

No. 13-55143

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

QUINTIN MORRIS,
Petitioner-Appellant,

v.

Rick Hill, Warden of Folsom State Prison
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HONORABLE A. HOWARD MATZ, JUDGE
Case No. CV12-6953-AHM (E)

**BRIEF OF THE INNOCENCE PROJECT AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER-APPELLANT**

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INTEREST OF AMICUS CURIAE

The Innocence Project¹ is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose innocence may be established through post-conviction evidence. The Innocence Project pioneered the post-conviction DNA litigation model that has exonerated 316 innocent persons to date. The Innocence Project also works to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system—including identifying those who actually committed crimes for which others were wrongfully convicted. Because wrongful convictions destroy lives and allow actual perpetrators to remain free, the Innocence Project’s objectives both serve as an important check on the awesome power of the state over criminal defendants and help to ensure a safer and more just society.

This Court has granted a certificate of appealability to determine an important question that is critically important to the Innocence Project and its mission: whether appellant Quintin Morris is required to seek authorization from

¹ *Amicus curiae* certifies that all parties have consented to the filing of this brief. Fed. R. App. P. 29(a). *Amicus curiae* further certifies, pursuant to Federal Rule of Appellate Procedure 29(c)(5), that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. No person other than *amicus curiae* or its counsel have authored any portion of the brief or made such a monetary contribution.

this Court to file a second or successive 28 U.S.C. § 2254 petition in order to raise his freestanding actual innocence claim. This issue has broad and profound implications for innocent prisoners whose continued incarceration violates the U.S. Constitution.

Under 28 U.S.C. § 2244(3)(C), this Court may “authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that” the application, among other things, relies on a new rule of constitutional law or is predicated on facts that could not have been discovered previously through the exercise of due diligence. The Innocence Project respectfully submits that this pre-authorization requirement should not apply to petitioners asserting free-standing claims of actual innocence under *Herrera v. Collins*, 506 U.S. 390, 398 (1993). Particularly where, as here, the evidence of actual innocence is so overwhelming, procedural bars must yield to the Constitutional prohibition on the continued incarceration of innocent people.

The Innocence Project urges the Court to reverse the District Court and remand for a determination of Mr. Morris’s habeas petition on the merits.

SUMMARY OF THE ARGUMENT

This is an extraordinarily rare case, in which the evidence of Mr. Morris's innocence is truly overwhelming. Mr. Morris has proffered compelling evidence of innocence, including a credible, sworn confession by the true perpetrator that fully exonerates him. This new evidence, particularly when considered in the context of the highly suspect eyewitness testimony that was the sole basis of his conviction, compels the conclusion that Mr. Morris is innocent. He has spent 21 years in prison for a crime he did not commit.

First, Mr. Morris's trial conviction, while perhaps not the result of any constitutional error, reflects a complete break-down of the adversarial process. These problems, without more, would cast grave doubt on the correctness of Mr. Morris's conviction. The conviction was secured by a grossly unreliable eyewitness identification that had several well-established hallmarks of unreliability, including the fact that the perpetrator was shooting at the witness from a dark street while wearing a stocking mask; that the witness saw him only briefly, from a considerable distance, at night, under the most stressful imaginable conditions; and that Mr. Morris was presented to the witness while shackled and surrounded by police officers in a highly prejudicial "showup." In addition, The trial was tainted by the false testimony of one of the arresting officers, which,

when its falsity was exposed, so concerned the trial judge he urged the State to dismiss the case.

But here there is more: affirmative evidence, in the form of a post-trial confession from the actual perpetrator, Howard Holt, that affirmatively disproves Mr. Morris's guilt. The judge who presided over Mr. Morris's trial credited the Holt's confession, which (unlike the case against Mr. Morris) is entirely consistent with the evidentiary record: Just as witnesses described, Holt was driving a white Cadillac (Morris's was yellow) and wearing a long black coat (Morris's was short) on the night of the shooting. The trial judge concluded that, had this confession been presented to the jury, Mr. Morris would not have been convicted. Mr. Morris would have been acquitted, not because there was reasonable doubt of his guilt, but because he is actually innocent and had the grave misfortune to be driving a Cadillac in the vicinity of the crime scene.

The Innocence Project respectfully submits that, in circumstances such as these, a habeas petitioner should have the right to present his freestanding actual innocence claim to the district court for review on the merits.

Despite this compelling evidence, procedural hurdles erected under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") have prevented Mr. Morris from obtaining judicial review of his actual innocence claim. But the

AEDPA was intended to prevent repetitive, frivolous post-conviction litigation, not to preclude persuasive claims of innocence. *See* H.R. Rep. 104-23, 9 (1995) (“First, the bill is designed to reduce the abuse of habeas corpus that results from delayed and repetitive filings.”); H.R. Rep. 104-518, 111 (1996) (“This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus.”) Despite this, the District Court concluded it was compelled to dismiss Mr. Morris’s habeas petition without consideration of the merits because it found that Mr. Morris had not met the strict standards set out in 28 U.S.C. § 2244(b) for successive petitions, including obtaining prior authorization from the court of appeals. Regardless of whether or not Mr. Morris could establish the standards that would have allowed this Court to grant the authorization to proceed, refusal to hear Mr. Morris’s extraordinarily compelling proffer of evidence would result in an unacceptable miscarriage of justice—the continued imprisonment of an innocent man.

The Innocence Project respectfully submits that, because Mr. Morris’s petition meets the “extremely high” standard required to satisfy a claim under *Herrera*, the District Court erred in dismissing his petition for failure to comply with the AEDPA’s procedural prerequisites for filing a successive petition.

ARGUMENT

I. PUBLIC POLICY CONCERNS STRONGLY COUNSEL IN FAVOR OF ELIMINATING PROCEDURAL BARRIERS TO THE JUDICIAL REVIEW OF FREESTANDING INNOCENCE CLAIMS

A. *Herrera* Claims Would Prevent Unjust Incarceration, A Paramount Goal of our Criminal Justice System

Protecting the actually innocent from unjust punishment is a paramount goal of the criminal justice system. “[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.” *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995); *see also Herrera v. Collins*, 506 U.S. 390, 398 (1993) (“[t]he central purpose of any system of criminal justice is to convict the guilty and free the innocent”). As the Supreme Court has recognized, a “prisoner [has] a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.” *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986); *Schlup*, 513 U.S. at 324 (“[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence.”)

The failure to allow the assertion of freestanding claims of actual innocence, without regard to the procedural requirements of the AEDPA, is inconsistent with these fundamental principles. Although our criminal justice system is imbued with protections for the criminal defendant, it is undeniable that those “protections sometimes fail,” and procedurally-valid trials can nonetheless result in wrongful

convictions. *Herrera*, 506 U.S. at 430-31(Blackmun, J., dissenting). Indeed, this fact is evidenced by 316 exonerations secured by DNA evidence. *Know the Cases*, Innocence Project (May 22, 2014), <https://www.innocenceproject.org/know/>. The injustice of continuing to incarcerate an innocent person is not lessened merely because the defendant cannot identify constitutional errors in his trial.

It would be unconscionable to condemn Mr. Morris to continued wrongful incarceration simply because he could not tether his claim of actual innocence to a claim of constitutionally deficient procedure or previously unavailable evidence. As his brief to this Court aptly demonstrates, the record in this case, from arrest through trial, shows that Mr. Morris was denied meaningful access to the adversarial process. The jury in Mr. Morris's case was presented with an incomplete, misleading view of the evidence leading directly to his wrongful conviction. Following that conviction, the actual perpetrator confessed. In such rare circumstances as these, innocence must trump procedure.

A freestanding innocence claim provides a critically important, yet narrow, avenue for justice for petitioners, like Mr. Morris, who can demonstrate they were wrongfully convicted despite a constitutionally-compliant trial.

B. Allowing A Freestanding Innocence Claim Like Mr. Morris’s To Be Heard Will Not Impose A Substantial Burden On The Federal Courts

It is a common misconception that all prisoners maintain their innocence and that *Herrera* claims of actual innocence threaten to flood busy federal courts with endless, meritless petitions. But, as Judge Friendly recognized nearly 40 years ago: “the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.” Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 145 (1970). A study that examined more than 1,500 non-capital habeas petitions confirmed Judge Friendly’s observation, concluding that fewer than 4% of petitioners in non-capital cases raised “new evidence of innocence of the offense of conviction—either DNA or non-DNA.” NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 30 (2007).

The Supreme Court also recently dismissed these sorts of concerns about judicial resources in the context of *Schlup* claims, holding that “claims of actual innocence pose less of a threat to scarce judicial resources” than other types of habeas claims. *Schlup*, 513 U.S. at 324. The Court explained that “[e]xperience has taught us that a substantial claim that constitutional error has caused the

conviction of an innocent person is *extremely rare*,” because the required evidentiary showing is so high. *Id.* (emphasis added):

To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Id. Given that *nonconstitutional* claims of actual innocence under *Herrera* would require the same high evidentiary showing, the same reasoning would necessarily apply.

Mr. Morris’s actual innocence claim is not some throw-away argument added to a “kitchen sink” petition. It is amply supported by numerous factors that, in combination, compel the conclusion that he is actually innocent of the crime for which he remains incarcerated. In these circumstances, the procedural bars and limitations that Congress has imposed on successive habeas petitions should not be allowed to preclude the District Court’s consideration of Mr. Morris’s petition.

II. MR. MORRIS’S PERSUASIVE CLAIM OF ACTUAL INNOCENCE DEMANDS HABEAS RELIEF

Under the law of this Circuit, to assert a freestanding innocence claim Mr. Morris “must go beyond demonstrating doubt about his guilt [and] must affirmatively prove that he is probably innocent.” *See Carriger v. Stewart*, 132

F.3d 463, 476 (9th Cir. 1997). Mr. Morris has satisfied this "extraordinarily high" standard. *Herrera*, 506 U.S. at 417.

A. Especially Given the Absence of Any Reliable Evidence Used to Convict Mr. Morris, the Actual Perpetrator's Confession Conclusively Establishes That He Is Innocent

The actual perpetrator's confession in this case, coupled with the absence of any meaningful evidence against Mr. Morris, amply establish, at a minimum, that he is "probably innocent." *See Carriger*, 132 F.3d at 477. After Mr. Morris was wrongly convicted, Howard Holt came forward to admit responsibility for the shooting. He has provided sworn statements acknowledging his guilt in the form of a declaration filed in support of Mr. Morris's 1996 habeas petition in Los Angeles Superior Court, ER 230-32, as well as testimony during a post-conviction evidentiary hearing. ER 108-71. The judge who presided over Mr. Morris's trial concluded that Holt's confession was credible and pointed to Mr. Morris's innocence. ER 226. Particularly in light of this finding, Mr. Morris should be permitted to present his claim of actual innocence to the District Court.

Like DNA evidence, third-party confession evidence, if true, conclusively proves innocence by establishing that a specific and identifiable other person committed the crime. While DNA evidence is a powerful tool that has corrected scores of injustices, including erroneous convictions based on mistaken identification, it cannot be the only fail-safe for the wrongly convicted. This is

particularly true given that the vast majority of criminal cases do not involve biological evidence. *See Non-DNA Exonerations*, Innocence Project (May 20, 2014), <http://www.innocenceproject.org/know/non-dna-exonerations.php>. In fact, experts estimate that only 5-10% of all criminal cases involve DNA evidence. *Id.*

This Court has already recognized that a confession by the actual perpetrator “constitute[s] some evidence tending affirmatively to show” innocence. *See Carriger*, 132 F. 3d 463, 477 (9th Cir. 1997). The confession at issue here does not suffer from any of the credibility problems at issue in *Carriger*, which led the Court to conclude that the “confession by itself [fell] short of affirmatively proving that Carriger more likely than not is innocent.” *Id.* In *Carriger*, the third-party confessor, Robert Dunbar, was the chief prosecution witness at trial, a fact that put this Court in the untenable position of trying to determine on which occasion Dunbar had lied under oath. *Id.* at 465. Adding to the difficulty was the fact that Dunbar recanted his confession three weeks later, and was a known liar. *Id.* at 467. Furthermore, the trial judge who received the sworn confession at issue in *Carriger* found it to be “incredible” and “inconsistent with the trial evidence.” *Id.*

Here, by contrast, Judge Hoff, who presided over Mr. Morris’s original trial, also presided over the post-conviction evidentiary hearing in which Holt testified to his responsibility for the shooting. As such, he was in the optimal position to

evaluate the credibility of the new confession evidence in light of the trial testimony and other evidence. *See United States v. Padilla*, 888 F.2d 642, 645 (9th Cir. 1989) (“Trial court determinations based on witness credibility are given special deference.”) (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). Judge Hoff found Holt’s testimony credible, stating that “the newly discovered evidence strongly points to a different jury verdict as to Mr. Morris, and I believe a new trial is in order.” ER 226. This determination is entitled to substantial deference. *See Padilla*, 888 F.2d at 645.

Indeed, Judge Hoff’s conclusion is clearly the right one. Holt’s sworn statements accepting responsibility have all been consistent. He has no connection to Mr. Morris (other than residing in the same community) and no motivation to lie. ER 137. Moreover, because Holt could face prosecution on the basis of his confession, these statements were clearly contrary to his own interest—a fact that our evidentiary rules recognize is indicative of reliability. ER 148; Fed. R. Evid. 804(B)(3) (providing that certain statements are not excluded by the hearsay rule, including a statement that “a reasonable person in the declarant’s position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant’s proprietary or pecuniary interest or had so great a tendency to invalidate the declarant’s claim against someone else or to expose the declarant to civil or criminal liability”). Furthermore, Holt’s confession is

consistent with the evidentiary record and explains gaps and inconsistencies in the prosecution's case against Mr. Morris. For example, Mr. Holt's testimony indicates that on the night in question he was wearing a long black jacket and driving a white Cadillac (ER 158,117)—facts which align with witness testimony. ER 290; 319, 346,435, 454, 458, 460-61. By contrast, Mr. Morris was in a yellow Cadillac, and wearing a short jacket. ER 289, 422-23. Holt's confession, in which he recounts his anger with the people whom he thought were the targets of his shooting over a near-accident, also provides a motive for an otherwise seemingly random crime, where as Mr. Morris had none. ER 121-126.

Under these circumstances, and as found by the judge who presided over Mr. Morris's trial, Mr. Holt's confession shows that Mr. Morris is "probably innocent." *Carriger*, 132 F.3d at 477. Mr. Morris must be allowed to present that evidence to the District Court, and to have the District Court weigh whether it establishes actual innocence, without regard to the requirements of the AEDPA.

B. Holt's Confession Exonerating Mr. Morris Becomes Even More Compelling Given the Likelihood That The Jury Was Misled in Convicting Him

As discussed next, there is no credible evidence of Mr. Morris's guilt. Rather, his conviction was secured by inherently unreliable eyewitness testimony, and tainted by the false testimony of an arresting officer. Those facts, coupled with the actual perpetrator's subsequent confession, which affirmatively exonerates

Morris and which the Judge found credible, makes clear that Mr. Morris is innocent.

1. Social Science Research Confirms That The Eyewitness Identification That Was The Basis Of Morris's Conviction Is Unreliable

Because there is no physical evidence connecting Mr. Morris to the shooting, *see* Pet. Br. at 29-30, the prosecution's case hinged on the eyewitness testimony of a single individual, Zaida Correa.² Common sense alone is sufficient to conclude that Ms. Correa's identification of Mr. Morris was highly flawed—it was made at night, from a distance of thirty feet, of an individual wearing a black stocking mask over his entire face. *See* ER 37 (Declaration of Judge Hoff) (“I accompanied the jury on a night time view of the crime scene and was surprised that the victim could have made an identification under such conditions.”) Any

² Livan Cartaya's supposed “identification” of Mr. Morris is even more suspect given that he was unable to identify Morris during the show-up procedure. ER 402. Scientific research indicates that memory is strongest when closest in time to the incident. Fishman & Loftus, *Expert Psychology Testimony on Eyewitness Identifications*, 4 Law & Psychol. Rev. 87, 90-92 (1978). Thus, Mr. Cartaya's belated in-court “identification” runs counter to the “forgetting curve.” *Id.* This “improvement” in Mr. Cartaya's memory is likely to be the result of prior exposure to Mr. Morris during the show-up procedure as opposed to a reliable expression of independent memory. *See State v. Henderson*, 27 A.3d 872 (N.J. 2011) (“[S]uccessive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.”)

remaining credibility is completely eviscerated when considered in conjunction with the significant body of social science research establishing that eyewitness identifications play a significant role in wrongful convictions and identifying the factors that most frequently contribute to mistaken identification.

Using DNA-based exonerations as natural case studies, researchers have identified mistaken eyewitness identifications as the leading contributing cause of wrongful convictions, contributing to approximately three-quarters of the wrongful convictions ultimately overturned by DNA evidence. *See* BRANDON L. GARRET, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (2011) (finding that “[e]yewitnesses misidentified 76% of the exonerees (190 of 250 cases)”); Gary L. Wells & Deah S. Quinlivan, *Suggestive Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAVIOR 1, 1 (2008) (“DNA exonerations show that mistaken identification is the primary cause of convictions”); *Reevaluating Lineups: Why Witnesses Make Mistakes and How To Reduce The Chance Of a Misidentification*, Innocence Project (May 22, 2014), http://www.innocenceproject.org/Content/Reevaluating_Lineups_Why_Witnesses_Make_Mistakes_and_How_to_Reduce_the_Chance_of_a_Misidentification.php (finding that “[o]ver 175 people have been wrongfully convicted based, in part, on mistaken identification and later proven innocent through DNA testing”).

Additionally, over the last 30 years, psychological scientists have studied human memory and recall and developed a body of research indicating that eyewitness testimony is most unreliable when certain factors are present during the incident. This body of research has been evaluated by a number of courts, including the state supreme courts of New Jersey, Oregon and Connecticut, all of whom concur that it is reliable. *See State v. Henderson*, 27 A.3d 872 (N.J. 2011); *State v. Guilbert*, 49 A.3d 705 (Conn. 2012); *State v. Lawson*, 291 P.3d 673 (Or. 2012). The New Jersey Supreme Court declared the research to represent the “gold standard in terms of the applicability of social science research to the law” and the Connecticut Supreme Court found that the research had reached “near perfect scientific consensus” and was widely recognized as such by courts around the country. *Henderson* 27 A.3d at 916; *State v. Guilbert*, 49 A.3d 705, 720-21 and N. 8 (2012) (collecting cases).

A significant number of the factors identified by the scientific research to diminish the reliability and accuracy of identification evidence are present in Mr. Morris’ case, and add to the already-substantial evidence that he was wrongly convicted.

a) Scientific Research Confirms That Ms. Correa’s Ability To Observe The Alleged Criminal Act Was Insufficient To Make A Reliable Identification

Ms. Correa’s fleeting observation of the gunman was made under the stress of attack by a pistol-wielding masked man shooting at her in the middle of the night. Scientific research confirms that these are precisely the circumstances that lead to misidentification.

The shooter’s disguise—a black stocking mask that covered his entire face—undoubtedly hindered Ms. Correa’s ability accurately to observe him. *See Lawson*, 291 P.3d at 702. Research has found that even subtle disguises can impair identification accuracy. “Disguises as simple as hats have been shown to reduce identification accuracy.” *Henderson*, 27 A.3d at 907 (citing Brian L. Cutler et al., *Improving the Reliability of Eyewitness Identification: Putting Contexts into Context*, 72 J. Applied Psychol. 629, 635 (1987)). An analysis of six studies with data from 1300 eyewitnesses found that correct identifications were lower among eyewitnesses who viewed perpetrators wearing hats (44%) than eyewitnesses who viewed perpetrators not wearing hats (57%). Brian L. Cutler et al., *A Sample of Witness, Crime and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. LAW, POLICY & ETHICS J. 327, 332-33 (2006); *see also* Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233, 240,

244-45 (1987) . Here, the stocking mask worn by Holt covered his entire face, making it extremely difficult, if not impossible, for a stranger to provide an accurate identification.

The scientific research also establishes that the fact that Ms. Correa and the shooter were of different races makes it significantly more likely that Ms. Correa's identification of Morris was mistaken. Research confirms that eyewitnesses are generally more accurate at identifying perpetrators of their own races than perpetrators of other races. *See Henderson*, 27 A.3d at 907; *Lawson*, 291 P.3d at 703. Data analyzing 39 research articles, involving 91 independent samples and nearly 5,000 participants confirmed that participants were "1.4 times more likely to correctly identify a previously viewed own-race face when compared with performance on other-race faces" and "1.56 times more likely to falsely identify a novel other-race face when compared with performance on own-race faces." Christian A. Meissner and John C. Brigham, *Thirty Years of Investigating Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & LAW 2, 15 (2001). Here, the risk of cross-racial misidentification was particularly pronounced given that, as prosecutor and defense counsel agreed on the record, the shooter and Mr. Morris were the same race, sex, age, size, and build and shared the same prominent features and skin tone. ER 172-73.

In addition, the presence of a weapon and the high stress of the situation—after all, Ms. Correa *was being shot at* during the viewing period—likely affected her ability to accurately process and remember the event. ER. 288. As the court explained in *Henderson*, “[w]hen a visible weapon is used during a crime it can distract a witness and draw his or her attention away from the culprit.” *Henderson*, 27 A.3d at 904. This phenomenon is known as “weapon focus.” See Elizabeth F. Loftus et al., *Some Facts About “Weapon Focus,”* 11 LAW & HUM. BEHAV. 55, 55 (1987). Studies have “consistently shown that the presence of a weapon (e.g. a gun or knife in the hand of the culprit) leads to a reduced ability to recognize the face of the culprit later.” Gary L. Wells & Deah S. Quinlian, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 11 (2009); see also *Lawson*, 291 P.3d at 701-02 (finding that “[t]he negative effect of weapon-focus on identification accuracy may be magnified when combined with stress, short exposure times, [and] poor viewing conditions”). Moreover, “[e]ven under the best viewing conditions, high levels of stress can diminish an eyewitness’ ability to recall and make an accurate identification.” *Henderson*, 27 A.3d at 904; accord *Lawson*, 291 P.3d at 700-01. A review of 27 studies that tested the effect of heightened stress on eyewitness identification over a thirty-year period found that there was “clear support for the hypothesis that heightened stress has a negative

impact on eyewitness identification accuracy.” Kenneth A. Deffenbacher et. al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 692, 699 (2004). Accurate identifications decreased 22% under high stress conditions. *Id.* at 694 (concluding that the “overall proportion of correct identifications for the high stress condition was .42; for the low stress condition, it was .54”). In one study, false-positive identifications occurred among participants subjected to a high-stress environment more than twice as often as those subjected to non-stress interrogations. *See* Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT’L J.L. & PSYCHIATRY 265, 272 (2004).

Finally, the fact that the observation period was extremely brief also undermines Ms. Correa’s eyewitness identification of Mr. Morris. “Scientific studies indicate that longer durations of exposure (time spent looking at the perpetrator) generally result in more accurate identifications.” *Lawson*, 291 P.3d at 702; *accord Henderson*, 27 A.3d at 905 (recognizing that “a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure”);. “Not surprisingly, the more time an eyewitness has to view a perpetrator, the more time she has to encode the perpetrator’s characteristics into memory, and the more likely she is to make a correct identification at a later time.”

Brian L. Cutler et al., *A Sample of Witness, Crime and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 CARDOZO PUB. LAW, POLICY & ETHICS J. 327, 331 (2006); *see also* A. Memon, et. al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 BRITISH J. OF PSYCHOL 339, 344-45 (2003).

In short, the only evidence purportedly connecting Mr. Morris to the crime is completely undermined by the scientific research about eyewitness memory and perception. This, coupled with the fact that the actual perpetrator later came forward to admit that he, and not Mr. Morris, was the gunman, compels the conclusion that Mr. Morris is, at a minimum, probably innocent.

b) The Highly-Prejudicial Show-Up Procedure in Which Ms. Correa Identified Mr. Morris Also Seriously Undermines The Reliability of Her Identification

Ms. Correa identified Mr. Morris during a showup, effectively a one-man line-up, in which he was handcuffed and surrounded by police cars. ER. 315-16. Courts have long recognized what social science research has confirmed: showups are highly suggestive and therefore unreliable. *See e.g., Stovall v. Denno*, 388 U.S. 293, 302 (1967) (explaining that showups are “widely condemned”). Showups are dangerous because they “outright tell the eyewitness who the suspect is.”

BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 55 (2011). Moreover, “[u]nlike lineups, which include

fillers who can help to protect an innocence suspect from a misidentification, showups provide no alternatives for the victims to choose.” *Id.*; *Henderson*, 27 A.3d at 903 (“Experts believe the main problem with showups is that—compared to lineups—they fail to provide a safeguard against witnesses with poor memories or those inclined to guess, because every mistaken identification in a showup will point to the suspect.”) Thus, there is no way to know whether a witness is selecting the person shown in a showup because he matches the witness’s memory, because the witness believes that the police would only show him the true perpetrator, or because he is guessing.

As a result, an innocent person subject to a show-up procedure is more likely to be misidentified than in a traditional lineup. *See* Innocence Project, *Reevaluating Lineups: Why Witnesses Make Mistakes and How To Reduce The Chance Of a Misidentification*, Innocence Project (May 22, 2014), http://www.innocenceproject.org/Content/Reevaluating_Lineups_Why_Witnesses_Make_Mistakes_and_How_to_Reduce_the_Chance_of_a_Misidentification.php. One study found that only two hours after the encounter 58% of witnesses failed to reject an “innocent suspect” in a photo showup as compared to just 14% in a target-absent photo lineup. A. D. Yarmey et al., *Accuracy of Eyewitness Identifications in Show-ups and Lineups*, 20 LAW & HUM. BEHAV. 459, 464 (1996). The use of a show-up procedure has played a substantial role in wrongful convictions based

on mistaken identification. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 55 (2011). An analysis of 161 DNA exonerations found that 33% (53 trials) of convictions obtained with eyewitness misidentifications involved a showup. *Id.*

The showup at issue in this case was particularly suggestive and prejudicial, because Mr. Morris was handcuffed and surrounded by squad cars at the time of the identifications. ER 315-16. This suggestive context further underscored for the witness that Mr. Morris was not only the police suspect but was viewed as dangerous. Additionally, studies have found that false identifications in showups are even more common when, as here, the innocent suspect resembles the perpetrator and is wearing similar clothes. *See* Nancy Steblay et al., *Eyewitness Accuracy Rates in Police Lineup Presentations: A Meta-Analytic Comparison*, 27 LAW & HUM. BEHAV. 523, 523 (2003); Jennifer E. Dysart et al., *Showups: The Critical Issue of Clothing Bias*, 20 APPLIED COGNITIVE PSYCHOL. 1009, 1019 (2006). As the prosecutor and defense counsel agreed on the record, Holt and Mr. Morris shared a number of physical similarities. These facts further undermine the reliability of an already highly suggestive show-up procedure.

2. The False Testimony Offered at Mr. Morris's Trial Further Establishes His Innocence

Mr. Morris was further prejudiced during the original trial by false testimony from a prosecution witness, Officer Munguia, as to the circumstances of Mr. Morris's arrest. Officer Munguia falsely testified that he heard gunshots while on patrol and that he arrived at the scene of the crime within thirty seconds—with enough time to see the culprits speed away. ER 358, 360-62. Officer Munguia also testified that he pursued the vehicle and lost sight of the car for only ten seconds before pulling it over and arresting the occupants. ER 364-66. Ms. Correa's testimony purported to corroborate this version of events. Obviously, these facts, if true, would strongly suggest that the persons pulled over had in fact committed the crime.

However, the record evidence disproves this testimony. The 911 tape and police radio dispatch recordings conclusively demonstrate that the police did not arrive on the scene until minutes after the 911 call was placed. ER 426-28. The first sighting of Mr. Morris's vehicle was not as it fled the crime scene, but rather as it was backing out of a nearby residential driveway. ER 426-28, 463, 465. Although the prosecution eventually stipulated that Officer Munguia's testimony was wrong and that the police could not have arrived in time to see the vehicle fleeing from the scene, the prejudice from the false testimony was incurable. And

after that stipulation, Ms. Correa miraculously “recalled” a new version of events and corrected her testimony to correspond with the new timeline. ER 462-63.

Once it became clear that the prosecution’s narrative describing the aftermath of the crime and the pursuit and arrest of Morris was patently false, the trial judge went off the record and counseled the prosecution to consider dismissing the case in light of the highly prejudicial false testimony of multiple witnesses. ER 181-82. The prosecution declined to do so and Mr. Morris was convicted and sentenced based on this wholly unreliable evidence. *Id.*

Holt’s credible confession , especially when considered in conjunction with the inherently unreliable evidence used to convict Mr. Morris clearly establishes Mr. Morris’ innocence. Thus, Mr. Morris has satisfied the exceedingly high standard required to state a claim under *Herrera* and is entitled to have this claim considered by the District Court on the merits.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Innocence Project respectfully urges the Court to reverse the District Court's dismissal of Mr. Morris' habeas petition.

Dated: May 22, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rule of Appellate Procedure, the undersigned certifies that:

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 5,600 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because it is proportionally spaced and has a typeface of 14 points or larger.

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2014, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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