No. 19-5334

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner submits this reply to the Brief for the United States in Opposition ("BIO"). The cases cited by the government actually confirm the longstanding circuit-split regarding whether and when a district court is required to give an eyewitness identification jury instruction. For this reason alone, the Court should grant this petition to resolve the conflict.

The government also fails to provide an explanation as to why the Court should not embrace the rule urged by petitioner and adopted by several circuits, which requires an instruction under the circumstances. In other words, the government does not offer any policy or other reason as to why the jury should not be given an eyewitness identification instruction when identification is the crucial issue in the case and factors call into question the reliability of the identifications. The government's silence is not surprising, as this Court has recognized that such instructions are an important "safeguard" against "eyewitness testimony of questionable reliability." *Perry v. New Hampshire*, 565 U.S. 228, 245-46 (2012).

This case is also an excellent vehicle for review, as the issue is squarely presented and preserved. The government's complaint that any error was harmless is not an issue that this Court typically considers in the first instance. In any event, the error was not harmless, especially as to petitioner's assault conviction which was based on a single eyewitness and the thinnest of evidence.

ARGUMENT

Petitioner has contended that, unlike the Ninth Circuit below, the D.C., First, Sixth, Seventh, and Eighth Circuits require 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. *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). While the government acknowledges that these circuits have adopted this rule, it attempts to chip away at the firmness of their precedent by contending that some cases in these circuits take a more fact-bound approach and do not "reflexively" require an instruction. BIO 11-12. The cases cited by the government do not demonstrate that these circuits have retreated to the conflicting "flexible" or discretionary approach adopted by some of the other circuits. *See United States v. Brooks*, 928 F.2d 1403, 1406-09 (4th Cir. 1991); *United States v. Luis*, 835 F.2d 37, 41 (2d Cir. 1987); *United States v. Thoma*, 713 F.2d 604, 608 (10th Cir. 1983).[1]

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[1] The government reformulates the question presented to whether the district court "abused its discretion" in refusing an eyewitness identification instruction. BIO I. By doing so, the government assumes the answer to the question. In other words, the question presented is whether an eyewitness identification

With respect to the D.C. Circuit, the government cites *United States v. Boney*, 977 F.2d 624 (D.C. Cir. 1992) and *United States v. Smith*, 41 F.3d 1565 (D.C. Cir. 1994). BIO 12. *Boney* confirmed the D.C. Circuit's rule that an instruction is required when identification is the crucial issue and there are factors calling into question the reliability of the identification; it simply held that the latter prerequisite was not satisfied because there were no "special difficulties" with the identification, which was made by an officer who engaged in a face-to-face transaction with the defendant and then arrested him a few minutes later at the scene. *Boney*, 977 F.2d at 632. Likewise, *Smith* confirmed that D.C. "Circuit precedent *requires* that an identification instruction be given when the evidence reveals some 'special difficulty' in a witness's identification of the defendant as the perpetrator of the crime." *Smith*, 41 F.3d at 1568 (emphasis added). It simply held that any instructional error was harmless, as officers caught the defendant in the middle of dealing drugs, the defendant then fled in his car, and when the officers finally stopped him they found drugs and drug paraphernalia in his vehicle. *Id.* at 1567-68.

With respect to the First Circuit, the government cites *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999), BIO 13, but the district court in that

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instruction is *required* under the circumstances, as several circuits have held, or instead whether it is simply a matter of trial-court "discretion," as others have held.

case *did* give an identification instruction. Furthermore, *Candelaria-Silva* approvingly cited the First Circuit's prior opinion in *Kavanagh*, 572 F.2d at 11-13, which noted the circuit-split and joined the approach originally advocated by the D.C. Circuit in *Telfaire*. Admittedly, *Candelaria-Silva* stated that the failure to give an eyewitness identification instruction when warranted does not trigger "*per se* reversal . . . ." *Candelaria-Silva*, 166 F.3d at 37. Petitioner, however, is not advocating a structural error or *per se* reversal rule, as it is well-settled that, with the exception of an erroneous reasonable doubt instruction, *see Sullivan v. Louisiana*, 508 U.S. 275 (1993), instructional error is generally subject to harmless-error analysis. *See Neder v. United States*, 527 U.S. 1, 7-15 (1999).

To create doubt in the Sixth Circuit's precedent, the government cites *United States v. Jennings*, 40 Fed. Appx. 1, 6 (6th Cir. 2001). BIO 12-13. Putting aside that the decision is *unpublished*, *Jennings* approvingly cited the Sixth Circuit's prior published opinion in *Tipton* and the D.C. Circuit's opinion in *Telfaire* and simply held that it was not plain error for the district court to have failed to give an eyewitness identification instruction *sua sponte* when the defendant had not requested one. The government appears to recognize that its effort to muddy the Seventh Circuit's precedent, BIO 13, as established in *Hodges*, 515 F.2d at 652-53, fails for the same reason – review was only for plain error in

the cases cited, which recognized *Hodges*, because the defendants had not adequately preserved the instructional issue in the district court. *See United States v. Fleming*, 594 F.2d 598, 606 (7th Cir. 1979); *United States v. Cowsen*, 530 F.2d 734, 738 (7th Cir. 1976).

The government's efforts to soften the Eighth Circuit's approach also fail. BIO 13-14. In *United States v. Johnson*, 848 F.2d 904 (8th Cir. 1988), there was no potential unreliability in the identification, and therefore an instruction was not required. *Id.* at 906 (the officer "observed Johnson from a distance of twenty feet, retrieved the handgun, and immediately arrested Johnson, apparently without ever losing sight of him"). Despite the government's suggestion, BIO 13, *Mays* confirmed the Eighth Circuit's alignment with the *Telfaire* approach. *See Mays*, 822 F.2d at 798 ("We have approved a specific jury instruction on the reliability of eyewitness testimony in cases in which the reliability of eyewitness identification of a defendant presents a serious question. It is reversible error for a trial court to refuse this specific jury instruction where the government's case rests solely on questionable eyewitness identification."). *Mays* simply found that any instructional error was harmless, where the government presented overwhelming evidence of guilt, including the defendant's confession. *Id.* at 796.

The government cites *Cotton v. Armontrout*, 784 F.2d 320, 322 (8th Cir. 1986), which also acknowledged the Eighth Circuit's alignment with the *Telfaire*

approach in *federal* criminal cases, and *Jones v. Smith*, 772 F.2d 668, 672-73 (11th Cir. 1985), which declined to decide the issue as a matter of federal criminal law. BIO 11, 14. *Cotton* and *Jones* were habeas corpus cases, and therefore those opinions addressed whether an eyewitness identification instruction was *constitutionally* required. Although the Court should conclude that the Due Process Clause requires an instruction when requested by a defendant under these circumstances, *see Carter v. Kentucky*, 450 U.S. 288, 295-305 (1981) (requiring cautionary jury instruction on defendant's decision not to testify), this petition does not require the Court to decide the constitutional question.

One of the reasons why this federal criminal case is such a good vehicle for review is that it provides flexibility for the Court to consider whether an eyewitness identification instruction is required under its supervisory powers. *Id.* at 295-96 (explaining Court had previously decided that a jury instruction was required as a matter of federal law before considering whether an instruction was constitutionally required). Even as to "discretionary" matters typically left to trial courts, this Court will exercise its supervisory powers, particularly when there are "constitutional overtones[,]" *United States v. Hale*, 422 U.S. 171, 180-81 and n.7 (1975), like the due process implications involved with eyewitness identification evidence. *See, e.g.*, *Rosales-Lopez v. United States*, 451 U.S. 182, 190-92 (1981); *Brasfield v. United States*, 272 U.S. 448 (1926). In other words, not only can this

Court resolve a circuit-split in the federal courts, but it can also provide guidance for the state courts in an important area of criminal law while not necessarily reaching a constitutional rule. Although the state courts would not be required to follow a supervisory rule, they certainly would respect the guidance on the policy considerations underlying the federal rule adopted by this Court. *See, e.g.*, *Bowe v. State*, 514 A.2d 408, 411 (De. 1986) (noting that *Hale* was a supervisory-powers case and following it as a matter of state law).

When it comes to policy considerations, the government's brief is noticeably silent. As the First Circuit stated in joining the *Telfaire* approach, "[t]here would appear to be no reason for not giving such a charge, particularly if counsel so requested." *Kavanagh*, 572 F.2d at 12. The government's brief does not offer any reason why a district court should decline to give an eyewitness identification instruction when identity is the crucial issue and there are factors that call into question the reliability of the identifications.

This Court has recognized that "identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate a fair trial." *United States v. Wade*, 388 U.S. 218, 228 (1967). One "commentator has observed that 'the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other

factors combined.'" *Id.* at 228-29 (citation omitted); *see Perry*, 565 U.S. at 250-51 (Sotomayor, J., dissenting). In this area fraught with peril, an instruction that jurors would be obligated to view as a "definitive and binding statement[] of the law[,]" *Boyde v. California*, 494 U.S. 370, 384 (1990), is an essential safeguard. *Perry*, 565 U.S. at 245-46.

Despite the government's contention, BIO 8-9, the other general "trial instructions and arguments of counsel" were not a "substitute for [an] explicit instruction" as requested by petitioner. *Carter*, 450 U.S. at 304. The jury would "have derived 'significant additional guidance' from the instruction requested [a]nd most certainly, defense counsel's own argument . . . cannot substitute for instructions by the court." *Id*. (quoting *Taylor v. Kentucky*, 436 U.S. 478, 484 (1978)). "It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Id.* at 302 n.20 (quoting *Starr v. United States*, 153 U.S. 614, 626 (1894)). In short, the government undervalues the importance of a specifically tailored jury instruction, and there is every reason to give one under the circumstances versus none for declining one.

The government does not dispute that the issue presented is important. *See Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 343-

44 (3d Cir. 2016) (*en banc*) (McKee, J., concurring). The government points out that, after the decision in this case, and perhaps as a result of the decision in this case, App. 4-6, the Ninth Circuit's Jury Instructions Committee revised the commentary to its model eyewitness identification instruction. BIO 7-8. The model instructions and their commentary are not binding law in the Ninth Circuit. *See United States v. Warren*, 984 F.2d 325, 327 n.3 (9th Cir. 1993). In any event, the revision did little and still essentially vests unreviewable discretion with the district court, in conflict with the circuits adopting the *Telfaire* approach. There has been a circuit-split on the issue presented for quite some time. The jury instruction committees in the various circuits have had plenty of time to consider the issue, and the recent action, or lack thereof, by the Ninth Circuit's Committee demonstrates that it does not plan on changing its approach.

The government appears to acknowledge that identity was the crucial issue in this case and several factors called into question the reliability of the identifications, thereby neatly teeing up the question presented. Nevertheless, the government contends that this case is a poor vehicle for review because any error was harmless. BIO 15-16. This complaint is not a valid basis to deny review, as the preferred approach is for the court below to consider harmless error in the first instance. *See, e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015); *Carter*, 450 U.S. at 304. The government's reliance on harmless error also reflects

one of the flaws with the "flexible" approach, which conflates the question of whether there was error with the question of harmlessness. *See Luis*, 835 F.2d at 41.

In any event, the instructional error was not harmless, especially as to the assault conviction. The *only* witness to identify petitioner as the person who threw the rock failed to identify him on the night of the alleged assault, only did so many months later while questioned by border agents after he had been arrested for illegally returning to the United States, and he purportedly saw the incident from a distance, at night, and in poor visibility conditions (among other factors calling the testimony into question). Given the state of the evidence as to the assault charge, the error was not harmless. *See United States v. Holley*, 502 F.2d 273, 276-77 (4th Cir. 1974) (refusal to give identification instruction was not harmless where single eyewitness).[2]

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[2] Petitioner does not mean to suggest that the instructional error was harmless as to the alien smuggling convictions, as the identifications of petitioner as the "guide" were plagued with similar factors demonstrating unreliability. Furthermore, the evidence concerning petitioner's niece, *see* BIO 15, did not persuasively demonstrate that the eyewitnesses correctly identified petitioner as the "guide" because they could have confused petitioner with his brother, who the government contended was also an alien smuggler and who physically resembled petitioner, as demonstrated by a photograph of the niece with the two brothers found on her phone and entered into evidence at trial. At the very least, however, the error was not harmless as to the assault conviction, which was only supported by the thinnest of evidence from a single eyewitness. The assault conviction triggered higher Sentencing Guidelines and therefore essentially determined petitioner's

The government contends that the jury would not have acquitted if it had been given an eyewitness identification instruction, BIO 15-16, but that is not the standard. Instead, the prejudice inquiry considers whether one juror could have changed his or her mind if the error had not been committed, *see Cone v. Bell*, 556 U.S. 449, 452 (2009); *Wiggins v. Smith*, 539 U.S. 510, 537 (2003), and that is the standard the Ninth Circuit would apply on remand. *See United States v. Kohring*, 637 F.3d 895, 906 (9th Cir. 2011). The government's harmless error conclusion, which heavily relies on defense arguments and tactics as a sufficient substitute, BIO 15, also disregards the importance that this Court has placed on a jury instruction. *See Carter*, 450 U.S. at 304 and n.20.

Finally, the jury's deliberations demonstrate that it thought the case was close. The evidentiary portion of the trial lasted perhaps a day and a half. Even though it was a short trial, the jury deliberated over the course of two days and more than a full day in total before reaching a verdict, in which it partially rejected the government's allegations as to the assault charge. The length of the deliberations in comparison to the length of the trial shows that the government cannot satisfy its burden of demonstrating that the error was harmless, *see Parker v. Gladden*, 385 U.S. 363, 365 (1966), particularly as to the assault conviction.

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sentence. App. 9. Thus, reversal of that count alone would have a significant effect on the judgment.

Certainly, the Ninth Circuit may think so on remand. *See, e.g.*, *United States v. Leal-Del Carmen*, 697 F.3d 964, 971, 976 (9th Cir. 2012) (finding error was not harmless in similar case and citing similar length of deliberations); *United States v. Caruto*, 532 F.3d 822, 832 (9th Cir. 2008).

CONCLUSION

This petition presents an excellent vehicle for this Court to resolve a long-established circuit-split in an important area of federal criminal law. The Court should therefore grant this petition for a writ of *certiorari*.

Dated: November 4, 2019

Respectfully submitted,

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