed the jury on the credibility of witnesses:

> In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:
>
> 1. the witness's opportunity and ability to see or hear or know the things testified to;
>
> 2. the witness's memory;
>
> 3. the witness's manner while testifying;
>
> 4. the witness's interest in the outcome of the case, if any;
>
> 5. the witness's bias or prejudice, if any;
>
> 6. whether other evidence contradicted the witness's testimony;
>
> 7. the reasonableness of the witness's testimony in light of all the evidence; and
>
> 8. any other factors that bear on believability.
>
> The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

C.A. E.R. 35; see also Manual of Model Crim. Jury Instructions for the 9th Cir. 3.9 (2010 ed.) (MMCJ).

The district court declined petitioner's request that the jury also receive the Ninth Circuit's model instruction on eyewitness testimony, which states:

> 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 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.

MMCJ 4.11 (brackets in original); C.A. E.R. 150. The court did, however, instruct the jury on petitioner's theory of defense "that the government has not proved identification by proof beyond a reasonable doubt." C.A. E.R. 46.

The jury found petitioner guilty on one count of assault on a federal officer with a deadly weapon, in violation of 18 U.S.C.

111, and three counts of bringing aliens into the United States for financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii). Jury Verdict 2-4.

3. The court of appeals affirmed petitioner's convictions in an unpublished memorandum disposition. Pet. App. 3-10. As relevant here, the court determined that the district court did not abuse its discretion in declining to give the eyewitness-identification instruction. Id. at 4. The court of appeals observed that the final jury instructions "discussed [petitioner's] identification defense and provided a general witness credibility instruction." Ibid. The court further noted that petitioner had "elicit[ed] comprehensive expert testimony on, among other things, eyewitness memory, memory for the details of events, the ability to pick faces, and suggestibility." Ibid. And the court observed that petitioner's counsel had "extensively argued the identification defense to the jury based on this testimony," which "alerted [jurors] to potential weaknesses in the Government's eyewitness identification evidence." Ibid. The court accordingly did not find an "abuse of discretion in the District Court's refusal to give the Model Eyewitness Instruction." Ibid.

The court of appeals went on to critique a "comment to the Model Eyewitness Instruction that recommends 'against the giving of an eyewitness identification instruction.'" Pet. App. 4

(quoting MMCJ 4.11 cmt.). The court "encourage[d] the Jury Instructions Committee to reassess" that comment, which the court viewed to be "inconsistent with legal precedent and growing scientific evidence" about the nature of eyewitness-identification testimony. Id. at 5. The court also identified language in the comment to the Model Eyewitness Instruction that "seem[ed] to suggest that a district court may either give the Model Eyewitness Instruction or allow expert witness testimony, but not both." Id. at 6. The court "encourage[d] the Jury Instructions Committee to make clear that it is within a [district] court's sound discretion to provide both safeguards if the facts and circumstances of the case so require." Ibid.

4. In June 2019, approximately two months after the Ninth Circuit's decision in this case, the Ninth Circuit's Jury Instructions Committee revised the comment to the model instruction on eyewitness testimony. The Committee deleted the sentence in the comment cautioning against giving the eyewitness-identification instruction and modified the other sentence that the Ninth Circuit had viewed as potentially confusing. The comment now reads:

> It is within the trial court's sound discretion to instruct a jury both on eyewitness identification and general witness credibility. The need for heightened jury instructions should correlate with the amount of corroborative evidence. See United States v. Masterson, 529 F.2d 30, 32 (9th Cir. 1976).

> The Ninth Circuit has approved the giving of a comprehensive eyewitness jury instruction, at least when the district court has determined that proffered expert witness testimony regarding eyewitness identification should be excluded. See, e.g., United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996), overruled on other grounds, United States v. W.R. Grace, 526 F.3d 499 (9th Cir. 2008).

MMCJ 4.11 cmt. (updated Sept. 2019, 2010 ed.).

ARGUMENT

Petitioner renews his argument (Pet. 8-12) that the district court was required to give his proposed jury instruction on eyewitness identification. The court of appeals correctly determined that the district court did not abuse its discretion in its instructions in this case. The court of appeals' unpublished, factbound decision does not conflict with any decision of this Court or any other court of appeals, and the Ninth Circuit's Jury Instructions Committee has since modified the comment to the model eyewitness instruction. The petition for a writ of certiorari should be denied.

1. The district court's instructions in this case were not an abuse of its discretion. Considered as a whole, the jury charge fairly and adequately guided the jury's consideration of the eyewitness testimony. See, e.g., United States v. Dixon, 201 F.3d 1223, 1230 (9th Cir. 2000) ("In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation."). The court instructed the jury on witness credibility and highlighted

"the witness's opportunity and ability to see or hear or know the things testified to" as well as "any other factors that bear on believability," C.A. E.R. 35. The jury would have understood that instruction to encompass the factors discussed by petitioner's expert on eyewitness testimony, including "eyewitness memory, memory for the details of events, the ability to pick faces, and suggestibility." Pet. App. 4; see Boyde v. California, 494 U.S. 370, 384 (1990) (testimony elicited at trial "certainly is relevant to deciding how a jury would understand an instruction").

Furthermore, petitioner's counsel "extensively argued the identification defense to the jury" based on the expert's testimony, which "alerted [the jury] to potential weaknesses in the Government's eyewitness identification evidence." Pet. App. 4. In addition, the district court instructed the jury on petitioner's theory of defense--that the government had failed to prove identification. C.A. E.R. 46. That instruction made clear that jurors must carefully evaluate the identification evidence in accordance with the general instruction on witness credibility. Particularly in light of that context, the jury instructions adequately addressed the issue of eyewitness-identification testimony, and the court of appeals correctly determined that those instructions were not an abuse of the district court's discretion.

Moreover, as this Court recognized in Perry v. New Hampshire, 565 U.S. 228 (2012), there are also "other safeguards built into our adversary system that caution juries against placing undue

weight on eyewitness testimony of questionable reliability." Id. at 245. Those include "the defendant's Sixth Amendment right to confront the eyewitness," his "right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments," the "requirement that the government prove the defendant's guilt beyond a reasonable doubt," the trial court's ability to prevent the introduction of evidence that is more prejudicial than probative, and, in appropriate cases, "expert testimony on the hazards of eyewitness identification evidence." Id. at 245-247. Each of those other safeguards was present in this case.

2. Petitioner asserts (Pet. 8) that the decision below conflicts with decisions from other courts of appeals that he contends "requir[e] 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." That assertion lacks merit. In recognition that district courts have wide discretion in selecting jury instructions, all courts of appeals conduct a fact-dependent and case-specific inquiry to determine whether an eyewitness-identification instruction is appropriate.

Several courts of appeals have expressly recognized that district courts have broad latitude to determine when to give an

eyewitness-identification instruction. See, e.g., United States v. Brooks, 928 F.2d 1403, 1406-1409 (4th Cir.), cert. denied, 502 U.S. 845 (1991); United States v. Luis, 835 F.2d 37, 41 (2d Cir. 1987); United States v. Thoma, 713 F.2d 604, 607-608 (10th Cir. 1983), cert. denied, 464 U.S. 1047 (1984). In accord with that approach, the Ninth Circuit has stated that the "general instructions on the jury's duty to determine the credibility of the witnesses and the burden of proof are fully adequate," United States v. Miranda, 986 F.2d 1283, 1286 (9th Cir.), cert. denied, 506 U.S. 929 (1993), but has also approved the eyewitness-identification instruction and has included that instruction in its model jury instructions for years, see, e.g., United States v. Hicks, 103 F.3d 837, 847 (9th Cir. 1996), cert. denied, 520 U.S. 1193 (1997), overruled on other grounds, United States v. W.R. Grace, 526 F.3d 499 (9th Cir. 2008) (en banc); see also Jones v. Smith, 772 F.2d 668, 672 (11th Cir. 1985) (determining that "the more general instructions [on evaluating witness credibility] fairly covered the essence of the identification issue"), cert. denied, 474 U.S. 1073 (1986).

Petitioner is wrong to assert (Pet. 8-9) that the First, Sixth, Seventh, Eighth, and D.C. Circuits have adopted a bright-line rule that invariably requires an eyewitness-identification instruction in certain circumstances. Although those courts have indicated that such an instruction may be necessary "when identification is the crucial issue and facts undermine the

reliability of the identifications," Pet. 9, they have evaluated each case on its particular facts to determine whether the instructions as a whole adequately guided the jurors' consideration of identification evidence. For example, while petitioner relies (Pet. 9) on the D.C. Circuit's decision in United States v. Telfaire, 469 F.2d 552 (1972) (per curiam), that court has made clear that the "suggestion" in its precedent that a district court give an eyewitness-identification instruction "in cases in which identification is a major issue" "must be read as precatory" because "in the absence of * * * circumstances [presenting 'special difficulties'] the failure to instruct is not error," United States v. Boney, 977 F.2d 624, 632 (1992); see also United States v. Smith, 41 F.3d 1565, 1568 (D.C. Cir. 1994) (finding no error where other instructions "repeatedly directed the jurors that the government must prove beyond a reasonable doubt that the defendant committed the crimes charged").

The other courts of appeals to which petitioner attributes a hard-and-fast rule similarly do not reflexively find instructional error any time eyewitness identification is a crucial issue, but instead conduct case-specific inquiries with attention to all of the facts. For example, the Sixth Circuit has observed that "giving the instruction is a matter of discretion for the trial court" and "[d]ue process does not require that the jury be instructed on eyewitness testimony where * * * the government's case rests on the testimony of more than one witness." United

States v. Jennings, 40 Fed. Appx. 1, 6 (2001) (unpublished). And the First Circuit has emphasized that it has "expressly declined to adopt a rule of per se reversal [for declining to give the eyewitness-identification instruction], choosing not to constrain district courts with yet another mandatory requirement." United States v. Candelaria-Silva, 166 F.3d 19, 37 (1999) (citation, ellipses, emphasis, and internal quotation marks omitted), cert. denied, 529 U.S. 1055 (2000).

The Seventh and Eighth Circuits likewise do not automatically find instructional error when a district court fails to give an eyewitness-identification instruction. See, e.g., United States v. Johnson, 848 F.2d 904, 906 (8th Cir. 1988) (affirming the district court's decision to give a general witness-credibility instruction rather than an eyewitness-identification instruction when "[n]othing suggest[ed] that the [eyewitness's] testimony was unreliable"); United States v. Mays, 822 F.2d 793, 798 (8th Cir. 1987) (no error in declining to give the instruction when the government's case did not "rest[] solely on questionable eyewitness identification" and instead there was "other corroborating evidence of [the defendant's] guilt"); United States v. Fleming, 594 F.2d 598, 606 (7th Cir.) (no error where instruction not requested), cert. denied, 442 U.S. 931 (1979); United States v. Cowsen, 530 F.2d 734, 738 (7th Cir.) (no error where defendant requested an eyewitness-identification instruction but did not tender "a proper instruction" on that issue and the

district court gave a general instruction on witness credibility), cert. denied, 426 U.S. 906 (1976); cf. Cotton v. Armontrout, 784 F.2d 320, 322 (8th Cir. 1986) (observing in a habeas case that the failure to give a specific "instruction concerning eyewitness identification is not constitutional error if the issue is adequately covered by other instructions" that make it clear that the government has "the burden of proof to show beyond reasonable doubt that the defendant was at the scene of the crime and committed the [crime]"). Thus, although some circuits may take a broader view of the circumstances in which a defendant is entitled to an eyewitness-identification instruction, it is far from clear that any circuit would find that the district court abused its discretion in the circumstances of this case. Instead, every court of appeals reviews a district court's decision not to give an eyewitness-identification instruction based on the specific facts and circumstances presented.

Contrary to petitioner's suggestion (Pet. 10-11), that approach accords with this Court's decision in Perry, supra. Perry observed that "many federal and state courts ha[d] adopted" eyewitness-identification instructions, but the Court did not suggest that such instructions are mandatory whenever identification is a central issue in the case. 556 U.S. at 246. Perry accordingly does not displace the broad discretion that district courts have to select appropriate jury instructions based on the particular circumstances of the case.

3. In any event, this case presents a poor vehicle for addressing the question presented because any error in failing to give an express eyewitness-identification instruction was harmless. In light of the evidence at trial--including cross-examination of the witnesses, the expert's testimony, and the jury instructions as a whole--the addition of such an instruction would not have "planted doubt in the minds of the jurors sufficient for an acquittal." United States v. Leal-Del Carmen, 697 F.3d 964, 976 (9th Cir. 2012).

Based on the evidence at trial and the jury instructions as a whole, "the minds of the jury were plainly focused on the need for finding the identification of the defendant as the offender proved beyond a reasonable doubt," United States v. Tipton, 11 F.3d 602, 608 (6th Cir. 1993) (finding the failure to give an eyewitness-identification instruction harmless) (citation omitted), cert. denied, 512 U.S. 1212 (1994). The government introduced substantial evidence to support the identification of petitioner, including multiple witness accounts and evidence obtained from petitioner's niece. See, e.g., C.A. S.E.R. 39-42; C.A. E.R. 62-63. The jury was made fully aware of "potential weaknesses" in that evidence based on the cross-examination of witnesses, the expert testimony on eyewitness identification, and the arguments by defense counsel. Pet. App. 4; see e.g., C.A. S.E.R. 106 (opening statement); id. at 163-165, 228-231, 253-254 (cross-examination of Agent Parco); id. at 329-330, 340-344

(aliens' original declinations to identify petitioner); id. at 381-398 (expert testimony); id. at 511, 513-515, 517-518 (closing arguments). In addition, the district court provided a general witness-credibility instruction and specifically instructed the jury on petitioner's theory of defense based on an asserted failure to prove identification. Pet. App. 4; see, e.g., C.A. E.R. 46 (theory-of-defense instruction); id. at 35 (witness-credibility instruction). Under these circumstances, there is no reasonable possibility that the jury would have acquitted petitioner had the court also given an eyewitness-identification instruction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2019