NO: 17-7412

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

REPLY TO BRIEF IN OPPOSITION

Timothy Cone
Counsel for Petitioner Grace
1150 Connecticut Avenue, N.W. 9th floor
Washington, D.C. 20036
Tel. (202) 862-4333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

ARGUMENT

1. The government incorrectly asserts that the Eleventh Circuit's position on expert testimony regarding the reliability of eyewitness identifications "does not conflict with any decision of . . . another court of appeals."

The Eleventh Circuit, in *United States v. Holloway*, summarily rejected a defendant's argument that the trial court abused its discretion by denying a motion in limine to admit the testimony of an expert in eyewitness identification, stating: "This argument is without merit. The established rule of this circuit is that such testimony is not admissible." 971 F.2d 675, 679 (11th Cir. 1992) (citing *United States v. Benitez*, 741 F.2d 1312, 1315 (11th Cir. 1984) and *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. Unit B)). Subsequently, the Eleventh Circuit confirmed that "expert testimony regarding eyewitness reliability is inadmissible per se." *United States v. Smith*, 122 F.3d 1355, 1358 (11th Cir. 1997) (citing *Holloway*, 971 F.2d at 679, and *Benitez*, 741 F.2d at 1315).

In *United States v. Harris*, the Fourth Circuit contrasted the Eleventh Circuit's position that "expert testimony on eyewitness identification [is] per se inadmissible" with "the trend in recent years" in other circuits (and in State courts) to permit such testimony to be admitted. 995 F.2d 532, 535 (4th Cir. 1993) (citing, *inter alia*, *Holloway*, 971 F.2d at 679; *United States v. Downing*, 488 F.2d 1148, 1152-53 (3d Cir. 1985)).

More recently, a dissenting opinion to an Eleventh Circuit decision noted that the Eleventh Circuit has held that the 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).

Recent law review articles identify the Eleventh Circuit as "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); 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.").

Based on the above authorities, in the first question presented in his Petition for a Writ of Certiorari, Grace urged this Court to resolve the Circuit conflict regarding the admissibility of eyewitness identification expert testimony. Pet. 11-13

Notwithstanding the above authorities, the government's Brief in Opposition to Grace's Petition ("Brief in Opp.") ventures that no conflict exists, claiming that all circuits "broadly agree" that the admission of expert testimony "is a matter of case-by-case discretion." Brief in Opp. 13 (citation omitted). Clearly, the government misreads Eleventh Circuit precedent.[1]

The government heavily relies on *United States v. Smith*, 122 F.3d 1355, to attempt to argue that the Eleventh Circuit does not have a per se rule. Brief in Opp. 14-17. This interpretation of *Smith* is mistaken. In *United States v. Rodriguez-Felix*, the Tenth Circuit cited *Smith* as "reaffirming

[1] Eleventh Circuit aside, the government's claim that the Circuits "broadly agree" on the standard for admitting expert testimony on eyewitness identification downplays significant disagreements among Circuits that do not per se exclude this testimony. *See* Tallent, *Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 Wash. & Lee L. Rev. at 786-87 (distinguishing "a small group of Circuits [that] takes a more progressive approach and generally favors admission" from other Circuits that "favor or presume exclusion . . . in all but the most 'narrow' of circumstances.").

earlier precedent creating a per se rule of inadmissibility," contrasting the Eleventh Circuit's position with "the majority of other circuits [that] reject per se exclusion." 450 F.3d 1117, 1124-25 (10th Cir. 2006) (citing *Smith*, 122 F.3d at 1357-59).

Contrary to the government's contention, *Smith* confirms that Eleventh Circuit precedent leaves no room for an Eleventh Circuit panel to reverse a district court for excluding expert testimony on eyewitness identification; appellate review in the Eleventh Circuit is not "a matter of case-by-case discretion."

In *Smith*, the defendant argued that the district court abused its discretion in excluding defense expert testimony regarding eyewitness reliability. 122 F.3d at 1357. Rejecting this argument, *Smith* stated:

> This Court has consistently looked unfavorably on such testimony. In *United States v. Thevis*, 665 F.2d 616, 641 (5th Cir. Unit B), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L. Ed.2d 61 (1982), we held that the district court had not abused its discretion in excluding expert testimony regarding eyewitness reliability. Furthermore, we stated:
>
>> To 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. Moreover, we conclude, as did the trial judge, that the problems of perception and memory can be adequately addressed in cross-examination and that the jury can adequately weigh these problems through common-sense evaluation.
>
> *Id*. That attitude of disfavor continued in later cases, where this Court extended *Thevis* and held that expert testimony regarding eyewitness reliability was inadmissible.

122 F.3d at 1357 (emphasis added) (citing *Holloway*, 971 F.2d at 679 and *Benitez*, 741 F.2d at 1315).

Having thus expressly relied on the Circuit precedent that "held that expert testimony regarding eyewitness reliability was inadmissible," the *Smith* opinion went on to address the defendant's request that the Eleventh Circuit "reconsider its stance in light of the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and in light of nascent case law more receptive to expert testimony on eyewitness reliability." 122 F.3d at 1358. Before turning to *Smith*'s grounds for rejecting the defendant's arguments, it bears emphasis that these arguments by the defendant in *Smith* were asking the Eleventh Circuit to *reconsider* precedent. In other words, unless reconsidered, Circuit precedent continued to hold, in the words of the *Smith* opinion, that such expert testimony "was inadmissible." 122 F.3d at 1357 (citations omitted).

The *Smith* opinion stated:

> We have *held* that a district court does not abuse its discretion when, after examining the proffered testimony, the court excludes it. *Thevis*, 665 F.2d at 641. Most recently, we have *held* that expert testimony regarding eyewitness reliability *is inadmissible per se*. *Holloway*, 971 F.2d at 679; *Benitez*, 741 F.2d at 1315. We need not decide whether the post-*Thevis* per se inadmissibility rule decisions conflict with *Daubert*, because we conclude that our holding in *Thevis* is in accord with *Daubert*, and *that is all that is necessary to dispose of an appeal in which a district court has excluded the proffered testimony*.

Smith, 122 F.3d at 1358 (emphasis added).

Smith concluded that there was no conflict between *Daubert* and the district court's ruling that expert testimony would not be "helpful" to the jury. *Id*. at 1358-59 & n. 1. *Smith* stated:

> [the Court] reasoned in *Thevis* that expert testimony was not needed, because the jury could determine the reliability of eyewitness identification with the tools of cross-examination. Expert testimony that does not assist the trier of fact can be excluded under *Daubert*.

> . . . *Thevis* held that expert testimony regarding eyewitness reliability does not assist the jury, and we conclude that that holding is in harmony with *Daubert*. Therefore, it is as true after *Daubert* as it was before that a district court does not abuse it[s] discretion in excluding such testimony.

Id. at 1358-59 (emphasis added).

Smith then turned to the defendant's reliance on "an emerging body of case law" from *other Circuits* which had held that expert testimony on eyewitness reliability "would be admissible," and had reversed a district court for excluding this expert testimony. 122 F. 3d at 1359 (citing cases from the Third and Fourth Circuits). Rejecting this reliance on cases from other Circuits, the Eleventh Circuit stated: "we are not free to judge the *Thevis* rule in light of case law from other circuits." *Id*. *Smith* added:

> Whatever effect *Daubert* may, or may not, have had on our post-*Thevis* decisions in *Holloway* and *Benitez*, it did not vitiate *Thevis*' holding that a district court does not abuse its discretion when it excludes expert testimony on eyewitness identification. Of course, defendants who want to attack the reliability of eyewitness recollection are free to use the powerful tool of cross-examination to do so. They may also request jury instructions that highlight particular problems in eyewitness recollection. Smith did in the present case and was successful in getting the district court to instruct the jury about cross-racial identification, potential bias in earlier identifications, delay between the event and the time of identification, and stress.

122 F.3d at 1359. Thus, in rejecting a challenge to the exclusion of expert testimony on eyewitness identification, the Eleventh Circuit in *Smith* expressly stated that it remained bound by its (former Fifth Circuit) precedent in *Thevis*.

In the unpublished decision in the present case, the Eleventh Circuit quoted *Smith*'s holding that "a district court does not abuse its discretion when it excludes expert testimony on eyewitness identification." A14. This statement does not suggest that the Eleventh Circuit panel in this case believed that its precedent gave it a basis for reversing the district court's exclusion of Grace's proffered expert testimony on eyewitness identification. To the contrary, the decision added: "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 or until they are overruled by the Supreme Court or this Court sitting en banc." *See* Pet. App. A-14-15.

The government focuses on the following statement in *Smith* : "[w]e need not decide whether the post-*Thevis* per se inadmissibility rule decisions conflict with *Daubert*." Brief in Opp. 16. The government interprets this statement as "reserv[ing] judgment on the compatibility of such a rule with *Daubert*." Brief in Opp. 16. But, in the context of the full *Smith* opinion, the contrary is true, as the Seventh Circuit made clear in its citation to *Smith* in *United States v. Hall*, 165 F.3d 1095, (7th Cir. 1999).

In *Hall*, the Seventh Circuit addressed the defendant's argument that, based on *Daubert*, it should "reassess" its precedent that "strongly disfavored" the admission the expert testimony on eyewitness identification. *Id*. at 1106. Rejecting this argument, the Seventh Circuit noted that its precedent had "consistently" held that eyewitness identification expert testimony "will not 'assist the trier of fact' under Rule 702." *Id*. Because *Daubert* required expert testimony to "assist the trier of fact," *Daubert* "[left] intact our pre-*Daubert* caselaw interpreting this issue." 165 F.3d at 1106 (citing *Daubert*, 509 U.S. at 592). In support of this conclusion, the Seventh Circuit immediately cited the Eleventh Circuit's statement in *Smith* that "*Thevis* [a pre-*Daubert* decision] held that expert testimony regarding eyewitness reliability does not assist the jury, and we conclude that that holding is in harmony with *Daubert*. Therefore, it is as true after *Daubert* as it was before that a district court does not abuse it[s] discretion in excluding such testimony." *Id*. at 1106 (quoting *Smith*, 122 F.3d at 1359).

The holding in *Smith*, based on *Thevis*, was that expert testimony on the reliability of eyewitness identifications is not helpful to the jury and therefore inadmissible. In full, the sentence cited by the government stated: "We need not decide whether the post-*Thevis* per se inadmissibility rule decisions conflict with *Daubert*, because we conclude that our holding in *Thevis* is in accord with *Daubert*, and *that is all that is necessary to dispose of an appeal in which a district court has excluded the proffered testimony*." 122 F.3d at 1358. Thus, post-*Daubert*, in a case where a district court has *excluded* the proffered expert testimony, *Thevis* was "all that is necessary" to reject an argument that the district court abused its discretion.

Neither *Smith* nor a subsequent Eleventh Circuit decision undermined the per se rule of exclusion applied in *Holloway* and *Benitez*. As a result, the conflict between the Eleventh Circuit's per se rule and other Circuits persists. And it exists today regardless of whether in the future the Eleventh Circuit might reconsider the compatibility of its *per se* rule of exclusion with *Daubert*.[2]

2. The district court's ruling in the case was not a "factbound ruling."

The government claims that the district court here made a "factbound ruling" that "does not implicate any disagreement [among the Circuits]." Brief in Opp. 16-17. The government further

---

[2] The government's claim (Brief in Opp. 16) that the Eleventh Circuit might revisit whether there is an "incompatibility" between *Daubert*, on the one hand, and the Circuit's per se prohibition on eyewitness identification, on the other, does not accord with reality. In more than 20 years since *Smith*, no defendant has argued successfully (or, most likely, at all) that *Daubert* overrules Eleventh Circuit precedent on eyewitness identification expert testimony. Under the Eleventh Circuit's prior panel precedent rule, an intervening decision of the Supreme Court must effectively *overrule* a prior panel decision in order to render this precedent infirm. *See Smith*, 122 F.3d at 1359 (discussing the standard for reconsidering Circuit precedent based on an intervening Supreme Court decision).

claims that the Eleventh Circuit, in turn, merely held that the district court "'did not abuse its discretion when it exclude[d] expert testimony on eyewitness identification'" on the basis that this testimony would not be "helpful to the jury." Brief in Opp. 11-12. In sum, the government claims that the district court's "factbound" ruling, coupled with the Eleventh Circuit's review, indicates that the Eleventh Circuit's position is consistent with the view of other Circuits, which also consider whether the testimony "may be helpful to the jury." Brief in Opp. 14. This is incorrect.

The Eleventh Circuit itself summarized the district court's ruling as follows: "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), and 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." Pet. App. A-9 (emphasis added). Clearly, the district court here did not make a "factbound ruling."

First, a district court does not make a "factbound ruling" when it precludes testimony based on "prior precedent" from the Court of Appeals that holds that such testimony is "not admissible." Pet. App. A-9.

Second, the district court's conclusion that "cross examination was a sufficient tool to address any problems with the eyewitness identification in this case," Pet. App. A-9, echoed the reasoning of *Thevis* "that the problems of perception and memory can be adequately addressed in cross-examination and that the jury can adequately weigh these problems through common-sense evaluation." 665 F.2d at 641; *accord Smith*, 122 F.3d at 1359 ("defendants who want to attack the reliability of eyewitness recollection are free to use the powerful tool of cross-examination to do so."). The district court's adoption of the reasoning of a prior appellate court decision is not a "factbound" ruling, but is legal reasoning – legal reasoning that, here, squarely conflicts with the reasoning in other Circuits that cross-examination is "not an effective substitute" for expert testimony. *Ferensic v. Birkett*, 501 F.3d 469, 482 (6th Cir. 2007) (citation omitted).

Third, the district court's was not making a "factbound ruling" when it determined that expert testimony would not be "helpful to the jury." The requirement that expert testimony assist the trier of fact applies to *all* expert testimony, under Federal Rule of Evidence 702. *See Daubert*, 509 U.S. at 591. The Eleventh Circuit has "held that expert testimony regarding eyewitness reliability does not assist the jury." *Smith*, 122 F.3d at 1359 (citing *Thevis*). Thus, the Eleventh Circuit's per se rule governing expert testimony on eyewitness identification is not "factbound," but, to the contrary, lodged in an essential legal requirement for admissibility. *See* Fed. R. Evid. 702(a). As a result of this Eleventh Circuit precedent, "the exclusion of such expert testimony can never be – regardless of the circumstances – an abuse of discretion" – that is, the Eleventh Circuit's rule operates "as a one-way evidentiary ratchet to insulate exclusions of this type of expert testimony from meaningful appellate review." *Whatley*, 719 F.3d at 1224-25 (Jordan, J., dissenting).

3. Contrary to the government's contention, other Circuits could have held that the district court in this case abused its discretion in excluding expert testimony on eyewitness identification.

In an alternative argument, the government accepts (for the sake of argument) that the Eleventh Circuit "applies a more parsimonious standard of review than other circuits," – *i.e.*, that Eleventh Circuit precedent "could be read as disposing altogether with any case-specific abuse-of-discretion review." Brief in Opp. 17. Even so, the government insists, the present case would be "an unsuitable vehicle" to resolve the Circuit conflict, because "no court of appeals would have found that the district court abused its discretion in excluding the [expert] testimony on eyewitness identification." Brief in Opp. 17. The argument is unpersuasive.

First, the government frames the question incorrectly. Clearly, a per se rule conflicts with a rule that requires adjudication on a case-by-case basis. *See* Brief in Opp. 13 (claiming that no conflict exists because all Circuits "broadly agree" that this "is a matter of *case-by-case* discretion." (emphasis added). By "disposing altogether with any case-specific abuse-of-discretion review," the Eleventh Circuit's position conflicts with other Circuits not only in cases where other Circuits "would have" found an abuse of discretion in Grace's case, but, more broadly, in all cases, like Grace's, where other Circuits *could have* found an abuse of discretion, because these Circuits evaluate the issue on a case-by-case basis.

And other Circuits certainly could have found an abuse of discretion in Grace's case. Tellingly, the government does not argue that if, in this case, the district court erroneously excluded the expert testimony on eyewitness identification, this evidentiary ruling was harmless error. *See* Pet. 9, n. 3. As the government's own summary of the evidence makes clear, pizza delivery driver Garcia's identification of Grace as his assailant was crucial evidence. Brief in Opp. 4.[3] In Circuits outside the Eleventh Circuit, it would be an abuse of discretion for a district court to exclude expert testimony on eyewitness identification when this eyewitness identification was crucial to conviction. In *United States v. Brownlee*, 454 F.3d 131, 140-44 (3d Cir. 2006), as the government recognizes,

---

[3] For the record, Grace notes that the government's description of Garcia's identification does 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 correctly recognized the assailant, telling Garcia "This is the picture, but anyway, I'm going to show you the rest of the pictures," and adding that the person Garcia had just recognized had been arrested and detained. Pet. 9, n. 2.

the Third Circuit found an abuse of discretion in the exclusion of expert testimony because this testimony was "a critical part" of the defense. Brief in Opp. 18, n. 2 (citing *Brownlee*, 454 F.3d at 144); *see also United States v. Mathis*, 264 F.3d 321, 339-42 (3d. Cir. 2001) (holding that the district court abused its discretion by not admitting expert eyewitness identification testimony into evidence). In the Sixth Circuit, this exclusion can be reversible error. *See United States v. Smithers*, 212 F.3d 306, 311-18 (6th Cir. 2000) (reversing conviction because district court erred in not admitting eyewitness-identification expert testimony, when eyewitness testimony was the "crucial" basis for conviction).

4. Question 2 in Grace's Petition warrants review by this Court.

Question 2 of Grace's Petition presented the following question for review by this Court: "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?" Pet. i. Grace pointed out that the Courts of Appeals send "conflicting signals" on this issue, because some now encourage district courts to include the recent conclusions of social science in their instructions, while a majority cling to outdated instructions that do not incorporate these conclusions. Pet. i.

The government responds, first, by adopting the Eleventh Circuit's view that the district court in this case correctly refused to give Grace's proposed jury instructions on eyewitness identification because "[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 argument to suggest other questions that may be relevant to evaluating the particular eyewitness identification in a given case." Brief in Opp. 18-19 (quoting Pet. App. A16-A17). But this is "no longer 'enough.'" Pet. 27. As Chief Judge McKee wrote in his concurring opinion in *Dennis v. Sec.*

Pennsylvania Dep't of Corrections, a "plain vanilla" instruction that does not incorporate the findings of social science studies fails to give juries necessary guidance regarding the factors that affect the reliability of eyewitness identification. 834 F.3d 263, 342 (3d Cir. 2016) (McKee, J., concurring). Chief Judge McKee's wrote this lengthy concurrence "to underscore . . . the inadequacies of our standard jury instructions [relating to eyewitness testimony]." *Id*. at 313-14 ("the law has not caught up to the science."); *accord State v. Guilbert*, 306 Conn. 218, 258, 49 A.2d 705, 735 (Conn. 2012) (directing trial courts to instruct juries on eyewitness identification based on "conclusions of the relevant scientific literature," and holding that the earlier "broad, generalized instructions on eyewitness identification . . . previously approved by this court . . . do not suffice.");

The government, next, faults Grace for failing to identify a Circuit "that would have found the jury instructions given here to be reversible error on the basis that it did not sufficiently incorporate the findings of social-science research." Brief in Opp. 20. But Grace's petition identified the First and Second Circuits as Circuits that encourage district courts to address the conclusions of social science research in their eyewitness identification jury instructions. Pet. 22 (citing *United States v. Jones*, 689 F. 3d 12, 16, 20 (1st Cir. 2012) (noting approvingly the "extensive" jury instructions on eyewitness identification, that referenced studies that addressed the effects of stress, cross-racial identification and "studies [that] show that the reliability of an identification doesn't really depend upon how positive the person is."); *Young v. Conway*, 698 F.3d 69, 79 (2d Cir. 2012) (noting that the Second Circuit has approved lower courts' drawing upon the social science literature on eyewitness identification)).

Grace further noted (Pet. 24) that in *United States v. Hall*, Judge Easterbrook wrote separately to encourage trial judges to incorporate scientific knowledge into their jury instructions regarding eyewitness identification. 165 F.3d 1095, 1120 (7th Cir. 1999) (Easterbrook, J. concurring). The Seventh Circuit's Pattern Criminal Jury Instructions cite to Judge Easterbrook's concurrence in *Hall*. Pattern Criminal Jury Instructions of the Seventh Cir. (2012 ed.), at § 3.12 (cited at Pet. 24). In addition, as just noted, Chief Judge McKee similarly endorsed giving such instructions in his *Dennis* concurrence. 834 F.3d at 342 (McKee, J., concurring).

In Circuits that have approved and encouraged jury instructions that incorporate social science research, a district court's refusal – as here – to instruct a jury on these factors certainly could have been reversible error. *Cf. Wilson v. Town of Mendon*, 294 F.3d 1, 14 (1st Cir. 2002) ("A trial court's refusal to give a particular instruction constitutes reversible error only if the requested instruction was (1) correct as a matter of substantive law, (2) not substantially incorporated into the charge as rendered, and (3) integral to an important point in the case.") (brackets and citations omitted); *United States v. Quinones*, 511 F.3d 289, 314 (2d Cir. 2007) (reversal for jury instruction occurs when the instruction "either failed to inform the jury adequately of the law or misled the jury about the correct legal rule").

Finally, the government leaves wholly unaddressed Grace's request that this Court exercise its supervisory authority to direct trial courts to instruct juries on the factors, based on recent social science research, that affect the reliability of eyewitness identifications – as a number of State Supreme Courts have done in recent years. Pet. 32-33. The government's silence on this point might reflect the reality that for quite some time this Court has not exercised its supervisory authority over jury instructions in federal trial courts.

But this Court has this authority. *See* Pet. 33, n. 13. In *Jones v. United States*, this Court recognized its authority, but cited to several State Supreme Court decisions that had declined to require a requested jury instruction as a basis for not exercising its supervisory powers to require that this instruction be given in federal cases. 527 U.S. 373, 383 (1999) (citations omitted). Here, however, to the contrary, the trend among State Supreme Courts is to require the jury instruction at issue; correlatively, therefore, it would be appropriate for this Court to consider whether it should likewise exercise its supervisory authority to this same end. *See* Pet. 32-33.

The conditions are right for the exercise of this authority.

First, a number of jurists view jury instructions on eyewitness identification as a more efficient way than expert testimony to convey the conclusions of social science to a jury. *Hall*, 165 F.3d at 1118-19 (Easterbrook, J. concurring) (noting the advantages of communicating social science conclusions to the jury through jury instructions rather than through "a barrage of expert testimony"); *Guilbert*, 306 Conn. at 281-82, 49 A.3d at 749 (noting the "imperfections and deficiencies" of expert testimony compared to more "focused and concise" jury instructions) (citing *State v. Henderson*, 208 N.J. 208, 298, 27 A.3d 872, 926 (2011)); Christian Sheehan, *Making the Jurors the "Experts": The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. Rev. 651 (2011) ("Expert testimony increases the length and costs of trials in a way that jury instructions do not."); Kelly McKay, *Note, Educating a Jury on Eyewitness Testimony: Using Jury Instructions is a Better Approach than Expert Testimony*, 37 N. Ill. U. L. Rev. 175,195 (2016) ("Jury instructions are the best method for educating the jurors because they 'can easily be incorporated into a trial.'") (quoting Derek Simmonsen, *Teach Your Juror Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Identification*, 70 Md. L Rev. 1044, 1080 (2011)).

Thus, were this Court to grant certiorari review on Question 2 presented in Grace's petition, and address federal jury instructions, it would preserve an option that is viewed by some as a better approach to educating juries on eyewitness identification reliability, compared to expert testimony, the issue presented in Question 1.

In addition, this question has lingered, and is lingering, unresolved, for too long. In many Circuits, the Circuit's pattern jury instructions cling to decades-old, outdated, jury instructions on eyewitness identifications. Pet. 22 ("the pattern eyewitness identification 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.").[4] *Cf.* McKay, *Using Jury Instructions is a Better Approach*, 37 N. Ill. U. L. Rev. at 201 (noting that Illinois' eyewitness identification instructions are based on caselaw that is more than 38 years old, and urging the State to adopt new instructions because "Illinois needs to keep up [with] the times.").

The law's delay here is attributable to the "law-science gap" – the reluctance of jurists to "conform[ ] their assumptions about human behavior to available social science." Girvan, *When Our Reach Exceeds Our Grasp*, 94 Or. L. Rev. at 362. Illustratively, in a case arising out of the District of Columbia municipal courts, the D.C. Court of Appeals affirmed as a "thoughtful exercise of discretion" the trial court's decision to refuse to give defense instructions based on the revised New Jersey instructions on eyewitness identification, and to "stick with the Red Book." *Corbin v. United States*, 120 A. 3d 588, 607 (D.C. 2015).

---

[4] Even in the Third Circuit which, in September 2016, shortly after the issuance of Chief Judge McKee's concurring opinion in *Dennis*, 834 F.3d at 342, created a Task Force charged with making recommendations regarding jury instructions on eyewitness identifications, at this writing no recommendations have issued, even though the Task Force was tasked with issuing its report by June 2017. *See* Third Circuit Task Force on Eyewitness identifications-Order (available at http://www.ca3.uscourts.gov/sites/ca3/files/TFEyewitnessIdOrder_11042016.pdf).

"When there is a gap between the legal doctrine and our best empirical understanding . . . this failure can threaten the accuracy, consistency, and legitimacy of the legal system." Girvan, *When Our Reach Exceeds Our Grasp*, 94 Or. L. Rev. at 417-18. Professor Girvan's concern is fully borne out in the present context. In *Perry v. New Hampshire*, 565 U.S. 228, 247, 132 S.Ct. 716, 728 (2012) (citation omitted), this Court acknowledged studies "showing that eyewitness misidentifications are the leading cause of wrongful convictions." *Accord id*. 565 U.S. at 263, 132 S.Ct. at 738-39 (Sotomayor, J., dissenting) ("The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification.").

In sum, both the persistence of the law's delay in making its jury instructions consistent with recent empirical conclusion, and the harm caused by this delay, counsel for an exercise of supervisory authority by this Court.

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: s/Timothy Cone
Timothy Cone
Counsel for Petitioner Grace

February 16, 2018
Washington, D.C.