

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

MIKEL CLOTAIRE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

s/; Peter T. Patanzo

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QUESTION PRESENTED FOR REVIEW

- I. Whether the Eleventh Circuit's decision to admit a mug shot in a criminal trial absent a need for the evidence splits with well-established Sixth Circuit precedent resulting in the evisceration of the presumption of innocence and violated Mr. Clotaire's rights to a fair trial and fundamental fairness guaranteed by the Fifth and Fourteenth Amendment.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of this case.

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OCTOBER TERM, 2019

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PETITION FOR WRIT OF CERTIORARI

Mikel Clotaire respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in, *United States v. Mikel Clotaire*, case number 17-15287, on June 30, 2020, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit affirming the judgment and commitment of the United States District Court is contained in the Appendix. [App.p.3].

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III, of the Rules of the Supreme Court of the United States. The Eleventh Circuit's opinion conflicts with well-established Sixth Circuit precedent and has decided an important question of federal law that conflicts with another United States Court of Appeals. The final decision from the Eleventh Circuit was issued on June 30, 2020. This Petition is timely filed pursuant to SUP CT. 13.1. The District Court had jurisdiction because the Petitioner was charged with violating federal criminal laws. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291, and 18 U.S.C. § 3742, which provides that, Courts of Appeal have jurisdiction for all final decisions of United States District Courts.

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves a violation of a Defendant's right to a fair trial guaranteed by the Fourteenth Amendment and the Fifth Amendment's fundamental principles of Due Process. The Petitioner intends to rely on the following:

Amendment V.

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 offense to be twice put in jeopardy of life limb; 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.

Amendment XIV.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Brothers Mikel and Yvenel Clotaire were convicted of fraudulently applying for and receiving benefits from Florida's unemployment benefits system. A jury found the brothers leveraged Yvenel's job as a postal carrier and participated in a scheme to intercept preloaded debit cards obtained through fraudulent electronic applications. The information contained in the applications was for residents who lived on Yvenel's route. The banks where the debit cards were used had surveillance cameras that captured the perpetrators making cash withdrawals. The federal government charged the brothers with; conspiracy to commit unauthorized access device fraud, in violation of 18 U.S.C. § 1029(a); access device fraud, in violation of 18 U.S.C. § 1029(a)(2); and aggravated identity theft, in violation 18 U.S.C. § 1028A(a)(1). [ECF:1].

PROCEDURAL HISTORY

On February 23, 2017, the Government filed a Superseding Indictment charging the Clotaire's with the offenses detailed above. [ECF:49]. The District

Court severed the brother's trials.

On March 9, 2017, a jury found Yvenel Clotaire guilty as charged. [ECF:74]. The District Court sentenced Yvenel Clotaire to a total sentence of 36 months imprisonment, followed by 36 months of supervised release. [ECF:104]. Yvenel Clotaire did not appeal his convictions or sentence.

On July 24, 2017, Mikel Clotaire commenced his jury trial. Three days later, on July 26, the jury found Mikel guilty of all counts in the Superseding Indictment. [ECF:141]. On November 2, 2017, the District Court sentenced Mikel Clotaire to a total sentence of 54 months imprisonment. That sentence consisted of 30 months on Counts 1 and 2, to be served concurrently, and 24 months on Counts 3-7, to be served concurrent with each other but consecutive to the prison term imposed in Counts 1 and 2. [ECF:172]. A term of supervised release was also imposed. Mikel Clotaire is presently serving his sentence.

On November 14, 2017, Mikel Clotaire timely appealed the judgment and commitment to the Eleventh Circuit Court of Appeals. [ECF:173]. Mr. Clotaire argued, among other things, that the District Court violated his right to a fair trial by permitting the Government to use as evidence a mug shot that carried a clear indication of criminal activity. On June 30, 2020, the Eleventh Circuit issued an opinion affirming the District Court's judgement and commitment order. The mandate was issued July 29, 2020. [ECF:203]. Mr. Clotaire has timely filed this Petition for a Writ of Certiorari to the United States Supreme Court.

STATEMENT OF THE CASE

The Social Security Act of 1935 initiated the Unemployment Insurance Program also referred to as the Reemployment Assistance Program which was designed to provide benefits to persons out of work due to no fault of their own. In Florida, the state agency responsible for program oversight is the Department of Economic Opportunity (hereinafter referred to as “DEO”) on behalf of the United States Department of Labor (hereinafter referred to as “USDOL”).

An applicant for benefits is required to complete an application, and thereafter, file claims on a weekly or biweekly basis via the internet. The electronic applications certify, under the penalty of perjury, that the information supplied to the DEO is accurate. After an application is approved, the DEO authorizes the State of Florida’s Department of Financial Services to send unemployment benefits to the applicant by: (1) a State of Florida prepaid unemployment visa debit card sent to the applicant by mail; or (2) direct deposits into the applicant’s designated bank account or pre-paid debit card account via electronic transfer of funds. In this case, the applicants chose to receive a prepaid unemployment visa debit card which was sent via U.S. Mail, to the addresses listed in the applications.

On May 1, 2014, DEO advised USDOL-Miami that they had received a complaint regarding a fraudulent application for benefits and stolen personal identification information. An investigator with the DOL was assigned and a criminal investigation was opened. The investigation revealed several fraudulent

electronic applications with several similarities which led investigators to believe the applications were part of a common scheme.

The investigation also identified debit card numbers issued to eight victims. With the debit card numbers, investigators were able to obtain ATM withdrawal histories for each card detailing where and when the cards were used. Investigators received ATM surveillance photos from the banks which showed perpetrators making unlawful cash withdrawals. One of the ATM photos captured a license plate number that led investigators to a Hertz rental car agreement in Yvenel Clotaire's name. Yvenel's drivers license photo was compared to the bank ATM photos and Yvenel Clotaire was indicted and accused of, among other things, making the illegal cash withdrawals captured in the ATM surveillance photos.

There was just one problem. During the post arrest investigation of Yvenel Clotaire, investigators changed their opinion about the identity of the person in the ATM photos. Investigators no longer believed the man in the photos was Yvenel Clotaire, but rather, his brother Mikel Clotaire. The original Indictment against Yvenel was dismissed and in February, 2017, a grand jury indicted both brothers and now identified Mikel Clotaire as the man in the ATM photos.

Mikel Clotaire was tried separate from his brother and to no surprise his trial defense was largely based upon mistaken identity. The identification of the person captured in the ATM photos was the ultimate issue to be decided. In an effort to prove the identification of Mikel Clotaire, the Government offered,

among other evidence, the surveillance images from the banks, several natural photographs of the Defendant including several drivers license photos, a passport photo, two natural photos of Mikel socializing with friends showing his dread locks and facial features, a civilian witness who testified the ATM photos were not Yvenel Clotaire and in opposite of the theory of defense, and Mikel Clotaire's mug shot. [App.p.28,29,33].

The Defendant's mug shot was highly prejudicial and violated his right to a fair trial. The mug shot proved to be a clear indication of the Defendant's criminal activity and bad character which called into question the integrity of the trial. The parties stipulated the mug shot was from October 2016, and in reality was the Defendant's booking photo for the instant offense. A fact not told to the jury and no limiting instruction was given from the trial court. As one can imagine, the booking photo taken immediately following his arrest for federal crimes was less than flattering and portrayed Mr. Clotaire in an overly prejudicial manner. Mr. Clotaire appeared in standard issue institutional jailhouse garb which is apparent to any viewer. The clothing was so demonstrative that, the Government described the clothing as the kind you typically see on Defendants who are in custody. [ECF:178,p.98].

The Government's inartful masking of the prejudicial features did little to dispel the message so vividly conveyed and heightened the jury's awareness of the picture's prejudicial nature. The Government attempted to sanitize the photograph by striking jail numbers and side views. However, the background is

a cement cell block wall with visible height gauges making it obvious to the jury that the photo is a mug shot. Even the Eleventh Circuit's opinion concedes the mug shot could have been edited better. [App.p.25]. Importantly, the stipulated date of the photo does not dispel the impression that the photo is from prior criminal activity. Therefore, the photo is evidence of nothing more than Mr. Clotaire being incarcerated for some crime in October 2016.

Further complicating the infringement on Mikel Clotaire's right to a fair trial and due process is that the Government had more than reasonable alternatives to prove identification and a mug shot with clear indications of criminal activity was not needed. The Government offered photos of the Defendant from the Department of Motor Vehicles which provided a clear view of the Defendant's facial features and hair style including dread locks. The Government offered a passport application and photograph that gave jurors a second view of the Defendant's facial features and hair style including dread locks. Lastly, the Government offered a 2012 photograph of the Defendant on vacation with friends which gave the jury a third look at the Defendant's face and dread lock hair style. These photographs, taken together with the Government's witness who testified that the person in the ATM photos was not Yvenel Clotaire, provide ample reasonable alternatives to prove identification making the admission of the mug shot a clear violation of the Defendant's rights under the Fifth and Fourteenth Amendments.

On appeal, Mikel Clotaire challenged several issues from his trial and

writes here to further argue that the use of a mug shot, when identification is at issue, violates a Defendant's fundamental right to due Process and a fair trial guaranteed by the Fifth and Fourteenth Amendments. Through the Fifth and Fourteenth Amendments, every citizen is guaranteed that due process of law will be required in any proceeding that denies life, liberty or property. In this case, that fundamental right to a fair trial and the presumption of innocence was eviscerated by use of a mug shot to prove identity. The mug shot made the difference between the trial of a man presumptively innocent of any criminal wrongdoing and the trial of a known convict. The Eleventh Circuit's opinion affirming this issue presents a federal question of constitutional significance that conflicts with well-established precedent in other Circuits and should be decided by this Court.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's decision to admit a mug shot when identity is at issue splits from well-established Sixth Circuit precedent and the admission of the booking photo eviscerated the presumption of innocence and violated Mr. Clotaire's right to a fair trial and fundamental fairness guaranteed by the Fifth and Fourteenth Amendment.

The Eleventh Circuit has long said that mug shots and booking photos, snapped "in the vulnerable and embarrassing moments immediately after an individual is accused, taken into custody, and deprived of most liberties"—fit squarely within this realm of embarrassing and humiliating information.

Karantsalis v. U.S. Dep't of Justice, 635 F.3d 497 (11th Cir. 2011). More than

just “vivid symbols of criminal accusation,” booking photos convey guilt to the viewer. *Id.* (emphasis added). The Sixth Circuit agrees finding that, viewers so uniformly associate booking photos with guilt and criminality that courts strongly disfavor showing such photos to criminal juries. *See, United States v. Irorere*, 69 Fed.Appx. 231, 235 (6th Cir. 2003). In fact, the Sixth Circuit has condemned the practice of showing ‘mug shot’ evidence to a jury ‘as effectively eliminating the presumption of innocence and replacing it with an unmistakable badge of criminality’. *Id.*, *see also, Eberhardt v. Bordenkircher*, 605 F.2d 275, 280 (6th Cir. 1979); *United States v. McCoy*, 848 F.2d 743, 745–46 (6th Cir. 1988).

The Eleventh Circuit’s opinion affirming the use of a mug shot is inconsistent with long standing Sixth Circuit precedent. The Sixth Circuit and others, have strongly condemned the use of mug shots and booking photos in federal trials, as effectively eliminating the presumption of innocence and replacing it with an unmistakable badge of criminality. *Eberhardt v. Bordenkircher*, 605 F.2d at 280. These decisions found mug shot evidence prejudicial because it informs the jury that the defendant has a criminal record. *Murray v. Superintendent, Kentucky State Penitentiary*, 651 F.2d 451, 454 (6th Cir. 1981). The Eleventh Circuit’s decision to allow a mug shot to be used to prove identification sets differing standards of due process and meaning of a right to a fair trial. This disparity among the Circuits is precisely why this Court should decide whether a mug shot that clearly indicates criminal activity has any

place in a criminal trial.

The Eleventh Circuit decides this issue in large part on an analysis of the three prerequisites in *United States v. Hines*, 955 F.2d 1449, 1455-56 (11th Cir. 1992). First, the Government must have a demonstrable need to introduce the photograph. Second, the photos themselves must not imply that the defendant has a prior criminal record. Third, the manner of introduction must be such that it does not draw particular attention to the source of the photographs. *Id.* at 1455-56. The Eleventh Circuit found the first prerequisite, the need for the evidence, to be critical to its decision. The Court correctly points out that, the *Hines* decision does not articulate the definition of need, and concedes the standard needed to satisfy this prerequisite is ambiguous and subject to at least two different interpretations.

It should be noted at the outset that, this case is factually unique and different from *Hines* and other cases relied on by the Eleventh Circuit. The cases cited in the appellate opinion involve situations where mug shots in police photo spreads were used to prove a previous out of court identification to bolster an equivocal in court identification. That is not the case here. In this case, the Government has used a mug shot as substantive evidence to prove the issues of identity and guilt or innocence of the defendant. In other words, permitting the jury to review a photo clearly indicating criminal activity that is considered so prejudicial that it is prohibited in other Circuits. This disparity among the Circuits results in different standards of a fair trial, due process and

fundamental fairness and has great constitutional implications.

The Eleventh Circuit's opinion suggests the prerequisites found in *United States v. Hines*, was first established in *United States v. Harrington*, 490 F.2d 487 (1973). While *Harrington*, is not cited in *Hines*, the Eleventh Circuit draws this conclusion from other cases relied on by *Hines*. See *United States v. Fosher*, 568 F.2d 207 (1st Cir. 1978); *United States v. Torres-Flores*, 827 F.2d 1031 (5th Cir. 1987). However, none of these cases help define the need for the evidence or instruct what standard is needed to satisfy the first prerequisite.

The Eleventh Circuit concludes that, the prerequisite of need is satisfied simply by a showing that identification is central to the Governments case. [App.p.21]. This misguided conclusion disregards that, (1) identification is always central in criminal trials, and (2) that in *Fosher*, the Court found that where other credible evidence is available to identify the defendant as the perpetrator of the crime, a substantial risk is involved in the introduction of a mug shots. *Fosher*, 568 F.2 at 214. These alternatives in the evidence is why the Sixth Circuit and other courts have condemned the use of such evidence in trials.

The *Fosher* decision points out, the Government often finds itself with the conflicting interests of finding it necessary to admit such photographic evidence to prove it's case, and the defendant's right to freedom from a conviction based on suspicion of other crimes. The *Fosher* decision goes on to say, this conflict has created difficulties for the district courts and numerous occasions for appellate courts to consider the admissibility of mug shots. *Fosher*, 568 F.2d at 213. The

Fosher opinion concludes, these cases instruct that where other credible evidence is available to identify the defendant as the perpetrator of the crime charged, a substantial risk is involved in the introduction of mug shots. *Fosher*, 568 F.2d at 214. *See also*, *United States v. Reed*, 376 F.2d 226, 228 n.2 (7th Cir. 1967); *Barnes v. United States*, 365 F.2d 509, 510-11 (DC Cir. 1966); *United States v. Brunson*, 549 F.2d 348, 359-60 (5th Cir. 1977); *United States v. DiZenzo*, 500 F.2d 263, 265-66 (4th Cir. 1974).

The Eleventh Circuit writes little about the alternative evidence of identification presented in this case. The Court found that the purpose of the mug shot was for the Government to show a depiction of the Defendant contemporaneous with the ATM photos and his dread locks. [App.p.23]. This conclusion belies the facts. The Government offered a series of drivers license photos with full on view of the Defendant's facial features and dread locks hair style. The Government offered a passport photo, taken closer in time to the crimes, which depicts Mr. Clotaire's facial features and dread locks. The Government also provided the jury with two up-close natural photos of the Defendant in a social settings with friends that shows his facial features and dread lock hair style. The mug shot was taken more than two years after the ATM photos. The Eleventh Circuit disregards that the alternative evidence was closer in time to the crimes, accomplished the same purpose, and therefore more contemporaneous than the mug shot.

What the Eleventh Circuit did say about the alternative evidence is that,

it's not their role to determine what evidence bears a better resemblance to the ATM photos, and that it is enough to satisfy the need for the evidence simply by showing identification is important to the Government's case. [App.p21]. This reasoning disregards a reviewing court's obligation to protect a criminal defendant's right to a fair trial and the fact that identification is always an important issue in a criminal trial. By this rationale, a mug shot is admissible in any criminal proceeding which contrast with the long-standing skepticism of the courts for use of such evidence. It is not a question of what's better, as the Eleventh Circuit points out, but rather, what is consistent with constitutional safeguards. [App.p.23]. Even *Harrington* suggests that the proper standard for the need for the evidence is the total lack of alternatives as opposed to importance of identity. A fatal fact in this case.

In, *United States v. Reed*, 376 F.2d 226 (7th Cir. 1976), the Seventh Circuit followed the reasonable alternative analysis and determined that if a reasonable alternative to a mug shot exists then the photos admission is overly prejudicial. Although the court looked primarily to the effect of the photographs themselves in determining prejudice, it further implied that another factor to be considered was whether alternative means were available to accomplish the purposes for which the pictures were used. *See Reed*, 376 F.2d at 228, n.2. While *Reed* finds the manner in which the photos were admitted to be error, it is undeniable that this case suggests need is defined as total lack of alternatives, as opposed to, the importance of identity as the Eleventh Circuit concludes here.

The panel opinion finds nothing about the mug shot gives off the impression that this was a prior blemish with the law and that, the second prerequisite in *Hines* is easily met. This conclusion is contrary to the record evidence. The opinion suggest that the parties stipulated that the October 11, 2016, date was the date of arrest in this case. While the date stipulated is correct, the fact that the photograph was taken the day the Defendant was arrested for this offense was not part of the stipulation and did not come before the jury. The mug shot was a clear indication of criminal activity and the jury was left to speculate when this criminal conduct occurred and for what crimes. There is nothing in the record to prevent the jury from finding this mug shot was from another criminal episode and a prior contact with law enforcement. Since it is the inference of prior criminal behavior created in the minds of the jurors which is sought to be avoided, the visual message conveyed by the photograph assumes heightened importance. *Fosher*, 568 F.2d 207, 214 (1st Cir. 1978). No matter how you look at the photo, it's obvious you are looking at a mug shot with clear indications of criminal activity and this photograph turned the trial of a presumed innocent person into the trial of a convicted man.

In *Barnes v. United States*, 365 F.2d 509, 510-11 (DC Cir. 1966), the court points out that mug shots have little or no probative value in themselves. Pictures of criminals showing a front and profile view, with numbers displayed on the breast are common and familiar. It may well be doubted whether jurors remain in ignorance of the fact that the photographs and cards had to do with

some criminal records of the defendant. *Barnes*, 365 F.3d at 511. While the *Barnes* court went on to reverse due the manner in which the photo was introduced, the point is clear, mug shots, no matter how edited are more likely to convey criminal conduct. It is no different here. In light of the alternative evidence available to prove identity, the prejudicial effect of the photo outweighed any alleged need for the evidence.

In, *United States v. DiZenzo*, 500 F.2d 263, 266 (4th Cir. 1974), the court was confronted with the admission of similar fact evidence. In *DiZenzo*, the court stated that, in assessing probative value, the trial court must take into consideration not only relevance but also the necessity and reliability of the evidence. *See also, United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973). The *DiZenzo* court found that, necessity must be appraised in the light of other evidence available to the Government. *DiZenzo*, 500 F.2d at 266. Following this logic, the Eleventh Circuit's conclusion that need is met simply by the importance of identity is inconsistent with long standing precedent from several other Circuits.

CONCLUSION

The Eleventh Circuit and others have held that mug shots and booking photos are a unique and powerful type of photograph that raises interests distinct from normal photographs. A booking photograph is a vivid symbol of criminal accusation, which, when viewed is often equated with guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing

moments immediately after being accused, taken into custody, and deprived of most liberties. Because mug shots reveal clear indications of criminal activity the use at trial violated substantial rights and eviscerated the Defendant's right to a fair trial. The Eleventh Circuit's opinion split from well-established Sixth Circuit precedent and creates a significant constitutional question that should be resolved by this Court.

For the foregoing reasons, Mikel Clotaire request the Court take this writ and review the Eleventh Circuit opinion and remedy the disagreements among the Circuits on this issue.

Respectfully submitted;

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