No. 05-596

In the Supreme Court of the United States

JOSE ANTONIO PEREZ, AKA TONY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Neil v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), hold that, in deciding whether an out-of-court identification was reliable, and therefore admissible, despite an unduly suggestive identification procedure, a trial court should consider a number of factors, including the level of certainty demonstrated by the witness. The question presented is whether *Biggers* and *Brathwaite* should be overruled insofar as they include the witness's certainty on the list of factors to be considered.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 (1970) 14
Brodes v. *State*, 614 S.E.2d 766 (Ga. 2005) 13
Commonwealth v. *Cruz*, 839 N.E.2d 324 (Mass. 2005) . . . 9
Commonwealth v. *Johnson*, 650 N.E.2d 1257 (Mass. 1995) 13
Commonwealth v. *Santoli*, 680 N.E.2d 1116 (Mass. 1997) 13
Dickerson v. *United States*, 530 U.S. 428 (2000) 12
Evangelista v. *Ashcroft*, 359 F.3d 145 (2d Cir. 2004), cert. denied, 125 S. Ct. 1293 (2005) 15
Harris v. *United States*, 536 U.S. 545 (2002) 12
Lopez v. *Davis*, 531 U.S. 230 (2001) 14
Manson v. *Brathwaite*, 432 U.S. 98 (1977) 4, 6, 7, 8, 9
Neil v. *Biggers*, 409 U.S. 188 (1972) 4, 5, 7, 8, 9
Pasquantino v. *United States*, 125 S. Ct. 1766 (2005) 14
Roper v. *Simmons*, 125 S. Ct. 1183 (2005) 12
Stanford v. *Kentucky*, 492 U.S. 361 (1989) 12
State ex rel. Simmons v. *Roper*, 112 S.W.3d 397 (Mo. 2003), aff'd, 543 U.S. 551 (2005) 13
State v. *Dubose*, 699 N.W.2d 582 (Wis. 2005) 13

Cases—Continued: Page

State v. *Ledbetter*, 881 A.2d 290 (Conn. 2005) 9, 10, 13

State v. *Long*, 721 P.2d 483 (Utah 1986) 13

State v. *Ramirez*, 817 P.2d 774 (Utah 1991) 13

United States v. *IBM Corp.*, 517 U.S. 843 (1996) 12

United States v. *Wade*, 388 U.S. 218 (1967) 4

United States v. *Yousef*, 327 F.3d 56 (2d Cir.), cert. denied, 540 U.S. 933 and 993 (2003) 14

Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 14

Constitution, statutes, and rule:

U.S. Const.:

Amend. V (Due Process Clause) 13

Amend. XIV (Due Process Clause) 13

18 U.S.C. 924(c) 2

18 U.S.C. 924 (j)(1) 2

18 U.S.C. 1958 2

18 U.S.C. 1959 2

Fed. R. Evid. 401 10

Miscellaneous:

Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 Law & Hum. Behav. 581 (2000) 11

Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 Pace L. Rev. 815 (1994) 10

Miscellaneous—Continued: Page

Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 Psychol. Bull. 315 (1995) 10

Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603 (1998) 9

Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277 (2003) 9, 10

In the Supreme Court of the United States

No. 05-596

JOSE ANTONIO PEREZ, AKA TONY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 7a-10a) is not published in the *Federal Reporter* but is reprinted in 138 Fed. Appx. 379. The opinion of the district court (Pet. App. 11a-21a) is reported at 248 F. Supp. 2d 111. An opinion of the court of appeals deciding an issue not raised in the petition (Pet. App. 1a-6a) is reported at 414 F.3d 302.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2005. On October 5, 2005, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 10, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of conspiracy to commit murder for hire, interstate travel to commit murder for hire, and using an interstate facility to commit murder for hire, in violation of 18 U.S.C. 1958; committing a crime of violence in aid of racketeering, in violation of 18 U.S.C. 1959; and causing death by use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and (j)(1). He was sentenced to four concurrent terms of life imprisonment and one consecutive term of five years of imprisonment. The court of appeals affirmed.

1. After his release from federal prison in early 1995, Teddy Casiano returned to Hartford, Connecticut, where he resumed his leadership of a gang called the Savage Nomads. In the meantime, a family-based drug organization led by Wilfredo Perez, David Perez, and petitioner (the Perez organization) had been reaping large profits through the sale of kilogram quantities of cocaine at an establishment in Hartford called the Hour Glass Café. Casiano became angry that the Perez organization refused to pay sufficient respect to the Savage Nomads and did not provide him with a greater share of the profits from its drug business. In late 1995, Casiano and his gang kidnapped Ollie Berrios, a member of the Perez organization; forced him to reveal where the Perezes kept their drugs and money; and then stole a large quantity of cocaine and cash. Gov't C.A. Br. 5-9.

Tensions between Casiano and the Perez organization continued to mount until, in May 1996, Wilfredo Perez concluded that Casiano had to be killed. Berrios and his friend Santiago Feliciano recruited Fausto Gon-

zalez and Mario Lopez to do the job. Together with Berrios and Feliciano, Gonzalez and Lopez then met with Wilfredo Perez and petitioner at Perez Auto, a garage that Wilfredo Perez owned and operated, to plan the murder. Gov't C.A. Br. 9-12.

The next day, May 24, 1996, Gonzalez and Lopez traveled from the Bronx, New York, to Connecticut and again met with Wilfredo Perez and petitioner. Wilfredo Perez gave Berrios $6000 to pay Gonzalez once Casiano was killed, and petitioner agreed to let Berrios use his Cadillac to take Gonzalez and Lopez back to New York after the killing. Wilfredo Perez and petitioner then lured Casiano to the garage. After Casiano left, Lopez and Gonzalez followed him on a motorcycle driven by Lopez. The motorcycle pulled up to Casiano's car, and Gonzalez killed Casiano by shooting him several times at point-blank range. Once Gonzalez and Lopez were in petitioner's Cadillac, Berrios gave Gonzalez the $6000. Petitioner was observed at the scene of Casiano's murder, and acknowledged that Casiano had been at the garage shortly before the killing. Gov't C.A. Br. 12-17.

2. A few months after Casiano's murder, members of the Perez organization, including petitioner, were indicted on federal drug charges. Petitioner ultimately pleaded guilty to conspiracy to distribute more than five kilograms of cocaine. In January 2002, petitioner, Wilfredo Perez, and others were charged in a separate indictment with five offenses relating to Casiano's murder. Gov't C.A. Br. 3-4, 17.

3. On December 10, 2001, in an out-of-court photo-array identification procedure, Lopez had identified petitioner, among the eight men depicted in the array, as the "owner" of Perez Auto. Petitioner filed a motion to suppress the identification, on the ground that the photo

array was unduly suggestive. He argued that Lopez had described the "owner" as having dark skin, and that petitioner had the darkest skin of any of the men pictured in the array. Pet. App. 11a, 14a.

The district court held a hearing pursuant to *United States* v. *Wade*, 388 U.S. 218 (1967), to determine whether to admit Lopez's out-of-court identification at petitioner's trial. Chris Matta, a Special Agent with the Drug Enforcement Administration, and Lopez testified at the hearing. Lopez described the "owner" of Perez Auto in significant detail, based on their two meetings at the garage. Pet. App. 11a-13a.

4. The district court denied the motion to suppress. Pet. App. 11a-21a.

The court agreed with petitioner that the use of his "dark-skinned photograph juxtaposed with all other markedly lighter faces resulted in an identification procedure which was unduly suggestive." Pet. App. 14a. Recognizing that a "suggestive pretrial identification and any subsequent in-court identification may still be admissible if such identifications are * * * independently reliable," *id.* at 15a, the court then applied the standard for assessing independent reliability set forth in *Neil* v. *Biggers*, 409 U.S. 188 (1972), and *Manson* v. *Brathwaite*, 432 U.S. 98 (1977). Under that standard, the court said, it was required to evaluate the "totality of the circumstances," including "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Pet. App. 16a (quoting *Biggers*, 409 U.S. at 199-200). Of those five

factors, the court determined that four weighed in favor of an independently reliable identification. *Id.* at 16a-20a.

First, the court found that Lopez had "spent some time with [petitioner] on two consecutive days," and thus had had "a significant opportunity to view him." Pet. App. 16a. The court concluded that Lopez's "repeated opportunities to view [petitioner] are strong evidence of independent reliability." *Ibid.* Indeed, the court noted that "Lopez's two-day opportunity to view [petitioner] significantly exceeded what has been held sufficient in other cases." *Id.* at 19a-20a (citing cases).

Second, the court found that "Lopez's degree of attention adds somewhat to the reliability of his identification." Pet. App. 17a. The court relied, in part, on "Lopez's ability to remember in great detail the layout of the auto shop, as well as details such as the make of a car (Corvette) on the lift in the shop and the color of the van (sky blue) in which he was riding." *Ibid.* Pointing to Lopez's "relatively detailed" description of petitioner at the *Wade* hearing, the court rejected petitioner's contention that Lopez did not pay close attention to "facial features or other physical characteristics of the people he observed." *Id.* at 17a n.6.

Third, the district court found that "[t]he accuracy of Lopez's description of [petitioner] weighs slightly in favor of a conclusion of independent reliability." Pet. App. 18a. The court relied on Lopez's "*Wade* hearing description of the 'owner' as between 37 and 40 at the time of their summer 1996 encounter," which is consistent with petitioner's "January 2, 1960 date of birth." *Ibid.* Rejecting petitioner's argument that Lopez's description at the hearing was inaccurate, the court explained that the difference "of an inch or two" between

Lopez's description of petitioner's height and his actual height was "not significant, particularly as it could be attributable to the heel height of the leather boots that Lopez testified [petitioner] had been wearing." *Ibid.*

Fourth, the district court found that "Lopez's level of certainty in his identification of [petitioner] also weighs in favor of a conclusion of independent reliability." Pet. App. 19a. The court noted that Lopez had "testified to no uncertainty as to his identification" of petitioner, and that defense counsel had "concede[d] that Lopez appeared certain of []his identification." *Ibid.*

The only factor found by the district court to weigh against the independent reliability of Lopez's identification was the "time lapse between Lopez's observing [petitioner] and Lopez's selecting his photo from the photo array." Pet. App. 19a. Noting that "similar lapses have not automatically presented insurmountable barriers" to the admission of identification evidence, the court determined that the time lapse was "not dispositive," and that the other factors were "sufficient to counterbalance" it. *Ibid.* (citing cases). The court emphasized that it was ruling only on the admissibility of the identification, not on its weight, and that the lapse of time between Lopez's meetings with petitioner and his photo identification would "presumably be fertile ground for cross examination and argument to the jury." *Id.* at 20a (citing *Brathwaite*, 432 U.S. at 113 n.14).

5. At trial, the photo array and Lopez's identification of petitioner were admitted over petitioner's objection. In addition, Berrios and Feliciano testified that petitioner was involved in Casiano's murder, and Casiano's girlfriend, Maritza Alvarez, testified that petitioner had tried to lure Casiano to Perez Auto on the day of his murder. Pet. C.A. Br. 9; Gov't C.A. Br. 15, 61-62.

The jury found petitioner guilty on all five counts. The district court sentenced him to a prison term of life plus five years. Gov't C.A. Br. 4-5.

6. Petitioner raised a number of claims on appeal, including a challenge to the admission of Lopez's out-of-court identification. The court of appeals affirmed, rejecting one of petitioner's claims in a published opinion and his remaining claims, including his challenge to the admission of the identification, in an unpublished summary order. Pet. App. 1a-6a, 7a-10a. The court rejected petitioner's identification claim in a single paragraph. *Id.* at 10a. It noted that the district court had "conducted a multi-day Wade hearing" and had "reasonably determined that though the procedures used in obtaining the identification of [petitioner] were suggestive, the identification by one of his co-conspirators was itself reliable." *Ibid.* "Based on the district court's analysis," the court of appeals concluded, "there was no clear error" in the admission of Lopez's identification. *Ibid.*

ARGUMENT

In *Neil* v. *Biggers*, 409 U.S. 188 (1972), and again in *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), this Court considered when due process requires the exclusion of identification evidence following an out-of-court identification. Under those decisions, if the identification procedure was not unduly suggestive, the identification is admissible without further inquiry, and if the procedure *was* unduly suggestive, the identification is admissible as long as the identification is independently reliable. 432 U.S. at 107-117; 409 U.S. at 196-201. In both *Biggers* and *Brathwaite*, the Court listed factors to be considered in determining whether, despite an unduly suggestive procedure, the identification was reliable.

432 U.S. at 114; 409 U.S. at 199-200. One of those factors is the level of certainty of the witness. 432 U.S. at 114; 409 U.S. at 199. Relying on scientific studies addressing the correlation between a witness's certainty and the accuracy of the identification, petitioner contends (Pet. 3-20) that witness certainty should be removed from the list of factors to be considered.

Certiorari should be denied. First, the scientific evidence is not one-sided, and certainly is not sufficiently one-sided to justify overruling *Biggers* and *Brathwaite* in part. Second, despite petitioner's claim that the empirical foundations of *Biggers* and *Brathwaite* have washed away, no division of authority has emerged in the lower courts on whether the rule petitioner advocates is required by federal due process. Third, petitioner's claim was not adequately presented to, and was not passed upon by, the court of appeals. Finally, this case is also an unsuitable vehicle for deciding the question presented because adoption of petitioner's rule would have no effect on the outcome.

1. Petitioner does not challenge the applicable constitutional standard, which is "whether under the 'totality of the circumstances' the identification was reliable even though the [identification] procedure was suggestive." *Biggers*, 409 U.S. at 199. On the contrary, he acknowledges (Pet. 4) that "reliability is the linchpin in determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114. Petitioner's claim is much narrower. He contends that, in deciding whether the identification was reliable, trial courts should be prohibited from considering "the level of certainty demonstrated by the witness." *Biggers*, 409 U.S. at 199. But certainty is not the only, or even the primary, basis for a finding of reliability; it is one of five

factors identified by the Court, and the list is not exhaustive. See *Brathwaite*, 432 U.S. at 114 (factors "include" five identified by Court); *Biggers*, 409 U.S. at 199 (same). As explained below, there is no justification for the Court to make the modification urged by petitioner to the totality-of-the-circumstances test for deciding the reliability of an identification, and thereby to overrule *Biggers* and *Brathwaite* in part.

Contrary to petitioner's assertion, the witness's level of certainty has not been "conclusively shown" to have "little or no correlation with the accuracy of th[e] identification" (Pet. 3), and there is no "scientific consensus" (Pet. 5)—much less an "overwhelming" one (*ibid.*)—that supports his proposed rule. As the Supreme Court of Connecticut observed only a few months ago, the "scientific studies" on the correlation between a witness's confidence and the accuracy of his identification "are not definitive." *State* v. *Ledbetter*, 881 A.2d 290, 313 (2005). Accordingly, as the Supreme Judicial Court of Massachusetts observed only a few weeks ago, "there does not appear to be a consensus within the psychological community that 'no' relationship exists." *Commonwealth* v. *Cruz*, 839 N.E.2d 324, 331 (2005). Indeed, a number of studies, including some of the more recent ones on which petitioner relies, "show[] a positive correlation" between confidence and accuracy. *Ledbetter*, 881 A.2d at 313.[*]

[*] See, *e.g.*, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 283 (2003) ("Although any given experiment might show a statistically nonsignificant relation between certainty and accuracy, meta-analyses of the literature show a reliable correlation."); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603, 622 (1998) ("the most exhaustive review to date" suggests that "witnesses who are highly confident in their

Those findings do not support petitioner's basic assertion that witness certainty is "not relevant" (Pet. 10) to the reliability of identification evidence. Cf. Fed. R. Evid. 401 ("relevant" evidence is evidence having any tendency to make the existence of a material fact "more probable" than it would be without the evidence).

Petitioner acknowledges that "some studies have found a statistically significant correlation between witness certainty and accuracy," but contends that "these studies have found such a relationship only by controlling factors that it is impossible or wholly infeasible to control in the real world." Pet. 6. That is not correct. The studies suggest only that "the correlation may be stronger for witnesses who identify a subject during the identification procedure than for those who determine that the perpetrator is not present." *Ledbetter*, 881 A.2d at 313. See Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 283 (2003). And because it is only when a witness identifies a subject that the issue in this case will arise, the confidence-accuracy correlation for "witnesses who made a positive identification" is the "appropriate index." Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 Psychol. Bull. 315, 316 (1995).

According to petitioner, "research has shown that the certainty of a witness is easily manipulated by a variety

---

identifications are somewhat more likely to be correct as compared to witnesses who display little confidence"). See also Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 Pace L. Rev. 815, 852-853 (1994) ("[a] few studies show that confidence level is a valid predictor of identification accuracy").

of factors that have nothing to do with accuracy," such as "confirming feedback" from law enforcement officers. Pet. 7. Even if true, that is not a reason to adopt petitioner's categorical rule. If, in a particular case, a witness's confidence in the identification has in fact been "manipulated," it might be appropriate for the district court to give the level of certainty little or no weight under the totality of the circumstances. But there is no claim in this case that Lopez's confidence in his identification was "manipulated." Indeed, Special Agent Matta's testimony at the *Wade* hearing confirms that it was not. See 1/27/03 Tr. 28 ("Q. * * * [D]id you do anything to verify, confirm, dissuade him, congratulate him on his selection? A. No, I [did] not."); *id.* at 108 ("Q. * * * [Y]ou didn't encourage him, reward him, do anything to confirm his choice, you wanted it to be an act of his own free will; fair enough? A. Yes.").

Petitioner also relies on research showing that jurors place "disproportionate weight on the confidence of the witness" in deciding whether the identification of the witness was accurate—and, at least when identification is a central issue in the case, in deciding the ultimate question whether the defendant is guilty. Pet. 8. It is not clear that that is correct. As one of the articles on which petitioner relies reports, "survey data indicate that people believe all five criteria are important determinants of identification accuracy," and "certainty is actually ranked as *less* important than each of the four other criteria." Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 Law & Hum. Behav. 581, 591 (2000). In any event, petitioner does not contend that *trial courts* routinely place disproportionate weight on the witness's confidence in making

the threshold determination of whether identification evidence should be *admitted*, and there is no reason to believe that they do. Certainly the district court in this case did not. On the contrary, it appears that the court placed the heaviest weight on Lopez's "significant opportunity to view" petitioner. Pet. App. 16a, 19a.

Even if petitioner could demonstrate the merit of his proposed rule were the issue being considered as a matter of first impression, such a showing would be insufficient here. As petitioner concedes (Pet. 18-20), adoption of the rule he advocates would require the Court to overrule *Biggers* and *Brathwaite* in part, and even in constitutional cases, the doctrine of *stare decisis* "carries such persuasive force" that this Court has "always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks omitted). Accord, *e.g.*, *Harris* v. *United States*, 536 U.S. 545, 557 (2002) (opinion of Kennedy, J.); *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996). Because the "psychological research" on which petitioner relies (Pet. 19) does not unequivocally support his proposed rule, he falls far short of demonstrating the requisite "special justification" for overruling in part two of this Court's precedents.

2. Nor is certiorari warranted on the ground that there is a division of authority in the lower courts, for there is none. While they are of course bound by this Court's interpretation of the federal Constitution, lower courts occasionally issue decisions holding that the empirical basis for a constitutional rule adopted by this Court has been shown to be incorrect. See, *e.g.*, *Roper* v. *Simmons*, 125 S. Ct. 1183, 1189 (2005) (lower court held that, since this Court's decision in *Stanford* v. *Ken-*

tucky, 492 U.S. 361 (1989), holding that Constitution does not bar capital punishment for juvenile offenders, "a national consensus ha[d] developed" against that practice) (quoting *State ex rel. Simmons* v. *Roper*, 112 S.W.3d 397, 399 (Mo. 2003) (en banc), aff'd, 543 U.S. 551 (2005)). Petitioner cites no decision in which any court has held that, in light of the current state of scientific knowledge (or for any other reason), the Due Process Clause of the Fifth or Fourteenth Amendment prohibits a trial court from considering the witness's level of certainty in deciding whether an out-of-court identification is independently reliable, such that the out-of-court identification may be admitted (or an in-court identification may be made by the witness). Of the several state-court decisions cited by petitioner (Pet. 12-16), only one, *Ramirez*, 817 P.2d 774 (Utah 1991), adopted the rule that petitioner advocates, and that decision rested on state law, see *id.* at 780-781. The other decisions either addressed the issue of instructions to the jury on identification evidence, see *Ledbetter*, 881 A.2d at 316-319; *Brodes* v. *State*, 614 S.E.2d 766, 767-771 (Ga. 2005); *Commonwealth* v. *Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997); *State* v. *Long*, 721 P.2d 483, 487-495 (Utah 1986), or adopted, as a matter of state law, a rule of admissibility that differs from the one that this Court adopted in *Biggers* and reaffirmed in *Brathwaite*, see *State* v. *Dubose*, 699 N.W.2d 582 (Wis. 2005) (suggestive show-up identification requires exclusion unless procedure was necessary); *Commonwealth* v. *Johnson*, 650 N.E.2d 1257 (Mass. 1995) (suggestive show-up identification always requires exclusion).

3. Review should also be denied because petitioner's claim was not adequately presented to, and was not passed upon by, the court of appeals. "Where issues are

neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). Accord, *e.g.*, *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1781 n.14 (2005); *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001). There is no basis for an exception to that rule here.

In his opening brief in the court of appeals, petitioner conceded that the district court had "properly considered the five 'reliability' factors set out by the Supreme Court in *Neil* [v. *Biggers*] and *Manson* [v. *Brathwaite*]," including "the level of certainty expressed by the witness." Pet. C.A. Br. 43-44. His claim was that the district court's "ultimate conclusion of reliability was based on a *misapplication* of these factors." *Id.* at 44 (emphasis added). In asserting that claim, petitioner "d[id] not challenge the district court's finding that, with respect to the fourth *Neil* factor, the certainty of the identification, Lopez expressed no uncertainty when he identified the photo of [petitioner]." *Id.* at 47. Nor did he claim that the district court should not have considered that factor. He merely stated that "the continuing viability of th[e] 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 nevertheless wrong." *Ibid.*

It was not until he filed his reply brief that petitioner squarely raised the claim that he raises here: that "the five-factor test" described in *Biggers* and *Brathwaite* "for determining reliability and admissibility of suggestive out-of-court identifications" should be "modified in light of currently-available scientific research demon-

strating that there is virtually no correlation between the *certainty* expressed by a witness and the accuracy of the [sic] his/her identification." Pet. C.A. Reply Br. 12. Perhaps because the Second Circuit ordinarily does "not consider an argument raised for the first time in a reply brief," *Evangelista* v. *Ashcroft*, 359 F.3d 145, 156 n.4 (2d Cir. 2004) (quoting *United States* v. *Yousef*, 327 F.3d 56, 115 (2d Cir.), cert. denied, 540 U.S. 933 and 993 (2003)), cert. denied, 125 S. Ct. 1293 (2005), the court of appeals did not consider that claim. Instead, the court addressed only the fact-bound claim that petitioner raised in his opening brief. It explained that the district court had "reasonably determined that though the procedures used in obtaining the identification of [petitioner] were suggestive, the identification by one of his co-conspirators was itself reliable," and held that the district court had therefore not committed "clear error" in applying "the five-part reliability test." Pet. App. 10a.

4. This case is also an unsuitable vehicle for deciding the question presented because adoption of the rule petitioner advocates would have no effect on the outcome. To begin with, there is little doubt that the identification evidence would have been admitted even if the district court had not considered Lopez's level of confidence. Of the other four factors identified in *Biggers* and *Brathwaite*, the district court determined that three weighed in favor of admission. The court found that Lopez's "repeated opportunities to view [petitioner] are strong evidence of independent reliability" (Pet. App. 16a); that Lopez's "degree of attention adds somewhat to the reliability of his identification" (*id.* at 17a); and that "[t]he accuracy of Lopez's description of [petitioner] weighs slightly in favor of a conclusion of independent reliability" (*id.* at 18a). Only the "time lapse

between Lopez's observing [petitioner] and Lopez's selecting his photo from the photo array" was found by the district court to "weigh[] against a finding of independent reliability." *Id.* at 19a. The factor on which the district court appears to have placed the greatest weight in finding the identification reliable, moreover, was not Lopez's level of certainty but his "significant opportunity to view [petitioner]," *id.* at 16a, 19a, based on Lopez's having spent "time with [petitioner] on two consecutive days," *id.* at 16a. There was good reason for the district court to place substantial weight on that factor, because Lopez was not an "eyewitness" in the ordinary sense, but rather was petitioner's co-conspirator.

Even if the evidence would not have been admitted had the district court not considered Lopez's confidence in his identification, there is little doubt that the jury would have reached the same verdict, because there was substantial independent evidence of petitioner's guilt. Both Berrios and Feliciano, who recruited the killers and had known petitioner for some time, testified that petitioner was involved in the murder. Gov't C.A. Br. 61. In addition, Alvarez testified that it was petitioner who had called her apartment in an effort to lure Casiano to the garage before he was killed, and that Casiano had left her a voice-mail message saying that he was going to the garage because petitioner had paged him. *Id.* at 61-62. Indeed, petitioner admitted that he had spoken with Casiano at the garage shortly before the murder. *Id.* at 16, 62. Petitioner also told his girlfriend that he would be going to jail, or would be killed, because of what had happened to Casiano. *Id.* at 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney

JANUARY 2006