No.

IN THE SUPREME COURT OF THE UNITED STATES

GUILLERMO HERRERA,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MARTIN SABELLI
Law Offices of Martin Sabelli
740 Noe St.
San Francisco, CA 94114
(415) 298-8435

KAREN L. LANDAU, CSB # 128728
Attorney at Law
2626 Harrison Street
Oakland, CA 94612
(510) 839-9230
Counsel of Record

Counsel for Petitioner Guillermo Herrera

QUESTION PRESENTED

In *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993), this Court held that Fed. R. Evid. 702 superseded the common law rule governing the admission of expert testimony based on scientific or other specialized knowledge. Rule 702 required instead that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."

After *Daubert,* is there a valid basis to treat expert testimony regarding eyewitness identification differently from other scientifically based evidence?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner and the United States).

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

Petitioner Guillermo Herrera respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit issued on July 19, 2019, affirming the judgment of conviction. Appx. A.

OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit affirming petitioner's convictions is unpublished and is attached as Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming petitioner's judgment of conviction and sentence was entered on July 19, 2019. Appx. A. This Petition is filed within 90 days of October 1, 2019, the date on which the Ninth Circuit denied a timely filed petition for rehearing. Appx. B. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Fed. R. Evid. 702 provides:

A witness who was qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 403 provides:

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.

STATEMENT OF THE CASE

The principal charge against petitioner Guillermo Herrera was that he committed the murder in aid of racketeering of Armando Estrada. 18 U.S.C. § 1959(a)(1). Petitioner Herrera also was convicted of participating in a conspiracy to violate the Racketeering and Corrupt Influence Act. *E.g.,* 18 U.S.C. § 1962(d). The critical piece of evidence against petitioner was the eyewitness identification made by Hugo Galdamez, a citizen witness, who saw the Estrada homicide.[1] Galdamez identified petitioner from a photo-array of profile views.

Prior to trial, petitioner joined in a codefendant's proffer of Dr. Deborah Davis, an expert in the subject of eyewitness identification. After a hearing, the district court found that Dr. Davis was qualified under Fed. R. Evid. 702, but nonetheless excluded her testimony

1 Although there was other evidence pointing to petitioner as the perpetrator, it was not conclusive.

pursuant to Fed. R. Evid. 403. The court excluded all expert testimony regarding eyewitness identification.[2]

At the court's pretrial *Daubert* hearing, Dr. Davis testified about the science of memory and eyewitness identification, including the substantial testing and peer review to which studies had been subjected. She explained how testing was conducted, and how percentages of accuracy were determined, as well as the effects of various detrimental factors. She offered a PowerPoint presentation, which provided categories relevant to identification accuracy. These categories included the formation of memory, how memory could be changed or distorted, and what laypeople believed about how memory works, as compared with how eyewitnesses actually performed.

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2 The judge expressed considerable distrust of and prejudice against experts during the hearing. For example, the court suggested that many of the articles referenced by Davis were authored by "wackos," notwithstanding an utter lack of evidence supporting that point. The judge also expressed his view that the ordinary juror understood such matters as the problem of cross-racial identifications. That view appears to be a red herring given that cross racial identifications were not at issue in this case.

Importantly, Dr. Davis identified a number of misconceptions that laypeople commonly held about the eyewitness identification of strangers. She testified that most laypeople believed that persons could "successfully identify strangers that we've seen once at some time later," when in fact, this was not the case. Second, Dr. Davis testified that research showed that "the primary criteria that jurors use to determine whether they believe in eyewitnesses, [was] how confident they are in their identification." In reality, however, and contrary to common belief, the relationship between confidence and accuracy is quite small. Davis added "jurors tend to use the things that are actually the least predictive of accuracy and not use all the things that are most predictive of accuracy." Davis identified a third misconception held by laypeople regarding memory: the tendency to believe that "if something is stressful and scary and emotional as a crime, … that you'll never forget it, that you're definitely going to remember the perpetrator." This, too, was untrue: stress actually decreased the likelihood of a correct identification. Finally, Dr. Davis explained that laypeople had

misconceptions about how memory loss occurs, which affected their understanding of memory and its accuracy.

The defense did not ultimately offer testimony regarding whether, in this particular case, the eyewitness' identification was accurate. During the *Daubert* hearing, Dr. Davis said that she would virtually never make conclusions about the accuracy of a particular witness' identification in a particular case, outside certain limited situations where accurate identification was physically impossible. She explained: "What we can do is say these are things [factors] that are done that tilt the scales up or tilt the scales down. And that, you know, something about how they may combine. So for example, distance makes more distance when there's bad lighting, things like that."

The district court excluded the testimony pursue to Fed. R. Evid. 403. The Ninth Circuit affirmed, ruling that the district court did not abuse its discretion. Appx. A-5.

Statement of Lower Court Jurisdiction Under Rule 14.1(i).

The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231. The jurisdiction of the court below was invoked under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. There is a Split Among the Federal Circuits Regarding the Treatment of Expert Testimony Regarding Eyewitness Identification. The Circuits that Favor the Exclusion of Such Evidence have Used a Test that Both Contradicts the Principles Contained in Fed. R. Evid. 702 and 403.

The Ninth Circuit summarily concluded that the district court did not abuse its discretion in excluding the testimony of an expert in the area of eyewitness identification under Fed. R. Evid. 403, despite the fact that the testimony qualified for admission under Fed. R. Evid. Rule 702. Appx A-5. The court's decision, prior Ninth Circuit decisions, and other federal authority, demonstrate the need for this Court to weigh in on the admissibility of expert opinion testimony regarding eyewitness identification.

Fed. R. Evid. 702 allows the introduction of expert testimony

when it concerns a matter involving specialized knowledge, is sufficiently reliable, and would helpful to the jury. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993). *Daubert* teaches that the Federal Rules of Evidence broadened the range of admissible expert testimony, by eliminating the requirement of general acceptance as a prerequisite. 509 U.S. at 588. The second requirement of Rule 702, that the testimony be useful, primarily incorporates the requirement of relevance. *Id.* at 591.

Expert testimony is particularly useful, even necessary, where specialized knowledge reveals information that is contrary to the common sense assumptions of ordinary people. *See United States v. Shay*, 57 F.3d 126, 134 (1st Cir. 1995); *United States v. Rahm*, 993 F.2d 1405, 1413 (9th Cir. 1993). When science reveals a commonly held belief may be erroneous, such evidence is highly relevant and by definition, useful. *E.g.*, *Commonwealth v. Stonehouse*, 555 A.2d 772, 783-84 (Pa. 1989); *State v. Kelly*, 478 A.2d 364, 378 (N.J. 1984). Indeed, one of the

highest uses of expert testimony is to dispel "commonly held misperceptions through the use of scientific or other specialized knowledge." *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1124 (10th Cir. 2006).

Eyewitness identifications are a particularly problematic type of evidence. *See United States v. Wade*, 388 U.S. 218, 288 (1967). Mistaken eyewitness identifications are a significant, if not the leading source, of wrongful convictions. *See id.; Commonwealth v. Walker*, 92 A.3d 766, 779-80 (Pa. 2014); *State v. Guilbert*, 49 A.3d 705, 730 (Conn. 2012); *Tillman v. State,* 354 S.W.3d 425, 436 (Tx. Ct. Crim. App. 2011). There is nothing more convincing than an eyewitness, yet eyewitness identifications "are widely considered to be one of the least reliable forms of evidence." *Wade*, 388 U.S. at 288.

So-called common sense regarding the reliability and accuracy of eyewitness identifications is replete with misinformation. *People v. Lerma,* 47 N.E.3d 985, 993-95 (Ill. 2016); *Commonwealth v. Crayton,* 21 N.E.3d 157, 169 (Mass. 2014); *see also Peterson v. State,* 154 So.2d 275,

285 (Fla. 2014) (Pariente, J., concurring). “Jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable.” *United States v. Brownlee,* 454 F.3d 131, 142 (3d Cir. 2006)(quoting Rudolf Koch, “Note, Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony,” 88 Cornell L. Rev. 1097, 1099 n.7 (2003)).

Instead, most jurors find eyewitness identifications compelling, partly because they are unaware of the factors that detrimentally affect accuracy. A robust body of high-quality scientific studies show that multiple factors can significantly impair a witness’ ability to accurately process and recall what he observed. Many of the factors negatively affecting the accuracy of eyewitness identifications are counterintuitive and therefore cannot be deduced by the application of the "common sense" that juries are customarily instructed to employ. See Mark S. Brodin, Behavioral Science Evidence in the Age of *Daubert*: Reflections of a Skeptic, 73 U. Cin. L. Rev. 867, 889-90 (2005) ("Ironically, the form of social science evidence which is most solidly based in 'hard' empirical

science has met with the most resistance in the courts."). For example, scientific evidence directly contradicts common sense beliefs that the more certain the witness is of his identification, the more likely that identification is accurate. *Brownlee, id.*, 454 F.3d at 142; *United States v. Stevens*, 935 F.2d 1380, 1400-01 (3d Cir. 1991); *Minor v. United States*, 57 A.3d 406, 416-17 (D.C. App. 2012). This information is critical to the jury's assessment of the validity of an eyewitness identification. *See e.g. Brownlee, id.*, 454 F.3d at 142.

While jurors may be able to assess the effects of matters such as lighting or distance on identification, the same is not true for matters such as the certainty of the witness, type of view (profile or frontal), the presence of a weapon, or the stress of the situation. Moreover, the science surrounding eyewitness identification is not a matter of common understanding, to the contrary, it is a matter that falls squarely within the scope of expert or specialized knowledge. *Brownlee, supra*, 454 F.3d at 142.

Despite the weight of the scientific evidence, some courts, including many of the federal circuits, have continued to disfavor expert testimony regarding eyewitness identifications and exclude this testimony as either not useful, or on the flawed theory that specialized knowledge about factors affecting the accuracy of eyewitness identification can be conveyed another way. *See United States v. Smith*, 122 F.3d 1355, 1358-59 (11th Cir. 1997). Prior to *Daubert,* the federal circuits largely excluded expert testimony on eyewitness identification, ruling that it infringed upon the jury's role. *E.g., United States v. Amaral,* 488 F.2d 1148, 1152-53 (9th Cir. 1973); *United States v. Langford*, 802 F.2d 1176, 1179 (9th Cir. 1986). Post-*Daubert,* the Ninth Circuit amended its position, ruling that such evidence could not be excluded out of hand, but strongly suggesting that although relevant, the district court could convey the same information by providing "a comprehensive jury instruction to guide the jury's deliberations." *United States v. Rincon*, 28 F.3d 921, 924 (9th Cir. 1994). The *Rincon* decision, and similar decisions from other circuits have encouraged the

erroneous exclusion of expert testimony on eyewitness identification, despite its obvious relevance and probative value. *See United States v. Jones,* 689 F.3d 12, 19-20 (1st Cir. 2012) (expressing preference for jury instruction over admission of expert testimony); *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996) (affirming exclusion of testimony on stress, weapons focus and cross-cultural identification, noting that the court gave a four-page comprehensive instruction on factors affecting eyewitness identification).

The United States Court of Appeals for the Eleventh Circuit is notable for its firm stance disfavoring expert testimony on eyewitness identification. *E.g., United States v. Smith,* 122 F.3d at 1358-59; *United States v. Owens,* 682 F.3d 1358, 1363 (11th Cir. 2012)(Barkett, J., dissenting from denial of rehearing en banc)("Although the majority of trial judges have recognized the value of expert testimony on the reliability of eyewitness identification and permit it where useful, our court has not revised its isolated position today prohibiting review of the exclusion of such testimony even when it constitutes an abuse of

discretion."); *United States v. Thevis,* 665 F.2d 616, 641 (5th Cir. Unit B 1982). Other courts, while not entirely precluding such evidence, have held that factors that deleteriously affect the accuracy of eyewitness identification can be adequately addressed through cross-examination, or can be comprehended by the jury without any assistance. *United States v. Lespier,* 725 F.3d 437, 449 (4th Cir. 2013); *see also United States v. Hall,* 165 F.3d 1095, 1104-06 (7th Cir. 1999) (reaffirming court's disfavor of expert testimony regarding eyewitness identification as not useful to the jury); *Rincon, supra,* 28 F.3d at 924; *but see United States v. Nickelous,* 916 F.3d 721, 725-26 (8th Cir. 2019)(Erickson, J., concurring)("Current scientific evidence reveals at least a controversy over whether or not the usual legal process for rooting out witness unreliability is satisfactory in the context of eyewitness identifications without fully informing the jury of the nature of memory—including through the use of expert testimony.") As a result, district courts routinely exclude expert testimony – even in those cases where it would be most useful.

In contrast, the United States Court of Appeals for the Third Circuit largely requires the admission of expert testimony concerning factors affecting eyewitness identifications. Better reasoned authority, state and federal, concludes that expert testimony on eyewitness identifications is universally recognized as scientifically valid and helpful to the jury. *E.g., United States v. Mathis*, 264 F.3d 321, 340 (3d Cir. 2001) (requiring admission of expert testimony regarding the effect of stress upon memory based on weapons focus and exposure to multiple identification procedures); *United States v. Smithers*, 212 F.3d 306, 316 (6th Cir. 2000); *Guilbert*, *supra,* 49 A.3d at 722-24. Courts have approved of expert testimony on various factors affecting the accuracy of eyewitness identification, including the presence of a weapon, the presence of headwear or a hood, the angle of view, the stress of the situation, and the witness's exposure to the defendant through multiple identification procedures. *E.g., Brownlee*, 454 F.3d at 136 (approving testimony on lack of relationship between witness confidence and accuracy); *Mathis*, *id.,* 264 F.3d at 340 (same plus weapons focus);

United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985)(approving testimony regarding the effect of stress upon memory). The Third and Seventh Circuits have recognized the particular importance of information concerning the lack of a relationship between witness confidence and accuracy, with the Third Circuit vacating a conviction when the excluded expert testimony regarding the lack of a relationship between a witness' confidence in his identification and its accuracy. *Brownlee*, *id.,* 454 F.3d at 141-42; *see also United States v. Williams*, 522 F.3d 809, 811 (7th Cir. 2008) (approving testimony on the weak relationship between accuracy and confidence). This type of testimony would have been critical to the identification in this case, given the witness' claim of 100% certainty, even though his wife, who witnessed the same event, had misidentified another person (who was incarcerated at the time) as the murderer.

State courts too have recognized the value of expert testimony on eyewitness identifications. See e.g. *Commonwealth v. Walker*, *supra*, 92 A.3d at 779-80; *State v. Guilbert*, *supra,* 49 A.3d at 730; *Tillman v.*

State, supra, 354 S.W.3d at 436. State appellate courts have recognized the pervasive and repetitive problem that jurors both give great weight to eyewitness identifications and lack the tools with which to evaluate the reliability. *E.g. Commonwealth v. Crayton, supra,* 21 N.E.3d at 169; *State v. Clopten*, 223 P.3d 1103, 1109 (Utah 2009).

Cases involving expert testimony regarding memory and eyewitness identifications repeatedly present the same issues. Notwithstanding the repeated proffering of such evidence, the federal courts are split on when and how it should be admitted. On the one hand, the United States Court of Appeals for the Third Circuit directs the liberal admission of expert testimony on the accuracy of eyewitness identification in accord with Rule 702. On the other hand, the Eighth, Ninth and Eleventh Circuits strongly discourage the admission of such evidence. This Court should address the split and adopt the reasoning of the United States Court of Appeals for the Third Circuit, which liberally admits expert testimony on eyewitness identification in accord with Fed. R. Evid. 702.

II. This Court Should Address Whether Expert Testimony Concerning Eyewitness Identification Should be Treated Differently Than Other Expert Testimony, Such that It Can be Supplanted by A Jury Instruction or Cross-Examination.

Circuit authority governing expert testimony about factors affecting the accuracy of an eyewitness identification also is flawed, because it suggests that in this particular realm, there are alternatives to hard evidence, namely cross-examination, the arguments of counsel and jury instructions. *E.g., Rincon, supra,* 928 F.3d at 924. In no other area are the above considered adequate alternatives to evidence. Other courts have explicitly rejected the proposition that somehow, in this area, something less than evidence is sufficient. *Guilbert, supra*, 49 A.3d at 725-26; *Russell v. United States*, 17 A.3d 581, 589 (D.C. App. 2011)(rejecting argument that cross-examination was sufficient to expose deficiencies in eyewitness identification when expert testimony was central to misidentification defense). The aforementioned decisions relied on studies showing that cross-examination and jury instructions are not an adequate substitute for evidence. *Guilbert*, 49 A.3d at 725-26.

Neither cross-examination, jury instructions, or argument are adequate substitutes for expert testimony. The purpose of cross-examination is to undermine or test a witness' recollection: it can raise a reasonable doubt. But cross-examination will not serve to show that the identification, made by a very certain witness, is not necessarily an accurate identification. When a mistaken identification is made in good faith, cross-examination is particularly unlikely to expose the inaccuracy. *State v. Clopten, supra,* 223 P.3d at 1110. Cross-examination is not the equivalent of positive evidence; jurors may simply regard cross-examination as part of a partisan game. Moreover, why should cross-examination be considered an adequate substitute for positive evidence: a criminal defendant has a Sixth Amendment right both to present evidence and to cross-examination.

Similarly, a jury instruction is no substitute for evidence regarding factors that can cause a mistaken identification. *Clopten,* 223 P.3d at 1109 . Rather, expert testimony educates a jury about identifications without favoring either party. *Id.* A jury instruction can

only direct jurors to factors to be considered; a proper, non-argumentative instruction does not suggest whether certain factors are supportive of, or detrimental to, an accurate identification. Finally, the arguments of counsel can never be sufficient: in all cases, the court will instruct the jury that the arguments of counsel are not evidence.

III. This Case is an Appropriate Vehicle to Consider Questions Regarding the Proper Role of Expert Testimony Concerning Eyewitness Identifications.

The need for expert testimony regarding the reliability of eyewitness identification testimony was particularly acute here. Galdamez was quite certain of his identification despite the presence of many factors that undermine accuracy including weapons stress, the presence of headwear, and the fact that he was identifying a stranger. Galdamez became more certain of his identification over time: he was less certain when he initially identified a photograph of petitioner in a lineup, but was 100% certain at trial. Yet, the district court excluded evidence that would have provided useful information to the jury in evaluating whether Galdamez correctly identified petitioner. Dr. Davis'

excluded testimony was highly probative of and relevant to petitioner's defense of misidentification. Her anticipated testimony bore directly on the accuracy of eyewitness identifications, the critical piece of evidence against petitioner.

The excluded testimony would have provided objective support -- as opposed to partisan argument or cross-examination -- for the defense theory of misidentification. The expert testimony would have served to dispel commonly held but inaccurate beliefs about the accuracy of eyewitness identifications, namely, that a confident eyewitness, who testifies in good faith, like Hugo Galdamez here, may nonetheless be wrong. *Brownlee, supra*, 454 F.3d at 141-42. The expert testimony also would have provided the scientifically based and useful information that a side-view identification was a detriment to accuracy, as compared with a frontal view, that the presence of headwear, including a cap or bandana was a detriment to accuracy, and that stress, including that caused by the presence of a weapon, decreased the

quality of memory formation and negatively affected the reliability of an eyewitness identification. All of these factors were present in this case.

Finally, this Court has not addressed the meaning of the usefulness prong of Rule 702 since *Daubert.* Nor has this Court addressed the relationship between Rules 702 and 403 – the question when it is proper to exclude admissible and relevant expert testimony on the basis of judicial economy. In this case, the district court apparently excluded the testimony, because the court concluded the testimony was not important enough, and the matters at issue could be addressed another way. This Court should clarify that when evidence is available, it cannot be summarily excluded because it is inconvenient to the court. The trial of this case lasted approximately five months, the bulk of which was consumed by the government's evidence. Surely it is not too much to allow the testimony of a qualified expert on a matter critical to the defense: the question whether the eyewitness identified the right person.

The district court's decision to exclude the proffered expert testimony under Rule 403 and the Ninth Circuit's terse affirmance demonstrate the need for clarification on this important subject. This Court should address the question whether useful expert testimony regarding eyewitness identification can be treated differently than other useful expert testimony. Otherwise, lower courts will continue to exclude such testimony based on generalized hostility to experts or based on the same misconceptions held by potential jurors regarding memory. At least in the field of eyewitness identification and memory, in which well-established science casts doubt on common knowledge, courts should exercise their discretion in favor of admitting the testimony, not excluding it.

IV. Conclusion

Based on the foregoing arguments, petitioner respectfully requests this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: December 30, 2019

Respectfully submitted,

/s/Karen L. Landau
KAREN L. LANDAU
Counsel of Record