No. 23-_____

In the
Supreme Court of the United States

Richard Leon Wilbern,

Petitioner,

-v-

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Sarah Baumgartel
Counsel of Record
Federal Defenders of New York, Inc.
Appeals Bureau
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8772
Sarah_Baumgartel@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Witness misidentifications are a leading cause of wrongful convictions. The Fifth Amendment's Due Process Clause thus requires trial courts to exclude unreliable identifications obtained through improperly suggestive police procedures. But lower courts are divided over the standard of review to apply when a trial court rules that an identification is sufficiently reliable.

The question presented is whether courts of appeals should review *de novo* a district court's determination that an identification is constitutionally reliable, as the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits hold, or for clear error, as the Second Circuit holds.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

OPINIONS AND ORDERS BELOW

The Second Circuit's decision is available at 2022 WL 10225144 and appended at A.1.[1] The circuit's denial of rehearing is appended at A.11.

JURISDICTION

The Second Circuit issued its decision on October 18, 2022, A.1, and denied the petition for rehearing on January 4, 2023, A.11. This Court has jurisdiction under 28 U.S.C. § 1254(1). The circuit had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 18 U.S.C. § 3231.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

> 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; 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.

U.S. Const. amend. V.

---

[1] The appendix to this petition is cited "A."

STATEMENT OF THE CASE

A. Introduction

The Court should resolve a longstanding circuit split regarding the standard of appellate review of the reliability of identifications challenged under the Fifth Amendment.

Due process bars the use at trial of identification evidence obtained through suggestive police procedures that create a substantial likelihood of irreparable misidentification. *See, e.g.*, *Perry v. New Hampshire*, 565 U.S. 228, 237-41 (2012); *Neil v. Biggers*, 409 U.S. 188, 197-98 (1972). Thus, courts must exclude from trial any identification that results from unnecessarily suggestive police tactics and is not independently reliable. *See Perry*, 565 U.S. at 237-41.

But federal appellate courts are divided over how to review a district court's decision that an identification is constitutionally reliable (and thus admissible). Nine circuits treat this as a legal determination, reviewed *de novo*. But the Second Circuit reviews the same decision deferentially, only for "clear error." This Court should resolve this split to ensure that appellate courts apply a uniform approach to this important and recurring federal constitutional issue.

This case presents a clean opportunity to resolve this split. The issue was preserved below, the Second Circuit depended on its deferential standard of

review to uphold the admission of challenged identifications in petitioner's case, and the identifications were critical for conviction.

B. Arrest and Trial

Petitioner Richard Leon Wilbern was convicted of a cold-case robbery and killing that happened nearly 20 years ago. In 2003, a man wearing a disguise walked into a credit union in Webster, New York, brandished a gun, demanded money, and shot and killed a customer. The robber fled. No one would be charged for more than a decade.

No eyewitness could identify the robber: he had been wearing dark clothing, a vest, gloves, some kind of head covering, and sunglasses, effectively obscuring his eyes, face, hair, and body.

The credit union had only a rudimentary surveillance system, which captured poor quality still images of the robber, such as this:

Authorities publicized these images in local media and repeatedly appealed for help in identifying the robber. Hundreds of tips came in, but no one was arrested.

In 2016, law enforcement launched another media campaign, republicizing the surveillance images and advertising a $50,000 reward. In response, Jaime Labbate contacted police and for the first time claimed that he recognized a former coworker, petitioner Wilbern, as the person in the images. This led police to surreptitiously obtain a DNA sample from Wilbern and compare it to a miniscule amount of DNA recovered from the robbery. Police claimed that the DNA "matched" and arrested Wilbern.[2]

Police then approached several people who knew Wilbern to see if they could identify him as the person in the surveillance images. Police used unnecessarily suggestive procedures with these acquaintances. Before showing the images, police specifically asked about Wilbern, suggested he owned clothing matching the robber's, and asked whether he had ever been violent.

---

[2] Webster's local forensic laboratory and an independent forensic lab reported that there was insufficient DNA recovered from robbery evidence to develop a suspect DNA profile. But, at the time, New York City's forensic lab (OCME) had developed a controversial testing method that it claimed could generate profiles from such small amounts of DNA ("low copy" or "LCN" testing). OCME used LCN testing to generate the robbery DNA evidence used against Wilbern. OCME stopped doing LCN testing in 2017 and no other accredited forensic laboratory in the United States ever used it. Both New York and New Jersey state appellate courts have found that the testing method was not generally accepted within the scientific community and have held the testing results inadmissible in criminal trials. The Second Circuit is the only federal appellate court to sanction the admission of evidence from this type of DNA testing.

In some cases, police disclosed that Wilbern had already been arrested and that there was DNA evidence against him.

Numerous people who knew Wilbern and saw the images did not identify Wilbern as the person depicted. But three prior acquaintances claimed to recognize Wilbern as the person in the images. Two admitted they knew about the robbery from media reports and had seen the images previously but did not then believe it was Wilbern.

Wilbern was charged with federal robbery resulting in death, in violation of 18 U.S.C. §§ 2113(a) and (e). He was tried before a jury in October 2019. Pretrial, the defense moved, pursuant to the Fifth Amendment, to exclude the identifications by Wilbern's three acquaintances as the unreliable product of improper police suggestion. The district court denied this motion, finding that the identifications were sufficiently reliable to be admitted.

At trial, the government's evidence included these identifications, DNA evidence, and a hodgepodge of other circumstantial evidence. Wilbern was convicted and sentenced to life in prison.

C. Appeal

Wilbern appealed on several grounds, including that the three challenged witness identifications were unreliable and should have been excluded under the Fifth Amendment.

By order dated October 18, 2022, the Second Circuit affirmed Wilbern's conviction. A.1. With respect to Wilbern's argument that "his due process rights were violated by the admission of identification testimony that was the result of impermissibly suggestive police tactics," the Second Circuit stated that it "reviews the district court's determination of the admissibility of identification evidence for clear error" and that the district court did not "clearly err[] in admitting the identification testimony." A.9 (citing *United States v. Gershman*, 31 F.4th 80, 93-94 (2d Cir. 2022)).

The Second Circuit further opined that any error with respect to other challenged evidence (particularly the DNA evidence) was harmless in light of the witness identifications and other circumstantial evidence. A.4-5.

Wilbern moved for panel and *en banc* rehearing, arguing, *inter alia*, that "clear error" was the incorrect standard of review and that, consistent with the law of other circuits, the Second Circuit should decide *de novo* whether admission of the identification evidence violated Wilbern's due process rights. The Second Circuit denied rehearing on January 4, 2023. A.11.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for four reasons. First, the petition involves an important and recurring question of federal constitutional law, over which this Court should ensure a uniform standard of review. Second, there is a longstanding circuit split regarding the proper standard of review.

Third, this case is an excellent vehicle to resolve this conflict. And finally, the Second Circuit is wrong.

I. The Court should ensure a uniform standard of review for this important and recurring issue of federal constitutional law.

This Court recognized more than 50 years ago that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Further, a "major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Id.* The Court thus held that the Fifth Amendment's Due Process Clause protects criminal defendants from suggestive police procedures that create a substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 382-84 (1968); *Neil v. Biggers*, 409 U.S. 188, 197-98 (1972).

Accordingly, before admitting at trial any challenged witness identification of a defendant, a court must determine if the police elicited the identification through unnecessarily suggestive procedures and, if so, whether the totality of the circumstances indicates that the identification is nonetheless independently reliable. *Biggers*, 409 U.S. at 198-200; *Manson v. Brathwaite*, 432 U.S. 98, 105-14 (1977).

Witness identifications are among the commonest forms of evidence at criminal trials. And notwithstanding this Court's efforts to protect defendants from irreparable misidentification, mistaken identifications remain a leading cause of wrongful convictions. Contemporary studies of exonerations find that erroneous witness identifications play a significant role in wrongful convictions. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 60 (2008) (finding that 79% of 200 defendants exonerated by DNA evidence between 1989 and 2007 were convicted "based on eyewitness testimony"); *Tainted Identifications*, The National Registry of Exonerations, *available at* https://www.law.umich.edu/special/exoneration/about.aspx (Sep. 2016) (concluding that witness misidentifications contributed to 73% of 1,854 documented exonerations). Courts thus must ensure that only reliable identifications are admitted.

In addition, this Court must maintain uniformity among the circuits in how they review constitutional questions. The Court has recognized its own "special importance" in delineating standards "provided by the Constitution," *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984), as well as the need to maintain uniformity in constitutional standards, since "varied results" would be "inconsistent with the idea of a unitary system of law," *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

II. The circuits have long been divided over this issue.

Despite the importance of admitting only reliable identifications, and of maintaining nationwide standards over constitutional issues, there is longstanding division among the circuits as to how they should review the admission of identification evidence.

The vast majority of circuits recognize that the admissibility of identification evidence presents a mixed question of law and fact, and that an appellate court must review *de novo* the ultimate question of whether an identification is sufficiently reliable to satisfy due process. This is the law of the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuits. *See United States v. Hall*, 28 F.4th 445, 449 n.1 (3d Cir. 2022) ("[W]e review factual findings made in support of an evidentiary ruling for clear error. We apply *de novo* review to legal questions implicated in a decision to admit evidence—including, for example, whether admitting identification evidence would violate the defendant's due process rights."); *United States v. Saint Louis*, 889 F.3d 145, 152 (4th Cir. 2018) ("We review *de novo* the district court's legal conclusion as to whether the identification violated the Due Process Clause."); *United States v. Davis*, 754 F.3d 278, 282 (5th Cir. 2014) ("The question whether identification evidence and its fruits are admissible is a mixed question of law and fact, which generally is reviewed *de novo*."); *United States v. Meyer*, 359 F.3d 820, 824 (6th Cir. 2004) ("[W]e

apply the clearly erroneous standard to the district court's factual findings and the *de novo* standard to its legal conclusions. … Whether identification evidence was 'sufficiently reliable so as not to offend appellant's rights under the due process clause' is a question of law.") (internal citations omitted); *United States v. Recendiz*, 557 F.3d 511, 524 (7th Cir. 2009) (stating court reviews admission of identification *de novo*, with "due deference to findings of fact"); *United States v. Mshihiri*, 816 F.3d 997, 1008 (8th Cir. 2016) (reviewing admission of identification *de novo*); *United States v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021) (same); *United States v. Curtis*, 344 F.3d 1057, 1062 (10th Cir. 2003) (reviewing constitutionality of identification *de novo*); *United States v. Kelsey*, 917 F.3d 740, 750 (D.C. Cir. 2019) ("We review the district court's legal conclusions *de novo* and its findings of fact for clear error.").

A minority of circuits resist this rule. The Second Circuit holds, including in petitioner's case, that a district court's determination that an identification is reliable is reviewed deferentially, only for "clear error." *See* A.9; *United States v. Gershman*, 31 F.4th 80, 93-94 (2d Cir. 2022); *United States v. Diaz*, 986 F.3d 202, 207 (2d Cir. 2021); *United States v. Douglas*, 525 F.3d 225, 242 (2d Cir. 2008); *United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001); *United States v. Mohammed*, 27 F.3d 815, 821 (2d Cir. 1994); *United States v. Jakobetz*, 955 F.2d 786, 803 (2d Cir. 1992).

Two other circuits apply somewhat different standards of review. The First Circuit limits its review to whether "the district court's application of law to fact was reasonable," and holds that identification evidence should only be excluded in "extraordinary circumstances." *United States v. Constant*, 814 F.3d 570, 576 (1st Cir. 2016). The Eleventh Circuit reviews a district court's finding as to the suggestiveness of an identification procedure only for "clear error," but, "if" it reaches the "reliability finding," applies "plenary review to that." *United States v. Smith*, 967 F.3d 1196, 1203 (11th Cir. 2020).

III. This case presents an excellent vehicle to resolve this conflict.

This case is a clean opportunity to resolve this circuit split. The issue was raised and preserved below. In the district court, petitioner argued that the challenged identifications were the unreliable product of improper police suggestion, and that their admission at trial would violate his Fifth Amendment due process rights. There were no factual disputes regarding the circumstances of the relevant identifications.

After the district court denied his motion to exclude the identifications, petitioner pressed his constitutional argument on appeal. When the Second Circuit's decision applied the "clearly erroneous" standard of review, he moved for reconsideration because this standard was incorrect and inconsistent with the law of other circuits.

Further, the Second Circuit's opinion squarely and exclusively relied on its deferential standard of review to uphold the district court's admission of the challenged identifications. And these identifications were clearly important to petitioner's conviction: the circuit holds that any error with respect to other challenged evidence, particularly certain DNA evidence, was harmless in light of the identification evidence. In other words, the challenged identifications were likely dispositive evidence in petitioner's trial.

IV. The Second Circuit applies the wrong standard of review.

Finally, the Court should grant review because the Second Circuit is wrong. Based on this Court's precedents, *de novo* review is required.

Appellate courts review questions of law *de novo* and questions of fact for clear error. *Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020). For mixed questions of law and fact, the standard depends on whether review entails primarily factual or legal work. *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1199 (2021) (holding question of "fair use" is predominately legal issue reviewed *de novo*). This Court also considers whether a trial court or reviewing court is better situated to make the relevant determination and the standard of review that applied historically. *See U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge*, 138 S. Ct. 960, 966-67 (2018).

When the ultimate question presents a constitutional issue, this Court strongly favors *de novo* review. "In the constitutional realm" the Court has

"often held that the role of appellate courts 'in marking out the limits of [a] standard through the process of case-by-case adjudication' favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record." *Id.* at n.4 (quoting *Bose Corp.*., 466 U.S. at 503).

Thus, appellate courts decide *de novo* whether a confession is voluntary for purposes of the Fifth Amendment, *Miller v. Fenton*, 474 U.S. 104, 115 (1985); whether police have reasonable suspicion or probable cause for purposes of the Fourth Amendment, *Ornelas v. United States*, 517 U.S. 690, 696-98 (1996); if a punitive damages award is unconstitutionally excessive, *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001); and whether there is actual malice for purposes of the First Amendment, *Bose Corp.*, 466 U.S. at 501-02. This independent review is necessary for appellate courts "to maintain control of, and to clarify, the legal principles" and to "unify precedent" on important constitutional questions. *Ornelas*, 517 U.S. at 697-98.

The reliability of an identification for purposes of due process is a question of constitutional law analogous to the voluntariness of a confession, or whether police have probable cause or reasonable suspicion. It is the sort of constitutional question appellate courts should review *de novo*.

De novo review of an identification's reliability is also consistent with the position this Court has already taken. *See Ornelas*, 517 U.S. at 697 (including this as factor favoring *de novo* review). This Court's decisions addressing

identification evidence have not deferred to trial courts' determinations of reliability; instead, the Court has undertaken its own independent analysis of the totality of the circumstances to gauge whether an identification is reliable. *See, e.g.*, *Brathwaite*, 432 U.S. at 115-16 (independently evaluating factors related to identification's reliability); *Biggers*, 409 U.S. at 199-200 (weighing factors and stating that the Court "disagree[s] with the District Court's conclusion"). This historical practice further supports *de novo* review.

In sum, this Court's precedents confirm that appellate courts should review *de novo* whether an identification is sufficiently reliable for purposes of due process. The Second Circuit's deference to a district court's reliability determination is wrong.

CONCLUSION

For these reasons, the Court should grant this petition.

Respectfully submitted,

By: Sarah Baumgartel

Sarah Baumgartel
Federal Defenders of New York, Inc.
52 Duane Street, 10th Floor
New York, New York 10007
Sarah_Baumgartel@fd.org
Tel.: (212) 417-8772