NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JONATHAN DANIELS,

***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

HECTOR A. DOPICO
Interim Federal Public Defender
SARA W. KANE
Assistant Federal Public Defender
Counsel for Petitioner
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTION PRESENTED FOR REVIEW

At petitioner's Hobbs Act robberies trial, petitioner was identified as a robbery suspect by an eyewitness who had been subjected by police to a suggestive identification procedure. Petitioner requested the Third Circuit Court of Appeals' pattern eyewitness identification instruction, which—unlike the Eleventh Circuit Court of Appeals' pattern identification instruction—addresses suggestiveness. Instead, the district court read the Eleventh Circuit's pattern instruction, which provides only that the jury "may [] consider the circumstances of the identification of the Defendant, such as the way the Defendant was presented to the witness for identification."

The question presented for review is:

Whether petitioner's jury was adequately "warn[ed] to take care in appraising identification evidence," in accordance with due process, where his jury was not instructed that a suggestive identification procedure may undermine an eyewitness identification. *See Perry v. New Hampshire*, 565 U.S. 228, 245-46 (2012).

INTERESTED PARTIES

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

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Jonathan Daniels, No. 19-CR-20708-DPG (January 25, 2022)

United States Court of Appeals (11th Cir.):

United States v. Jonathan Daniels, 91 F.4th 1083 (11th Cir. 2024)

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PETITION FOR WRIT OF CERTIORARI

Jonathan Daniels 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, rendered and entered in case number 22-10408 in that court on January 24, 2024, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the published decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States

District Court for the Southern District of Florida, is contained in the Appendix (A-1).

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 decision of the court of appeals was entered on January 24, 2024. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because 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 provide that courts of appeals shall have jurisdiction for all final decisions of United States district court.

LEGAL PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution provides that, "No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . ." U.S. CONST. AMEND. V.

The Eleventh Circuit's pattern jury instruction on eyewitness identification provides:

> If a witness identifies a Defendant as the person who committed the crime, you must decide whether the witness is telling the truth. But even if you believe the witness is telling the truth, you must still decide how accurate the identification is.
>
> I suggest that you ask yourself questions:

> 1. Did the witness have an adequate opportunity to observe the person at the time the crime was committed?
> 2. How much time did the witness have to observe the person?
> 3. How close was the witness?
> 4. Did anything affect the witness's ability to see?
> 5. Did the witness know or see the person at an earlier time?
>
> You may also consider the circumstances of the identification of the Defendant, such as the way the Defendant was presented to the witness for identification and the length of time between the crime and the identification of the Defendant.
>
> After examining all the evidence, if you have a reasonable doubt that the Defendant was the person who committed the crime, you must find the Defendant not guilty.

11th Cir. Crim. Pattern Instr. S3.

STATEMENT OF THE CASE

Petitioner Jonathan Daniels was charged with multiple Hobbs Act robberies in the Southern District of Florida. *United States v. Daniels*, 91 F.4th 1083, 1087 (11th Cir. 2024). He proceeded to a jury trial. *Id.*

Petitioner's principal defense was mistaken identification.

As to one robbery count, petitioner's jury heard testimony that an eyewitness struggled to identify the suspect from a photographic array. *Daniels*, 91 F.4th at 1090. As "a refresher," a law enforcement officer—who was aware of the suspect's identity—presented the eyewitness with additional "still-frame" images, displayed on his cellphone, purportedly taken from surveillance videos of the robbery. *See id.* at 1090, 1099-1100; Dist. Ct. Dkt. 123 at 53-59, 68. The eyewitness eventually picked out

petitioner's photograph from the array, identifying him as the robber. *Daniels*, 91 F.4th at 1090. The officer involved in the identification denied that the identification procedure contravened his department's "double-blind" identification protocol, and further denied influencing the identification of petitioner. Dist. Ct. Dkt. 123 at 61, 62-70.

The Eleventh Circuit's pattern jury instruction regarding identification testimony says nothing about suggestiveness. 11th Cir. Crim. Pattern Instr. S3. Relying instead on the Third Circuit's pattern eyewitness identification instruction, petitioner asked the trial court to instruct the jury to consider "whether the witness's identification of the Defendant . . . was the product of the witness's own recollection," and "whether the witness made the identification while exposed to the suggestive influences of others." Dist. Ct. Dkt. 44; 3d Cir. Model Crim. Instr. § 4.15.

The trial court refused. *Daniels*, 91 F.4th at 1092. Consistent with the Eleventh Circuit's pattern instruction, the jury was told in pertinent part only that it "may consider the circumstances of the identification of the Defendant, such as the way the Defendant was presented to the witness for identification." Dist. Ct. Dkt. 58 at 7; 11th Cir. Crim. Pattern Instr. S3.

Mr. Daniels was convicted on all counts, and he appealed to the Eleventh Circuit Court of Appeals. *Daniels*, 91 F.4th at 1087.

At oral argument, Judge Marcus observed that "there was actually evidence of suggestive taint as to the photo array shown," and that Mr. Daniels' requested

instruction was "closely pegged" to that issue. Oral Arg. at 19:30-25:10, *United States v. Daniels*, No. 22- (11th Cir. Dec. 7, 2023), available at https://www.ca11.uscourts.gov/oral-argument-recordings. The government conceded that the identification procedure "may have been error," and agreed that the resulting identification was "an issue" at trial, but maintained that the instruction that was given "substantially covered" the suggestive identification procedure, by instructing the jury that it "may consider the circumstances of the identification of the Defendant, such as the way the Defendant was presented to the witness for identification." *Id*.

The Court of Appeals ultimately agreed with the government, finding that the jury instruction that was given "substantially covered" petitioner's proposed instruction on suggestiveness. *Daniels*, 91 F.4th at 1093-94. Finding no other reversible error, the Court of Appeals affirmed Mr. Daniels' convictions and sentence. *Id*. at 1102.

REASONS FOR GRANTING THE WRIT

Our Constitution "protects a defendant against a conviction based on evidence of questionable reliability" "by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). Eyewitness testimony is "of questionable reliability." *See id*. at 244-45 ("We do not doubt [] the fallibility of eyewitness identifications.").; *id*. at 263 (Sotomayor, J., dissenting) ("The empirical evidence

demonstrates that eyewitness misidentification is 'the single greatest cause of wrongful convictions in this country.'"). This is particularly true when an eyewitness identification results from suggestive identification procedures. *United States v. Wade*, 388 U.S. 218, 229 (1967) ("'[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor.") (internal citation omitted). Suggestive identification procedures increase the likelihood of misidentification, and "the likelihood of misidentification [] violates a defendant's right to due process." *Id*. *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972). Thus jury instructions that "warn the jury to take care in appraising identification evidence," serve as "means to persuade the jury" to discount unreliable evidence—and, in turn, as a key due process safeguard against the likelihood of mistaken identification. *See Perry*, 565 U.S. at 245-46.

Despite the Court's acknowledgement that jury instructions have a constitutional role in protecting defendants against misidentification, not all jurisdictions' jury instructions actually warn jurors about suggestive identification procedures. The Eleventh Circuit's pattern jury instruction on identification testimony, for example, lack an explicit warning about suggestive identification procedures. Eleventh Cir. Crim. Pattern Instr. S3. And petitioner's request for the Third Circuit's model eyewitness identification instruction—which touches on suggestiveness—was denied. Thus, petitioner's jury was not meaningfully "warn[ed] to take care in appraising identification evidence," and petitioner was deprived of a

key due process safeguard. *See Perry*, 566 U.S. at 237, 245-46. The Court should grant certiorari to determine whether courts have a constitutional duty to explicitly warn jurors about the risk of misidentification from suggestive identification procedures.

I. Courts must warn jurors about suggestive identification procedures.

Social science has identified several factors contributing to mistaken identifications. *See generally* Gary L. Wells et. al., *Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence,* 44 Law & Hum. Behav. 3 (2020).

Of particular importance to this petition, when an officer who is aware of the suspect's identity conducts an eyewitness identification, "it is virtually inevitable" that the officer *will* influence the witness, and therefore the identification. *See United States v. Owens*, 682 F.3d 1358, 1362 (11th Cir. 2012) (Barkett, J., dissenting from denial of rehearing *en banc*) (citing *New Jersey v. Henderson,* 27 A.3d 872, 896 (2011)). *See also* Wells, *Policy and Procedure Recommendations, supra*, at 15 (discussing "compelling evidence that [non]-blind lineup administration allows administrators to transmit information about who the suspect is to witnesses, even if unintentionally"). That is why identification procedures in which the officers conducting the lineup do not know the suspect's identity—so-called "double-blind" procedures—are more accurate than "non-blind" procedures. *See Owens*, 682 F.3d at 1362; Henry F. Fradella, *A Synthesis of the Science and Law Relating to Eyewitness Misidentifications and Recommendations for How Police and Courts Can Reduce*

Wrongful Convictions Based on Them, 47 Seattle U. L. Rev. 1, 81-82 (2023) ("A double-blind administration procedure significantly reduces, if not eliminates, suggestive behaviors by lineup administrators that can unduly influence the witness, consciously or unconsciously."). In response to the compelling research about the influence of "non-blind" identification procedures, some states—like Florida—have passed laws mandating that police departments implement "double-blind" identification procedures. *See* Fla. Stat § 92.70(3)(a) (outlining limited exceptions).

Laypersons, meanwhile, are unaware of the fallibility of eyewitness testimony, generally, and of the influence of law enforcement conduct on the identification procedure, specifically. *See Owens*, 682 F.3d at 1361-61 (Barkett, J., dissenting). Instead, jurors are "hesitant to discredit" eyewitness testimony, and typically find eyewitness identification evidence "extremely convincing." *Perry*, 565 U.S. at 253 (Sotomayor, J., dissenting). *See also* Fradella, *A Synthesis of the Science and Law, supra*, at 7 (collecting sources concluding that triers-of-fact give eyewitness testimony "significant weight that is simply not justified"). As one Justice put it, decades ago, "there is almost *nothing more convincing* [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says[,] 'That's the one!'" *Watkins v. Sowders,* 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original).

Eyewitness testimony therefore presents a "tragic irony" for defendants: jurors are not cognizant of the factors—like suggestibility—that make "eyewitness recollections [] highly susceptible to distortion," and "jurors routinely overestimate

the accuracy of eyewitness identifications." *See Perry*, 565 U.S. at 264 (Sotomayor, J., dissenting) (citations omitted); *United States v. Brownlee*, 454 F.3d 131, 142-43 (3d Cir. 2006) (using the term "tragic irony" to describe this phenomenon). *See also United States v. Smithers*, 212 F.3d 306, 312 (6th Cir. 2000) (discussing precedent "[r]ecognizing the dichotomy between eyewitness errors and jurors' reliance on eyewitness testimony"); Randolph N. Jonakait, The American Jury System 290 (2003) (observing that "research consistently confirms" that "many mistakes are made in eyewitness identifications," and "jurors are not good at distinguishing incorrect identifications from correct ones").

Courts, in contrast and as mentioned, are well-aware that eyewitness testimony is "notoriously" and "inherently" unreliable. *See Perry*, 565 U.S. at 263-64 (Sotomayor, J., dissenting); *Sowders*, 449 U.S. at 352; *Upshaw v. Stephenson*, -- F. 4th --, 2024 WL 1320111, at *6 (6th Cir. Mar. 28, 2024).[1] Courts also know that suggestive identification procedures by law enforcement increase the risk of misidentification—thereby implicating due process—and that misidentifications contribute to wrongful convictions. *See Neil v. Biggers*, 409 U.S. at 198-99. Thus, to prevent wrongful convictions, and protect due process, courts must warn jurors about

[1] Police, too, agree that, "[o]f all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification." *Dennis*, 834 F.3d at 341 (C.J. McKee, concurring) (quoting a 2006 document from the International Association of Chiefs of Police).

the impact of suggestive identification procedures on eyewitness evidence. *See Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 343 (3d Cir. 2016) (C.J. McKee, concurring).

II. Many jurisdictions do warn jurors about suggestive identification procedures.

Several courts recognize their duty to warn jurors about suggestive identification procedures, as demonstrated by their pattern, or model, jury instructions.

The Third Circuit Court of Appeals, for example, has long "recognize[d] a compelling need for guidelines which will obviate skeletal pattern instructions and assure the essential particularity demanded by the facts surrounding each identification." *See United States v. Barber*, 442 F.2d 517, 528 (3rd Cir. 1972).[2] In pertinent part, the Third Circuit's model eyewitness instruction advises the jury:

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[2] In partial response to *Barber*, the D.C. Circuit soon after issued "model" eyewitness instructions, which included the following question and warning:

> Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.
>
> . . . If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care.

United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972).

> [Y]ou should ask whether the witness's identification of (name of defendant) after the crime was committed was the product of the witness's own recollection.
>
> . . . If the identification was made under circumstances that may have influenced the witness, you should examine that identification with great care.
>
> Some circumstances which may influence a witness's identification are . . . whether the witness made the identification while exposed to the suggestive influences of others; and whether the witness identified (name of defendant) in conditions that created the impression that (he)(she) was involved in the crime.

Third Cir. Crim. Pattern Instr. § 4.15.

At least three other federal circuits also explicitly direct jurors' attention to the suggestive influence of others and or to suggestive identification procedures. The Eighth Circuit advises jurors that:

> You should also consider whether the identification made by the witness after the offense was the product of [his] [her] own recollection. You may consider, in that regard, the strength of the identification, and the circumstances under which the identification was made, keeping in mind that a witness may be certain but mistaken. . . . In determining the reliability of the lineup, you should consider whether the makeup of the lineup suggested to the witness who should be selected. You should consider the procedures used by law enforcement in conducting the lineup and whether those procedures affected the reliability of the witness's identification.

Eighth Cir. Crim. Pattern Instr. § 4.08. The Ninth Circuit instructs jurors to consider "whether the identification was the product of the eyewitness's own recollection or was the result of subsequent influence or suggestiveness[.]" Ninth Cir. Crim. Pattern Instr. § 3.11. Similarly, the First Circuit instructs jurors that, "Testimony by a

witness as to identity must be received with caution and scrutinized with care . . . You may consider the following in evaluating the accuracy of an eyewitness identification: . . . the influence of suggestive identification practices." First Cir. Crim. Pattern Instr. § 2.22.

States have also developed comprehensive eyewitness identification instructions that warn jurors about suggestive identification procedures. *See, e.g.*, Mass. Crim. Model Instr. "Model Jury Instruction on Eyewitness Identification" (2015); N.J. Model Crim. Instr. "Identification–In-Court and Out-of-Court Identifications" (2020).

Of particular relevance to this petition, Florida's pattern instruction on identification testimony repeatedly warns the jury about suggestiveness, improper influence, and suggestive identification procedures. *See* Fla. Crim. Pattern Instr. § 3.9c. For example, the Florida pattern instructs jurors to consider, "Whether the identification was the product of the eyewitness's own recollection or was the result of influence or suggestiveness." *Id.* When jurors have "heard testimony concerning a photo lineup conducted by a law enforcement agency," they are instructed that:

> Florida law requires that the person conducting the [live] [photo] lineup must not have participated in the investigation of the crime alleged and must not have been aware of which person in the [live] [photo] lineup was the suspect.

Id. After reviewing the multiple legal requirements that police departments must follow, jurors are also told that they "may consider compliance or noncompliance with

these requirements to determine the reliability of an eyewitness identification made during a [live] [photo] lineup procedure." *Id*.

III. The Eleventh Circuit does not warn jurors about suggestive identification procedures.

In contrast, the Eleventh Circuit does not warn jurors about the influence of others, or suggestive identification procedures. Instead, as to identification procedure, the Eleventh Circuit pattern jury instruction provides only:

> You may also consider the circumstances of the identification of the Defendant, such as the way the Defendant was presented to the witness for identification and the length of time between the crime and the identification of the Defendant.

11th Cir. Crim. Pattern Instr. S3. This instruction does not tell jurors *why* "the way the Defendant was presented to the witness for identification" matters, or how—or whether—"the way the Defendant was presented to the witness for identification" influences the reliability of identification testimony. The word "suggestive" is notably absent, as is the word "influence," as is the concept that an identification is unreliable if it is not the product of the witness's own recollection. *See id*.

As to suggestiveness, this instruction—which has not been substantively amended in approximately 40 years—*see Daniels*, 91 F.4th at 1106 (Jordan, J., concurring)—lacks "any explanation of the relevant [] variables that so crucially impact the reliability of witness identifications," leaving the jurors in "no position to fully appreciate that the witness' recollection of a stranger can be distorted easily by [] later actions of the police." *See Dennis*, 834 F.3d at 342 (C.J. McKee, concurring)

(internal citation and quotation omitted) (remarking also on "the limited utility of a [similarly] bare bones jury instruction").

The Court of Appeals routinely upholds its outdated and generic identification instruction against claims that it failed to address specific issues presented by the evidence at trial, including—but not limited to—suggestiveness.

In *United States v. King*, for example, a Black defendant was identified at trial as the robbery suspect by non-Black eyewitnesses, and he requested an instruction providing that "people may have greater difficulty in accurately identifying members of a different race." 751 F.3d 1268, 1275 (11th Cir. 2014). This modest request is clearly backed by social science. *See Daniels*, 91 F.4th at 1104-06 (Jordan, J., concurring) (summarizing studies, including a survey in which "more than 90% experts" agreed that eyewitnesses struggle with cross-racial identifications). A number of jurisdictions explicitly address cross-racial identification in their pattern or model jury instructions. *See id.* at 1105 (collecting examples). The Eleventh Circuit is not among them. *See id.*; Eleventh Cir. Crim. Pattern Jury Instr. S3.

The Court of Appeals nonetheless held that, even if King had presented evidence on this point, it "would not reverse on this record because the charge the district court gave substantively covered the proposed instruction." *King*, 751 F.3d at 1275. Yet, the instructions that the district court gave in *King* were identical to the current pattern instruction; they make no mention of cross-racial identification whatsoever. *See id.* at 1275-76; 11th Cir. Crim. Pattern Instr. S3; *Daniels*, 91 F.4th

at 1103 (Jordan, J., concurring). *See also United States v. Grace*, 711 F. App'x 495, 502 (11th Cir. 2017) ("It is enough that the district court provides a non-exhaustive list of questions that are generally relevant to evaluating eyewitness identifications."); *United States v. Owens*, 445 F. App'x 209, 217 (11th Cir. 2011) (affirming district court's reliance on the pattern identification instruction, even though that instruction "did not specifically discuss cross-racial identification, double-blind lineup procedures, or the effect of stress and weapons on identifications"—all issues that arose at trial—because "Owens was able to cross-examine and argue about each of these points").

Likewise, in petitioner's case, the Court of Appeals held that it was sufficient that "[t]he district court instructed the jury to consider whether the eyewitnesses' identification testimony was accurate and 'suggest[ed]' a number of factors that the jury may consider when making this determination." *See Daniels*, 91 F.4th at 1093-94 (citing *King*). It was irrelevant, under circuit precedent, that the factors "suggested" by the district court did not include suggestiveness, even though there was a suggestive identification procedure at issue. *Id.*

Notably, Eleventh Circuit defendants cannot supplement the circuit's inadequate pattern instruction with expert testimony. It is true that the Supreme Court has characterized "expert testimony on the hazards of eyewitness identification evidence," as another important due process safeguard against unreliable identifications, s*ee Perry*, 565 U.S. at 245-46; and "[n]umerous studies have found

that cross-examination and jury instructions are inadequate alternatives to eyewitness identification expert testimony." Fradella, *A Synthesis of the Science and Law, supra*, at 113. Still, binding Eleventh Circuit precedent effectively precludes defense eyewitness experts. *See United States v. [Fred] Smith*, 122 F.3d 1355, 1358-59 (11th Cir. 1997) (upholding prior precedent affirming exclusion of such testimony as "often unhelpful to the jury"). *See also United States v. Thomas Daniels,* -- F.4th--, 2024 WL 1336317, at *4–5 (11th Cir. Mar. 29, 2024) (relying on *Fred Smith* to uphold district court's exclusion of defense eyewitness expert); *Owens*, 445 F. App'x at 216 (same).

The Eleventh Circuit is an outlier in this latter respect, as well. *See Owens*, 682 F.3d at 1360 (Barkett, J., dissenting) (observing that "ten other circuits and forty-two state courts [] disagree with our approach [and] recognize[] that expert testimony can be helpful to the jury precisely because the conclusions of the psychological studies are largely *counter-intuitive*") (emphasis in original). No other circuit deprives defendants facing eyewitness identification testimony of *both* a meaningful jury instruction *and* the opportunity to present expert testimony.

IV. This petition provides a worthy vehicle to not only correct the decision below but also to ensure that all juries are warned about suggestive identification procedures.

It is undisputed that petitioner was identified as a suspect at trial by an eyewitness who had been subjected by police to a suggestive identification procedure. *Daniels*, 91 F.4th at 1090; Oral Arg. at 19:30-25:10; Dist. Ct. Dkt. 123 at 53-70.

However, because the district court relied on the Eleventh Circuit's pattern instruction on identification testimony, petitioner's jury was never warned that a suggestive identification procedure can undermine an eyewitness identification. Dist. Ct. Dkt. 58. And, in compliance with circuit precedent, petitioner did not present an identification expert. Thus, faced with "the tragic irony" of eyewitness testimony, petitioner lacked two due process safeguards: relevant jury instructions, and expert testimony. *See Brownlee*, 454 F.3d at 142-43; *Perry*, 565 U.S. at 245-46.

By repeatedly upholding the reading of its generic identification pattern instruction irrespective of the case-specific factors that undermine identification evidence, the Court of Appeals flouts decades of social science. *See Dennis*, 834 F.3d at 341-42 (C.J. McKee, concurring). Where the factor missing from the jury instructions is a suggestive identification procedure, circuit precedent—like the decision below—also imperils due process. *See Perry*, 565 U.S. at 245-46.

Had petitioner been tried in the state where the robberies occurred, or in several other federal circuits, his jury would have been "warned to take care in appraising identification evidence," in accordance with the facts of his case and with due process. *See Perry,* 565 U.S. at 246. Because that did not happen, but should have, the decision below is wrong. Moreover, this important issue was fully preserved at trial, and on appeal, making this petition a worthy vehicle to not only correct the decision below, but also to ensure that courts fulfill their constitutional duty to warn jurors about suggestive identification procedures.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

HECTOR DOPICO
INTERIM FEDERAL PUBLIC DEFENDER

By: *s/Sara W. Kane*
Sara W. Kane
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
April 22, 2024