NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

QUANTRELL GRACE,

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

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QUESTIONS PRESENTED FOR REVIEW

1. In response to empirical studies of the factors that affect the reliability of eyewitness identifications, criminal defendants often proffer expert testimony on this subject. Among the federal Circuits, some generally favor the admission of such expert testimony; others favor exclusion; but the Eleventh Circuit, alone, mandates a per se rule of exclusion for eyewitness identification expert testimony. Here, the Eleventh Circuit affirmed the district court's exclusion of the defense expert, holding: "Regardless of whether the concerns about eyewitness testimony discussed in [Grace's briefs] cast doubt on our [precedent's] reasoning . . . we are bound to follow those decisions unless and until they are overruled." This holding presents the question: can a district court's exclusion of expert testimony on the factors that affect the reliability of eyewitness identification be an abuse of discretion?

2. Social science studies have reached important conclusions regarding eyewitness identifications: the correlation between a witness's confidence and the accuracy of his identification is weak, at best; identification accuracy is reduced when it is cross-racial, or made under stress, or under suggestive practices. Grace submitted eyewitness identifications jury instructions that incorporated these conclusions. Rejecting his proposed instructions, the district court instead gave a decades-old pattern instruction. The Eleventh Circuit held that such instructions are "enough."

Circuit courts send conflicting signals on this issue. Some now encourage district courts to include the recent conclusions of social science in their instructions, but a majority cling to older instructions that do not incorporate these conclusions. This presents the question: Should district courts give jury instructions that incorporate the recent empirical conclusions of social science on the factors that affect the reliability of eyewitness identification?

INTERESTED PARTIES

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

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Quantrell Grace 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 Nos. 16-12909 & 16-17052 in that court on September 27, 2017, *United States v. Quantrell Grace,* which affirmed the judgment and commitment order, and the order of restitution, 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, *United States v. Grace*, ___ F.3d ___, 2017 WL 4279208 (11th Cir. September 27, 2017), which affirmed the judgment and commitment order of the district court, 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 September 27, 2017. 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 courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

1. Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

2. Eleventh Circuit Pattern Criminal Jury Instruction S3 provides:

> The Government must prove beyond a reasonable doubt that the Defendant was the person who committed the crime.
>
> 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.

STATEMENT OF THE CASE

1. Facts Underlying the Offense.

A federal grand jury indictment charged Grace with conspiracy to commit a Hobbs Act robbery, and substantive Hobbs Act robbery, in violation of 18 U.S.C. § 1951, and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). His case was tried before a jury. The Eleventh Circuit summarized the facts as follows:

> On June 21, 2015, Geremias Garcia was working in Opa-locka, Florida, as a delivery driver for Papa Johns. Sometime before 10:00 pm, someone placed an order with Papa Johns, asking that a pizza be delivered to the Palm Lake Apartments – a home for the elderly. Garcia was tasked with delivering the order.
>
> Upon nearing the apartment building, Garcia (who was new to the area) called the phone number on the pizza receipt —which ended in 5318 —to ask for directions. A man answered the phone and began to direct Garcia to the correct address. As they spoke, Garcia continued to drive. Eventually, he saw the man on the phone standing on the fourth floor of a building. The man waved to indicate that he was the person Garcia was speaking to. Garcia testified at trial that the lighting conditions at this time were very good.
>
> Garcia asked the man to come down to collect his pizza, but the man said to come up to deliver it. Garcia parked his car and, leaving his phone in the vehicle, went up a staircase to meet the man. When he opened the door to enter the fourth floor of the building, he saw the man who had waved to him. There was nothing covering the man's face and the lighting was very good. The man had his right hand behind his back. Another person was with him.
>
> The man Garcia had seen wave approached Garcia and put a pistol to his forehead. The man's companion said to kill Garcia. The man grabbed Garcia by the back of the neck and forced him to the ground, saying "stay down, stay down, stay down." The man took all of Garcia's belongings, saying he would not kill Garcia if Garcia gave him all "the money." The man made off with the money Garcia was carrying, his license, and his wallet. Garcia testified that he was carrying approximately $700, which included around $200 in his

wallet, \$70 to \$80 that belonged to Papa Johns, and \$420 to \$430 dollars that he had earned working at Papa Johns over the past three days. With the gun still pressed against Garcia's head, the man told him to stay where he was. Garcia remained face-down on the ground until he heard the man run down the stairs.

Garcia then returned to his car and called the police. Detective Darell Rodriguez responded to the call. Garcia described what had happened and provided Detective Rodriguez with the phone number from the pizza receipt. Detective Rodriguez, in turn, provided that number to the detectives in the police department responsible for tracking phone numbers. He was soon advised that the phone was being tracked to an address on West Golf Drive in Miami. Upon researching the address, the detective obtained several names, including Grace's. And he noted that Grace matched Garcia's description of the assailant.

At trial, a representative from Metro PCS/T-Mobile (a cell phone company) testified that the phone number Garcia called (from the pizza receipt) was registered to Trello Santana. But he explained that, because customers pay for Metro PCS phone usage up front, the company does not verify the information they provide and "[a]n individual can use any name they want to." The representative explained that the physical address connected to the cell phone account was the West Golf Drive address. Only one phone was listed on the account. The phone records indicated that, around 10:40 pm on June 21, a call was placed from Garcia's cell phone to that number.

Law enforcement officers from the Miami-Dade Police Department conducted surveillance at the West Golf Drive address. At some point, detectives monitoring the house and cell phone radioed other detectives nearby to indicate that a subject carrying the cell phone was leaving the residence. Those nearby detectives moved in and found "the subject" was Grace, the defendant, and he had the phone. Grace was arrested. He did not have a firearm on his person at that time and the pistol used in the robbery has not been recovered.

After Grace had been detained, Detective Rodriguez prepared a photographic lineup to show Garcia. He used Grace's driver's license photo as well as five other "filler" photographs selected based on Garcia's description of his assailant. Detective Rodriguez traveled to Garcia's house to show him the lineup. He testified that, before showing the photos to Garcia, he gave the standard instructions related to photographic lineups and asked him to sign a document

> indicating that he had received the instructions. Those instructions included admonitions that: (1) he was not obligated to pick anyone out; (2) that the person who committed the crime might not be in the lineup; and (3) to disregard any markings he might see on the photographs. Detective Rodriguez then, after shuffling the six photographs so he did not know what order they would appear in, showed them to Garcia one-by-one to see if Garcia recognized any of the persons depicted from the robbery.
>
> Garcia testified that Detective Rodriguez did not say anything to him as he was looking at the photographs. Garcia told Detective Rodriguez that the person depicted in the third photograph was his assailant; the third photo was the picture of Grace. Garcia testified that he was one hundred percent sure that the person in the photo was the man who attacked him, and Detective Rodriguez testified that Garcia seemed "very certain" of the identification. Detective Rodriguez had him sign the third photograph after he had reviewed all of the pictures. Garcia added that Detective Rodriguez did not say anything to him after he identified the third photograph and that the officer's demeanor did not change as a result of the identification.

A-2-A-5.[1]

2. Photographic identification.

The Eleventh Circuit summarized Garcia's identification as follows:

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[1] The Eleventh Circuit's opinion did not mention certain additional facts relating to discrepancies in Garcia's account. He testified on direct examination that he first confronted the assailant after he "got on the fourth floor from the staircase." DE142:100. On cross-examination, Garcia admitted that he had testified at the suppression hearing that he first confronted the assailant while "still inside the stairwell." DE143:30. Garcia testified that his assailant was 5' 7" and he weighted 160-170 pounds and was 25-29 years old. DE143:26-27. Grace driver's licence indicates that his height is 6'1" and he weighs 200 pounds and is 21 years old. DE145:21; PSI ¶ 3.

Garcia testified that he was "thrown down" to the ground by the assailant, DE143:33, but he had told Detective Rodriguez that he was "ordered to the ground," not "thrown to the ground. DE145:26-27. Garcia testified that the robber "put a firearm on my head, on my forehead," DE142:101, but he had told Detective Rodriguez that the robber was "close . . . within one to two arm's lengths [away]." DE145:26-27. Garcia testified that he saw a second person with his assailant who told the assailant that he should "kill" Garcia, DE142:101. But he told Detective Rodriguez that he never heard the second person speak. DE145:28.

[Garcia] identified Grace as the man who attacked him. He testified that the person who assaulted him was approximately five-feet-seven-inches tall, was African American, had black hair, and weighed around 160 to 170 pounds. He told the jury that he has very good eyesight and does not wear eyeglasses or contact lens. Through cross-examination, defense counsel highlighted a number of inconsistencies between Garcia's testimony and what he said on earlier occasions.

Detective Rodriguez testified that, after reviewing records of the phone calls placed from jail, he noticed that some of the numbers Grace had called from jail matched some of the numbers that had been dialed from the cell phone used to lure Garcia to the scene of the robbery. On cross-examination, Detective Rodriguez admitted that none of the numbers that were common to the two call logs were dialed from the cell phone on the night of the robbery. He also acknowledged that he had never played any recordings of Grace's jail calls for Garcia to see if he recognized Grace's voice.

A significant portion of the cross-examination of Detective Rodriguez focused on the photographic lineup. When asked why he did not record the lineup, Detective Rodriguez said he was not required to do so. He also testified that it was not the department's normal practice to record identifications, although he had recorded some identifications in the past. He admitted that Grace was wearing a black shirt in the photo used in the lineup and Garcia had said that his assailant had been wearing a black shirt during the robbery. Detective Rodriguez admitted that he did not tell Garcia: that it was just as important to clear the innocent as to identify the perpetrators of a crime; not to look to the detective for guidance; to take as much time as he needed; that his exact words about the identification would be noted; or that the police would continue to investigate even if he couldn't make an identification. Detective Rodriguez also acknowledged that he could see the photos as they came up and that a lineup administrator can sometimes influence the victim if he knows which photograph is the suspect's, but he explained that he stood behind Garcia so his reactions or expressions would not influence the identification. Detective Rodriguez admitted he could have placed the photographs in envelopes or folders to further reduce the risk that he might influence the identification; he testified that he did not do so because it was not required. Detective Rodriguez admitted that after Garcia had made the identification he told Garcia that the police had someone in custody.

In addition to cross-examining Garcia and Detective Rodriguez about the circumstances of the photographic identification, Grace's trial counsel tried to undermine the identification in at least three other ways. Each time, the attempt was foiled by the district court. First, he sought to question Detective Rodriguez about the Miami-Dade Police Department's new policy for photo identifications, which increased the precautions officers were required to take in order to ensure that an eyewitness' identification from a photographic lineup was reliable. Detective Rodriguez did not follow that policy in all of its particulars, but there was some dispute as to whether the policy had become effective at the time of the photographic lineup in this case. After the government moved to prevent this line of questioning, the district court excluded testimony about the new policy on the grounds that the policy was not relevant and that introducing evidence about it would confuse the jury.

Next, Grace's counsel attempted to present an expert witness who would testify about the numerous issues with eyewitness identifications according to social science. The district court granted the government's motion to preclude the expert from testifying because prior precedent from this Court established that the testimony was not admissible under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786 (1993), that cross-examination was a sufficient tool to address any problems with the eyewitness identification in this case, and that the testimony would not assist the trier of fact.

Finally, defense counsel asked the district court to include in its charge to the jury a lengthy instruction detailing some of the problems with eyewitness testimony that he contended social science has identified. The district court declined to do so, instead giving a relatively standard instruction to the jury about how it should evaluate eyewitness identifications.

The jury convicted Grace of Hobbs Act robbery and brandishing a firearm in furtherance of a crime of violence, but acquitted him on the conspiracy charge. The court later sentenced Grace to 125 months in prison followed by 48 months of supervised released and ordered him to pay $627.01 of restitution.

A-6-A-9.[2]

On appeal, Grace argued that, whether its rulings were viewed individually, or together as "cumulative error," the district court committed reversible error when it (1) limited cross-examination of Detective Rodriguez regarding police procedures governing eyewitness identification, (2) excluded a defense expert witness on eyewitness identification, and (3) rejected a jury instruction on eyewitness identification.

In an unpublished opinion, the Eleventh Circuit affirmed Grace's conviction and sentence. A-1-20. In this opinion, the Eleventh Circuit did not address whether the district court's preclusion of cross-examination of Detective Rodriguez about his department's lineup procedures violated the Sixth Amendment right to confrontation, finding that "[e]ven if it did, that error was harmless beyond a reasonable doubt." A-12-13.[3]

The Eleventh Circuit rejected Grace's challenge to the exclusion of a defense expert on eyewitness identification, citing binding Circuit precedent. A-14 (citing *United States v. Smith*, 122

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[2] The Eleventh Circuit's opinion did not mention that when Garcia told Detective Rodriguez that he recognized the person in the third photo as his assailant, Detective Rodriguez told Garcia that he had recognized the assailant, adding: "This is the picture, but anyway, I'm going to show you the rest of the pictures." DE62:41. When they were done, Detective Rodriguez told Garcia that he will get some correspondence via mail that he would have to go to court. DE62:42. Detective Rodriguez told Garcia that the person he recognized had been arrested and detained. DE62:42.

[3] The present certiorari petition does not ask this Court to address whether the Eleventh Circuit correctly decided that the district court's preclusion of cross-examination, if it was error, was "harmless" error. However, the Eleventh Circuit expressly grounded this harmless error determination on its rejection on the merits of the two other claims Grace raised on appeal. A-10, n. 1. The present petition asks this Court to review the Eleventh Circuit's rulings on these two claims. Accordingly, should this Court grant certiorari review in this case and ultimately overrule the Eleventh Circuit on these two questions, this would, in turn, undermine the Eleventh Circuit's harmless error determination on the district court's preclusion of cross-examination, and, at minimum, call for a remand for the Eleventh Circuit to reconsider its harmless error determination.

F.3d 1355, 1357 (11th Cir. 1997) and *United States v. Thevis*, 665 F.3d 616, 641 (5th Cir. Unit B 1982)).[4] The Eleventh Circuit stated: "Regardless of whether the concerns about eyewitness testimony discussed in the array of secondary sources Grace cites in his briefs cast doubt on our reasoning in *Smith* or the former Fifth Circuit's reasoning in *Thevis*, we are bound to follow those decisions unless and until they are overruled by the Supreme Court or this Court sitting en banc." A-14-15.

The Eleventh Circuit also rejected Grace's argument that the district court erred by rejecting his proposed eyewitness identification jury instructions. A-15-17. The opinion noted that, when Grace asked the district court to include in its charge to the jury an instruction that addressed the problems with eyewitness testimony that social science has identified, the district court declined to do so, instead giving "a relatively standard instruction to the jury about how it should evaluate eyewitness identifications." A-9. The Eleventh Circuit found that the district court's instruction was not substantially different from the standard jury instruction it had upheld in *United States v. King*, 751 F.3d 1268, 1275 (11th Cir. 2014) (rejecting a cross-racial identification instruction). The Eleventh Circuit stated: "It is enough that the district court provides a non-exhaustive list of questions that are generally relevant to evaluating eyewitness identifications, leaving to counsel in closing arguments to suggest other questions that may also be relevant to evaluating the particular eyewitness identification in a given case. . . . As a result, the district court did not abuse its discretion by declining to give the requested instruction." A-16-17.

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[4] The Eleventh Circuit has adopted as binding precedent all of the decisions of Unit B of the former Fifth Circuit. *United States v. Schultz*, 565 F.3d 1353, 1360 n. 4 (11th Cir. 2009).

REASONS FOR GRANTING THE WRIT

1. This Court should resolve the Circuit conflict regarding the admissibility of eyewitness identification expert testimony.

a. The Circuit conflict.

Eleventh Circuit precedent holds that a district court's exclusion of expert testimony on eyewitness identification "can never be – regardless of the circumstances – an abuse of discretion." *United States v. Whatley*, 719 F.3d 1206, 1224-25 (11th Cir. 2013) (Jordan, J., dissenting) (citing *United States v. Smith*, 122 F.3d 1355, 1357-59 (11th Cir. 1997) and *United States v. Thevis*, 665 F.2d 616, 641-42 (5th Cir. Unit B 1982)); *see United States v. Owens*, 445 Fed. Appx. 209, 216 (11th Cir. 2011) (unpublished) ("We have 'consistently looked unfavorably on' expert testimony about eyewitness reliability and held that 'a district court does not abuse its discretion when it excludes expert testimony on eyewitness identification.'") (quoting *Smith*, 122 F.3d at 1357, 1359); *United States v. Vega,* 450 Fed. Appx. 844 (11th Cir. 2012) (unpublished) (same); Brief for the United States in *United States v. Grace*, 2016 WL 6905751, at * 25-26 (11th Cir. Nov. 22, 2016) (*Smith* "categorically [provides] that a district court always has the discretion to preclude expert testimony on eyewitness identification.").

"[T]he Eleventh Circuit is the last remaining circuit to mandate a per se rule of exclusion for eyewitness identification expert testimony." Lauren Tallent, *Note, Through the Lens of Federal Evidence Rule 403, An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 Wash. & Lee L. Rev. 765, 787 (2011) (citing *Smith*, 122 F.3d 1355).

Unlike the Eleventh Circuit, "a small group of circuits takes a more progressive approach and generally favors admission and recognizes the importance of eyewitness identification expert testimony." *Id*. & n. 135 (citing *United States v. Mathis*, 264 F.3d 321, 339-40 (3d Cir. 2001) (examining an eyewitness expert's methods and "welcom[ing] such testimony");[5] *United States v. Smithers*, 212 F.3d 306, 311-18 (6th Cir. 2000) (2-1) (reversing conviction because district court erred in not admitting eyewitness-identification expert testimony);[6] *United States v. Moore*, 786 F.3d 1308, 1313 (5th Cir. 1986) ("[i]n a case in which the sole testimony is casual eyewitness identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged.").[7]

Other circuits "favor or presume exclusion of eyewitness expert testimony in all but the most 'narrow' of circumstances." Tallent, *Eyewitness Identification Expert Testimony Admissibility*, 68 Wash. & Lee L. Rev. at 786 & n. 134 (citing *United States v. Bartlett*, 567 F.3d 901, 906-07 (7th

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[5] *Accord United States v. Brownlee*, 454 F.3d 131, 144 (3d Cir. 2006) (reversing district court for excluding defense's eyewitness identification expert, who would have testified about the correlation between eyewitness confidence and accuracy)

[6] *Accord Ferensic v. Birkett*, 501 F.3d 469, 477-80 (6th Cir. 2007).

[7] A number of States also favor the admissibility of expert testimony. *See Perry v. New Hampshire*, 565 U.S. 228, 247 (2012) (noting that "[i]n appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence."); *State v. Henderson*, 208 N.J. 208, 297, 27 A.3d 872, 925 (N.J. 2011) (collecting cases from state and federal courts that have "also recognized the usefulness of expert testimony relating to eyewitness identification"); *State v. Guilbert*, 306 Conn. 218, 234, 49 A.3d 705, 720-21 (Conn. 2012) (overruling prior precedent that excluded eyewitness identification expert testimony because it was "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror"); *People v. Santiago*, 17 N.Y.3d 661, 934 N.Y.S. 2d 874 (N.Y. 2011) (trial court abused its discretion when it refused to admit expert testimony on studies showing that eyewitness confidence is poor predictor of identification accuracy); *Benn v. United States*, 978 A.2d 1257, 1277 (D.C. 2009) (noting more recent studies and overruling precedent that had held per se exclusion of expert testimony); *State v. Clopten*, 2009 UT 84, A 33, 223 P. 3d 1103, 1113 (Utah 2009) ("We expect . . . that in cases involving eyewitness identification of strangers or near-strangers, trial courts will routinely admit expert testimony [on the dangers of such evidence].").

Cir. 2009) (affirming the exclusion of eyewitness expert testimony because the multiple witnesses who identified the defendant knew him well); *United States v. Villiard*, 186 F.3d 893, 895 (8th Cir. 1989) (no abuse of discretion in denying expert eyewitness identification testimony because the government's case did not rest exclusively on uncorroborated eyewitness testimony); *United States v. Smith*, 156 F.3d 1046, 1053-54 (10th Cir. 1998) (refusing to find "narrow circumstances" existed when there were five eyewitnesses); *United States v. Harris*, 995 F.2d 532, 535 (4th Cir. 1993) (applying "narrow circumstances" test).

In *Howard v. Clark*, 608 F.3d 563, 573-74 (9th Cir. 2010), the Ninth Circuit rejected a habeas petitioner's claim that counsel was ineffective for failing to call an eyewitness identification expert, stating: "We have repeatedly affirmed district court decisions to exclude the testimony of eyewitness identification experts from federal criminal trials . . . [and] made it clear that we adhere to the position that skillful cross examination of witnesses, coupled with appeals to the experience and common sense of jurors, will sufficiently alert jurors to specific conditions that render a particular eyewitness unreliable."

The First Circuit has noted that whether expert eyewitness identification testimony should be admitted "has become a recurring [question]," adding that "as circumstances vary from case to case, this court has declined to lay down a general rule." *United States v. Jones*, 689 F.3d 12, 19 & n. 2 (1st Cir. 2012) (collecting cases).

Thus, the Eleventh Circuit alone has a rule of per se exclusion. *See* Erik J. Girvan, *When Our Reach Exceeds Our Grasp: Remedial Realism in Antidiscrimination Law*, 94 Or. L. Rev. 359, 362 n. 4 (2016) ("Two jurisdictions retain the per se exclusion of expert testimony on eyewitness reliability: the United States Eleventh Circuit Court of Appeals and Louisiana.").

In this case, the Eleventh Circuit held that its precedent required affirmance of the district court's exclusion of Grace's eyewitness identification expert testimony; the opinion stated:

> Regardless of whether the concerns about eyewitness testimony discussed in the array of secondary sources Grace cites in his briefs cast doubt on our reasoning in *Smith* or the former Fifth Circuit's reasoning in *Thevis*, we are bound to follow those decisions unless and until they are overruled by the Supreme Court or this Court sitting en banc.

A-14. Four years ago, it was noted that "the Eleventh Circuit seems unlikely to overrule [its eyewitness identification expert preclusion] precedent any time soon." W. Randall Bassett, Susan M.Clare, Simon A. Rodell, *Evidence*, 64 Mercer L. Rev. 929, 943 (2013). This prediction remains true, and is unlikely to proved wrong. *See* Girvan, *When Our Reach Exceeds Our Grasp*, 94 Or. L. Rev. at 362 & n. 4 (citing the Eleventh Circuit's per se exclusion of expert testimony on eyewitness identification as an example of judicial reticence to incorporate the understandings of social science into legal doctrine). Accordingly, this Court should overrule the decision below and thereby resolve the conflict created by the Eleventh Circuit's position that it is never an abuse of discretion for a district court to exclude expert testimony on the factors that affect the reliability of eyewitness identifications.

b. Expert Testimony On Eyewitness Identification Should be Presumed Admissible under Rule 702.

Federal Rule of Evidence 702 contemplates that expert testimony should be admitted when it "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 591-92 (1993) (discussing Rule 702's "helpfulness standard"). The arguments for allowing expert testimony on eyewitness identification under Rule 702 are compelling.

In the past, eyewitness identification expert testimony was not thought to meet Rule 702's "helpfulness" criterion. *See United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999) ("we find [the expert's] proposed testimony intrudes too much on the traditional province of the jury to assess witness credibility.").

But, today, social science studies show that expert testimony on eyewitness identification is helpful to the jury. *See* Nat'l Research Council of the Nat'l Acads, *Identifying the Culprit: Assessing Eyewitness Identification* 111 (2014) (recommending that judges allow expert testimony on the current state of scientific research on eyewitness identifications); Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 Ga. L. Rev. 723, 772 (2013) (the "counterintuitive nature" of the factors affecting eyewitness identifications "argues strongly in favor of admitting expert testimony"); Margery M. Koosed, *Reforming Eyewitness Identification Law and Practice to Protect the Innocent*, 42 Creighton L. Rev. 595, 619 (2009) ("Expert testimony should be permitted in all cases where the perpetrator's identity is a central issue, and there is little or no other independent evidence of the defendant's guilt"); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Testimony*, 1 Psychol. Publ. Pol'y & L. 909, 924 (1995) ("eyewitness expert testimony is not only appropriate, but needed in certain circumstances to improve the likelihood of a valid jury decision."); Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, *A Tripartite Solution to Eyewitness Error,* 97 J. Crim. & Criminology 807, 823 (2007) (arguing for the admissibility of expert testimony "when the primary or sole evidence against the defendant is eyewitness testimony"); Valena Elizabeth Beety, *What the Brain Saw: The Case of Trayvon Martin and the Need for Eyewitness Identification Reform,* 90 Den. U. L. Rev. 331, 345-46 (2012) (despite the fact that jurors must weigh the reliability of eyewitness testimony, they "generally show a poor understanding of scientific research on whether and how eyewitness testimony is reliable"); David E. Aaronson & Julia M. Fox, *Mistaken Eyewitness Identifications in Maryland*, 48 Aug. Md. B. J. 26, 30 (July/Aug. 2015) ("in appropriate cases, trial judges should consider allowing expert witness testimony . . . to help jurors better understand the circumstances that may affect the accuracy of eyewitness identification evidence"); Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 Am. Crim. L. Rev. 1013, 1035 (1995) (discussing studies); Note, *The Province of the Jurist*, 126 Harv. L. Rev. at 2401 (noting the "body of research on the limitations of courtroom procedures like cross-examination . . . to counteract faulty eyewitness evidence"); Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 454 (2012) (standard tools like cross-examination cannot show how the memory of an eyewitness may have been altered); Christian Sheehan, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. Rev. 651, 665 (2011) ("Although a skillful cross-examination may be effective in exposing a dishonest or biased witness, a cross examining lawyer is ill equipped to confront an honest but mistaken witness who, because she is giving testimony she believes to be true, will not display the demeanor of someone who is lying.").

This case well illustrates the necessity for expert testimony, because the confidence of the eyewitness played a pivotal role at trial. On direct examination the prosecution elicited Garcia's "100 percent" certainty that the person he identified in the photographic line-up was Grace:

> Q. [By the prosecutor]: After you looked at the second photograph, what happened next?
>
> A. [By Garcia]: The next photograph, that was the assailant.

> Q. What did you do when you saw that third photograph?
>
> A. I told the detective that that was he, 100 percent.
>
> . . .
>
> Q. How sure were you that the person in the third photograph was the robber?
>
> A. 100 percent.

DE143:17-18.

On redirect examination, the prosecutor again elicited Garcia's confidence in his identification of Grace:

> Q. Once you identified the third photograph as the man who robbed you on June 21st, did Detective Rodríguez say or do anything?
>
> A. Yes. He said – I said to him that I was sure. I was sure that that was he. And he said, "But I am going to continue to show the rest."
>
> Q. What happened when you looked at the fourth photograph? What did you do?
>
> A. I told him, "Let's not waste any more time," that the assailant was this one, 100 percent.

DE144:17.

On direct examination of Detective Rodriguez, the prosecution again elicited testimony of Garcia's certainty:

> Q. [By the prosecutor]: What happened [during the line-up] when you showed [Garcia] Government's Exhibit 6-C [the photo of Garcia].
>
> A. [By Detective Rodriguez]: As I flipped this page over and started to place it down on the trunk of the car, Mr. Garcia immediately pointed at the photograph, pushing it down on the trunk and said, "That's him. That's the guy," in Spanish.

> Q. How did Mr. Garcia appear to you at that time when you showed him Government's Exhibit 6-C?
>
> A. He appeared to be very sure that this was the person who robbed him.

DE144:64.

In closing argument Garcia's confidence in his identification of Grace became the primary focus of the prosecution. The prosecutor told the jury: "Later, when [Garcia] was shown the [photographic] lineup, he said with 100 percent certainty: That is the man." DE155:23. The prosecutor later told the jury:

> The third photo is shown.
>
> And that's when the victim testified: Yes. This is the man that robbed me at gunpoint. This is the man when I was
>
> The detective was asked: How sure did the victim seem?
>
> The detective says he seemed very sure.
>
> The victim was asked: How sure are you that this was the man that robbed you?
>
> The victim over and over again said: 100 percent.
>
> When the victim was asked if he saw that man in the courtroom, he said: With 100 percent certainty, that is the man.
>
> At some point the victim said, as a third photograph was shown to him: Let's not waste any more time. That is him.
>
> Ladies and gentlemen, *that's how you know* – that's how the evidence establishes that it was the Defendant who robbed the victim at gunpoint on the night of June 21st, 2015.

DE155:25-26 (emphasis added). The prosecution reiterated this point in rebuttal closing argument: "And what did the evidence show? That Geremias Garcia was 100 percent certain on June 26th that the Defendant robbed him." DE155:59.

The defense closing argument acknowledged Garcia's confidence in his identification of Grace. *See* DE155:31 ("And the prosecutor told you he's 100 percent certain. You heard how certain [Garcia] was. And he sounded certain."). Defense counsel attempted to address this certainty by making "certainty" the theme of her closing argument, and pointing to other aspects of Garcia's account about which he seemed equally "certain," yet about which he made inconsistent statements. DE155:31-35. Defense counsel then argued that "just because you are 100 percent certain of something, it doesn't make it right." DE155:40. But, in making this crucial argument, defense counsel was not able to cite to the *record*, because the district court had excluded expert witness eyewitness identification testimony. Mere argument is no substitute for record evidence. *See* Tracy L. Denholtz & Emily A. McDonough, *State v. Guilbert: Should Jurors in Connecticut Be Educated About Eyewitness Reliability Through Expert Testimony or Jury Instructions*, 32 Quinnipiac L. Rev. 865, 903 (2015) ("in the absence of evidentiary support, counsel's words are likely to be viewed as little more than partisan rhetoric. Without expert testimony, the jury has no basis beyond defense counsel's word to suspect the inherent unreliability of the eyewitness' identifications. . . . This is especially true if the argument relates to a factor that is counter-intuitive.") (citations and brackets omitted); *United States v. Hines*, 55 F. Supp. 2d 62, 72 (D. Mass. 1999) ("a defense lawyer . . . may try to argue that cross racial identifications are more problematic than identifications between members of the same race, or that stress may undermine accuracy, but his voice necessarily lacks the authority of the scientific studies [an expert] cited.").

Grace's proffer stated that the expert would have explained to the jury that, with respect to eyewitness identifications, "[e]ven under the best of circumstances, the relationship between confidence and accuracy is not perfect, meaning that sometimes highly confident eyewitnesses are inaccuracy (sic)." DE95:4; Ex. 1, p. 3. This expert testimony would have been essential to the jury, because one key "counterintuitive" finding of scientific studies is "the lack of any correlation between the degree of confidence expressed by eyewitnesses at trial and the accuracy of their identifications." Fiona Leverick, *Jury Instructions on Eyewitness Identification Evidence: A Re-Evaluation*, 49 Creighton L. Rev. 555, 562-63 (2016). "The outcomes of empirical studies, reviews, and meta-analyses have converged on the conclusion that the confidence-accuracy relationship for eyewitness identification is weak, with average confidence-accuracy correlations generally estimated between little more than 0 and .29." Brewer et al, *The Confidence-Accuracy Relationship in Eyewitness Identification*, 8 J. Experimental Psychol. Applied 44, 44-45 (2002).

The expert would also have testified about the risk that an administrator conducting a line-up will "inadvertently communicate" the identity of the suspect when the administrator knows the identity of the suspect – how "feedback" from police officers can produce a false sense of confidence in an eyewitness. DE95-1:2; DE91:8. In this case, after Garcia told Detective Rodriguez that he recognized the person in the third photo as his assailant, Detective Rodriguez told Garcia that he had recognized the assailant. DE62:41 (Garcia testifies at the suppression hearing: He [Detective Rodriguez] told me you have recognized the assailant. This is the picture, but anyway, I'm going to show you the rest of the pictures."). The expert would have drawn the jury's attention to this comment in evaluating Garcia's identification, because "the confidence of eyewitnesses in actual cases, unlike in controlled experiments, may be infected by positive feedback received in the investigative process (for example, an officer stating during a photo array or line-up, 'good, you identified the suspect.')." *Phillips v. Allen*, 668 F.3d 912, 916-17 (7th Cir. 2012) (citing Brief of the American Psychological Ass'n as amicus curiae in *Perry v. New Hampshire*, 2011 WL 3488994, at * 19, n. 14 (Aug. 5, 2011)) (cited in Note, *The Province of the Jurist: Judicial Resistance to Expert Testimony on Eyewitnesses as Institutional Rivalry*, 126 Harv. L. Rev. 2381, 2386-87 & n. 44 (2013)).

Expert testimony is essential to a jury when the answer to the question at issue is, as here, counterintuitive. *See* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 Hous. L. R. 1281, 1313 (2004) ("although it is proper to require some showing of reliability and applicable for defense-proffered expertise as well, the exclusion of it on grounds that it 'invades the province of the jury' is misplaced whenever the testimony seeks to educate the jury about counterintuitive facts that are well supported by research and that jurors may not know from their general background experience.").

Further, Grace's expert would have addressed how eyewitnesses subject to "stressful conditions" can give erroneous identifications; how the risk of error is "higher" when a weapon was visually present; and about "cross-racial identification" – how eyewitnesses "make more errors when identifying perpetrators of other races." DE95-1:1. This testimony would have been consistent with social science studies. *Perry*, 565 U.S. at 243 (among the factors that can lead to misidentification is "whether the witness was under stress when he first encountered the suspect") (citing Brief for American Psychological Association as *Amicus Curiae* 9-12); *see* Sheehan*, The Case for Eyewitness Identification Jury Instructions*, 52 B.C.L. Rev. at 673. Stress and cross-racial identification were at work during Garcia's identification.

In sum, this Court should resolve the Circuit conflict by overruling the Eleventh Circuit's rule that it is never an abuse of discretion to exclude expert testimony on eyewitness identification, and hold that this expert testimony should be presumed admissible because it helps a jury draw inferences that it "could not have readily drawn." *See* Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting Into the Age of Social Media*, 46 New. Eng. L. Rev. 769, 778 (2012).

2. This Court should resolve the conflicting signals among the Circuits on whether district courts should incorporate recent empirical conclusions of social science in eyewitness identification jury instructions.

The federal Circuits are sending conflicting signals on whether their district courts should incorporate the conclusions of social science research in their jury instructions on eyewitness identification. The First and Second Circuits encourage district courts to address the conclusions of social science research in their eyewitness identification jury instructions. The Third, Seventh, and Ninth Circuits go part of the way there. By contrast, the pattern eyewitness identification jury instructions of the Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh and D.C. Circuits remain based on decades-old precedent that does not incorporate more recent empirical research. This petition urges this Court to resolve these conflicting signals, and to hold that district courts should incorporate the conclusions of social science in their jury instructions.

a. The conflicting signals.

The First Circuit's pattern eyewitness identification instruction incorporates the recent conclusions of social science in bracketed phrases that signal a district court's latitude in including them in its jury instruction. The pattern jury instructions provides: "You may consider the following in evaluating the accuracy of eyewitness identification: [risks of cross-racial identification] [risks of identification under stress] [at best, weak correlation between the witness's confidence and accuracy of the identification] [the influence of suggestive identification practices]." Pattern Criminal Jury Instructions for the District Court of the First Circuit, at § 2.22.

The Second Circuit (which does not appear to have pattern jury instructions) has "approved lower courts' drawing upon [the social science] literature [on eyewitness identification]," and encourages district courts to give "a very detailed instruction to the jury regarding the evaluation of eyewitness identification evidence." *Young v. Conway*, 698 F.3d 69, 79 (2d Cir. 2012) (collecting Second Circuit cases). The Second Circuit endorses the New Jersey Supreme Court's conclusions regarding the applicability of eyewitness identification social science research in legal proceedings. *Id*. at 79 (citing *State v. Henderson*, 208 N.J. at 283); *see id*. at 88 (noting studies suggesting that "eyewitness confidence is a poor postdictor of accuracy.") (citations omitted).

In 2016, the Third Circuit established a "Task Force on Eyewitness Identification" to make recommendations regarding jury instructions (and other procedures relating to eyewitness identifications). *See* Third Circuit Task Force on Eyewitness Identification - Order (available at http://www.ca3.uscourts.gov/sites/ca3/files/TFEyewitnessIdOrder_11042016.pdf). At this writing, the Third Circuit's task force has not yet issued a report. The Third Circuit's pattern instruction includes some of the recent conclusions of social science.[8]

[8] The current Third Circuit pattern jury instruction on eyewitness identification instructs the jury to consider the witness' "stress while observing the person who committed the crime," and whether the witness and the person "were of different races." Third Circuit Model Criminal Jury Instructions, at 4.15 (available at http://www.ca3.uscourts.gov/sites/ca3/files/2016%20Chapter%204%20revisions.pdf). The instruction also instructs the jury to consider whether a witness is "positive" in the identification. This instruction, as the commentary to the First Circuit's pattern instruction notes, "could be

The Seventh Circuit's pattern eyewitness identification instruction, notes, without more, that judges may consider instructing on additional factors as suggested by Judge Easterbrook's concurring opinion in *United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999). Pattern Criminal Jury Instructions of the Seventh Cir. (2012 ed.), at § 3.12. Judge Easterbrook's concurring opinion in *Hall* encouraged trial judges to incorporate scientific knowledge into their jury instructions regarding eyewitness identification. 165 F.3d at 1120.

The Ninth Circuit does not require any cautionary instruction regarding eyewitness testimony, but has "approved the giving of a comprehensive eyewitness jury instruction where the district court has determined that proffered expert witness testimony regarding eyewitness identification should be excluded." Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit (2010 ed.), at § 4.11.

By contrast, the remaining Circuits (including the Eleventh Circuit) approve of jury instructions that were drafted based on caselaw that is now decades-old, and that is outdated because it does not incorporate the more recent social science conclusions on eyewitness identification. *See United States v. Greene*, 704 F.3d 298, 313 (4th Cir. 2013) (affirming the eyewitness identification instruction given by the district court based on *United States v. Holley*, 502 F.2d 273, 275 (4th Cir. 1974); Fifth Circuit Criminal Jury Instructions (2015), at § 1.29 ("Identification Testimony" pattern instruction does not incorporate recent social science conclusions); Sixth Circuit Pattern Jury Instructions, at 7.11 (same; providing pattern jury instruction based on *United States v. Telfaire*, 469

interpreted *as inconsistent with the social science empirical evidence* that shows only a weak relationship, if any, between the witness's affirmative confidence in the identification and the accuracy of the identification." First Circuit Pattern Criminal Jury Instructions for the District Court of the First Circuit, at § 2.22, Comment (emphasis added).

F.2d 552, 558-59 (D.C. Cir. 1972)); Eighth Circuit Model Jury Instructions, § 4.08 (same, citing *Telfaire*); Tenth Circuit Criminal Pattern Jury Instructions (2011 ed.; updated January 2017), § 1.29 (same). *Telfaire* remains law in the D.C. Circuit. The pattern Eleventh Circuit jury instruction on eyewitness identification was derived from *United States v. Martinez*, 763 F.2d 1297 (11th Cir. 1985). *See* Annotations and Comments to Eleventh Circuit Pattern Jury Instructions (Criminal Cases) S3 (2010). *Martinez*, in turn, relied on the D.C. Circuit's 1972 decision in *Telfaire*. 763 F.3d at 1304.

b. Decades-old eyewitness identification instructions are no longer "enough."

Social science studies regarding the reliability of eyewitness identification reach these conclusions:

1. The correlation between the eyewitness's confidence and the accuracy of the identification is weak, at best;[9]

2. Cross-racial identifications have a higher risk of inaccuracy;[10]

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[9] *See New Jersey v. Romero*, 191 N.J. 59, 76, 922 A.2d 693, 703 (N.J. 2007) (requiring jury instruction that "a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification"); *State v. Mahmoud*, 147 A.3d 833, 836 (Me. 2016) (juries should be instructed to "consider . . . [the] at best, weak correlation between the witness's confidence and accuracy of the identification"); *Perry*, 565 U.S. at 264 (Sotomayor, J., dissenting) ("Study after study demonstrates that . . . jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy) (citations omitted); Sheehan, *The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. Rev. at 693 (analyzing empirical studies, and proposing that juries be instructed to "keep in mind that the confidence displayed by a witness does not necessarily mean that [he or she] is accurate."); *Phillips v. Allen*, 668 F.3d at 916-17 (discussing empirical studies that indicate that "the confidence-accuracy relationship for eyewitness identification is weak") (citations omitted).

[10] *See Mahmoud*, 147 A.3d at 836; Sheehan, *The Case for Eyewitness Identification Jury Instructions*, 52 B.C.L. Rev. at 673.

3. Stress impairs the accuracy of identifications;[11] and

4. Suggestive identification practices impair accuracy.[12]

Grace submitted written jury instructions that included each of these now well-established social science conclusions. DE81:4-9. The district court rejected Grace's proposed instructions. Instead, the district court gave the Eleventh Circuit's Pattern Jury Instruction on Eyewitness Identification, verbatim:

> 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:
>
> • Did the witness have an adequate opportunity to observe the person at the time the crime was committed?
>
> • How much time did the witness have to observe the person?
>
> • How close was the witness?
>
> • Did anything affect the witness's ability to see?
>
> • Did anything affect the witness's ability to focus on the person?
>
> • 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.

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[11] *See Perry*, 565 U.S. at 243 (among the factors that can lead to misidentification is "whether the witness was under stress when he first encountered the suspect") (citing Brief for American Psychological Association as *Amicus Curiae* 9-12); Sheehan*, The Case for Eyewitness Identification Jury Instructions*, 52 B.C.L. Rev. at 673.

[12] *See* Sheehan, *The Case for Eyewitness Identification Instructions*, 52 B.C. L. Rev. at 661.

DE117:7; *see* Annotations and Comments to Eleventh Circuit Pattern Jury Instructions (Criminal Cases) S3 (2010).

On appeal, Grace challenged the district court's rejection of his proposed jury instructions. The Eleventh Circuit rejected this challenge, noting that the pattern instruction that the district court gave was "relatively standard," and holding that this pattern instruction was "enough." A-9, A-16-17. But, social science conclusions make clear that this "relatively standard" instruction is no longer "enough."

Mistaken eyewitness identifications "are the leading cause of wrongful convictions." *Perry*, 132 S.Ct. at 728; *see Owens*, 682 F.3d 1358, 1360-61 (11th Cir. 2012) (Barkett, dissenting from the denial of rehearing en banc) ("eyewitness misidentification remains the leading cause of false convictions in the United States") (citation omitted); Leverick, *Jury Instructions on Eyewitness Identification Evidence*, 49 Creighton L. Rev. at 555 ("It can scarcely be debated these days that mistaken eyewitness identification evidence is one of the major causes – if not *the* major cause – of wrongful conviction."). To address this vulnerability of our system of justice, the conflicting signals among the Circuits should be resolved. This Court should send a clear signal that district courts ought to give jury instructions that incorporate conclusions of social science regarding the reliability of eyewitness identifications.

The Eleventh Circuit, here, reasoned that the district court did not abuse its discretion rejecting all of Grace's proposed instruction on eyewitness identification, because such questions may be raised by "counsel in closing argument," and therefore need not be addressed in jury instructions. A-17. This deeply flawed reasoning underscores the urgency of the need for this Court's intervention.

First, the Eleventh Circuit failed to recognize that jury instructions safeguard the legal system against wrongful convictions. In *Perry v. New Hampshire*, this Court cited the fact that "[e]yewitness-specific jury instructions warn the jury to take care in appraising identification evidence" as a rationale for not requiring trial courts to make a preliminary determination of the admissibility of the identification at issue. 565 U.S. at 246 & n. 7.

"Over the past three decades, more than two thousand studies related to eyewitness identification have been published." *Perry v. New Hampshire*, 132 S.Ct. at 738 (Sotomayor, J., dissenting). Jury instructions must evolve with advances in social science. *See Mahmoud*, 147 A.3d at 838-39 (noting an "evolving trend among both state and federal courts" to instruct juries more carefully on the reliability of eyewitness identification in response to the "voluminous body of scientific research"); *United States v. Hall*, 165 F.3d 1095, 1120 (7th Cir. 1999) (Easterbrook, J., concurring) (urging trial judges to incorporate scientific knowledge into jury instructions regarding eyewitness identification).

But the eyewitness identification instruction that was given here was based on the instruction that the D.C. Circuit approved in *Telfaire*, in 1972. "[A]lthough the *Telfaire* instruction attempts to alert jurors to some of the possible problems with *perception* . . . it makes not mention of the psychological processes . . . which can have equally significant effects on eyewitness accuracy." Sheehan, *The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. Rev. at 680-81 (emphasis added) (noting that "the *Telfaire* instruction fails to alert jurors to the lack of any positive relationship between witness confidence and identification accuracy."). Factors that can lead to misidentification, like undue confidence, stress, or cross-racial identification, are now well-established by social science. When, as here, they bear on the facts at issue at trial, it should be an abuse of discretion for a district court to reject instructions that incorporate these social science conclusions.

Second, the Eleventh Circuit's reasoning that social science studies could be simply be argued by counsel to the jury in closing argument fails to account for the particular role of jury instructions in conveying *counterintuitive* precepts to the jury.

A jury brings to the courtroom the community's "common sense judgment," *Ring v. Arizona*, 536 U.S. 584, 609 (2002). But social science studies have identified psychological factors that affect the reliability of eyewitness identification and that often are contrary to common sense, that is, counterintuitive. *See United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) ("the conclusions of the psychological studies [on eyewitness identification] are largely *counterintuitive*, and serve to explode common myths about an individual's capacity for perception.") (emphasis in original; citation omitted); *Owens*, 682 F.3d at 1361 (Barkett, J., dissenting from the denial of rehearing en banc) (instructions are necessary because, without them, "jurors remain uninformed of [the] causes of eyewitness errors and therefore are unable to evaluate their impact on the reliability of eyewitness testimony."); *United States v. Smithers*, 212 F.3d 306, 329 (6th Cir. 2000) (Batchelder, J., dissenting) (recognizing that defense cross-examination of a witness may be "unable to establish" for the jury the "counterintuitive concept" that confidence does not necessarily reflect accuracy, and suggesting that this concept can be "communicated" through jury instructions); Brian H. Bornstein & Joseph A. Hamm, *Jury Instructions on Witness Identification*, 48 CT. Rev. 48, 53 (2012) (noting jurors' "strong, yet often erroneous, intuitions about the topic [of eyewitness identification]."); Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Convictions*, 7 Ohio St. J. Crim. L. 603, 630 (2010) ("Unfortunately, cross-examination is not an effective means of making jurors aware of the *counterintuitive* facts relating to eyewitness identification accuracy.") (emphasis added).

When a factual issue (1) can result in wrongful conviction if incorrectly evaluated, and (2) requires counterintuitive understandings to be correctly evaluated, the jury's framing of the factual issue cannot be left to the argument of counsel. When the determination of a factual question requires knowledge beyond the jury's "common sense judgment," it requires jury instructions.

There are several examples of jury instructions that convey counterintuitive understandings to the jury in order to avoid wrongful convictions. Thus, one standard jury instruction is: "The law presumes every defendant is innocent." DE155:68. *See Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of administration of our criminal law."). This presumption "stems from our society's aspiration to protect against the possibility of a wrongful conviction." *Prost v. Anderson*, 636 F.3d 578, 582 (10th Cir. 2011). But the presumption of innocence instruction is counterintuitive: it tells jurors "to close their eyes to what will frequently seem to be the factual probabilities." Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 12 (1964); *accord* Richard L. Lippke, *The Prosecutor and the Presumption of Innocence*, 8 Crim. L. & Phil. 337, 338 (2014) (the presumption of innocence instruction makes jurors "adopt a somewhat counter-intuitive stance toward criminal defendants."); Christine Alice Corcos, *Presuming Innocence: Alan Pakula and Scott Turow Take on the Great American Legal Fiction*, 22 Okla. City U. L. Rev. 129 (1997) ("the presumption of innocence is counterintuitive."). Thus, the presumption of innocence instruction provides "the ordinary citizen" with "significant *additional* guidance." *Taylor v. Kentucky*, 436 U.S. 478, 484 (1978) (emphasis added).

Another standard instruction is: "A defendant does not have to testify; and if the Defendant chose not to testify, you cannot consider that in any way while making your decision." DE155:68. This instruction also seeks to avoid wrongful convictions, by forestalling convictions that might result when an innocent defendant fears he might bungle his case by taking the witness stand, and therefore declines to testify. *Carter v. Kentucky*, 450 U.S. 288, 299-300 & n. 15 (1981) ("It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him.") (citation omitted). This instruction, moreover, is counterintuitive, since "the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is . . . natural and irresistible." *Griffin v. California*, 380 U.S. 609, 614 (1965).

Another standard instructions tells the jury, in accord with Federal Rule of Evidence 404(b), that evidence of "prior bad acts" is admitted not to directly establish the defendant's guilt of the charged crime, but only for the limited purposes allowed by this Rule. *See Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) (the trial court, upon request, should instruct the jury that similar acts evidence is to be considered only for the proper purpose for which it was admitted). A Rule 404(b) instruction is given not because evidence that a defendant had "prior trouble with the law" is "irrelevant." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). "[O]n the contrary, [such evidence] is said to weigh *too much* with the jury and to so *overpersuade* them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id*. (emphasis added). Thus, a Rule 404(b) instruction tempers the jurors' inference that a past conviction suggests "some probability" that the defendant committed the offense with which he is now charged. *United States v. Pritchard*, 973 F.2d 905, 908 (11th Cir. 1992).

When requested by the defense, a judge's failure to give any one of the above jury instructions is reversible error. *Taylor v. Kentucky*, 436 U.S. at 484; *Carter v. Kentucky*, 450 U.S. 288; *United States v. Gonzalez*, 975 F.3d 1514 (11th Cir. 1992).

The jury instructions regarding eyewitness identifications, adopted in a number of courts around the country, and proposed by Grace in this case, are akin to the above instructions on the presumption of innocence, the defendant's decision not to testify, and the weight to be given evidence of prior bad acts. Like those instructions, these eyewitness identification instructions are designed to avoid wrongful convictions, by instructing on counterintuitive precepts that temper its reliance on evidence that, as this Court aptly put it in *Michelson*, can "overpersuade" a jury.

In recent years, several State Supreme Courts have taken the lead in requiring jury instructions that address the reliability of eyewitness identification testimony. *See Com. v. Gomes*, 470 Mass. 352, 22 N.E. 3d 897 (Mass. 2015) ("We are not alone in concluding that certain scientific principles should be incorporated into a model jury instruction on eyewitness identification."); *State v. Cabagbag*, 127 Hawai'i 302, 315, 277 P. 3d 1027, 1040 (Hawai'i 2012) ("we are exercising our supervisory powers in order to ensure that, upon request of the defendant when identification is a central issue, the jury will be specifically instructed as to the potential factors that can affect the reliability of eyewitness testimony."); *State v. Henderson*, 208 N.J. 208, 27 A. 3d 872 (N.J. 2011) (revising jury instruction on eyewitness identification based on recent social science research); *State v. Ledbetter*, 275 Conn. 534, 881 A. 2d 290, 318 (Conn. 2005) (Supreme Court of Connecticut invokes its supervisory authority and directs trial courts to instruct juries on eyewitness identification "to mitigate the potential risk of mistaken identification").[13]

In the same spirit as these Supreme Court initiatives, and to resolve the conflicting signals among the federal Circuits, this Court should hold that district courts ought to incorporate in their eyewitness identification jury instructions the factors that, according to social science studies, affect the reliability of eyewitness identification.

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,

By: ______________________________
Timothy Cone
Counsel for Petitioner Grace

December 2017
Washington, D.C.

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[13] Like the "supervisory authority" relied on by some of the above State Supreme Courts, this Court has supervisory power over jury instructions in federal prosecutions. *See Early v. Packer*, 537 U.S. 3, 10 (2002) (noting that in federal prosecutions in *Jenkins v. United States*, 380 U.S. 445 (1965) (per curiam) and *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), this Court exercised its supervisory powers to reverse convictions based on inadequate jury instructions) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 239 n.2 (1988)).

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 16-12909 & 16-17052
Non-Argument Calendar

D.C. Docket No. 1:15-cr-20789-JAL-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

QUANTRELL GRACE,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Florida

(September 27, 2017)

Before ED CARNES, Chief Judge, JULIE CARNES, and JILL PRYOR, Circuit Judges.

PER CURIAM:

A jury convicted Quantrell Grace of Hobbs Act robbery and brandishing a firearm in furtherance of a crime of violence. As a result of those convictions, the district court, among other things, sentenced him to a lengthy prison term and ordered him to pay restitution. In these consolidated appeals, he challenges both his convictions and the district court's calculation of restitution.

I.

Because Grace was convicted of two of the crimes charged in the indictment, we recite the facts of his crimes in the light most favorable to the government and draw all reasonable inferences in favor of the jury's verdict. See United States v. Martin, 803 F.3d 581, 585 (11th Cir. 2015). We take the procedural history of this case from the district court record.

A.

On June 21, 2015, Geremias Garcia was working in Opa-locka, Florida, as a delivery driver for Papa Johns. Sometime before 10:00 pm, someone placed an order with Papa Johns, asking that a pizza be delivered to the Palm Lake Apartments — a home for the elderly. Garcia was tasked with delivering the order.

Upon nearing the apartment building, Garcia (who was new to the area) called the phone number on the pizza receipt — which ended in 5318 — to ask for directions. A man answered the phone and began to direct Garcia to the correct address. As they spoke, Garcia continued to drive. Eventually, he saw the man on the phone standing on the fourth floor of a building. The man waved to indicate that he was the person Garcia was speaking to. Garcia testified at trial that the lighting conditions at this time were very good.

Garcia asked the man to come down to collect his pizza, but the man said to come up to deliver it. Garcia parked his car and, leaving his phone in the vehicle, went up a staircase to meet the man. When he opened the door to enter the fourth floor of the building, he saw the man who had waved to him. There was nothing covering the man's face and the lighting was very good. The man had his right hand behind his back. Another person was with him.

The man Garcia had seen wave approached Garcia and put a pistol to his forehead. The man's companion said to kill Garcia. The man grabbed Garcia by the back of the neck and forced him to the ground, saying "stay down, stay down, stay down." The man took all of Garcia's belongings, saying he would not kill Garcia if Garcia gave him all "the money." The man made off with the money Garcia was carrying, his license, and his wallet. Garcia testified that he was carrying approximately $700, which included around $200 in his wallet, $70 to $80 that belonged to Papa Johns, and $420 to $430 dollars that he had earned working at Papa Johns over the past three days. With the gun still pressed against Garcia's head, the man told him to stay where he was. Garcia remained face-down on the ground until he heard the man run down the stairs.

Garcia then returned to his car and called the police. Detective Darell Rodriguez responded to the call. Garcia described what had happened and provided Detective Rodriguez with the phone number from the pizza receipt. Detective Rodriguez, in turn, provided that number to the detectives in the police department responsible for tracking phone numbers. He was soon advised that the phone was being tracked to an address on West Golf Drive in Miami. Upon researching the address, the detective obtained several names, including Grace's. And he noted that Grace matched Garcia's description of the assailant.

At trial, a representative from Metro PCS/T-Mobile (a cell phone company) testified that the phone number Garcia called (from the pizza receipt) was registered to Trello Santana. But he explained that, because customers pay for Metro PCS phone usage up front, the company does not verify the information they provide and "[a]n individual can use any name they want to." The representative explained that the physical address connected to the cell phone account was the West Golf Drive address. Only one phone was listed on the account. The phone records indicated that, around 10:40 pm on June 21, a call was placed from Garcia's cell phone to that number.

Law enforcement officers from the Miami-Dade Police Department conducted surveillance at the West Golf Drive address. At some point, detectives monitoring the house and cell phone radioed other detectives nearby to indicate that a subject carrying the cell phone was leaving the residence. Those nearby detectives moved in and found "the subject" was Grace, the defendant, and he had the phone. Grace was arrested. He did not have a firearm on his person at that time and the pistol used in the robbery has not been recovered.

After Grace had been detained, Detective Rodriguez prepared a photographic lineup to show Garcia. He used Grace's driver's license photo as well as five other "filler" photographs selected based on Garcia's description of his assailant. Detective Rodriguez traveled to Garcia's house to show him the lineup. He testified that, before showing the photos to Garcia, he gave the standard instructions related to photographic lineups and asked him to sign a document indicating that he had received the instructions. Those instructions included admonitions that: (1) he was not obligated to pick anyone out; (2) that the person who committed the crime might not be in the lineup; and (3) to disregard any markings he might see on the photographs. Detective Rodriguez then, after shuffling the six photographs so he did not know what order they would appear in, showed them to Garcia one-by-one to see if Garcia recognized any of the persons depicted from the robbery.

Garcia testified that Detective Rodriguez did not say anything to him as he was looking at the photographs. Garcia told Detective Rodriguez that the person depicted in the third photograph was his assailant; the third photo was the picture of Grace. Garcia testified that he was one hundred percent sure that the person in the photo was the man who attacked him, and Detective Rodriguez testified that Garcia seemed "very certain" of the identification. Detective Rodriguez had him sign the third photograph after he had reviewed all of the pictures. Garcia added that Detective Rodriguez did not say anything to him after he identified the third photograph and that the officer's demeanor did not change as a result of the identification.

B.

Grace was indicted by a federal grand jury for conspiracy to commit a Hobbs Act robbery, substantive Hobbs Act robbery, and brandishing a firearm in furtherance of a crime of violence. His case was tried before a jury.

During his testimony, Garcia again identified Grace as the man who attacked him. He testified that the person who assaulted him was approximately five-feet-seven-inches tall, was African American, had black hair, and weighed around 160 to 170 pounds. He told the jury that he has very good eyesight and does not wear eyeglasses or contact lens. Through cross-examination, defense counsel highlighted a number of inconsistencies between Garcia's testimony and what he said on earlier occasions.

Detective Rodriguez testified that, after reviewing records of the phone calls placed from jail, he noticed that some of the numbers Grace had called from jail matched some of the numbers that had been dialed from the cell phone used to lure Garcia to the scene of the robbery. On cross-examination, Detective Rodriguez admitted that none of the numbers that were common to the two call logs were dialed from the cell phone on the night of the robbery. He also acknowledged that he had never played any recordings of Grace's jail calls for Garcia to see if he recognized Grace's voice.

A significant portion of the cross-examination of Detective Rodriguez focused on the photographic lineup. When asked why he did not record the lineup, Detective Rodriguez said he was not required to do so. He also testified that it was not the department's normal practice to record identifications, although he had recorded some identifications in the past. He admitted that Grace was wearing a black shirt in the photo used in the lineup and Garcia had said that his assailant had been wearing a black shirt during the robbery. Detective Rodriguez admitted that he did not tell Garcia: that it was just as important to clear the innocent as to identify the perpetrators of a crime; not to look to the detective for guidance; to take as much time as he needed; that his exact words about the identification would be noted; or that the police would continue to investigate even if he couldn't make an identification. Detective Rodriguez also acknowledged that he could see the photos as they came up and that a lineup administrator can sometimes influence the victim if he knows which photograph is the suspect's, but he explained that he stood behind Garcia so his reactions or expressions would not influence the identification. Detective Rodriguez admitted he could have placed the photographs in envelopes or folders to further reduce the risk that he might influence the identification; he testified that he did not do so because it was not required. Detective Rodriguez admitted that after Garcia had made the indentification he told Garcia that the police had someone in custody.

In addition to cross-examining Garcia and Detective Rodriguez about the circumstances of the photographic identification, Grace's trial counsel tried to undermine the identification in at least three other ways. Each time, the attempt was foiled by the district court. First, he sought to question Detective Rodriguez about the Miami-Dade Police Department's new policy for photo identifications, which increased the precautions officers were required to take in order to ensure that an eyewitness' identification from a photographic lineup was reliable. Detective Rodriguez did not follow that policy in all of its particulars, but there was some dispute as to whether the policy had become effective at the time of the photographic lineup in this case. After the government moved to prevent this line of questioning, the district court excluded testimony about the new policy on the grounds that the policy was not relevant and that introducing evidence about it would confuse the jury.

Next, Grace's counsel attempted to present an expert witness who would testify about the numerous issues with eyewitness identifications according to social science. The district court granted the government's motion to preclude the expert from testifying because prior precedent from this Court established that the testimony was not admissible under Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786 (1993), that cross-examination was a sufficient tool to address any problems with the eyewitness identification in this case, and that the testimony would not assist the trier of fact.

Finally, defense counsel asked the district court to include in its charge to the jury a lengthy instruction detailing some of the problems with eyewitness testimony that he contended social science has identified. The district court declined to do so, instead giving a relatively standard instruction to the jury about how it should evaluate eyewitness identifications.

The jury convicted Grace of Hobbs Act robbery and brandishing a firearm in furtherance of a crime of violence, but acquitted him on the conspiracy charge. The court later sentenced Grace to 125 months in prison followed by 48 months of supervised released and ordered him to pay $627.01 of restitution. Grace appeals his conviction and the calculation of restitution.

II.

Grace primarily contends that the district court erred by restricting in several ways his ability to counter Garcia's eyewitness testimony. He argues that the district court improperly (1) restricted his ability to cross-examine Detective Rodriguez, (2) ruled that his expert witness' testimony was inadmissible, and (3) rejected his proposed jury instructions related to eyewitness identifications.[1]

We review each of those rulings only for an abuse of discretion. See United States v. Takhalov, 827 F.3d 1307, 1311 (11th Cir. 2016) (refusing to give a jury instruction); United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004) (excluding expert testimony); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1370–71 (11th Cir. 1994) (limiting cross-examination). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co., 828 F.3d 1331, 1333 (11th Cir. 2016) (quotation marks omitted). But we determine de novo the legal correctness of a proposed jury instruction, Takhalov, 827 F.3d at 1312, and recognize that "[w]hile the district court has discretionary authority to rule on the admissibility of evidence, including the power to limit cross-examination, [that] discretion is limited by the guarantee of the Sixth Amendment's Confrontation Clause that a criminal defendant has the right to cross-examine prosecutorial witnesses," United

[1] Grace also contends that, even if none of these three errors is (on its own) sufficient to warrant reversing his conviction, the three of them together deprived him of his right to a fair trial. Because we ultimately reject two out of three of Grace's claims of error on their merits and conclude that (to the extent his last claim of error has merit) the remaining error was harmless, however, we are not persuaded by his cumulative effect contention.

States v. Maxwell, 579 F.3d 1282, 1295 (11th Cir. 2009) (quotation marks omitted).

A.

We begin with Grace's argument that the district court improperly restricted his cross-examination of Detective Rodriguez by refusing to allow his attorney to question the detective about the Miami-Dade Police Department's photographic lineup procedures.

Grace claims that the district court's limitations on his cross-examination of Detective Rodriguez violated his Sixth Amendment right to confront the witnesses against him. "The Confrontation Clause of the Sixth Amendment guarantees criminal defendants an opportunity to impeach through cross-examination the testimony of adverse witnesses." United States v. Arias-Izquierdo, 449 F.3d 1168, 1178 (11th Cir. 2006). That said, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985). "[T]rial judges retain wide latitude . . . to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986). A limitation on cross-examination violates the Sixth Amendment only where "a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." United States v. Maxwell, 579 F.3d 1282, 1296 (11th Cir. 2009) (quotation marks omitted).

And even if a reasonable jury would have received a different impression of a witness' credibility as a result of the defense's legally permissible but erroneously prohibited line of cross-examination, that constitutional violation will not require reversal of the conviction if the error was harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. at 680–81, 106 S. Ct. at 1436. An error is harmless if it did not contribute to the verdict obtained. Weaver v. Massachusetts, 582 U.S. ___, 137 S. Ct. 1899, 1907 (2017). Whether a constitutionally erroneous limitation on cross-examination is harmless "depends upon a host of factors," which "include [1] the importance of the witness' testimony . . . , [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and . . . [5] the overall strength of the prosecution's case." Van Arsdall, 475 U.S. at 684, 106 S. Ct. at 1438.

In this case, we need not determine whether the district court's decision to preclude Grace from cross-examining Detective Rodriguez about his department's lineup procedures violated the Sixth Amendment. Even if it did, that error was harmless beyond a reasonable doubt.[2]

To begin with, the probative value of this line of cross-examination is weak. Evidence that Detective Rodriguez did not follow the new departmental procedure governing photographic lineups would not necessarily show that Garcia's identification of Grace was unreliable. At best, it would show that the identification procedure could have been conducted in a more reliable way. Cf. Dusenbery v. United States, 534 U.S. 161, 172, 122 S. Ct. 694, 702 (2002) ("Even if one accepts that the [Bureau of Prison's] current procedures improve delivery to some degree, our cases have never held that improvements in the reliability of new procedures necessarily demonstrate the infirmity of those that were replaced. Other areas of the law, moreover, have for strong policy reasons resisted rules crediting the notion that, because the world gets wiser as it gets older, therefore it was foolish before.") (quotation marks omitted). And defense counsel was able to make a similar point through cross-examination by asking Detective Rodriguez if he could have conducted the procedure in a different way.

Even without the evidence demonstrating that Garcia identified Grace at an

[2] The government does not argue in its brief that, to the extent the district court's limitation on Grace's ability to cross-examine the detective violated the Sixth Amendment, the error was harmless, but we "may consider the harmlessness of a trial court's error where it has not been briefed by the Government." United States v. Adams, 1 F.3d 1566, 1575 (11th Cir. 1993); see also United States v. Troya, 733 F.3d 1125, 1136 (11th Cir. 2013).

earlier photographic lineup, the evidence against Grace was strong and Garcia's identification was corroborated by other evidence at trial. The cell phone used in the robbery was registered to Grace's address, he was found with it after leaving that address, and Garcia identified him in open court. To the extent the district court erred by not permitting this line of cross-examination, the error was harmless under Chapman. [3]

B.

Next, Grace argues that the district court abused its discretion by excluding the testimony of his expert on eyewitness identification. But we have explained that "a district court does not abuse its discretion when it excludes expert testimony on eyewitness identification" because that testimony is often not helpful to the jury. United States v. Smith, 122 F.3d 1355, 1357–59 (11th Cir. 1997); see also United States v. Thevis, 665 F.2d 616, 641 (5th Cir. Unit B 1982).[4] Regardless of whether the concerns about eyewitness testimony discussed in the array of secondary sources Grace cites in his briefs cast doubt on our reasoning in Smith or the former Fifth Circuit's reasoning in Thevis, we are bound to follow those decisions unless and until they are overruled by the Supreme Court or this Court

[3] For similar reasons, we conclude that — to the extent the district court erred by excluding this line of cross-examination under the Federal Rules of Evidence — the error was harmless. See Fed. R. Crim. P. 52(a); United States v. Lehder-Rivas, 955 F.2d 1510, 1518 (11th Cir. 1992) (concluding that an erroneous ruling under Rule 403 is subject to harmless error review).

[4] We have adopted as binding precedent in this Circuit all of the decisions of Unit B of the former Fifth Circuit. United States v. Schultz, 565 F.3d 1353, 1360 n.4 (11th Cir. 2009).

sitting en banc. Smith, 122 F.3d at 1359.

C.

Grace also argues that the district court abused its discretion by rejecting his proposed jury instruction dealing with eyewitness identifications. His eight-page instruction differed from the instruction given by the district court primarily because it discussed more issues with eyewitness identification than the district court's instruction addressed and discussed the issues the district court's instruction did address at greater length. In determining whether a district court's refusal to give a requested instruction was an abuse of discretion, "we will reverse only if (1) the requested instruction correctly stated the law; (2) the actual charge to the jury did not substantially cover the proposed instruction; and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense." United States v. King, 751 F.3d 1268, 1275 (11th Cir. 2014) (quotation marks omitted).

In our decision in King, we held that a jury instruction "substantially cover[s]" a proposed instruction if "the charge, when viewed as a whole, fairly and correctly states the issues and the law." Id. (quotation marks omitted). We also held that the jury charge regarding eyewitness identifications in that case satisfied that requirement, even though (despite a request from the defendant) it did not include any language discussing cross-racial identifications. Id. There are only two differences between the instruction we upheld in King and the instruction here. First, the instruction in King explicitly informed the jurors that, when evaluating an eyewitness' testimony, they could consider questions other than those suggested by the court. Id. at 1276. Second, the instruction in this case suggested that the jurors (in addition to considering the questions posed by the instruction in King) consider whether "anything affect[ed] the witness's ability to focus on the [assailant]."

We are not persuaded that these differences make a difference. Though the King court told the jury to consider specific questions "among others," while the district court here told the jurors to "ask [themselves] questions" and then listed examples, the meaning in both cases is the same. The district court did not limit the ambit of questions the jurors could consider and the list that followed its admonition to "ask . . . questions" was plainly a list of examples. The fact that the district court added an additional example of potential questions jurors might ask themselves when evaluating eyewitness testimony helped rather than harmed Grace.

To the extent that the evidence in this case may have raised issues with eyewitness identifications that were not discussed in the King decision, that does not matter. King rejects the idea that the district court must, in its instruction on evaluating eyewitness identifications, explicitly address every potential problem with eyewitness identifications that is raised by the defense. See id. It is enough that the district court provides a non-exhaustive list of questions that are generally relevant to evaluating eyewitness identifications, leaving to counsel in closing arguments to suggest other questions that may also be relevant to evaluating the particular eyewitness identification in a given case. See id. For that reason, we conclude that the district court's instruction substantially covered the instruction suggested by the defense in this case. As a result, the district court did not abuse its discretion by declining to give the requested instruction.

III.

Grace next contends that the district court should have dismissed his indictment for brandishing a firearm in furtherance of a crime of violence. This is so, he argues, because Hobbs Act robbery does not amount to a crime of violence under 18 U.S.C. § 924(c) in the wake of the Supreme Court's decision in Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015). We have not yet determined whether Johnson's holding that the residual clause of 18 U.S.C. § 924(e) was unconstitutionally vague applies to the residual clause of § 924(c). In re Fleur, 824 F.3d 1337, 1340 (11th Cir. 2016). But a prior panel of this Court has held that Hobbs Act robbery qualifies as a crime of violence under the elements clause of § 924(c), which would not have been affected by Johnson. Id. at 1341. If Grace believes that holding is erroneous, he must take it up with either the Supreme Court or this Court en banc. See United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) ("[A] prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc.").[5]

IV.

Finally, Grace contends that the district court erred in calculating the amount of restitution he owes as a result of his convictions. We review a district court's calculation of restitution only for an abuse of discretion. United States v. Robertson, 493 F.3d 1322, 1330 (11th Cir. 2007). Because Grace does not contend that the district court applied the wrong law, misinterpreted the law, misapplied the law, or employed improper procedures in calculating its restitution award in this case, its calculation could be an abuse of discretion only if the factual findings supporting it were clearly erroneous. See Hartford Cas. Ins. Co., 828 F.3d at 1333. They were not.

There was testimony and other evidence that contradicted Garcia's claim that Grace stole $700 from him.[6] But the district court's decision to credit Garcia's

[5] Grace argues that In re Fleur was merely a three-judge order denying a second or successive petition for relief under 28 U.S.C. §§ 2255(h) and 2244(b) and, for that reason, should not be considered binding precedent. But that argument is, itself, precluded by prior panel precedent. See In re Lambrix, 766 F.3d 789, 794 (11th Cir. 2015) ("[P]ublished three-judge orders issued under § 2244(b) are binding precedent in our circuit."); cf. Griffin v. Sec'y, Fla. Dep't. of Corr., 787 F.3d 1086, 1095 n.7 (11th Cir. 2015) (explaining that "[t]he denial of a COA by three judges in a published opinion . . . does constitute binding precedent that the issue in question has no merit"). We are bound by this Court's decision in In re Lambrix.

[6] While the district court did not explain its restitution calculation in detail, it appears (from the Government's Motion in Support of Restitution) that it settled on the amount of

version of events instead of the evidence that contradicted it is a credibility judgment. Because the district court heard the testimony and, as a result, is in the best position to judge its veracity, we will reverse its decision to credit a witness' testimony over contradictory evidence only where the credited testimony "is contrary to the laws of nature, or is so inconsistent or improbable on its face that no reasonable factfinder could accept it." United States v. Ramirez-Chilel, 289 F.3d 744, 749 (11th Cir. 2002) (quotation marks omitted). Garcia's testimony was not so improbable that no factfinder could believe it over the contrary evidence, and "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S. Ct. 1504, 1512 (1985).

V.

To the extent that the district court erred by limiting Grace's cross-examination of Detective Rodriguez, that error was harmless beyond a reasonable doubt. The district court did not abuse its discretion by excluding the testimony of Grace's eyewitness identification expert or declining to instruct the jury as Grace requested. It did not err by concluding that Hobbs Act robbery qualifies as a crime of violence under 18 U.S.C. § 924(c). And its restitution calculation was not

$627.01 because approximately $72.99 of the $700.00 Garcia testified was taken from him belonged to Papa Johns.

clearly erroneous or an abuse of discretion.

AFFIRMED.

UNITED STATES DISTRICT COURT
Southern District of Florida
Miami Division

UNITED STATES OF AMERICA

v.

QUANTRELL GRACE

JUDGMENT IN A CRIMINAL CASE

Case Number: **15-20789-CR-LENARD**
USM Number: **08544-104**

Counsel For Defendant: **Aimee Ferrer**
Counsel For The United States: **Cary Aronovitz**
Court Reporter: **Lisa Edwards**

The defendant was found guilty on count(s) 2 and 3 of the indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1951(a)	Hobbs Act Robbery	06/21/2015	2
18 U.S.C. § 924(c)(1)(A)(ii)	Brandishing a Firearm in Furtherance of a Crime of Violence	06/21/2015	3

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **5/9/2016**

Joan A. Lenard

Joan A. Lenard
United States District Judge

Date: 5/10/16

DEFENDANT: **QUANTRELL GRACE**
CASE NUMBER: **15-20789-CR-LENARD**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **125 months total: 41 months as to count 2 and 84 months as to count 3 which shall run consecutively to count 2**.

The Court makes the following recommendations to the Bureau of Prisons: Defendant be placed in a facility in Florida or as close to Florida as possible to be near family. Defendant be evaluated for placement into the drug/alcohol treatment program. Defendant be evaluate for mental health treatment.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

____

____

____

____

____

____

Defendant delivered on ____________________ to ____________________

at ____________________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **QUANTRELL GRACE**
CASE NUMBER: **15-20789-CR-LENARD**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4 years as to count 3 and 3 years as to count 2, all to run concurrently**.

The defendant must report to the probation office in the district to which the defendant is released within 48 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **QUANTRELL GRACE**
CASE NUMBER: **15-20789-CR-LENARD**

SPECIAL CONDITIONS OF SUPERVISION

Employment/Community Service - The defendant shall make every reasonable effort to be employed. If the defendant is not employed within thirty (30) days of his release, than he shall perform fifteen (15) hours per week of community service as monitored by the U.S. Probation Officer, until such time as he is employed.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **QUANTRELL GRACE**
CASE NUMBER: **15-20789-CR-LENARD**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$200.00	$0.00	$0.00

The determination of restitution is deferred until such time as the Court enters an Order. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **QUANTRELL GRACE**
CASE NUMBER: **15-20789-CR-LENARD**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $200.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.