NO.

IN THE

SUPREME COURT OF THE UNITED STATES

ANGEL NOEL GUEVARA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITIION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

PETITIION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether excluding expert testimony on eyewitness memory and police lineup procedures violates the Sixth Amendment right to present a defense, or constitutes an abuse of discretion under Rule 403, when eyewitnesses must identify a stranger, no substantial independent evidence corroborates identification, and expert testimony is the sole defense?

2. Whether the government violates *Brady v. Maryland* and the Fifth and Sixth Amendment rights to due process and cross-examination by withholding ex parte arrests, detentions, court hearings, and government contacts, it used to secure eyewitness trial testimony, and whether a defendant is entitled to an evidentiary hearing to determine whether the government's activities materially affected eyewitness credibility, when defendant learns about suppressed information on appeal?

PRIOR PROCEEDINGS

1. Angel Noel Guevara was the appellant, and the United States was the appellee, for *United States v. Guevara*, Docket 11-10644, United States Court of Appeals for the Ninth Circuit. This case was consolidated for appeal with *United States v. Jonathan Cruz-Ramirez*, Docket 11-10632; *United States v. Moris Flores*, Docket 11-10635; *United States v. Erick David Lopez*, Docket 11-10638; *United States v. Marvin Carcamo*, Docket 11-10645; and *United States v. Guillermo Herrera*, Docket 12-10051. This case was related for appeal, but not consolidated with, *United States v. Danilo Velasquez*, Docket 12-10099, and *United States v. Manuel Franco*, Docket 12-10212.
2. Angel Noel Guevara was the defendant, and the United States the plaintiff, for *United States v. Guevara*, Docket 3:08-cr-08-00730-WHA-3, United States District Court, Northern District of California, San Francisco Division. Judgment was entered on December 6, 2011. This case was consolidated for trial with the trials in the aforementioned, *United States v. Jonathan Cruz-Ramirez*, *United States v. Moris Flores*, *United States v. Erick David Lopez, United States v. Marvin Carcamo*, and *United States v. Guillermo Herrera*.

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OPINIONS BELOW

The unpublished memorandum decision of the court of appeals may be found at *United States v. Cruz-Ramirez*, 782 F. App'x 531 (9th Cir. 2019). App. 4-15.[1] The district court's unpublished orders relevant to Guevara's eyewitness identification expert are located at *United States v. Guevara*, No. CR 08-0730 WHA, 2011 WL 2445978, (N.D. Cal. June 17, 2011), and *United States v. Herrera*, 788 F. Supp. 2d 1026 (N.D. Cal. 2011). App. 20-30. The above, and other pertinent orders, opinions, and excerpts from the trial record, are contained in the Appendix.

JURISDICTION

The circuit court of appeals affirmed the judgment on July 19, 2019 and denied Guevara's timely petition for rehearing en banc on October 2, 2019. App. 1-15. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution guarantees:

> 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;

[1] "App" refers to the Appendix filed herewith. "JER" refers to Appellants' Joint Excerpts of Record, "FJER" to Appellants' Further Joint Excerpts of Record, "SFJER" to Sealed Further Joint Excerpts of Record, and "GIER" to Guevara's Individual Excerpts of Record, for the Ninth Circuit appeal.

> 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.

The Sixth Amendment to the U.S. Constitution guarantees:

> 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 defence.

Rule 403 of the Federal Rules of Evidence provides:[2]

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

INTRODUCTION

The credibility and accuracy of eyewitness identifications was essential for counts (25) to (30), which alleged Guevara perpetrated two stabbings, and aided and abetted a third. The eyewitnesses were previously unfamiliar with the perpetrator, best practices were not employed for the lineups, and other evidence failed to substantially corroborate the identification of Guevara as the perpetrator, i.e., no fingerprint, photograph, surveillance video, D.N.A., trace blood, bloody weapon,

[2] References to Rules are to the Federal Rules of Evidence unless otherwise stated.

blood-stained clothes, admission to others, co-conspirator, or confession, corroborated the eyewitness identification.

Despite the critical nature of the eyewitness testimony, the government and district court deprived Guevara of critical evidence for his defense in two ways.

First, the district court prejudicially deprived Guevara of his Sixth Amendment right to present his defense, or alternatively abused its discretion, by excluding expert testimony about the reliability of eyewitness identification evidence. The testimony was admissible and reliable under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and rule 702. The expert would not have opined about the accuracy of the eyewitnesses. Instead, the expert would have educated the jury about commonly unknown scientific findings concerning eyewitness memory and lineup procedures, which are not adequately explained through cross-examination or jury instructions, such as the fact that confidence or certainty about a stranger identification, even under ideal conditions, is not as accurate as commonly believed, and certain police lineup procedures can increase or decrease the reliability of identifications. The expert would have educated the jury so it could make an informed evaluation of the accuracy and credibility of the eyewitness evidence in ways cross-examination, argument, and jury instructions could not.

Second, unbeknownst to Guevara, the government prejudicially withheld material information affecting the credibility of the eyewitnesses in violation of *Brady v. Maryland,* 373 U.S. 83 (1963) and Guevara's Fifth Amendment right to due process and Sixth Amendment right to meaningful cross-examination. Three eyewitnesses failed to appear for trial as subpoenaed and one threatened to refuse to testify. Ex parte arrest warrants issued for two of them, one was arrested and jailed overnight, and the other two were detained, including one whom, after detention, "totally freaked out." The ex parte hearings, warrants, and related orders were kept under seal until months after trial and notice of appeal. Suppression of the information, and the circuit's failure to remand for an evidentiary hearing, denied Guevara his due process rights to cross-examine the eyewitnesses whether fears of arrest, rather than memory, motivated either the substance of their testimony or the confidence and certainty they projected to the jury.

STATEMENT OF THE CASE

I. Procedural overview

A federal indictment in the United States District Court for the Northern District of California alleged three conspiracies and individual charges against Guevara and others, as members of, or associated with Mara Salvatrucha, a Sureño

gang, commonly known as MS-13. JER 427-535. The district court had jurisdiction under 18 U.S.C. § 3231.

Count (1) alleged conspiracy to conduct the affairs of MS-13 through a pattern of racketeering activity, including murder, attempted murder, drug distribution, assault, robbery, extortion, and auto theft, in violation of 18 U.S.C. § 1962(d). JER 493-517. Count (2) alleged conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5). JER 517-19. Count (3) alleged conspiracy to commit assault with a dangerous weapon, in violation of 18 U.S.C. § 1959(a)(6). JER 519-21. Count (4) alleged Guevara used and/or possessed a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). JER 521-22. Counts (25) to (30) alleged Guevara assaulted Jesus Reynoso and Ronald Donaire, and aided and abetted assault on Milagros Moraga, with a dangerous weapon in aid of racketeering, and attempted murder, in violation of 18 U.S.C. §§ 1959(a)(3) and (a)(5). JER 532-35.

On August 30, 2011, after a five-month trial, a jury convicted Guevara of all charges and special allegations. JER 3394-3406.

The court sentenced Guevara to life imprisonment for Count (1), 120 months for Count (2); 36 months for Count (3); 60 months for Count (4); 240 months each for Counts (25), (27) and (29); and 120 months each for Counts (26), (28), and (30). All terms are concurrent except Count (4), which is consecutive. JER 853.

Guevara, and his co-defendants, appealed to the United States Court of Appeals for the Ninth Circuit. The Circuit reversed Count (4) under *United States v. Davis*, 139 S.Ct. 2319, 2336 (2019), which held 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague, but otherwise affirmed the judgment. App. 11.

II. Eyewitnesses and proposed expert testimony

On December 26, 2007, at 7:05 p.m., Jesus Reynoso was walking toward a woman in the Mission District of San Francisco when two men jumped from a car, and one of the men stabbed him. JER 1192-1215; GIER 1541-48. Twenty minutes later at a bus stop in the same city, a man stabbed Ronald Donaire while a woman simultaneously stabbed Milagros Moraga. JER 1250-83, 1366-1423. None of the victims or eyewitnesses was familiar with the perpetrators.

Police held interviews that night. Reynoso did not identify his assailant. JER 1190-95. Donaire said he could not identify his assailant. JER 1391. Moraga said she would remember the couple if she saw them again. JER 1245-46.

Moraga's boyfriend, Luis Prado, was at the bus stop, but ran away without injury. JER 1259-63, 1375-76. That night, Prado told Inspector Lau of the San Francisco Police Department, he thought Donaire's assailant had a mark on his face, but when Inspector Lau showed Prado a photo array of six-men that included Guevara's photo (simultaneously, not sequentially), Prado did not choose Guevara as Donaire's assailant. JER 1379-96, 1424-29, 3795-96.

The next day, Inspector Lau, rather than a blind administrator, showed to Moraga an array of six men that included Guevara's photo (again, simultaneously, not sequentially), and Moraga chose Guevara as Donaire's assailant. JER 1426-29, 3785-86; GIER 1280-81, 1510.

Three days later, police searched Guevara's home and car, which were located in the neighborhood of the stabbings, but found no physical evidence, such as knives or bloody clothes, connecting Guevara to the stabbings. JER 1430-47; GIER 1287. Police found no forensic evidence connecting Guevara to the crimes, such as blood trace, fingerprints, D.N.A., videos, or photographs. GIER 1347-52, 1378-81. Guevara did not confess, and no coconspirator identified him.

Police detained Guevara's friend, Veronica Hernandez, during their search of Guevara's home. JER 1430-34. Police searched her purse and found a diary labeled "Grumpy Loca," containing a poem about committing violent acts against gang members, however, it did not describe the stabbing incidents, and there was no evidence Guevara knew of, created, read, or approved the poem. JER 1436-38, 1466-71, 1479, 3843-44, 3797-801.

Eight days later, Inspector Lau, rather than a blind administrator, showed to Donaire a photo array of six-men, including Guevara (simultaneously not sequentially, and identical to the array he previously showed Moraga), and Donaire chose Guevara's photo. JER 1404-07, 1472-73, 3793-94; GIER 1274

Two months later, Reynoso failed to identify Guevara as the man who stabbed him in a six-man photo array. JER 1230-37.

Forty-two days later, Moraga identified Guevara's friend, Veronica Hernandez, as her assailant, from a lineup array depicting six women (simultaneously, not sequentially). JER 1271-72, 1442-43, 3787-88.

Two months later, Reynoso failed to identify Guevara as the man who stabbed him, but identified Hernandez as the woman at the scene of his stabbing from a six-woman photo array. JER 1230-37.

Reynoso subsequently told a grand jury Guevara's photo was the "closest," but he was not sure Guevara was his attacker. JER 1239-40.

Before trial, Guevara noticed Dr. Deborah Davis, a qualified expert on witness memory, identifications, and police lineup procedures. GIER 2115-27. Dr. Davis would not give the jury her opinion about the eyewitness's accuracy. GIER 48. Instead, Dr. Davis was expected to assist the jury in its evaluation of the reliability of the eyewitness testimony by explaining how scientific studies significantly refute commonly held assumptions about eyewitness accuracy, e.g., a witness's confidence or certainty about an identification is only a reliable predictor of accuracy about 70% of the time. GIER 1922, 1970. Dr. Davis would also explain scientific findings on how certain police lineup procedures promote identification reliability, e.g., (1) blind administration; (2) sequential viewing; (3) equalizing

photos with fillers where the suspect has an unusual feature; and (4) using profile photos when a witness viewed a perpetrator's profile. GIER 748-861, 1227-65, 1677-1731, 1927-40.

Guevara's counsel argued Dr. Davis's expert testimony was probative because it would assist the jury in calculating the reliability of the eyewitness identifications, and was necessary because cross-examination and jury instructions couldn't explain the scientific findings. GIER 2079-90. Guevara joined co-defendant Guillermo Herrera's assertions that excluding Dr. Davis's testimony violates "due process rights under the Sixth Amendment." GIER 2113-14.

After pretrial hearings, the district court implicitly held Dr. Davis's testimony admissible and reliable under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and rule 702, but postponed its decision on admissibility until trial. App. 24.

At trial, Reynoso failed to identify Guevara as his assailant. JER 1237-38. Prado didn't identify Guevara as Donaire's assailant either. JER 1371-89. Donaire admitted he did not see his assailant's face, but nevertheless identified Guevara. JER 1410, 1418. Moraga identified Guevara as Donaire's assailant. JER 1255-83. The government presented no physical evidence (such as blood trace, D.N.A., fingerprint, photo, video, audio, weapon, clothes, etc.), no coconspirator testimony, no informant testimony, and no confession, corroborating the identification.

Although there was evidence Guevara's cell phone was located in the area at the time of the stabbings, Guevara lived in that neighborhood. JER 676-79, 3320-24, 3387, 1430. Although Hernandez was identified as Moraga's attacker, and identified as present during Reynoso's earlier stabbing, Reynoso testified two men were present at the scene, but only one stabbed him. JER 1204-06.

Inspector Lau testified the photo arrays he showed Moraga, Donaire, and Prado were "as fair as possible." JER 1425; GIER 1292-93, 1354, 1365. However, when Guevara's counsel attempted to cross-examine Inspector Lau about his knowledge of "various factors that affect the accuracy of eyewitness identifications," based on his experience, the district court prohibited Inspector Lau's answer, stating those were questions for an expert, and limited counsel to asking about Lau's preparation of the arrays. JER 1425; GIER 1269-70, 1283-1302, 1354, 1365.

Guevara had no evidence for his defense to Counts (25) to (30) except for his proposed expert, Dr. Davis, JER 723A-C, 3153-54.

The district court excluded Davis's entire testimony under Rule 403, stating,

> After due consideration of the eyewitness' actual testimony and all other particulars of our ongoing trial, this order finds that the time and confusion involved would outweigh the little probative value possibly lurking somewhere in the proffer. In opening argument and cross-examination of the eyewitnesses and examining officers, counsel has already explored the possible shortcomings and weaknesses of the eyewitness identifications at issue."

App. 21.

The court instructed the jury to consider the following in evaluating the eyewitness testimony: (1) the capacity and opportunity of the eyewitness to observe the offender based on the length of time for observation, including lighting, distance, and angle of view; (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 witness; (4) witness familiarity with the subject identified, including whether the offender was of a different race from the witness; (5) the strength of earlier and later identifications; (6) lapses of time between the event and identifications; (7) the totality of the circumstances, including combinations of the foregoing factors, surrounding the eyewitness' identification; (8) the fairness of the photo lineup shown to the eyewitness; and (9) the fairness of the way in which the lineup was shown to the witness. App. 16-19.

III. Government ex parte contacts with eyewitnesses

On appeal, Guevara discovered the government withheld ex parte arrest warrants, arrests, detentions, hearings, and government contacts with eyewitnesses Prado, Donaire, and Moraga, after each failed to appear for trial or threatened not to appear. GIER 1-7. Prado was arrested, jailed overnight, and released only after a hearing in which he promised to appear and testify. GIER 22, 1427-68. Donaire was detained after failing to return calls and failing to appear at meetings with

government agents who were to transport him to trial, and "totally freaked out" when the government detained him. GIER 1424-68. Moraga thrice failed to appear for meetings with the government, so the government sought an arrest warrant and detained her. GIER 1459-63, 1556-63.

REASONS TO GRANT THE PETITION FOR WRIT OF CERTIORARI

I. The circuit's decision affirming exclusion of expert testimony on eyewitness memory and police lineup procedures in this uncorroborated stranger identification case is in conflict with state and circuit authorities.

A. There is a growing nationwide consensus among circuit and state courts, state legislatures, and law enforcement, that treatment of eyewitness memory and traditional lineup procedures must change because they are not as reliable as jurors commonly believe and cross-examination, argument, and jury instructions do not adequately address them.

According to the Innocence Project, 69 percent of individuals exonerated by D.N.A. evidence were convicted by misidentification, and 32 percent involved multiple misidentifications of the same person. See http://www.innocenceproject.org/dna-exonerations-in-the-united-states.

Scientific studies in recent decades confirm common, but erroneous, beliefs about eyewitness memory and police lineup procedures, are primary sources of wrongful convictions, and juries cannot rely on common sense in evaluating eyewitness identification accuracy because scientific evidence on eyewitness accuracy has produced counterintuitive results. GIER 58-1267, 1564-2054. For example, there is a consensus among experts that an eyewitness's confidence or

certainty in his or her identification is not a reliable indicator of the accuracy of the identification, even though jurors rely on confidence and certainty in determining their verdicts. GIER 448-97, 1924.

In 1999, the U.S. Department of Justice published Eyewitness Evidence: A Guide for Law Enforcement, NCJ 178240 (1999), recommending best practices for eyewitness identification procedures, including blind administration, sequential viewing, and other methods, that scientific studies have proven will produce more accurate eyewitness identifications. GIER 748-865; See https://nij.ojp.gov/library/publications/eyewitness-evidence-guide-law-enforcement

In 2017, the United States Deputy Attorney General issued a Memorandum to Heads of Department Law Enforcement Components and All Department Prosecutors, adding further recommendations, including e.g., filler and suspect photographs depicting the same unique featured described by the eyewitness, or alternatively, altering photographs of fillers to the extent necessary, to achieve an appearance consistent with the suspect's unique feature. See https://www.justice.gov/opa/pr/justice-department-announces-departement-wide-procedures-eyewitness-identification.

Although the DOJ Guide was not mandatory, it set the stage for what is now a growing nationwide reform movement by law enforcement agencies, state courts and legislatures, and some Circuits, adapting to the reality of eyewitness

identification evidence. See e.g., *State v. Guilbert*, 306 Conn. 218, 243 (2012) ("As a result of strong scientific consensus, federal and state courts around the country have recognized that the methods traditionally employed for alerting juries to the fallibility of eyewitness identifications – cross examination, closing argument and generalized jury instructions on the subject – frequently are not adequate to inform them of the factors affecting the reliability of such identifications.").

1. Twenty-two states and eleven law enforcement agencies have enacted or proposed eyewitness identification reform to increase the accuracy of stranger identification.

In the decade since state police investigated the identity of the man who stabbed Reynoso and Donaire, and Guevara's trial and conviction eight years ago, fifteen state legislatures joined two others, in enacted laws reforming police lineup procedures to increase the accuracy of eyewitness identifications, and one state currently has a bill working through its legislature.[3] Those laws require "blind administration," "sequential viewing of one suspect at a time," "placing the suspect

[3] See Haw. Rev. Stat. Ann. § 801K-2 (Effective June 1, 2020); Utah R. Evid. 617 (Effective November 1, 2019); N.M. Stat. Ann. § 29-3B-3 (Effective July 1, 2019); Okla. Stat. Ann. tit. 22, §21 (Effective November 1, 2019); N.C. Gen. Stat. Ann. § 15A-284.52 (Effective June 26, 2019); Cal. Penal Code § 897.5-897.7 (Effective January 1,2019); La. Code Crim. Proc. Ann. art. 251-53 (Effective May 23, 2018); Fla. Stat. Ann. § 92.70 (Effective October 1, 2017); Ga. Code Ann. § 17-20-1, 20-2 (Effective July 1, 2016); Colo. Rev. Stat. An. § 16-1-109 (Effective July 1, 2015); MD PUBLIC SAFETY § 3-506.1 (Effective April 14, 2015); 725 Ill. Comp. Stat. Ann. § 5/107A-2 (Effective January 1, 2015); Vt. Stat. Ann. tit. 13, § 5581 (Effective January 1, 2015); W. Va. Code Ann. § 62-1E-1 and 2 (Effective July 12, 2013); Conn. Gen. Stat. Ann. § 54-1p. (Effective July 1, 2012); Ohio Rev. Code Ann. § 2933.83 (Effective July 6, 2010); 12 R.I. Gen. Laws Ann. § 12-1-16 (Adopted June 22, 2010); Wis. Stat. Ann. § 175.50 (Effective December 31, 2005); See also 2019 Pennsylvania Senate Bill No. 872, Pennsylvania Two Hundred Third General Assembly - 2019-2020 (proposing eyewitness identification procedure reform).

in a different position in the lineup for each eyewitness," and "fillers resembling the suspect's features, including unique or unusual features;" some further require documenting confidence levels at the time an eyewitness first identifies a suspect.

Five additional states enacted legislation directing law enforcement agencies and task forces to develop new guidelines and officer training methods, to include some or all of the aforementioned procedures, emphasizing blind administration and sequential viewing,[4] and one other state has proposed legislation to do so.[5]

Apart from legislation, since Guevara's conviction, law enforcement agencies in eight states joined the DOJ and three others states, in rendering statewide reform of eyewitness identification lineup policies and law enforcement training to include, at the very least, blind administration and sequential viewing.[6]

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[4] See e.g., N.Y. Crim. Proc. Law § 60.25, 60.30, (Effective July 1, 2017)(directing Division of Criminal Justice Services to develop written eyewitness identification procedures grounded in evidence-based principles); Tex. Code Crim. Proc. Ann. art. 2 2.1386 (directing The Texas Commission on Law Enforcement to establish comprehensive education and training program on eyewitness identification)(Effective September 1, 2017); Neb. Rev. Stat. Ann. § 81-1455 (Effective July 21, 2016); Nev. Rev. Stat. Ann. § 171.1237 (Effective October 1, 2011); N.H. Rev. Stat. Ann. § 595-C:2 (Effective January 1, 2019).

[5] See 2019 Wash. Legis. Serv. Ch. 359 (S.S.B. 5714) (establishing "eyewitness identification work group" to maximum reliability of eyewitness identification collected during criminal investigations)

[6] See e.g., Delaware Police Chiefs' Council and the Delaware Attorney General Office's Model Policy for Eyewitness Identification Procedures (2018); Kentucky League of Cities (KLC) Model Policy for Eyewitness Identification Procedures (2015); Washington Association of Sheriffs and Police Chiefs (WASPC) Model Policy on Eyewitness Identification (2015); Virginia Department of Criminal Justice Services Model Policy on Eyewitness Identification (September 24, 2013); Washington D.C. Metropolitan Police Department's Procedures for Obtaining Pretrial Eyewitness Identification (2013); Montana Law Enforcement Agency (MLEA) Model Policy for Eyewitness Identification Procedures (2012); Michigan Bar Association Task Force Policy Writing Guide for Eyewitness Identification Procedures (2012); Arkansas Association of Chiefs of Police (AACP) Model Policy for Eyewitness Identification Procedures (2012); Massachusetts Chiefs of Police Association (MCOPA)

In Louisiana, the legislature recently acknowledged the problems associated with stranger identification by amending its Evidence Code section 702 to expressly permit expert witness testimony on memory and eyewitness identification in criminal cases where the expert does not offer an opinion whether a witness's memory or eyewitness identification is accurate, and no physical or scientific evidence corroborates the identification of the defendant. See La. Code Evid. Ann. art. 702 (Effective June 5, 2019).

Illinois has proposed legislation to decertify capital cases for first-degree murder convictions if the sole evidence supporting the death penalty was a single uncorroborated eyewitness. See 2019 Illinois Senate Bill No. 2292, Illinois One Hundred First General Assembly - First Regular Session, 2019 Illinois Senate Bill No. 2292, Illinois One Hundred First General Assembly - First Regular Session.

Only sixteen states (32%) presently have no formal eyewitness reform.[7]

Model Policy on Eyewitness Identification (2010); California Commission on the Fair Administration of Justice's Report and Recommendations Regarding Eye Witness Identification Procedures (April 13, 2006); and New Jersey Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Procedures (2001). For quick reference, see https://www.innocenceproject.org/policy/.

[7] The sixteen states without recent eyewitness identification reform are Alabama, Alaska, Arizona, Idaho, Indiana, Iowa, Kansas, Maine, Minnesota, Mississippi, Missouri, North Dakota, South Carolina, South Dakota, Tennessee and Wyoming. For quick reference, see https://www.innocenceproject.org/policy/.

2. State courts across the country have joined the reform movement by holding exclusion of expert testimony on eyewitness memory and lineup procedures violates constitutional rights to due process or to present a defense, or constitutes an abuse of discretion, in uncorroborated stranger identification cases.

Seven years ago, this Court acknowledged the growing acceptance of expert testimony about eyewitness memory and eyewitness lineup procedures among courts by observing, "[S]ome courts require expert testimony about factors affecting eyewitness identification reliability where eyewitnesses identify a stranger and no substantial evidence corroborates the identification." See *Perry v. New Hampshire*, 565 U.S. 228, 247 (2012), *citing State v. Clopten*, 2009 UT 84, 223 P.3d 1103, 1113.

Indeed, many state courts have reformed, or are in the process of reforming, jury instructions and barriers to admission of expert testimony on eyewitness memory and police lineup procedures in uncorroborated stranger identification cases due to the inadequacy of cross-examination, argument, and general jury instructions as substitutes. See e.g., *People v. Lemcke*, No. G054241, 2018 WL 3062234 (Cal. Ct. App. June 21, 2018) review granted (Oct. 10, 2018) (whether "instructing a jury that an eyewitness's level of certainty can be considered when evaluating the reliability of the identification violate[s] due process."); *People v. Reed*, 4 Cal.5th 989, 1028-31 (2018) (Liu, J., dissenting) (instruction on witness confidence is one, among multiple problems, with California's eyewitness procedure and jurisprudence); *People v. Sanchez*, 63 Cal.4th 411, 494-98 (2016) (Liu, J., concurring) (instructing jurors regarding eyewitness confidence fraught with danger

because perception that confidence equals accuracy unsupported by empirical evidence and danger is so acute propriety of instructing jurors to consider confidence should be reexamined); *Commonwealth v. Snyder*, 475 Mass. 445, 451 (2016), citing *Commonwealth v. Gomes*, 470 Mass. 352, 365-66 (2015), (expert testimony may be an important means of explaining counterintuitive principles regarding the reliability of eyewitness identifications),; *People v. Lerma*, 47 N.E.3d 985, 997 (2016) (abuse of discretion to deny expert testimony where sole evidence consisted of two stranger eyewitnesses, and acknowledged, "[W]e have not only seen that eyewitness identifications are not always as reliable as they appear, but we have also learned, from a scientific standpoint, why this is often the case."); *Commonwealth v. Walker*, 625 Pa. 450, 460-95 (2014) (overruling prior precedent, lifted ban on use of expert testimony to aid jury in understanding eyewitness identification, and acknowledged "cross-examination and oral argument are less effective in educating jury about fallibility of eyewitness identification."); *Guilbert, supra*, 306 Conn. at 226-67 (expert testimony on eyewitness identification admissible, cross-examination about confidence no substitute for expert because confident eyewitnesses believe identifications are accurate; cross-examination can't penetrate such beliefs, yet confidence has a substantial influence on the verdict, but held failure to permit expert testimony harmless because four eyewitnesses knew defendant prior to incident); *State v. Lawson*, 352 Or. 724, 745 (2012) (en banc)

(witness confidence or certainty in identifying stranger not a good indicator of identification accuracy, but nevertheless continues to substantially influence jurors); *Minor v. U.S.*, 57 A.3d 406, 413-24 (D.C. 2012) (although trial courts retain discretion to admit or exclude expert testimony, discretion must be weighed against defendant's constitutional right to present a defense, and failure to permit expert to testify was not harmless where two witness identified a stranger, and little other evidence was presented.); *State v. Henderson*, 208 N.J. 208, 217-20, 230-304 (2011) (rejected test for evaluating eyewitness identification in *Manson v. Brathwaite*, 432 U.S. 98 (1977), and revised jury instructions to account for scientific evidence on eyewitness identification); *Benn v. U.S.,* 978 A.2d 1257, 1265-84 (D.C. 2009) (acknowledged excluding expert on eyewitness identification may infringe right to present a defense, and found exclusion not harmless where multiple eyewitnesses from the same family were strangers to defendant and their certainty increased over time); *Commmonwealth v. Christie* (2002), 98 S.W.3d 485, 486-92 (Ky. 2002) (probative value of expert testimony on eyewitness identification reliability not outweighed by prejudicial effect in burglary prosecution where identification of strangers of a different race was main evidence, there was no direct evidence, and circumstantial evidence weak); See also *People v. McDonald* (1984) 37 Cal.3d 351, 369 (1984) (recognized thirty-five years ago what science has proved: there is a "lack of correlation between the degree of confidence an eyewitness expresses in his

[or her] identification and the accuracy of that identification), overruled on other grounds in *People v. Mendoza* 23 Cal.4th 896 (2000).

3. Some circuits have joined the reform movement by holding exclusion of expert testimony on eyewitness memory and lineup procedures violates constitutional rights to due process or to present a defense, or constitutes an abuse of discretion, in uncorroborated stranger identification cases.

Some circuits acknowledge the constitutional and evidentiary importance of permitting expert testimony on eyewitness memory and police lineup procedures where eyewitnesses identify a stranger and no substantial evidence corroborates identification. See *Thomas v. Heidle*, 615 F. App'x. 271, 280 (6th Cir. 2015) (when government relies on eyewitness evidence, defendant has "weighty" interest is eyewitness identification expert testimony); *U.S. v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) (acknowledged high error rates for identification of strangers, but where multiple eyewitnesses previously knew and identified defendant, excluding expert not abuse of discretion); *U.S. v. Smith*, 621 F.Supp.2d 1207, 1214-15 (M.D. Ala. 2009) (acknowledged the precise case for expert on eyewitness identification is where evidence consists of eyewitnesses and inconclusive surveillance tape); *U.S. v. Williams*, 522 F.3d 809, 811 (7th Cir. 2008) ("If there is one thing known about eyewitness identification, it is that 'common sense' misleads more often than it helps.") citing *U.S. v. Brown*, 471 F.3d 802 (7th Cir. 2006); *Ferensic v. Birkett*, 501 F.3d 469, 476-80 (6th Cir. 2007) (excluding expert testimony about eyewitness's identifications violated the Sixth Amendment right to present a defense where

eyewitnesses unfamiliar with perpetrator and eyewitnesses were primary evidence); *U.S. v. Brownlee*, 454 F.3d 131, 140-44 (3d Cir. 2006) (excluding expert testimony about eyewitness memory abuse of discretion requiring new trial because no other admissible evidence tied defendant to crime); *U.S. v. Rodriguez-Felix*, 450 F.3d 1117, 1123-24 (10th Cir. 2006) (eyewitness identification subject to significant error or manipulation, but excluding eyewitness expert harmless where videotape and photograph corroborated four eyewitnesses."); *U.S. v. Mathis*, 264 F.3d 321, 341-42 (3d Cir. 2001) (excluding eyewitness expert abuse of discretion where defendant sought to disprove identification by demonstrating it was the product of "weapon focus" and viewing defendant's photograph; not independent memory.); *U.S. v. Smithers,* 212 F.3d 306, 317 (6th Cir. 2000) ("[E]xpert testimony should be admitted … when there is no other inculpatory evidence presented against the Defendant with the exception of a small number of eyewitness identifications."); *U.S. v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993) ("[t]here has been a trend in recent years to allow such [expert] testimony under circumstances described as 'narrow.' "); *U.S. v. Stevens*, 935 F.2d 1380, 1397, 1400-01 (3d Cir. 1991) (abuse of discretion to exclude expert testimony "about the lack of a correlation between confidence and accuracy in eyewitness identifications"); *U.S. v. Moore*, 786 F.2d 1308, 1312-13 (5th Cir. 1986) ("[in] a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and

properly may be encouraged….”). In the Eleventh Circuit, at least one judge acknowledged the need for that Circuit to at least review exclusion of expert witness testimony on eyewitness identification for abuse of discretion since to not do so not only conflicts with all other circuits and at least five states, but “continued adherence to a rule that disfavors this form of testimony is indefensible in light of the science supporting its usefulness.” *U.S. v. Owens*, 682 F.3d 1358, 1359 (11th Cir. 2012) (Barkett, CJ, dissenting from denial of rehearing en banc.)

B. The circuit’s decision is contrary to other circuit and state court decisions because it relied on obsolete and irrelevant precedent.

The nationwide acceptance of the scientific findings on eyewitness memory and police lineup procedures, and acknowledgement of the limitations of cross-examination, argument and instructions to enlighten jurors about these findings, represents a sea change. Unfortunately for Guevara, whose investigation and conviction occurred near the inception of what is now a growing reform movement, this sea change has not reached the Ninth Circuit.

Instead of merging with nationwide consensus, the circuit relied on what is now obsolete and irrelevant precedent to affirming the exclusion of Dr. Davis’s expert testimony. App. 11, relying on *U.S. v. Rincon*, 28 F.3d 921, 925–26 (9th Cir. 1994). *Rincon* is irrelevant because, unlike here, photos corroborated the identification. *Ibid.* *Rincon* is obsolete because in 1994, unlike in 2011, scientific

findings on eyewitness memory and police lineup procedures, were not yet sufficiently accepted by the scientific community for Rule 702. *Ibid*.

Under *Ferensic, supra,* 501 F.3d at 475-84, excluding Dr. Davis's testimony violated Guevara's Sixth Amendment right to present his defense since there was no substantial independent evidence corroborating the identification of Guevara.

As in *Brownlee, supra,* 454 F.3d at 140-44, *Mathis, supra,* 264 F.3d at 333-43, and *Stevens, supra*, 935 F.2d at 1400-01, 1406-07, excluding Dr. Davis's testimony constituted abuse of discretion because the probative value of the expert testimony was high (when viewed in the light most favorable to Guevara as the expert's proponent) given the eyewitnesses identified a stranger viewed under poor conditions and no substantial independent evidence corroborated identification, as compared to the clarification (not confusion) it would have provided to the jury.

And, as in *Mathis, supra*, 264 F.3d at 342, excluding Dr. Davis's expert testimony about weapons focus was error because it was important in evaluating Moraga's identification since she focused on the knife and her own assailant, rather than the face of Donaire's assailant.

The circuit and district court each relied on traditional assumptions that cross-examination, jury instructions, and argument are adequate constitutional and evidentiary safeguards against wrongful conviction in uncorroborated stranger identification cases. App. 11, 20. Those assumptions no longer hold in the face of

scientific studies that courts, legislatures, and law enforcement across the country have accepted as proof they are inadequate prophylactics against erroneous eyewitness identifications of strangers in the absence of corroborating evidence. See e.g., *Lawson, supra*, 352 Or. at 760 (reversing exclusion of expert testimony on identification finding assumptions that cross-examination, argument, and jury instructions are not adequate substitutes for expert testimony to satisfy constitutional rights to due process); *Clopten, supra*, 223 P.3d at 1110 (cross examination cannot penetrate honest, but mistaken eyewitnesses, and jurors cannot tell whether an eyewitness is accurate when the eyewitness honestly, but mistakenly, believes their identification is accurate); See also *U.S. v. Wade*, 388 U.S. 235, 234 (1967) ("even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of [an eyewitness's] accuracy and reliability.).

C. This case presents a straightforward vehicle to establish federal constitutional and evidentiary requirements respecting expert testimony on eyewitness memory and lineup procedures for often-recurring stranger identification cases in light of nationwide reform.

Guevara's case presents a simple vehicle for this Court to address the new reality regarding expert testimony on eyewitness identification vis à vis due process, the right to present a defense, and evidentiary rules.

The exclusion of Dr. Davis's testimony violated Guevara's Sixth Amendment right to present his sole defense as to Counts (25) to (30), and constituted an abuse

of discretion. Without Dr. Davis's testimony, Guevara's counsel was unable to use cross-examination, jury instructions, and argument to explain counterintuitive scientific findings on eyewitness memory or the importance of using particular lineup procedures. Common sense might alert jurors that certain procedures are better than others, however, without expert testimony explaining why and how much better they are, jurors are likely to assume police used the best available methods, whether they did so or not. Here, police did not.

Dr. Davis was not permitted to explain that, contrary to common sense, a witness's confidence or certainty in their identification of a stranger, even when viewed under ideal conditions, is only accurate about 70% of the time. GIER 1921-24, 1981. Reliance on the confidence of eyewitnesses is extremely likely in Guevara's case, and particularly troublesome, because the eyewitnesses identified a stranger they briefly saw, while under stress, in the dark, and the jury could not alternatively rely on substantial independent evidence corroborating identification, such as familiarity with the perpetrator, coconspirator testimony confirming the identification, physical evidence such as photos, videos, D.N.A, blood, or fingerprint evidence, a confession, or co-conspirator admission.

Dr. Davis was not permitted to testify about scientific studies concerning factors outside a typical juror's experience that affect eyewitness identification reliability, including police lineup procedures. App. 20-22. Many of the eyewitness

identification lineup procedure reforms, e.g., blind administration, sequential viewing, showing different arrays to each eyewitness, and equalizing facial features, were not used in Guevara's case.

Although Guevara's counsel attempted to cross-examine Inspector Lau whether in his "experience" having prepared "over 50 lineups" he was aware of "various factors that affect the accuracy of eyewitness identifications," the court disallowed the question, stating it was a question for an expert. App. 31-33. Without testimony from Dr. Davis, or Inspector Lau, counsel had no evidentiary basis to argue scientific findings on confidence versus accuracy, or that blind administration, etc., is more likely to produce accurate identification.

Dr. Davis would have testified officers could unintentionally communicate the suspect's identity or confirm identification through non-verbal and other cues, and "blind administration" supports accuracy. GIER 48, 56, 1258-59, 1265, 2032-34, 2124-25. This was important because a single officer, Inspector Lau, showed photo arrays to Prado, Donaire, and Moraga. Without the expert's testimony about scientific studies, counsel had no basis to argue the importance of blind administration, sequential viewing, and other methods, that are proven more likely to produce accurate identifications.

Dr. Davis would explain studies conclude sequential viewing is preferable because it mitigates the effect of "relative judgment," a problem that was evident in

Reynoso's grand jury testimony that Guevara's photo was the merely "closest." JER 209-10, 245, 255-62, 475, 512, 515, 585. There is no way counsel could explain bona fide scientific findings concerning relative choice through cross-examination of the eyewitnesses or Inspector Lau.

Dr. Davis would explain that when a witness describes a suspect with a distinctive mark on his face, as does Guevara, identification is more reliable where police place a bandage or mark on the same spot for each of the suspects in the photo array so that the suspect is chosen because he is the person the witness saw, not because his photo is the one with the mark. GIER 844-47, 1245-50, 1265. Lau did not employ this method. JER 3785-95. This was significant because Moraga's boyfriend, Prado, did not choose Guevara's photo the night of the stabbing even though he was the first to describe an assailant with something on his face. Dr. Davis' testimony would have been useful for the jury to know so it could incorporate it into its calculus of Moraga's identification since Inspector Lau, not Moraga, brought up the idea that Donaire's assailant had a mark on his face. JER 1428-29; GIER 1280-81. Counsel could not effectively lend credence to scientific findings by cross-examining eyewitnesses about this method.

Dr. Davis would explain scientific findings about the use of profile arrays as more reliable than frontal view arrays where a witness saw the assailant's profile, as did Moraga. JER 1255-65, 1277, 1259-60; GIER 1922, 1949. Lau did not employ

this method. Dr. Davis would have educated the jury so it could consider this when calculating the reliability of Moraga's identification. Even if counsel could have cross-examined eyewitnesses and Inspector Lau about this, cross-examination could not explain the scientific findings concerning the reliability of this method.

Davis would explain scientific findings about the degree of accuracy where a weapon is present, i.e., "weapon focus." JER 1264-66; GIER 1925-26. This was important for the jury's evaluation of Moraga's identification because she testified she focused on the knife, not the face of Donaire's assailant. JER 1254-78; GIER 1491-94, 1507, 1925-26. Counsel could not explain the scientific findings concerning the importance and the impact of weapon focus on memory by cross-examining Moraga, or by asking Inspector Lau about that factor.

Congress has not yet joined the reform movement. This case presents this Court with an opportunity to establish constitutional boundaries concerning trial court decisions to admit or deny expert testimony on stranger identification and the impact of lineup procedures, according to the Sixth Amendment right to present a defense and federal rules of evidence.

II. This Court should instruct circuits that, under *Brady* and the Fifth and Sixth Amendment rights to due process and cross-examination, a defendant is entitled to an evidentiary hearing to determine whether suppressed ex parte arrests, warrants, detentions, hearings, and government contacts with eyewitnesses prejudicially affected witness credibility at trial, when a defendant does not discover the suppressed information until appeal.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87 (1963); See also *Giglio v. U.S.,* 405 U.S. 150, 153–154 (1972) (clarifying *Brady* applies to evidence undermining witness credibility).

A defendant need only show the undisclosed information could "help the defense by either bolstering the defense case or impeaching potential prosecution witnesses," e.g., by showing bias or interest. *U.S. v. Bagley*, 473 U.S. 667, 676 (1985); See *Giglio, supra,* 405 U.S. at 154; *Brady, supra,* 373 U.S. at 87.

Evidence is "material" under *Brady*, when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different, and a "reasonable probability" does not mean a different verdict with the evidence, only that "the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016); *Smith v. Cain*, 565 U.S. 73, ---- 132 S.Ct. 627, 629 (2012); *Giglio, supra,* 450 U.S. at 154 (quoting *Napue v. Illinois,* 360 U.S. 264, 271 (1959)).

Since Counts (25)-(30) wholly depended on the credibility of Prado, Donaire, and Moraga as eyewitnesses, and there was no independent evidence corroborating identification, had Guevara possessed the suppressed information, his counsel could have cross-examined the eyewitnesses to uncover (1) influence or suggestion by government agents; (2) whether and to what extent uncertainty about their eyewitness testimony made them reluctant to testify, and (3) whether fear of arrest motivated their testimony, or caused them to project greater confidence in their testimony and identification. GIER 22-24, 1423-68, 1549-63.

The circuit decided the government did not violate *Brady* because the information was not "exculpatory" and "there is no reasonable probability" the result of the trial would be different. App. 13; See e.g., *Cain, supra*, 132 S.Ct. at 629 (eyewitness testimony was sole evidence linking defendant to crime, so eyewitness's undisclosed statements contradicting defendant's testimony was material under *Brady*).

This Court has held suppressed information need not be exculpatory; rather, it need only undermine confidence in the verdict, i.e., undermine eyewitness testimony by putting it "in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, fn 8. (1995).

By assuming the suppressed information must be exculpatory, the circuit's decision incorrectly applied a sufficiency of evidence test, i.e., absent the error, there

is still sufficient evidence to convict. See *Kyles, supra*, 514 U.S. at fn 8. ("This Rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone.").

The Circuit's decision also erroneously concluded the eyewitnesses were reluctant to testify solely because they were afraid to testify against defendants as alleged gang members. App. 13.

Since Guevara only discovered the arrest warrants, detentions, and government contacts after his case was on appeal, he was denied an evidentiary hearing to uncover the impact of the government's actions on the eyewitness testimony and demeanor. See *Turner v. U.S.*, 137 S.Ct. 1885, 1888 (2017) (district court held evidentiary hearing to determine whether the suppressed information was material to witness credibility.). An evidentiary hearing would afford him an opportunity to determine whether, for example, the eyewitnesses did not want to testify because they became less certain about their identification than they previously told police, were forced to do so out of fear of arrest, and accordingly changed their projected demeanor and elevated their confidence.

Because jurors rely on eyewitness confidence and certainty about identification in the absence of independent evidence corroborating the identification, omitting the information undermines confidence in the verdict for Counts (25) to (30). See GIER 711-34, 448-97, 1564-90; *Stevens, supra*, 935 F.2d at

1397, 1400-01; *Guilbert, supra*, 306 Conn. at 226-67; *Lawson, supra*, 352 Or. at 745 (witness confidence or certainty in identifying stranger not a good indicator of identification accuracy, but nevertheless continues to substantially influence jurors). Even without an evidentiary hearing, the information puts the eyewitness testimony in a completely different light than was presented to the jury. The eyewitnesses may have been afraid of gang retaliation, but, based on the suppressed information, they were also afraid of the government.

This Court should use this simple case to direct circuit courts confronted with potential *Brady* violations discovered on appeal, that the constitution requires remand for an evidentiary hearing to determine whether the undisclosed information influenced or motivated eyewitness testimony so that determination whether defendant was prejudiced can be ascertained, rather than assumed.

CONCLUSION

This Court should grant certiorari to consider the often recurring question whether exclusion of expert testimony on eyewitness memory and police lineup procedures violates the Sixth Amendment right to present a defense, or constitutes an abuse of discretion, in uncorroborated stranger identification cases, in light of the growing consensus that cross-examination, argument, and jury instructions are inadequate safeguards against wrongful conviction.

This Court should also grant certiorari to direct circuits that defendants who discover on appeal that the government withheld ex parte arrests, detentions, court hearings, and government contacts, used to secure eyewitness testimony, are entitled to an evidentiary hearing to determine prejudice under the Fifth and Sixth Amendment rights to due process and to cross-examine witnesses.

Guevara respectfully requests this court grant certiorari, and reverse and remand this case for a new trial for counts (25) to (30), under Supreme Court Rules 10(a) and/or 10(c).

DATED: December 27, 2019

Respectfully submitted,

s/_____
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