

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

PEOPLE OF THE STATE OF CALIFORNIA, No. S274743

6th D.C.A.
No. H045212

Plaintiff and Respondent,

v.

Santa Clara Co.
Superior Court
No. C1518795

FRANCISCO BURGOS, et. al.,

Defendant and Appellant.

_____ /

APPEAL FROM THE JUDGMENT OF THE SANTA CLARA
COUNTY SUPERIOR COURT, STATE OF CALIFORNIA

The Honorable Cynthia Severly, Presiding

**APPELLANT FRANCISCO BURGOS'S
ANSWER TO PETITION FOR REVIEW
(JOINDER OF RICHARDSON'S ANSWER)**

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT:

On May 25, 2022, respondent petitioned this Court for review of the decision of the Sixth District Court of Appeal, dated April 15, 2022, that reversed appellants' robbery convictions.

On June 10, 2022, co-appellant James Richardson filed an answer to respondent's petition for review.

Pursuant to rules 8.500(a)(2) and 8.504(e)(3) of the California Rules of Court, Mr. Francisco Burgos, defendant and appellant, respectfully joins co-appellant Richardson's answer,

requesting that this Court deny review. Appellant also joins Richardson's alternative request, that if this Court grants review, it also consider whether an appellate court may weigh evidence, and assess the evidence's reliability, in conducting an insufficiency-of-the-evidence analysis in a case based primarily on eyewitness identification evidence. Pursuant to the California Rules of Court, rule 8.504(c), appellant discusses the evidence as it relates to his case.

STATEMENT OF ADDITIONAL ISSUES

- 1.) In evaluating the sufficiency of the evidence for a conviction resting largely on a single eyewitness identification, does the substantial evidence test permit the appellate court to weigh the identification's probative value, and the evidence as a whole, to determine if a reasonable jury could have convicted?

STATEMENT OF PROCEDURAL HISTORY

The Court of Appeal's decision accurately summarizes this case's procedural background. (Opn., pp. 2–3.)

STATEMENT OF FACTS

Appellant accepts the Court of Appeal's recitation of facts for the purpose of this answer. The opinion omitted key facts relevant to Burgos's case that bear on whether the evidence was sufficient to support his conviction.

Richardson explains that he was confused with Keison Hames, a large man wearing a blue shirt. (Richardson's Answer, pp. 18–28.) Richardson also points out that there was ample time to walk from 7-Eleven at 12:21 a.m. back to the apartment before the robberies occurred between 12:35–12:45 a.m. (Answer, pp. 27–28, citing Exh. 7 [video file ending in 712.1], 4CT 1075, 1134–1135; 32RT 9391.)

In Burgos's case, because his race and clothing did not match the victim's descriptions of the assailants, this evidence, which will be set forth further in Argument II, must be considered when evaluating whether there was sufficient evidence to support his convictions.

ARGUMENT

I. This Court Should Deny Review on the Issue of Penal Code section 1109's Retroactivity.

Appellant Burgos joins Richardson's Argument I, incorporated here. (Cal. Rules of Ct., rule 8.504(e)(3).)

II. If this Court Grants Review, It Should Also Consider Whether an Appellate Court May Weigh the Evidence's Probative Value in Determining if a Conviction Based on Eyewitness identification Violates the Fourteenth Amendment Due Process Requirement of Sufficient Evidence.

Appellant Burgos also joins Richardson's Argument II, incorporated here. (Cal. Rules of Ct., rule 8.504(e)(3).) Appellant provides additional facts relating to his case that should be considered in evaluating the sufficiency of the evidence. As will be discussed in detail below, the victims that were robbed late at night by a group of men both initially described their robbers as black males, wearing hoodies and hats. Burgos is Hispanic and the only codefendant who was not Black. He was not wearing long sleeves and was not wearing a hat.

Victim Rodriguez initially described the robbers as African American or Black males and wearing beanies or hats or hoodies. (27RT 7924; 4CT 1131, 1133, 1136–1137.) Burgos is not an African American or Black male. He is Hispanic. (8CT 2260

[formal arrest history lists race as Hispanic]; 47RT 13820 [closing argument description].) Burgos was also the only Hispanic codefendant. (8CT 2232 [Stevenson listed as Black]; 8CT 2288 [Rodriguez listed as Black]; 42RT 12362 [Byrd self-describes as Black]; 35RT 10278; People’s Exh. No. 17, file No. 15-241-0077.20150829102423.BFOREPORT-HP716.9m4v; 5CT 1243–1244 [arrest photo of Lozano: appears Black]; 42RT 1246 [Byrd refers to Lozano as Black].) Burgos had nothing on his head and was not wearing a hoody in the video or photos at the time of arrest. (People’s Exh. No. 17, file No. 15-241-0077.20150829102423.BFOREPORT-HP716.9m4v; 5CT 1292–1297.)

According to the police’s audiotape of Rodriguez during the showup, Rodriguez did not recognize Hames, who is 6’1”, a similar height to Richardson. (28RT 8138, 8143; 32RT 9379; 4CT 1162.) Rodriguez was shown a third suspect, Stevenson, who had long braided hair and Rodriguez said, “he just stood there.” (4CT 1163; 28RT 8138; 32RT 9394.) Rodriguez was shown a fourth suspect, Burgos, also with braided hair. (28RT 8139; 32RT 9394.) When Rodriguez was shown Burgos, Rodriguez noted that he was now confused because they both had braided hair. (28RT 8139; 32RT 9394; 4CT 1165.) Rodriguez was no longer sure of his prior identification of Stevenson and was not sure about Burgos either. (4CT 1165–1166; 28RT 8139.) Besides providing a negative

identification, Rodriguez pointed out that suspect Burgos's hairstyle was similar to suspect Stevenson's and that they looked "the same." (4CT 1165; 32RT 9374.) Detective O'Grady concluded that Rodriguez made a "negative" identification on Burgos. (4CT 1165.) Because Detective O'Grady documented or concluded that Rodriguez's response was a negative identification, it should be viewed as such. (See also, *Pitt v. District of Columbia* (D.C. Cir. 2007) 491 F.3d 494, 502–503 [classifying a "not sure" as a negative identification].)

Victim Cortez's initial description of one of the robbers was that the one with braids was wearing a *white* shirt. (28RT 8196–8197.) But Burgos was always wearing a short-sleeved *black* shirt. (People's Exh. No. 17, file No. 15-241-0077.20150829102423.BFOREPORT-HP716.9m4v; People's Exh. 19; 24RT 6957; 5CT 1247–1248.)

Neither Rodriguez nor Cortez mentioned two people with braids in their initial description. Yet all the defendants had braids. According to the 7-Eleven video, Stevenson had a long braid down his back, and Richardson had a small one. (People's Exh. No. 17, file No. 15-241-0077.20150829102423.BFOREPORT-HP716.9m4v.) Stevenson was wearing a white (or light grey) shirt. (People's Exh. No. 17, file No. 15-241-0077.20150829102423.BFOREPORT-HP716.9m4v; People's Exh. No. 16; 5CT 1241–1242; 24RT 3955; 46RT 13592.)

According to the detective, during the showup, Cortez identified Burgos as the person who took his wallet. (4CT 1181–1182; 28RT 8149.) Many factors undermine any confidence in the reliability of this identification. Besides a discrepancy in race as reported by Rodriguez, according to the detective, Cortez had stated that the person with braids was wearing a white shirt.¹ (28RT 8196–8197.) As stated before, Burgos was always wearing a short-sleeved black shirt. (People’s Exh. No. 17, file No. 15-241-0077.20150829102423.BFOREPORT-HP716.9m4v; People’s Exh. 19; 24RT 6957; 5CT 1247–1248.)

Cortez’s identification must be counter-balanced with Rodriguez’s negative identification, particularly where Burgos looked similar to a third party — in this case Stevenson — causing Rodriguez to reverse his initial identification of Stevenson. Stevenson was also always wearing a grey or white

¹ Cortez’s initial description of his assailants is based on O’Grady’s memory because his recorder was not working at that time. (28RT 8146; 31RT 9055, 9087, 9095–9096.) O’Grady’s memory is suspect, given his misrecollection of the order in which suspects were presented to Cortez as explained in Stevenson’s opening brief. (SAOB, p. 29, 33–34.) The detective was also impeached with his preliminary hearing testimony that described his initial contact with Cortez as amounting to Cortez answering the door in his pajamas, O’Grady asking if Cortez would do an in-field line-up and Cortez stating that he would be glad to. (32RT 9375.)

shirt, which is consistent with what Detective O’Grady claimed Cortez said the person with braids was wearing, as previously discussed. (People’s Exh. No. 17, file No. 15-241-0077.20150829102423.BFOREPORTHP716.9m4v; People’s Exh. No. 16; 5CT 1241–1242; 24RT 3955; 46RT13592.)

In finding sufficient evidence, the Court of Appeal placed weight on the fact that the defendants had been seen with codefendant Lozano (admittedly involved in the robbery based on his fingerprint found on the stolen phone) at the 7-Eleven and the apartment. (Opn., p. 8.) But in a later section of the opinion, the Court of Appeal agreed that “the evidence identifying them as the robbers was not overwhelming,” and pointed out that “[w]hile the 7-Eleven videos put appellants near the scene of the robbery, the evidence did not show them committing the crime. Similarly, the fact that stolen evidence was found in Byrd’s apartment did not establish which of the persons inside the apartment actually stole it.” (Opn., p. 20.)

Evidence that Burgos was with Lozano at the 7-Eleven and the apartment — insufficient evidence in and of itself — must also be considered with the facts that Burgos’s salient characteristics did not match the initial descriptions of those committing the robbery. The evidence in totality is insufficient to support his convictions under the Fourteenth Amendment’s due process clause and article I, section 15 of the California

Constitution. (U.S. Const., 14th Amend.)

CONCLUSION

For the above reasons, this Court should deny review as to the issue presented by respondent. If review is granted, appellant requests that this Court also consider the additional issue identified in Argument II.

Dated: June 12, 2022

Respectfully submitted,



LAURIE WILMORE
Attorney for Appellant
Mr. Francisco Burgos

CERTIFICATE OF APPELLATE COUNSEL

Pursuant to rule 8.504(d) of the California Rules of Court, I, Laurie Wilmore, appointed counsel for Francisco Burgos, hereby certify that I prepared the foregoing Appellant's Answer to Respondent's Petition for Review on behalf of my client, and that the word count for this brief is 4,679 words, excluding tables. This brief therefore complies with the rule limiting a computer-generated brief to 8,400 words. I certify that I prepared this document in Microsoft Word, and that this is the word count Microsoft Word generated for this document.



Laurie Wilmore

RE: *People v. Francisco Burgos et. al.*; Appeal No. H045212;
Santa Clara Sup. Ct. No. C1518795

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action. My electronic service address is LWilmore@rocketmail.com and my business address is P.O. Box #1466, Soquel, CA 95073. On the date shown below, I served the within **Answer to Petition for Review** to the following parties hereinafter named by:

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I declare under penalty of perjury the foregoing is true and correct. Executed this June 13, 2022, at Soquel, California.



Laurie Wilmore

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S274743**
Lower Court Case Number: **H045212**

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/s/Laurie Wilmore

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