

No. 05-596

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**In the Supreme Court of the United States**

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JOSE ANTONIO PEREZ,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Second Circuit**

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**REPLY BRIEF FOR THE PETITIONER**

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## REPLY BRIEF FOR THE PETITIONER

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Reasonable people might disagree about whether or under what circumstances this Court should promulgate binding, multi-factor tests, such as the one at issue here. But it ought to be beyond dispute that if and when this Court does so, the test should clearly accomplish its intended purpose. Concomitantly, lower courts should not be required to persist in employing a test whose empirical basis has, with the passage of time, been shown to be of dubious validity.

The government's main argument for retaining the witness-certainty test from *Neil v. Biggers*, 409 U.S. 188 (1972)—beyond a few “vehicle” contentions which, as we show below, are entirely without merit—is that a handful of studies exist that run counter to the prevailing view that the certainty factor is not an appropriate measure of an identification's reliability. The government's approach in essence establishes a presumption that would keep in place virtually indefinitely a standard that has long since been discredited by the great weight of authority.

The government's suggestion that the existence of a few outlying studies warrants retention of the witness-certainty factor should be rejected. Instead, the witness-certainty factor should be removed from the list of mandatory criteria that lower courts must consider when assessing the reliability of suggestive identifications.

The importance of the issue could not be greater. As the Innocence Network notes in its amicus brief in support of certiorari (at 16), mistaken identifications played a part in *over 75%* of known convictions for which the individual was later exonerated by DNA evidence. The *Biggers* witness-certainty factor is scientifically unsound, has been widely rejected, and leads to the conviction of innocent defendants. The continued admissibility of unreliable eyewitness evi-

dence undermines the integrity of the criminal justice system and subverts the twin goals of law enforcement: convicting the guilty and protecting the innocent. The petition should be granted.

**I. *Biggers*'s Witness-Certainty Test Is Unsound.**

The intuitive notion that courts should be more willing to allow into evidence an eyewitness identification when the witness is confident as to that identification is unsound. The government's counterarguments (Br. in Opp. 8–12) are largely based on a misinterpretation of our argument.

We do not argue that there is “‘no’ relationship” between witness certainty and accuracy of identification (Br. in Opp. 9 (quoting *Commonwealth v. Cruz*, 839 N.E.2d 324, 331 (Mass. 2005) (emphasis added))). As we acknowledge in the petition (at 6–7), some research shows that there may be a slight relationship between the two, such that a witness who is more certain as to an identification is somewhat more likely to be accurate in that identification. Other research has found there to be no correlation or has even found there to be a *negative* correlation. See Pet. 6. This variation alone is a sufficient basis for granting the Petition and removing the witness-certainty factor from *Biggers*. Lower courts should not be *required* to apply a standard that even the government would have to concede is not broadly and consistently viewed by the experts as reliable.

This is quite unlike a situation in which a *legal* question is subject to differing answers and thus amenable to further “percolation” in the lower courts. Here it is plain that, at a minimum, the witness-certainty factor is of dubious scientific validity. In these circumstances there is no justification for continuing to require lower courts to apply it.

Moreover, although it would be impractical (and probably unwise, from the standpoint of institutional competence) for petitioner or the government to ask this Court to undertake an independent assessment of the underlying science,

the evidence to which the government points is weak. For example, while the Wells and Olson article on which the government heavily relies notes that a meta-analysis by Sporer found a correlation between certainty and accuracy, it comments that it is “unclear” whether the result of this “meta-analysis of experiments can be directly applied to actual cases in which there are other influences that inflate the certainty of eyewitnesses.” See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANNU. REV. PSYCHOL. 277, 284 (2003), available at [http://www.psychology.iastate.edu/faculty/gwells/annual\\_review\\_2003.pdf](http://www.psychology.iastate.edu/faculty/gwells/annual_review_2003.pdf). And the sentence from the Mayer article quoted in part by the government (at 9–10 n.\*) actually states in full that “[a] few studies show that confidence level is a valid predictor of identification accuracy, while many others demonstrate that there is no correlation between certainty and reliability of the identification.” Connie Mayer, *Due Process Challenges To Eyewitness Identification Based On Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 852–53 (1994) (emphasis added).

The simple fact is that, even if there did turn out to be some small correlation between certainty and accuracy, it is—on the government’s own studies—sufficiently weak that it is likely to be misleading in a wide range of cases. Where else do we systematically draw judges’ and jurors’ attention to indicia that *even at best* have error rates of 30%? And where else do we draw attention to such a problematic indicator without providing the jury information about just how problematic an indicator it is?

Requiring the certainty factor to be considered leads to far too many “false positive” results, in which juries give excessive credence to a confident but inaccurate identification. It makes no sense to continue doing so. This Court should revisit *Biggers* and excise this scientifically and constitutionally problematic factor from the admissibility analysis.

## II. The Fact That No Court Has Expressly Refused To Follow *Biggers* In No Way Undermines The Case For Certiorari.

The government argues (Br. in Opp. 12–13) that certiorari is unwarranted because there is no division of authority in the lower courts. That is a red herring. As we explained in our petition, there can be no circuit split or other express division among the lower courts in this situation. As the government recognizes (*id.* at 12), the lower courts cannot overturn *Biggers*, and cannot ignore this Court’s holding in that case that witness certainty must be considered in deciding whether the admission of evidence violates the federal Due Process Clause.

It would make no sense for this Court to wait in vain for the lower courts to engage in lawless insurrection before granting review. And in fact state courts and lower federal courts have held that the empirical premise on which *Biggers* rested—the notion that witness certainty is substantially correlated with accuracy—has no basis. See Pet. 12–16.

While avoiding direct conflict with *Biggers*, as they must, state and federal courts alike have made plain their lack of confidence in the decision. Many of the state courts that have rejected the *Biggers* rule as a matter of state constitutional law have done so under general principles of due process contained in state constitutions. See Pet. 13–15 (discussing the holdings of *State v. Ramirez*, 817 P.2d 774, 780–781 (Utah 1991) (holding *Biggers* test is insufficient guarantee of due process under the Utah Constitution and adopting a “more empirically based” test); *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1260–1261 (Mass. 1995) (state constitution requires *per se* exclusion of unnecessarily suggestive identifications); *State v. Dubose*, 699 N.W.2d 582, 593–596 (Wis. 2005) (adopting a *per se* exclusion of unnecessarily suggestive line-ups unless the procedure was necessary under the totality of the circumstances)). Other state and federal

courts that have addressed the witness-certainty factor in contexts other than pre-trial admissibility hearings—and thus in instances in which *Biggers* is not controlling—have also been extremely critical of the witness-certainty factor.<sup>11</sup>

These courts have all recognized *Biggers*' shortcomings. But only this Court can reconsider *Biggers* as a matter of federal constitutional law. There is no reason to wait any longer to do so.

### **III. Petitioner's Claim Was Adequately Presented Below.**

The government argues (Br. in Opp. 13–15) that certiorari should be denied because petitioner's challenge to *Biggers* was not adequately presented to or preserved in the court of appeals. That assertion is flatly incorrect. Petitioner's opening brief in that court explicitly raised the issue, arguing that

the continuing viability of [the witness-identification] factor has been called into serious question by the numerous reported DNA exonerations of people who had been convicted, many of capital felonies, based on eyewitness identifications by people who were quite certain, but were nonetheless wrong.

2d Cir. Br. 47. The argument was reiterated in petitioner's reply brief in that court, which explained that the government

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<sup>11</sup> See, e.g., *Brodes v. States*, 614 S.E.2d 766, 771 (Ga. 2005) (holding that trial courts should not instruct juries to consider the witness's level of certainty “when instructing them on the factors that may be considered in deciding the reliability of [an] identification”); *State v. Ledbetter*, 881 A.2d 290, 311 (Conn. 2005) (criticizing the witness certainty factor as “particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness \* \* \* and the accuracy of that identification”). See also Pet. 14–16.

had failed to respond to the claim that the certainty factor was no longer viable and should be rejected “in light of currently-available scientific research demonstrating that there is virtually no correlation between the *certainty* expressed by a witness and the accuracy of the [sic] his/her identification.” 2d Cir. Reply Br. 12.

In fact, at oral argument in the Second Circuit, both parties argued about the viability of the certainty factor. The government did not claim that petitioner had waived the issue. Instead, it asserted that petitioner had raised “an interesting argument, [but] really not an argument that can be made here. \* \* \* Ultimately what defense counsel is asking [the Second Circuit] to do is to overrule *Neil v. Biggers*, which, obviously, is something that would put [that] court in difficult straits.”<sup>2</sup>

Judge Calabresi, too, specifically noted that this issue was presented by petitioner’s appeal but was not one on which the Second Circuit could grant relief. Defense counsel argued that “certainty has no relation to accuracy and I don’t think the Court can ignore the scientific evidence that’s now available.” In response, Judge Calabresi asked, “But can we bring *Biggers* into question, or is that something that only the Supreme Court can do?” A member of the panel appeared to agree that the certainty factor is problematic, noting that it is “interesting that it isn’t generally allowed to let a jury know just how frequently firm identifications turn out to be false.” And Judge Calabresi went on to note that, while trial courts might be able to scrutinize *Biggers* presentations with care,

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<sup>2</sup> The Second Circuit does not transcribe oral arguments, but audiotapes are available from that court. After consulting with the Supreme Court clerk’s office, in this brief we quote from our informal transcript of relevant portions of the oral argument. However, we would be glad to have the oral argument formally transcribed in its entirety were the Court to request it.

and “the Supreme Court could change the rule \* \* \* arguably the one court that can do very little about that is the court that’s in the middle”—the court of appeals.

Thus, the briefs and argument below clearly addressed the claim presented in the petition, and in any event the government has waived any objection by arguing the issue below without suggesting that it was not properly raised. The Second Circuit’s opinion is merely a straightforward application of *Biggers*, which—as the Second Circuit itself noted at oral argument—can be corrected only by this Court.<sup>3</sup>

**IV. The Government’s Speculation That The District Court Might Have Admitted The Eyewitness Identification Evidence Even Without Relying On The Witness Certainty Factor Is Unsupported And No Cause To Deny Review.**

The government also contends that this case is an improper vehicle for considering the question presented because, it asserts, there is “little doubt” that the district court would have admitted the identification evidence even if that court had not considered the witness’s certainty in his identification. See Br. in Opp. 15. That claim should be rejected, for two reasons.

First, this is sheer speculation on the part of the government. Neither the government nor this Court can know how

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<sup>3</sup> It is unsurprising that the Second Circuit did not specifically discuss the viability of the certainty factor in its summary order, because that court is, of course, “well aware of the Supreme Court’s admonition that if a Supreme Court precedent has direct application in a case before us, but rests on reasons [subsequently eroded], [the lower court] should follow the directly controlling case and leave to the Supreme Court the prerogative of overruling its own decisions.” *United States v. Logan*, 419 F.3d 172, 180–181 (2d Cir. 2005) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (internal quotation marks omitted)).

the district court would have weighed the remaining factors in assessing this concededly suggestive identification had it not been able to consider the witness's certainty in deciding whether to admit his testimony.<sup>4</sup> Thus, the appropriate course of action is for this Court to grant review to determine whether that factor should be considered *at all*, leaving it to the lower court, if necessary, to reweigh the various factors relevant to admissibility *after* this Court's review.

Second, the government's speculation that the witness-certainty factor might not have affected the admissibility of the eyewitness testimony in this case could be made in *every* case in which witness certainty is at issue. Thus, given the frequency with which eyewitness testimony is critical in criminal cases (see NACDL Amicus Br. 15–19; Innocence

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<sup>4</sup> The district court found that the huge, five-year lapse between the crime and the unconstitutionally suggestive identification procedure was “counterbalance[d]” by the other four *Biggers* factors, including the witness certainty factor. Pet. App. 19a. In particular, the court found that Lopez had a “significant opportunity” to view petitioner (*id.* at 16a), that his degree of attention added “some-what to the reliability of his identification” (*id.* at 17a), that the accuracy of his description weighed “slightly in favor” of reliability (*id.* at 18a), and that he had a “significant level of certainty” in his identification (*id.* at 19a).

The government asserts that the district court “appears to have placed the greatest weight” on the opportunity Lopez had to view the owner of the auto shop (Br. in Opp. 16), but that is pure speculation. What we do know from the district court's opinion is that it weighed the positive factors *together*. Pet. App. 19a. More importantly, that court found that both the witness's opportunity to view the owner of the auto shop and his level of certainty were “significant” factors in favor of finding reliability. *Ibid.* Because the court found that Lopez's level of certainty was a “significant” factor in favor of finding the identification reliable, the government cannot reasonably argue that it knows whether the lower court would have admitted the identification absent that factor.

Network Amicus Br. 16–19), and the evidence suggesting that eyewitness certainty is a highly problematic factor, the government’s speculation provides no reason not to grant review and revisit *Biggers* now, before more innocent defendants are convicted based on evidence that should have been excluded.

**V. The Admission Of The Eyewitness Identification Evidence In This Case Was Not Harmless Error.**

The government’s final argument is that the Court should not grant certiorari to consider the validity of the witness-certainty factor because, even if the identification evidence had been excluded, “there is little doubt” that petitioner would nonetheless have been found guilty based on other evidence. See Br. in Opp. 16. This argument is baseless.

In order for the government to prevail on its harmless error argument, it must demonstrate that the admission of the identification evidence was “harmless *beyond a reasonable doubt.*” *Chapman v. California*, 386 U.S. 18, 24 (1967) (emphasis added); see also *Neder v. United States*, 527 U.S. 1, 15 (1999); *United States v. Wade*, 388 U.S. 218, 242 (1967). Particularly given the weight jurors place on eyewitness testimony (see, e.g., ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 9–11 (1996) (finding that in a study of 150 mock jurors, 68% who heard eyewitness testimony with cross-examination voted guilty compared with 18% who did not hear such testimony)), the government cannot conceivably meet that burden based on the evidence in this record.

In this case, the eyewitness identification was persuasive evidence linking petitioner to the crime because the witness, Mario Lopez, identified petitioner as the “owner” of the auto shop who, he said, repeatedly attempted to call the victim to lure him to the shop. Gov’t 2d Cir. Br. 15, Tr. 1289–1290. Of course, the government acknowledges that petitioner was *not* the “owner” of the auto shop. See Br. in Opp. 3 (Perez Auto owned by Wilfredo Perez, not petitioner).

The other evidence used to link petitioner to the crime was highly problematic. In particular, the credibility of the other individuals who linked petitioner to the murder was low. Ollie Berrios, who implicated petitioner, received total immunity for his involvement in the crime in exchange for his testimony. Pet. 2d Cir. Br. 4 & n.5; Tr. 1635–1636. And Santiago Feliciano, the government’s other main witness, pleaded guilty immediately after he was indicted and cooperated with the government in exchange for favorable treatment. Pet. C.A. Br. 5 n.7. Any defense lawyer worth his or her salt would be more than happy to try a case in which the primary evidence against the defendant was the testimony of such dubious cooperating witnesses.

Thus, given (1) the questionable nature of the evidence against petitioner other than Lopez’s eyewitness testimony, (2) the importance jurors place on eyewitness testimony, and (3) the high burden the government would have to meet to demonstrate harmless error, the government’s harmless-error argument provides no basis to deny the petition for certiorari.

### **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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