No. 20-232

IN THE

Supreme Court of the United States

ROBERT ANDERSON,

Petitioner,

v.

TERI KENNEDY,

Warden, Pontiac
Correctional Center

Respondent.

On A Petition For A Writ Of Certiorari
To The United States District Court
For The Northern District of Illinois, Eastern Division

BRIEF OF THE ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Illinois Association of Criminal Defense Lawyers ("IACDL") is a non-profit organization dedicated the defending the rights of all persons as guaranteed by the U.S. Constitution. Its membership consists of private criminal defense lawyers, public defenders, investigators, and law professors throughout the State of Illinois. The IACDL's mission is to preserve the adversary system of justice; to maintain and foster independent and able criminal defense lawyers; and to ensure due process for persons accused of crime.

Members of the IACDL consistently advocate for the fair and efficient administrative of criminal justice. IACDL has, from time to time, has participated as *amicus* on important issues concerning criminal justice. *See, e.g., Peugh v. United States,* 569 U.S. 530 (2013). The IACDL has a keen interest in ensuring that the federal constitutional right to present a defense in a criminal case is preserved so as to preserve a defendant's fundamental right to a fair trial.[1]

[1] Petitioner has sent the undersigned counsel correspondence electronically granting the Illinois Association of Criminal Defense Lawyers consent to the filing of an amicus brief. Respondent has granted its consent to the filing of this *amicus* brief first based on a telephone conversation on September 25 which was also followed by electronic correspondence on September 28 granting the Illinois Association of Criminal Defense Lawyers consent to the filing of an amicus brief. No party, party's counsel, or person—other than the *amici curiae* and their counsel—authored any part of this brief or contributed any money to fund preparation or submission of the brief.

SUMMARY OF ARGUMENT

The ruling barring expert testimony in Petitioner's case because there is "other evidence" implicating him is arbitrary and not based on the reliability or admissibility of the proffered defense expert's testimony. The ruling undermined Petitioner's right to present a complete defense guaranteed by the Sixth and Fourteenth Amendments.

Illinois has a long history over the decades of exonerations after people who were wrongfully convicted served lengthy prison sentences, including in cases involving eyewitness identifications. Until recently, Illinois has also had a long history until recently of regularly denying defense motions *in limine* for experts to testify to the limitations in the accuracy in eyewitness identifications.

Now that the Illinois Supreme Court in *People v. Lerma*, 2016 IL 118496 has held that such eyewitness experts should testify, the trial court and Illinois Appellate Court in Petitioner's case decided that it would be appropriate to deny an expert from testifying anyway, simply and only because there was "other evidence" implicating the Petitioner.

Habeas relief was improperly denied to the Petitioner because this "other evidence" rule clearly violates the Petitioner's right to present a *complete* defense based on this Court's prior holdings in *Washington v. Texas*, 388 U.S. 14 (1967), *Crane v. Kentucky*, 476 U.S. 683 (1986), and *Holmes v. South Carolina*, 547 U.S. 319 (2006).

This "other evidence" rule is just as clearly arbitrary and unconstitutional as the rules this Court previously encountered in *Washington*, *Crane*, and *Holmes*. This Illinois "other evidence" standard leaves no room for the evaluation of the prosecution "other evidence" since there is no serious pre-trial examination" of that evidence's vulnerabilities. This makes this rule in Petitioner's case to be arbitrary and unconstitutional.

ARGUMENT

I. Illinois Courts Have Historically Adopted Rules That Put Innocent People At Risk of Conviction.

The Illinois Appellate Court in Petitioner's case has issued a rule that is of major concern to the Illinois criminal defense bar. This is so because the rule is arbitrary, vague, and serves no legitimate governmental purpose. As will be discussed *infra*, Illinois now has two sets of rules regarding whether a competent, relevant expert may testify regarding the reliability of eyewitness identification testimony. In one category, cases where eyewitness testimony is the sole evidence against a defendant in a criminal case, a competent expert may testify for the defense about the specific factors that may hinder or compromise the accuracy of an eyewitness' testimony. In another category, where there is other evidence against the defendant in addition to the eyewitness or eyewitnesses, the same expert testimony regarding the same specific factors may be excluded by the trial court because there is other evidence implicating the defendant.

This "other evidence" rule set forth is exceedingly arbitrary and irrational, serving no legitimate governmental purpose. This rule undermines a criminal defendant's right to present a complete defense guaranteed by the Sixth and Fourteenth Amendments. This rule contradicts clearly established precedent of this Court. This Court must now say so.

A. Illinois Has a Bad Track Record of Protecting Innocent People From Conviction.

The goal of a criminal trial is to determine the guilt of the accused. Unfortunately, Illinois, when compared to other States, has an unfortunate history of convictions of both guilty and innocent people alike. As of September 26, 2020, according to the not-for–profit group, the Innocence Project, 380 people nationwide have been released from prisons (including death row for some) where their exonerations occurred due to later post-conviction DNA testing. *See*, https://www.innocenceproject.org/all-cases/. Based on a review of the main factors that can lead to a wrongful conviction, the Innocence Project has identified 260 of these faulty cases where convictions occurred due at least in part to incorrect eyewitness identification testimony that wrongly named those people as perpetrators of serious crimes. *See*, https://www.innocenceproject.org/all-cases/#eyewitness-misidentification. Eyewitness identification is generally accepted to be the leading cause of wrongful convictions in the United States. *See,* Petition for Writ of Certiorari at pp. 36-37).

Illinois' contribution to these aforementioned numbers is substantial and disproportionate to other States. Of the 380 exonerations, 49 cases come from the State of Illinois. *See*,

https://www.innocenceproject.org/all-cases/#illinois. Illinois cases provide almost 13 percent of the national total.

Eyewitness misidentification is a major factor in Illinois cases. Per the Innocence Project's review, 26 of those 49 Illinois cases occurred at least in part due to eyewitness testimony which condemned an innocent man to conviction. https://www.innocenceproject.org/all-cases/#eyewitness-misidentification,illinois.

The examination of data that encompasses both DNA and non-DNA exonerations is equally disheartening. The more recently established (compared to the Innocence Project) National Registry of Exonerations, a joint project of the University of California Irvine's Newkirk Center for Science and Society, the University of Michigan Law School, and the Michigan State University College of Law tracks all identified exonerations across the country. As of September 26, 2020, there are 2,673 exonerations nationwide in the Registry (since the first identified exoneration in 1989). *See*, https://www.law.umich.edu/special/exoneration/Pages/about.aspx. A significant percentage of their studied cases involve eyewitness misidentifications in court as a factor that led to a wrongful conviction. "As of October 14, 2014, 35% of the exonerations in the Registry include mistaken eyewitness identifications, 509 cases out of 1446." *See*, https://www.law.umich.edu/special/exoneration/Pages/Features.Eyewitness.ID.aspx.

Cases in the National Registry from the State of Illinois corroborate the Innocence Project's information showing that Illinois wrongful convictions disproportionately exit. Of the aforementioned 2,673 cases in the National Registry, Illinois has 349, or slightly over 13 percent of the national total. *See*, https://www.law.umich.edu/special/exoneration/Pages/browse

.aspx. Illinois is one of the leaders of the Nation when it comes to producing wrongful convictions.

B. Illinois Only Recently Started Allowing Expert Testimony In Trials Regarding the Issue of the Reliability of Eyewitness Identification.

The Illinois criminal defense bar has been trying to persuade its courts for decades to allow appropriate expert witness testimony in eyewitness identification cases. The body of law that developed over the years was of no avail to defendants. "Illinois courts have consistently upheld a trial court's decision to bar expert testimony regarding witness identification." *People v. Lerma*, 2016 IL 118496 at ¶ 9; *citing*, *People v. Enis*, 139 Ill.2d 264, 564 N.E.2d 1155, (1990); *People v. Tisdel*, 316 Ill. App. 3d 1143, 739 N.E.2d 31, (1st Dist. 2000); *see also*, *People v. McGhee*, 2012 IL App (1st) 093404 ¶ 55; *People v. Clark*, 124 Ill. App. 3d 14, 21-22, 463 N.E.2d 981, 987 (1st Dist. 1984); *People v. Perruquet*, 118 Ill. App. 3d 339, 344, 454 N.E.2d 1051, 1054 (5th Dist. 1983); *People v. Brown*, 100 Ill. App. 3d 57, 71-72, 426 N.E.2d 575, 584-85 (2nd Dist. 1981); *People v. Johnson*, 97 Ill. App. 3d 1055, 1069, 423 N.E.2d 1206, 1216-17 (1st Dist. 1981); *People v. Dixon*, 87 Ill. App. 3d 814, 818-19, 410 N.E.2d 252, 256 (2nd Dist. 1980).

Relatively recently however, the Illinois Supreme Court held that this long-standing position no longer squares with the Fourteenth Amendment's Due Process Clause. In *People v. Lerma*, the Illinois Supreme Court held that the trial court abused its discretion when it denied Mr. Lerma's motion to allow expert testimony regarding the reliability of eyewitness identifications. *People v. Lerma*, 2016 IL 118496 at ¶ 3. Lerma, like the Petitioner, was tried for and convicted of First

Degree Murder (*See*, 720 Ill. Comp. Stat. 5/9-1). In Lerma's murder prosecution, defense counsel proffered the testimony of Dr. Solomon Fulero, the same expert that the Petitioner moved the trial court to use in his defense. *Id.* at ¶ 8.

In its response, the State argued, and the trial court relied on the fact that Doctor Fulero's research and data dealt with "stranger identifications," while the eyewitnesses who were prepared to identify Lerma in court purportedly knew Mr. Lerma prior to the crime. *Id.* at ¶ 10. Motions to reconsider, including one made mid-trial using a second expert due to Dr. Fulero's passing, were also denied. *Id.* at ¶ 12, 16.

After Lerma was found guilty, on appeal, a panel of the First District Illinois Appellate Court reversed and remanded, holding that "the reasons the trial court gave for that ruling amounted to 'little more than a series of conclusions based on its personal belief' that acquaintance identifications are accurate and therefore not a proper subject for expert testimony." *Id.* at ¶ 20, *citing*, *People v. Lerma*, 2014 IL App (1st) 121880 at ¶ 38. The Illinois Supreme Court granted the State's Petition for Leave to Appeal. *People v. Lerma*, 2016 IL 118496 at ¶ 21.

The Illinois Supreme Court started its analysis with the statement that "(a) criminal defendant's right to due process and a fundamentally fair trial includes the right to present witnesses on his or her own behalf." *Id.* at ¶ 23, *citing*, *People v. Wheeler*, 151 Ill.2d 298, 305, 602 N.E.2d 826 (1992).

The Illinois Supreme Court in *Lerma* observed that in the decades since the Illinois Supreme Court last addressed this issue in *People v. Enis* (and by lower courts before *Enis*), there has been "a dramatic shift in the legal landscape, as expert testimony concerning the reliability of eyewitness

testimony has moved from novel and uncertain to settled and widely accepted." This was due in no small part to the fact that the findings of experts such as Dr. Fulero "are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive." *People v. Lerma*, 2016 IL 118496 at ¶ 24; *citing*, *State v. Guibert*, 306 Conn. 218, 239-41, 49 A.3d 705, 723-24 (1992). The Illinois Supreme Court, before moving on in its analysis, concluded that "…today we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony." *People v. Lerma*, 2016 IL 118496 at ¶ 24.

In concluding that the trial court's pre-trial rulings barring Doctor Fulero (and later, during trial barring Doctor Loftus) from testifying was an abuse of discretion, the *Lerma* court stated that " ...there is no question that this is the type of case for which expert eyewitness testimony is both relevant and appropriate." *Id.* at ¶ 26. After the Court observed that the only evidence against Lerma was eyewitness testimony, the Court held that "several factors that both Dr. Fulero and Dr. Loftus identified as potentially contributing to the unreliability of eyewitness testimony, most are either present or possibly present in this case." *Id.* Additionally, only one eyewitness was subject to cross-examination, and that witness denied the prosecution's pre-trial assertion upon which the trial court relied that the eyewitness previously knew the defendant before witnessing the event in question. *Id.*

In holding that the trial court abused its discretion, the *Lerma* Court took to task the trial court's "personal convictions that 'it is a fact that persons *** are less likely to misidentify someone they have met or know or seen before than a stranger,' and that expert testimony would both 'generate *** a referendum on the efficacy of identification testimony generally' and 'operat[e] as [an] opinion on the

credibility' of the eyewitnesses themselves." *Id.* at ¶ 27. Noting that Doctor Loftus' report both addressed the trial court's misperception and the fact that that Loftus' testimony would not include any credibility opinion as to specific witnesses or a specific identification, the *Lerma* court stated that the trial court "effectively substituted its own opinion on a matter of uncommon knowledge for that of a respected and qualified expert." *Id.* at ¶ 28. After discussing the State's pre-trial overstatements on which the trial court relied (regarding whether an eyewitness previously knew Lerma prior to the incident) (s*ee, Id.* at ¶ 29), the Lerma court found it troubling that the trial court would approach a complex issue of expert testimony by relying on a one sentence summary of Doctor Fulero's testimony in another reported case where Doctor Fulero testified 13 years prior. *Id.* at ¶ 30, 31; *cf. State v. Nickleberry*, 2000 Ohio App. LEXIS 5497, 2000 WL 1738356 (Ohio App. Ct. 8th Dist. 2000).

In finding that the trial court abused its discretion in denying the defense an opportunity to call an expert witness in the area of eyewitness identification, the Illinois Supreme Court decided that the trial court's decision was "arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Lerma*, 2016 IL 118496 at ¶ 32, *citing People v. Rivera*, 2013 IL 112467 at ¶ 37. The *Lerma* court concluded that this error was not harmless and affirmed the appellate court's judgment, reversing the trial court's ruling regarding the admissibility of expert witness testimony and ordering a new trial. *People v. Lerma*, 2016 IL 118496 at ¶ 33, 35.

C. The Illinois Appellate Court in Petitioner's Case Disallowed Expert Testimony Because of "Other Evidence" Implicating the Petitioner"

In attempting to distinguish the Illinois Supreme Court's holding in *Lerma* from the Petitioner's case, the Illinois First District Appellate Court began its analysis by stating that a subsequent sighting of the Petitioner by a third officer who was not present at the time of the shooting to claim that this subsequent encounter bolsters the police officer's eyewitness testimony. "Not only did the officers see defendant shoot the victims, they chased him through an alley. *After they lost sight of him, another officer saw the defendant who was wearing clothes that matched a radio broadcast that described the shooter*, running through a gangway and alley near the shooting, and defendant was detained four blocks from the shooting only four minutes after it had occurred." *People v. Anderson,* 2017 IL App (1st) 122640 at ¶ 86 (emphasis added).

While the Appellate Court stated that the radio description placed to seek the Petitioner was that "Officer Park radioed that defendant was running eastbound in the alley north of Irving Park Road" (*Id*. at ¶ 7), the actual radio description was not that of the Petitioner, but of a "Male black in all black clothing" (*See,* Petition for Writ of Certiorari at 11).

The Appellate Court also relied on the fact that Petitioner was seen "throwing down a pair of black gloves that later tested positive for gunshot residue." *See*, *People v. Anderson,* 2017 IL App (1st) 122640 at ¶ 86. In fact, one glove tested positive, while the other glove and other clothing had "background samples". *Id*. at ¶ 25; *see also,* Petition for Writ of Certiorari at pp. 13-14). The fact that the "murder weapon" was found on the "route" (on a roof) between where the eyewitnesses saw and lost sight of who they claim was the perpetrator and where the police officer who heard the radio

description grabbed the Petitioner was also of significance to the Appellate Court. *People v. Anderson,* 2017 IL App (1st) 122640 at ¶ 86.

The Appellate Court that there was "physical and circumstantial evidence outside of the identification testimony that supported defendant's conviction." *Id.* To the Appellate Court, this justified the trial court's decision to exclude the Petitioner's expert from testifying in front of the jury.

II. The Illinois "Other Evidence" Rule Permitting Courts To Disallow Defense Expert Witnesses Violates This Court's Clear Holdings Protecting the Guaranteed Right To Present a Complete Defense in a Criminal Trial.

The Illinois Appellate Court's "other evidence" rule has should be of concern to this Court because it is arbitrary and serves no legitimate governmental purpose. This rule violates long-standing clearly established precedent that stands for flies in the face of clearly established precedent of this Court. This Court must say so.

A. The Right to Present a Complete Defense Is Paramount

Since the goal of a criminal trial is to determine the guilt of the accused, it is of utmost importance that the accused's counsel be permitted to present evidence to contest the prosecution's evidence and present a complete defense. Otherwise, a trial cannot be fundamentally fair and thus, cannot comport with the Due Process Clause of the Fourteenth Amendment.

This Court has observed that the right to present a defense is rooted in more than one place in our Constitution.

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers* v. *Mississippi,* (410 U.S. 284 (1973)) *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington* v. *Texas*, 388 U.S. 14, 23 (1967); *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California* v. *Trombetta*, 467 U.S., (479) at 485; cf. *Strickland* v. *Washington*, 466 U.S. 668, 684-685 (1984) ('The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment').
>
> *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

Whether one views this right to present a complete defense as a Sixth Amendment issue or a Fourteenth Amendment issue, it is nevertheless been viewed as fundamental. For example, in the seminal case of *Washington v. Texas*, 388 U.S. 14 (1967), this Court reviewed a Texas state statute that provided that persons charged or convicted as coparticipants in the same crime could not testify for one another, although there was no bar to their testifying for the State. *Id*. at 16-17.

This Court held that this rule was arbitrary for preventing "whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief." *Id*. at 22. This Court stated that the rule is absurd, being "amply demonstrated by the exceptions that have been made to it" such as a co-defendant still being allowed to testify against the defendant by the prosecution. *Id*. at 22-23.

This Court was faced with a similar issue, albeit through trial court ruling rather than the trial court's implementation of a state statute. In *Crane v. Kentucky*, 476 U.S. 683 (1986), after the defense unsuccessfully litigated a motion to suppress evidence, arguing Crane's confession was involuntary, the trial court barred Crane's counsel from developing evidence in front of the jury regarding how the confession was obtained, hindering defense counsel's efforts to establish that the statement was unreliable, including "the duration of the interrogation or the individuals who were in attendance." *Id*. at 685-86.

In a unanimous decision, this Court had no difficulty concluding that this was not a case where the evidentiary rules were applied to prevent evidence that's of "marginal relevance" or "confusing." *Id*. at 685-86, *citing, Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973). Rather, this Court found that "(i)n the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Crane v. Kentucky*, 476 U.S. 683 , 690-91 (1986); *citing, United States v. Cronic*, 466 U.S. 648, 656 (1986); *Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

This Court again encountered an arbitrary rule in *Holmes v. South Carolina*, 547 U.S. 319 (2006). In *Holmes*, the State of South Carolina had an evidence rule which stated that Holmes could not introduce any otherwise-admissible evidence that someone other than Holmes committed the crime if the trial court decided that the prosecution had strong forensic evidence implicating Holmes' guilt. *Id*. at 321, 323-24.

Under this rule, the trial judge in *Holmes*, did not examine the probative value of the proffered evidence, nor its prejudicial effect. Instead, the evidence is excluded if the trial judge believes the prosecution proffers a strong forensic case regardless of the credibility of those prosecution witnesses or the validity or reliability of their forensic techniques. *Id*. at 329.

This Court had no problem finding this South Carolina rule to be illogical and arbitrary, violating Holmes' right to "'a meaningful opportunity to present a complete defense." *Id*. at 330-31; *citing*. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(further internal citation omitted).

B. The Illinois Rule Applied Against the Petitioner is Arbitrary and Serves No Legitimate Purpose.

The Illinois appellate court has now established a dichotomy where in a case where there is no "other evidence" save eyewitness testimony against a criminal defendant, the defense may call an expert witness to criminal defense lawyers had been trying to persuade its courts for years to allow *appropriate* expert witness testimony.

However, if there is "other evidence" against the same defendant, the trial court has the discretion to bar the same *appropriate* expert regarding the same vagaries of certain factors of eyewitness testimony. This rule is as "absurd" and "arbitrary" as the clearly established rules set forth in *Washington v. Texas, Crane v. Kentucky,* and *Holmes v. Kentucky*.

This is not a case where there is a determination that the proffered testimony has any potential to mislead the jury; nor is the proffered testimony of "marginal relevance;" nor is this expert testimony that has a "weak connection to the logical issues" in the case. *Cf. Holmes* at 330.

Rather, to be blunt, there is no rhyme or reason for a trial judge to deny the admissible, relevant expert witness evidence. The Illinois Supreme Court in *Lerma* held under similar circumstances (without "other evidence") that the evidence must be admitted. The rule is a governmental intrusion into a defendant's ability to present a *complete* defense. It makes as much sense to grant a defense motion *in limine* to bar the prosecution eyewitness evidence based on the defense evidence as it does to grant this prosecution motion *in limine* in the Petitioner's case.

The trial court's examination of the prosecution case to evaluate whether to admit relevant, admissible expert testimony before the Petitioner's trial was specifically rejected as "illogical" and arbitrary by this Court. *Holmes* at 330-31. "(N)o logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id* at. 331.

And exactly like *Holmes*, the trial court in Petitioner's case made no effort to evaluate the vulnerabilities of the prosecution's evidence. For example, gunshot residue results have been under scrutiny regarding the reliability of its results for some time. *See, e.g.* Dockery, *et. al*. "The Occurrence of False Positive Tests for Gunshot Residue Based on Simulations on the Suspect's Occupation" Journal of Undergraduate Chemistry Research, 10(3) 2011, (found at http://facultyweb.kennesaw.edu/cdockery/docs/JUCR%20201

1.pdf). The Illinois standard leaves no room for the evaluation of "junk science", and allows that science to be used without the rigors of cross-examination in a trial to be used to defeat the admission of expert witness evidence regarding eyewitness testimony. This arbitrary governmental incursion into the defendant's right to present a complete defense is nonsensical, fundamentally unfair, and unconstitutional.

CONCLUSION

For the foregoing reasons, amicus curiae urges this Court to grant Mr. Anderson's Petition for a Writ of Certiorari and to reverse the decision of the United States District Court, Eastern Division.

Respectfully submitted,

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