

No. 17-7412

IN THE SUPREME COURT OF THE UNITED STATES

QUANTRELL GRACE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding certain expert testimony about the reliability of eyewitness identifications.

2. Whether the district court abused its discretion in its instruction to the jury about the evaluation of an eyewitness identification.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is not published in the Federal Reporter but is available at 2017 WL 4279208.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2017. The petition for a writ of certiorari was filed on December 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of interference with interstate commerce by means of robbery, in violation of 18 U.S.C. 1951(a); and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Pet. App. A21. He was sentenced to 125 months of imprisonment, to be followed by four years of supervised release. Id. at A22-A23. The court of appeals affirmed. Id. at A1-A20.

1. a. On the evening of June 21, 2015, Geremias Garcia, a delivery driver for Papa John's Pizza, was dispatched to fulfill a delivery order in Opa-locka, Florida. Pet. App. A2. When he was nearing the address, Garcia, who was unfamiliar with the area, called the customer phone number listed on the delivery receipt to ask for directions. Ibid. The customer directed Garcia to the correct address, and Garcia eventually saw the customer with whom he was speaking wave to him from the fourth floor of the apartment building. Id. at A2-A3. Garcia parked his car and climbed the staircase to meet the man. Id. at A3. The area was well-lit and nothing was covering the man's face, but his right hand was behind his back. Ibid.; see Gov't C.A. Br. 4.

The man then put a semi-automatic firearm to Garcia's forehead. Pet. App. A3. A second man urged the assailant to "kill Garcia." Ibid. After holding the gun to Garcia's forehead for

"[a]bout 30 seconds," the assailant grabbed Garcia by the back of the neck and forced him to the ground. 2/11/2016 Tr. 102; Pet. App. A3. The assailant ordered Garcia to "stay down" and threatened to kill him if he did not hand over his money. Ibid. The assailant stole Garcia's belongings, including his driver's license and approximately \$700, consisting of Garcia's personal earnings from several days of work and money he had received for Papa John's deliveries earlier that evening. Pet. App. A3. The assailant continued to press the gun to Garcia's head and ordered Garcia not to move until he left. Ibid.; 2/11/2016 Tr. 105. Garcia continued to lie face-down on the ground until he heard the assailant and his associate leave. Ibid. Garcia returned to his car and called the police, who responded to the scene and obtained a description of the assailant from Garcia. Pet. App. A4; see Gov't C.A. Br. 5.

b. Several days later, using cell-phone company records, law enforcement tracked to petitioner's residence the cell-phone number that had been used to place the order with Papa John's and to communicate with Garcia on the night of the robbery. Pet. App. A4-A5. Officers detained petitioner shortly after he left his residence and, while conducting a pat-down, found the cell phone associated with the number that they had tracked. Ibid. Petitioner was arrested. Id. at A5; see Gov't C.A. Br. 5-6.

Detective Darell Rodriguez created a photographic lineup using petitioner's driver's license photograph and five other

"filler" license photographs selected based on Garcia's description of the suspect. Pet. App. A5. Before conducting the lineup with Garcia, Detective Rodriguez gave Garcia standard admonitions, including that Garcia was not obligated to identify any photograph; that the person responsible for the crime might not be in the lineup; and that Garcia should focus on permanent facial features and disregard any markings he might see on the photographs. Ibid.; see Gov't C.A. Br. 6-8.

Detective Rodriguez stood slightly behind Garcia so as not to influence Garcia's reaction to the photographs, and he shuffled the photographs so that he would not know what order they were in. Pet. App. A5; 1/8/16 Tr. 28; Gov't C.A. Br. 8. Without speaking, Detective Rodriguez showed them to Garcia, one-by-one. Pet. App. A5. Upon seeing the third photograph -- the driver's license photograph of petitioner -- Garcia immediately pointed to it and told Detective Rodriguez (in Spanish), "That's him. That's the guy with the gun." 1/8/16 Tr. 27; Pet. App. A5-A6. Garcia stated that he was "100 percent" sure that petitioner was the assailant. 1/25/16 Tr. 41. Detective Rodriguez explained to Garcia that, although Garcia had recognized his assailant, Detective Rodriguez had to show Garcia the remaining photographs, which he proceeded to do. Pet. App. A6; 1/8/16 Tr. 27-28; 1/25/16 Tr. 41; 2/16/16 Tr. 17-18. After Garcia had seen all six photographs, he again pointed out petitioner's picture and said, "This is him. This is the guy with the gun." 1/8/16 Tr. 28. Garcia was "very certain"

about the assailant's identity, and after completing the identification he signed the photograph of petitioner. 2/16/16 Tr. 65; Pet. App. A6; see Gov't C.A. Br. 8-9.

2. A grand jury in the Southern District of Florida returned an indictment charging petitioner with conspiracy to interfere with interstate commerce by means of robbery, in violation of 18 U.S.C. 1951(a); interference with interstate commerce by means of robbery, in violation of 18 U.S.C. 1951(a); and possession of a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (ii). Indictment 1-3.

At trial, Garcia identified petitioner in open court as the man who had attacked him. Pet. App. A6, A14. He testified that the assailant was approximately five feet and seven inches tall, was African American, had black hair, and weighed around 160 to 170 pounds. Id. at A6. Garcia further testified that he has very good eyesight and does not wear eyeglasses or contact lenses. Ibid. During cross-examination, defense counsel highlighted several inconsistencies between Garcia's testimony and Garcia's previous statements and petitioner's actual physical characteristics. See ibid. Detective Rodriguez also testified, and defense counsel cross-examined him extensively about the methods of the photographic lineup. See id. at A7-A8.

Petitioner proffered the testimony of a putative expert on eyewitness identification. See Pet. App. A8-A9. The government moved to exclude that testimony under Federal Rule of Evidence 702

and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). D. Ct. Doc. 101, at 3-8 (Feb. 17, 2016); 2/17/16 Tr. 20-23. The district court granted the motion to exclude. 2/18/16 Tr. 39-48. It determined that the proffered testimony was "scientific" evidence within the scope of Rule 702. Id. at 40. But, after surveying relevant Eleventh Circuit case law and describing the existing evidence, the court "f[ound] that the expert testimony would not assist the trier of fact in determining the facts at issue" and was "not needed to clarify facts," and should thus be excluded under Daubert. Id. at 48; see id. at 39-48. The court found that, in light of defense counsel's cross-examination of Garcia and of Detective Rodriguez -- which the court described in detail -- and the jury's in-person observation of the witnesses, "the jury would not be assisted by" the proffered testimony. Id. at 47; see id. at 43-47. It concluded that the "jury [was] able to determine the issues of common understanding" and "to comprehend for themselves in this case * * * the reliability of the identification of [petitioner] and the memory of [Garcia] and the truthfulness or lack of truthfulness of [Garcia]." Id. at 48.

Petitioner also requested a seven-and-a-half page jury instruction addressing what he asserted were problems identified by social-science research with eyewitness-identification testimony. Pet. App. A9; see D. Ct. Doc. 81, at 2-9 (Feb. 10, 2016). After hearing argument, the district court declined to

give petitioner's proposed instruction, concluding that it did not reflect the applicable law. 2/19/16 Tr. 13. Instead, the court supplemented the Eleventh Circuit's pattern jury instruction on eyewitness identification, by adding to a list of questions the jury should ask itself an additional question about whether anything affected the eyewitness's ability to focus on the person identified. Id. at 13-15, 17; see D. Ct. Doc. 117, at 7 (Feb. 23, 2016); cf. Eleventh Circuit Pattern Jury Instruction (Criminal Cases), Special Instruction No. 3 (2010).

Following an eight-day trial, the jury acquitted petitioner of the conspiracy charge and found him guilty of the remaining charges. Pet. App. A9, A21. The district court sentenced petitioner to 125 months of imprisonment. Id. at A22.

3. The court of appeals affirmed. Pet. App. A1-A20.

The court of appeals determined that the district court did not abuse its discretion in excluding petitioner's proffered expert testimony on eyewitness identification under Daubert. Pet. App. A14-A15. Following circuit precedent, the court of appeals 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." Id. at A14 (quoting United States v. Smith, 122 F.3d 1355, 1359 (11th Cir.) (per curiam), cert. denied, 522 U.S. 1021 (1997)). In Smith, the court had held that the district court did not abuse its discretion by excluding certain expert testimony about the

reliability of eyewitnesses because "the jury can adequately weigh these problems through common-sense evaluation," and "[t]o admit such testimony in effect would permit the proponent's witness to comment on the weight and credibility of opponents' witnesses and open the door to a barrage of marginally relevant psychological evidence." 122 F.3d at 1357 (citation omitted).

The court of appeals also rejected petitioner's contention that the district court had abused its discretion in declining to give petitioner's requested jury instruction on eyewitness-identification testimony. Pet. App. A15-A17. It reasoned that the instruction provided by the district court "substantially covered" the same issues addressed in petitioner's proposed instruction because, viewed as a whole, it fairly and correctly stated the issues and the law. Id. at A17; see id. at A15-A17. The court observed that the instruction given was substantially similar to an instruction that it had previously upheld, and that the instruction did not limit the issues the jury could consider in determining the reliability of the eyewitness identification. Id. at A15-A16 (citing United States v. King, 751 F.3d 1268, 1275 (11th Cir.) (per curiam), cert. denied, 135 S. Ct. 389 (2014)). The court also noted that the additional potential issue mentioned

in the instruction provided here “helped rather than harmed” petitioner. Id. at A16.¹

ARGUMENT

Petitioner contends (Pet. 11-22) that the district court abused its discretion in excluding his proffered expert testimony on eyewitness identification. He further contends (Pet. 22-33) that the district court abused its discretion in declining to give his requested instruction on eyewitness identifications. The court of appeals’ decision affirming petitioner’s conviction is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. a. The admissibility of expert testimony is governed by Federal Rule of Evidence 702. That rule provides that a qualified witness may provide expert opinion testimony if the witness’s “scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue,” “the testimony is based upon sufficient facts or data,” “the testimony is the product of reliable

¹ The court of appeals additionally rejected petitioner’s arguments that (a) the district court improperly restricted his ability to cross-examine Detective Rodriguez about the police department’s photographic lineup policies and procedures, Pet. App. A11-A14; (b) the district court should have dismissed the firearm charge because robbery under 18 U.S.C. 1951(a) is not a crime of violence under 18 U.S.C. 924(c) in light of Johnson v. United States, 135 S. Ct. 2551 (2015), Pet. App. A17-A18; and (c) the district court erred in calculating the amount of restitution petitioner owed, id. at A18-A19. Petitioner does not seek review of those issues in this Court.

principles and methods," and the witness "has reliably applied the principles and methods to the facts of the case." Ibid.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), this Court explained that the admission of proffered expert scientific testimony under Rule 702 depends, as a threshold matter, on a determination of whether the proffered testimony is based on reliable "scientific knowledge" and whether it "will assist the trier of fact to understand or determine a fact in issue." Id. at 592. The Court further explained that a court assessing a proffer of scientific testimony under Rule 702 should also be mindful of other applicable rules -- such as Federal Rule of Evidence 403, which permits the exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of * * * unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403; see Daubert, 509 U.S. at 595.

This Court has additionally made clear that a district court has "broad latitude" in determining whether to admit or exclude expert testimony under Daubert based on "the particular circumstances of the particular case at issue." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142, 150 (1999). A court's determination of whether to admit expert testimony is reviewed for abuse of that discretion, see id. at 141-142, and appellate courts accordingly owe "deference" to a trial court's assessment of the value of that testimony, General Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997).

b. The court of appeals correctly applied those principles in concluding that the district court here did not abuse its discretion in excluding petitioner's proffered expert testimony under Rule 702 and Daubert. Pet. App. A14-A15. The district court determined that the testimony met Daubert's first requirement because it is "scientific evidence." 2/18/16 Tr. 40. But the court found that, "in this case," Daubert's second requirement was not satisfied because the evidence "would not assist the trier of fact in determining the facts at issue." Id. at 48.

The district court examined prior cases in which expert evidence on eyewitness identification had been excluded. 2/18/16 Tr. 39-43. It explained that, as in those cases, petitioner here had "used the powerful tool of cross-examination" to highlight various reasons to doubt Garcia's identification. Id. at 40. It described in detail the cross-examinations of Garcia and Detective Rodriguez regarding that identification and found that, "in this case," with the benefit of cross-examination and in-person observation of the witnesses, the jury could "determine the issues of common understanding" and could "comprehend for themselves" issues relating to the "reliability and memory of [Garcia]" in identifying petitioner as well as "the truthfulness or lack of truthfulness of [Garcia] in terms of his identification of [petitioner]." Id. at 48; see id. at 43-47.

The court of appeals thus correctly determined that the district court "d[id] not abuse its discretion when it exclude[d]

expert testimony on eyewitness identification'" on the basis that it would not be "helpful to the jury." Pet. App. A14 (quoting United States v. Smith, 122 F.3d 1355, 1359 (11th Cir.) (per curiam), cert. denied, 522 U.S. 1021 (1997)). Petitioner contends that "expert testimony on eyewitness identification should be presumed admissible under Rule 702" and Daubert. Pet. 14 (capitalization and emphasis omitted); see Pet. 14-16. Nothing in Rule 702 or Daubert, however, supports such a blanket presumption. The determination of whether particular expert testimony "will assist the trier of fact to understand or determine a fact in issue," Daubert, 509 U.S. at 592, is appropriately determined based on the facts, issues, and existing evidence in a particular case. The categorical presumption that petitioner proposes would also be in considerable tension with the "broad latitude" of district courts to assess the value of expert evidence given the "particular circumstances of the particular case at issue." Kumho Tire Co., 526 U.S. at 142, 150; see United States v. Moore, 786 F.2d 1308, 1312-1313 (5th Cir. 1986) ("Although admission of expert eyewitness testimony is proper, there is no federal authority for the proposition that such testimony must be admitted.").

Petitioner additionally argues (Pet. 16-21) that the district court erred in its assessment of the degree to which his proffered expert testimony would have assisted the jury in this case. But that factbound disagreement with the court's application of Rule 702 and Daubert to the evidence in this case does not warrant this

Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

c. Petitioner errs in contending (Pet. 11-14) that review is warranted to resolve a conflict among the courts of appeals on the standard for admitting expert testimony on eyewitness identification. The court of appeals' unpublished decision here does not conflict with any other court of appeals' decision.

i. The courts of appeals broadly agree that, under Rule 702 and Daubert, "the admission" of expert testimony on eyewitness identification "is a matter of case-by-case discretion." United States v. Rodríguez-Berrios, 573 F.3d 55, 71 (1st Cir. 2009), cert. denied, 559 U.S. 905 (2010); see, e.g., United States v. Lumpkin, 192 F.3d 280, 289 (2d Cir. 1999); United States v. Stevens, 935 F.2d 1380, 1400-1401 (3d Cir. 1991); United States v. Harris, 995 F.2d 532, 534-535 (4th Cir. 1993); Moore, 786 F.2d at 1312-1313; United States v. Smithers, 212 F.3d 306, 314 (6th Cir. 2000); United States v. Hall, 165 F.3d 1095, 1105-1107 (7th Cir.), cert. denied, 527 U.S. 1029 (1999); United States v. Kime, 99 F.3d 870, 884-885 (8th Cir. 1996), cert. denied, 519 U.S. 1141, and 520 U.S. 1220 (1997); United States v. Rincon, 28 F.3d 921, 923-926 (9th Cir.), cert. denied, 513 U.S. 1029 (1994); United States v. Rodriguez-Felix, 450 F.3d 1117, 1124-1126 (10th Cir.), cert. denied, 549 U.S. 968 (2006); Smith, 122 F.3d at 1358 ("[A] district

court does not abuse its discretion when, after examining the proffered [expert] testimony, the court excludes it.”).

Courts have considered various factors in deciding whether a district court in a given case abused its discretion in excluding expert testimony about eyewitness identification. For example, some courts have indicated that such testimony may be helpful to the jury where the identification was cross-racial; where the identification was made after a long delay; where the eyewitness was under stress at the time of his initial observation of the suspect; or where the identification could have been unconsciously influenced by the eyewitness's discussions with other witnesses. See, e.g., Rodriguez-Berrios, 573 F.3d at 72; Rodriguez-Felix, 450 F.3d at 1124; Harris, 995 F.2d at 535; United States v. Smith, 736 F.2d 1103, 1106 (6th Cir.) (per curiam), cert. denied, 469 U.S. 868 (1984). Courts also have considered whether cross-examination would be sufficient to raise potential problems with the reliability of the identification; whether jury instructions could adequately bring those issues to the jury's attention; and whether the eyewitness identification was corroborated by other evidence, including other eyewitness testimony. See, e.g., Rodriguez-Berrios, 573 F.3d at 72; Rodriguez-Felix, 450 F.3d at 1126; Hall, 165 F.3d at 1107; Kime, 99 F.3d at 885; Rincon, 28 F.3d at 925; Harris, 995 F.2d at 535; Moore, 786 F.2d at 1313; United States v. Downing, 753 F.2d 1224, 1242-1244 (3d Cir. 1985).

ii. Relying principally on United States v. Smith, supra, and cases citing it, petitioner argues that the Eleventh Circuit has rejected that consensus and adopted a "rule of per se exclusion" of expert testimony on eyewitness identification. Pet. 13; see Pet. 11. Petitioner is mistaken, and in any event the court of appeals did not apply such a rule here.

In Smith, the Eleventh Circuit explained that its pre-Daubert precedent had "looked unfavorably on" expert testimony on eyewitness identification. 122 F.3d at 1357. As Smith explained, in United States v. Thevis, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008, 458 U.S. 1109, and 459 U.S. 825 (1982), superseded on other grounds by Fed. R. Evid. 804(b), the court (when it was part of the Fifth Circuit) held "that a district court does not abuse its discretion when, after examining the proffered testimony, the court excludes it." Smith, 122 F.3d at 1358. Smith further explained that, in other pre-Daubert decisions after Thevis, the court had further "held that expert testimony regarding eyewitness reliability is inadmissible per se," id. at 1358 (citing United States v. Holloway, 971 F.2d 675, 679 (11th Cir. 1992), cert. denied, 507 U.S. 962 (1993), and United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984), cert. denied, 471 U.S. 1137 (1985)), in accord with what was then the "nearly unanimous stance taken by other circuits," id. at 1357.

In Smith itself, which was decided after Daubert, a defendant who challenged exclusion of expert testimony on eyewitness

identification argued that "Daubert lowered the standard for admissibility of expert evidence" and thus required revisiting that earlier precedent. 122 F.3d at 1358 (brackets and internal quotation marks omitted). The Eleventh Circuit in Smith explained, however, that it "need not decide whether the post-Thevis per se inadmissibility rule decisions conflict with Daubert, because" its "holding in Thevis" -- that a district court, "after examining the proffered [expert] testimony," has discretion to exclude it -- "is in accord with Daubert" and was dispositive in the circumstances presented in Smith. Ibid. The district court in Smith had determined that the proffered evidence would not "assist the trier of fact in th[at] case," and the court of appeals determined that the district court had not abused its discretion in making that case-specific determination. Ibid.; see id. at 1358-1359. Smith thus did not establish or reaffirm a "rule of per se exclusion," Pet. 13; to the contrary, it expressly reserved judgment on the compatibility of such a rule with Daubert.

Likewise, in this case, the court of appeals did not adopt or apply a "rule of per se exclusion," Pet. 13, of expert testimony on eyewitness identification, Pet. App. A14-A15. The court cited Smith and Thevis for the proposition that a district court does not abuse its discretion when it excludes such evidence on the basis that it will not be helpful to the jury. Id. at A14. The court of appeals' decision affirming the district court's factbound ruling here thus does not implicate any disagreement on

the broader issue petitioner raises about the admissibility of expert evidence on eyewitness identification.

To the extent petitioner additionally contends (Pet. 11) that review is warranted because the Eleventh Circuit applies a more parsimonious standard of review than other circuits -- under which a district court's decision to exclude expert testimony about eyewitness testimony "is never an abuse of discretion," Pet. 14 -- he is mistaken. Even assuming that Smith and the unpublished decisions cited by petitioner (Pet. 11) could be read as disposing altogether with any case-specific abuse-of-discretion review, but see Smith, 122 F.3d at 1358-1359 (affirming decision to exclude evidence where district court found that the proffered testimony "w[ould] not assist the trier of fact in this case to understand and determine a fact in issue"), this case would be an unsuitable vehicle to resolve any conflict on the precise contours of abuse-of-discretion review in this context. The district court excluded petitioner's proffered expert evidence based on its detailed assessment of the assistance that such evidence would provide to the jury in deciding the issues in this particular case, in light of the evidence already in the record. 2/18/16 Tr. 39-48. Petitioner identifies no court of appeals that would have found that the district court abused its discretion in excluding the testimony based on that finding, and a decision by this Court rejecting a rule that it is never an abuse of discretion to exclude

expert testimony about eyewitness identification would be highly unlikely to alter the outcome here.²

2. a. The court of appeals also correctly rejected petitioner's challenge to the jury instruction on eyewitness identifications. Pet. App. A15-A17. As it explained, the instruction given, viewed as a whole, fairly and correctly stated the issues and the law. Ibid. The instruction stated that the jury must decide both whether the eyewitness was telling the truth and also how accurate the eyewitness identification was. D. Ct. Doc. 117, at 7. It provided a non-exhaustive list of questions the jurors could ask themselves in making that determination:

- 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?

² Petitioner cites (Pet. 12) Smithers, supra, but in that case the Sixth Circuit reversed the exclusion of expert testimony because the district court had "fail[ed] to apply the Daubert test" at all. 212 F.3d at 315. He also cites (Pet. 12 n.5) United States v. Brownlee, 454 F.3d 131 (3d Cir. 2006), but it likewise is inapposite. In Brownlee, the district court had admitted expert testimony about certain issues relating to eyewitness identification but excluded it on other issues. Id. at 140. The Third Circuit held that, in the particular circumstances of that case, excluding the expert testimony on the latter issues was an abuse of discretion because "expert testimony was the only method" by which the defendant could present a critical part of his defense to the jury. Id. at 144.

- Did anything affect the witness's ability to focus on the person?
- Did the witness know or see the person at an earlier time?

Ibid. The instruction also noted that the jury could "consider the circumstances of the identification" of petitioner, "such as the way [petitioner] was presented to the witness for identification and the length of time between the crime and the identification." Ibid.

As the court of appeals explained, although the district court declined to give petitioner's proposed seven-and-a-half page instruction on this issue, the instruction the court gave "substantially covered the instruction suggested by [petitioner]." Pet. App. A17. The court of appeals correctly rejected petitioner's contention "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." Id. at A16. Instead, the court of appeals appropriately reasoned that "[i]t 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." Id. at A16-A17. Because the district court's instruction did so here, the court of appeals correctly rejected his challenge. Ibid.

b. Petitioner contends (Pet. 22) that this Court's review is warranted because the courts of appeals have sent "conflicting signals" on whether jury instructions should incorporate social-science findings on the reliability of eyewitness identifications. See Pet. 22-23. That contention lacks merit. Petitioner identifies no court of appeals that would have found the jury instruction given here to be reversible error on the basis that it did not sufficiently incorporate the findings of social-science research. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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