No. _____

SUPREME COURT OF THE UNITED STATES

FRANCISCO VILLANUEVA,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

QUESTION PRESENTED

Whether accused citizens are entitled to present expert eyewitness testimony when unduly suggestive circumstances surround the identification?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

United States v. Adan James Corona, No. 22-1405, US Court of Appeals for the Eighth Circuit, Order entered September 16, 2024.

United States v. Estevan Baquera, No. 5:17CR50049-4, US District Court, District of South Dakota, Western Division, Judgment entered 11/30/2021.

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PETITION FOR WRIT OF CERTIORARI

Francisco Villanueva, an inmate currently incarcerated at ADX US Penitentiary Max, in Florence, Colorado, by and through Robert Rohl, Court Appointed Counsel, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The United States Court of Appeals denied Mr. Villanueva's direct appeal. The Opinion was filed on September 16, 2024. *See United States v. Villanueva*, 116 F.4th 813 (8th Cir. 2024).

JURISDICTION

Mr. Villanueva's petition for rehearing to the United States Court of Appeals for the Eighty Circuit was denied. The Order Denying Petition for *en banc* Rehearing was filed on October 17, 2024. Mr. Villanueva invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this Petition for Writ of Certiorari within ninety days of the United States Supreme Court's Judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

RULE 35 STATEMENT

Appellant Francisco Villanueva petitions for Writ of Certiorari. Laws should be applied uniformly in the United States, especially those laws relating to an accused's right to present a complete defense. Currently, there is a split in the Circuits as to the ability, legal standards, and methodology upon which an accused is entitled to present expert eyewitness testimony. The reliability of witness memory

is affected by numerous factors beyond the knowledge of lay persons and scholarship, judicially mandated studies, and peer-reviewed publications unanimously agree.

STATEMENT OF THE CASE

This appeal arises out of Villanueva's convictions for first degree murder and other related charges stemming from the death of Vincent Brewer. 18 U.S.C. §§ 2, 1111(a), 1152. The theory of the defense was misidentification. Appellant Villanueva noticed expert testimony on the scientific principles associated with eyewitness misidentifications[1]. R.Doc. 582. The Government's sole eyewitness identification of Appellant arose from patently suggestive circumstances.

The district court rejected the expert testimony and failed to provide Appellant an adequate opportunity to be heard. *See* R.Doc. 1010; *See also Petition for Rehearing En Banc*. The district court's exclusion of Appellant's eyewitness expert was affirmed by the 8th Circuit Court of Appeals. *See United States v. Villanueva,* 116 F.4th 813 (8th Cir. 2024). Had this case been prosecuted in other jurisdictions or Circuits, Villanueva would have been allowed to present the expert testimony as will be discussed in Section IX, Reason for Granting the Writ. The *Defendant's Expert Witness Disclosure – Cara Laney*, R.Doc. 582, was fully compliant with the Federal Rules of Evidence.

REASON FOR GRANTING THE PETITION

As this Court recognized over a half-century ago, "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of

[1] Appellant also moved to preclude admission of the unduly suggestive eyewitness identification. R.Doc. 549.

mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967); *see also Simmons v. United States*, 390 U.S. 377, 383-84 (1968); *Manson v. Brathwaite*, 432 U.S. 98 (1977). According to the Innocence Project, eyewitness misidentification was present in seventy-one percent (71%) of the cases in which subsequent DNA testing established the factual innocence of wrongfully convicted defendants. *See* Innocence Project, *Eyewitness Identification Reform*, https://innocenceproject.org/eyewitness-misidentification (Last Visited Nov. 19, 2024).

As a direct result of scientific research in the field of eyewitness identification, the use of experts has gained substantial acceptance by courts nationally. *Com. v. Walker*, 92 A.3d 766, 782 (Pa. 2014). Courts in forty-four (44) states and the District of Columbia have permitted such testimony at the discretion of the trial judge. *See Id.* at 78-83 (citations omitted).

The 8th Circuit remains "especially hesitant" to allow admission of expert testimony on "identification." *See United States v. Villanueva*, 116 F.4th, 813, 818 (8th Cir. 2024) (citing *U.S. v. Kime*, 99 F.3d 870, 885 (8th Cir. 1996)). Appellant is unable to identify a single 8th Circuit case authorizing use of eyewitness expert testimony. As concurring 8th Circuit Judge Erickson cautioned in *United States v. Nickelous*, 916 F.3d 721, 725 (8th Cir. 2019) (J. Erickson concurring):

> District judges would be well served to consider each case individually and not rush headlong into the conclusion that proffered expert testimony should be excluded in all (or even most) cases because of its potential to confuse the jury, invade the province of the jury, or because defense counsel is capable of exposing to the jury any potentially unreliable bases underlying the eyewitness identification through cross examination.

In the instant case, many of the typical causes of mistaken eyewitness identification are apparent. As enumerated by the 2nd Circuit, for example, "literature indicates that certain circumstances surrounding a crime – including the perpetrator's wearing a disguise, the presence of a weapon, the stress of the situation, the cross-racial nature of the crime, the passage of time between observation and identification, and the witness's exposure to the defendant through multiple identification procedures – may impair the ability of a witness .. to accurately process what [he] observed." *United States v. Nolan*, 956 F.3d 71, 80 (2d. Cir. 2020) (citing *Young v. Conway*, 698 F.3d 69, 78-79 (2d Cir. 2012)); *see generally* National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (2014) (hereafter *Identifying the Culprit*).[2]

This case is replete with impairing factors accepted by the scientific community in the field of eyewitness misidentification, i.e. perpetrators wearing disguises obscuring facial features; perpetrators were armed suggesting "weapon focus"; eyewitness under high stress; cross-racial identification; lapse of time; contamination by external information of "cowitness interaction"; and facebook photographs of Appellant provided to eyewitness at victim's funeral. *Identifying the Culprit* at 96; Charles A.

[2] Such research has already led the Supreme Court of two states to substantially change their approach to evaluating eyewitness identifications. *State v. Henderson*, 208 N.J. 208 (2011) (replacing the existing test for admissibility of eyewitness identifications with one that incorporates the findings of scientific research on eyewitness reliability); *State v. Lawson*, 352 Or. 724 (2012) (same).

Morgan III et al., *Accuracy of Eyewitness Memory for Person Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L. & Psychiatry 265 (2004); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. Applied Soc. Psychol. 972 (1988); Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139 (2008); Elin M. Skagerberg, *Co-Witness Feedback in Line-Ups*, 21 Applied Cognitive Psychol. 489 (2007).

The only safeguards provided to Appellant to address the impairing factors were cross-examination, closing argument and jury instructions. *See Report of the Minnesota Supreme Court,* Rules of Evidence Advisory Committee,

www.mncourts.gov/mncourtsgov/media/PublicationReports/Publications-Reports-Rules-of-Evidence-Advisory-Committee-Summary-Report.pdf (Last Visited Nov. 19, 2024) (recommending the Court clarify that the "safeguards" … are not substitutes for expert testimony on eyewitness identifications).

Had Mr. Villanueva been prosecuted in a different geographic location within this country, he would have been able to present his expert testimony and, thereby, his defense. This Court should grant the Writ and provide uniformity in an area of vital legal importance, the ability to present a meaningful and complete defense.

CONCLUSION

For these foregoing reasons, Mr. Villanueva respectfully requests that this Court issue a Writ of Certiorari to review the Order of the United States Court of Appeals for the Eighth Circuit.

DATED this 3rd day of January, 2025.

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CERTIFICATE OF COMPLIANCE

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Dated this 3rd day of January, 2025.

/s/ Robert J. Rohl

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