No. 15-99004

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY BOLIN,

Petitioner-Appellant,

v.

RENEE BAKER, ET AL.,

Respondents-Appellees.

On Appeal from the United States District Court
for the District of Nevada
No. 3:07-cv-00481-MMD-VPC
Hon. Miranda M. Du

MOTION OF THE INNOCENCE PROJECT TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER-APPELLANT AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Innocence Project, Inc., is an association dedicated to providing pro bono legal and/or investigative services to prisoners. The Innocence Project does not have a parent corporation, and there is no publicly-held corporation that has a 10% or greater ownership interest in the Innocence Project.

The Innocence Project, Inc., respectfully requests leave to file a brief as *amicus curiae* in support of Petitioner-Appellant Gregory Bolin and urging reversal, pursuant to Federal Rule of Appellate Procedure 29(a)(3). The proposed brief is attached as Attachment A. In support of this motion, the Innocence Project states as follows:

1. Counsel for the proposed amicus has contacted the parties concerning this motion. Petitioner-Appellant has consented to the motion. The Government has withheld consent to the motion.

2. This issues presented in this case are central to the work of the proposed amicus. The Innocence Project is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. The Innocence Project appears as amicus curiae before federal and state courts and, as perhaps the nation's leading authority on wrongful convictions, is regularly consulted by officials at the federal, state, and local levels.

3. The Innocence Project has a substantial interest in the issues presented in this case, which implicate the vulnerabilities of eyewitness identification. The vast majority of individuals exonerated by DNA testing were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. As a result, in order to minimize the risk of wrongful convictions based

on mistaken eyewitness identification, the Innocence Project has a compelling interest in ensuring that courts employ a legal framework that adequately protects criminal defendants from the use at trial of identification evidence that is so unreliable as to create a significant risk of misidentification.

For the foregoing reasons, proposed amicus The Innocence Project respectfully requests that this Court grant its motion and file the proposed brief attached as Attachment A.

September 6, 2017

Respectfully submitted,

/s/ Ishan K. Bhabha

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2017, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 6, 2017

/s/ Ishan K. Bhabha

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STATEMENT OF CONSENT TO FILING

Petitioner-Appellant has consented to the filing of this *amicus curiae* brief, the government has withheld consent. A motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a)(3) accompanies this brief.

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae The Innocence Project, Inc., by their attorneys, Jenner & Block LLP, submit this amicus brief in support of Petitioner-Appellant Gregory Bolin.[1]

The Innocence Project is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. It has a specific focus on exonerating long-incarcerated individuals through use of DNA evidence, including newly developed DNA testing methods. It also seeks 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 the 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 ensure a safer and more just society. As perhaps the nation's leading authority on wrongful convictions, the Innocence

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparation or submission of this brief.

Project and its founders, Barry Scheck and Peter Neufeld, are regularly consulted by officials at the federal, state, and local levels.

The Innocence Project pioneered the post-conviction DNA model that has led to the exoneration of 351 innocent persons to date, and the Innocence Project has served as counsel in many of those cases. The vast majority of individuals exonerated by DNA testing were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. As a result, in order to minimize the risk of wrongful convictions based on mistaken eyewitness identification, the Innocence Project has a compelling interest in ensuring that courts employ a legal framework that adequately protects criminal defendants from the use at trial of identification evidence that is so unreliable as to create a significant risk of misidentification.

SUMMARY OF ARGUMENT

Gregory Bolin's conviction was largely based on a form of evidence that scientific researchers have consistently found to be among the most fallible and yet among the most persuasive for jurors: eyewitness identification. Analyses of "false convictions have led to a consensus among legal scholars that mistaken eyewitness identification is one of the primary causes of wrongful convictions in the United States." Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 Alb. L. Rev. 1105, 1106 (2011). The outsized influence of eyewitness evidence has also been shown to affect jurors' reasoning where experimenters have controlled for guilt and innocence such that innocence is not a starting point for the analysis: One study found that "mock jurors were unable to distinguish between correct and incorrect witnesses, believing them 80% of the time when they were correct and 80% of the time when they were incorrect." *Id.* at 1148. As implied by these findings, jurors place disproportionate weight on eyewitness testimony, overestimating its accuracy and ignoring countervailing circumstances strongly correlated with inaccuracy such as limited viewing angle, poor lighting conditions, and cross-racial identification. All these indicators of inaccuracy are present in this case.

Eyewitness identification evidence was not only crucial to the state's case against Bolin, but, as wielded by the state, it bore the very markers of fallibility

that lead to wrongful convictions. The eyewitness evidence presented at trial suffered from nearly every key indicator of unreliability recognized by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). Because of the acknowledged power of mistaken eyewitness identifications, *see United States v. Wade*, 388 U.S. 218, 228-29 (1967), special care must be taken to assess an identification's reliability, particularly where, as here, the identification resulted from an inherently suggestive procedure involving a single-suspect, show-up presentation; leading instructions and suggestive comments; and police pressure to make an identification. And, none of the circumstances that promote reliability—such as an unhindered opportunity to view the suspect, a high degree of attention paid, an accurate description that followed, or a high level of certainty about the identification at the time it was first made—was present here. This evidence was particularly destructive given that jurors place inordinate weight on eyewitness identification evidence.

This Court should accordingly reverse the district court's decision.

ARGUMENT

I. SCIENTIFIC FINDINGS STRONGLY INDICATE THAT THE EYEWITNESS IDENTIFICATION PROCEDURE WAS UNDULY SUGGESTIVE, RESULTING IN AN UNRELIABLE IDENTIFICATION.

When an eyewitness makes an identification following a "suggestive" confrontation procedure, the witness's identification testimony is admissible only

if "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Biggers*, 409 U.S. at 199. Here, the confrontation employed in the police station was impermissibly suggestive, and scientific research demonstrates that the eyewitness identification was not otherwise reliable.

An identification procedure is impermissibly suggestive when it "give[s] rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968); *see also Biggers*, 409 U.S. at 197. Relevant considerations include whether the procedure involved only a single suspect or multiple suspects, *Stovall v. Denno*, 388 U.S. 293, 302 (1967), and the "expressions of law enforcement officials to the witness concerning the identity of the individual exhibited," *United States v. Jackson*, 448 F.2d 963, 966 (9th Cir. 1971). These considerations find support in the scientific literature, which has identified these "system variables"—or variables that "can be controlled by the system that is collecting the eyewitness evidence"—as factors that crucially affect eyewitness accuracy. Gary L. Wells et al., *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. Pub. Int. 45, 48 (2006).

More particularly, "[f]rom the perspective of psychological science, a procedure is suggestive if it [1] induces pressure on the eyewitness to make a lineup identification . . . , [2] fails to relieve pressures on the witness to make a

lineup selection . . . , [3] cues the witness as to which person is the suspect, or [4] cues the witness that the identification response was correct or incorrect." Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 years Later*, 33 Law & Hum. Behav. 1, 6 (2009).

These considerations indicate that the procedure here was impermissibly suggestive. *First*, the structure of the identification procedure was flawed because the procedure essentially involved the presentation of a single suspect in a "show-up," rather than an array of individuals from which the eyewitness had to identify the person who committed the crime. *See* Wells & Quinlivan, *supra*, at 7 ("Show-ups are not lineups at all, but instead are procedures in which the eyewitness is shown only one person . . . ."). Recognized as "the least reliable of all the identification procedures," Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-up Identifications*, 100 J. Crim. L. & Criminology, 381, 381 (2010), courts have "widely condemned" single-suspect procedures due to their inherent suggestiveness, *Stovall*, 388 U.S. at 302; *see also Manson v. Brathwaite*, 432 U.S. 98, 133 (1977) ("[Single-suspect procedures] give no assurance that the witness can identify the criminal from among a number of persons of similar appearance, surely the strongest evidence that there was no misidentification."). Law enforcement agencies also disfavor single-suspect presentations. *See, e.g.*,

IACP Nat'l Law Enforcement Policy Center: Eyewitness Identification Model Policy 1 (Sept. 2010) ("The use of showups should be avoided whenever possible in preference for the use of a photo array or a lineup.").

Here, according to the police, they eschewed a traditional lineup in favor of a show-up because they were "dealing with a rather unique suspect description in this case."[2] Interview with Keith Sirevaag 2, ECF No. 24-5 [hereinafter Sirevaag Interview].[3] Instead, after having the eyewitness, Keith Sirevaag, walk through the detention center where he could view those held there and those who worked there, the police drew attention to only one person—Bolin. *See* Jury Trial Transcript

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[2] Sirevaag described the suspect as "[a]round six foot, very clean cut, short hair, clean shaven," with no facial hair, weighing approximately "220, 230" pounds, with a "[b]ig, toned, very defined" muscular build. Transcript of Preliminary Hearing 150, ECF. 145-6. He also noted the suspect had a tattoo on his upper right arm, *id.* at 151, and that he estimated the suspect to be about 20 to 30 years old, Jury Trial Transcript Volume VIII — Morning Session 42, ECF No. 153-3. Even if this description were "rather unique," law enforcement agencies disfavor single-suspect confrontation procedures even for suspects with unique features. *See* Mem. for Heads of Dep't Law Enforcement Components All Dep't Prosecutors from Sally Q. Yates, Deputy Att'y Gen. re Eyewitness Identification: Procedures for Conducting Photo Arrays 4 (Jan. 6, 2017), https://www.justice.gov/file/923201/download ("Where the suspect has a unique feature, such as a scar, tattoo, or mole, or distinctive clothing that would make him or her stand out in a photo array, filler photographs should include that unique feature either by selecting fillers who have such a feature themselves or by altering the photographs of fillers to the extent necessary to achieve a consistent appearance. If a suspect's distinctive appearance cannot be readily duplicated on the filler photograph[]s, then the suspect's feature can be blacked out and a similar black mark can be placed on the filler photographs."); IACP Nat'l Law Enforcement Policy Center: Eyewitness Identification Model Policy, *supra*, at 5 (similar).

[3] ECF references are to the district court docket.

Volume VIII — Afternoon Session 34-37, ECF No. 153-4 [hereinafter Sirevaag Cross PM]. Bolin was "escorted" into the booking area where Sirevaag was waiting by officers Sirevaag *knew* to be involved in investigating the case, as he recognized them from the crime scene. *Id.* at 37, 42-43. Then, compounding these suggestive cues, Bolin was "the only person [Sirevaag] saw to actually line up against a wall for viewing." *Id.* at 42.

An officer overseeing the confrontation also confirmed the single-suspect nature of the procedure. He testified that Bolin "was brought out and made to stand in the hall to loiter around so that Mr. Sirevaag could get a good look at him." Jury Trial Transcript Volume XVII — Afternoon Session 22, ECF No. 158-4 [hereinafter Officer Hefner Cross]. And once the officer had determined that Sirevaag "had had enough time in my eyes to view [him]," the officers "proceeded with doing what they needed to do" to continue processing Bolin as a suspect, including photographing him, with and without his shirt on, and his tattoo—all in front of Sirevaag. *Id.* at 22-23; Sirevaag Cross 38.

The officer also confirmed that only Bolin got this treatment—that he did not recall any light-skinned black men in the confrontation vicinity other than Bolin, that no other black men were asked to remove their shirts for viewing and photographs, that no other black men were cleanly shaven like Bolin, and that no other black men were made to show their tattoos. Officer Hefner Cross 21. In

short, while at the detention center, Sirevaag was presented with no other individual who remotely matched his description of the person he saw at the construction site, and he was presented with no other individual who was being treated as a suspect by the officers he knew to be investigating the crime for which he had been called in as a witness. And yet, Sirevaag said he was "not sure" he could make an identification. *Id.*

It was only after talking to this officer, and over an hour after the show-up—after Sirevaag had left the detention center—that Sirevaag became "a little stronger about what" he had seen. Sirevaag Cross PM, at 45. And Sirevaag's conversations with the officer concerned not only the suspect's appearance; Sirevaag asked the officer "a few times over the whole ordeal" "if they had any other evidence." *Id.* Indeed, the officer drove Sirevaag home after the show-up, and Sirevaag asked him, "[H]ow did you get him, find this individual so fast[?]" Transcript of Preliminary Hearing 183, ECF No. 145-6 [hereinafter Transcript of Preliminary Hearing]. In other words, the show-up procedure led Sirevaag to believe that the police had arrested Bolin for the crime he knew them to be investigating. It was only following this suggestive procedure, these conversations with the officer, and leaving the jail did Sirevaag express any certainty as to an identification of Bolin, and then only 70 to 80%. Sirevaag Cross PM, at 46.

Second, the instructions given by the police detectives pressured Sirevaag to make an identification. Under the Wells & Quinlivan rubric described above, Sirevaag received biased instructions characterized by pressure to make an identification, failure to relieve pressure to make an identification, cues as to which person was the suspect, and cues that the identification response was correct or incorrect. *See* Wells & Quinlivan, *supra*, at 6.

Police repeatedly emphasized the need for an identification, "cue[d] [Sirevaag] as to which person [wa]s the suspect," and "cue[d] [Sirevaag] that the identification response was correct." *Id*. Police pressured him to make an identification by telling him he was "help[ing] [them] solve [a] terrible crime," "an important witness," "the only person who saw" the suspect, "the only one that can do this," and "the person that will ultimately have to make an identification or not make an identification"; that whether to make an identification and the identification he might make "solely rest[ed] with" him (which they said twice); and that he bore an "awesome responsibility." Sirevaag Interview 1-2.

They cued Sirevaag as to which person was the suspect by saying "obviously in this situation we're looking for a black suspect," and that they were "dealing with a rather unique suspect description . . . which ma[d]e it kind of hard to deal with [the] suspect . . . in a line-up." *Id.* at 2. The police further cued

Sirevaag by suggesting that the suspect they were pursuing was there in the station by stating that they had already "made some progress" in the case. *Id.* at 1.

Finally, police signaled that Sirevaag's identification response was correct by handling Bolin as a suspect after Sirevaag tentatively identified him—such as making him remove his shirt and photographing him and his tattoo. These instructions underscored the need for an identification, suggested characteristics of the suspect, and reinforced a tentative identification by suggesting it was correct. Moreover, police signaled that Sirevaag's failure to made an identification of Bolin at the detention center was *incorrect*: After Sirevaag was unable to make an identification at the detention center, the officer who drove him home "told [Sirevaag] if [he] thought of anything or something d[id] come back to [him] to notify" the officer. Jury Trial Transcript Volume VII — Afternoon Session 70, ECF No. 153-2 [hereinafter Sirevaag Direct].[4]

As such, the procedure significantly increased the likelihood of a misidentification. In one scientific study, two groups of eyewitnesses were given instructions before being presented with a lineup that did not contain the actual suspect. Joanna D. Pozzulo & Julie Dempsey, *Biased Lineup Instructions:*

[4] While, at one point, police detectives also told Sirevaag that it was "alright also if [he] d[id]n't see anybody" to identify, Sirevaag Interview 2—arguably "reliev[ing] pressures on the witness to make a lineup selection"—this statement was far outweighed by the many other hallmarks of biased instructions the police employed, Wells & Quinlivan, *supra*, at 6.

Examining the Effect of Pressure on Children's and Adults' Eyewitness Identification Accuracy, 36 J. App. Soc. Psychol. 1381, 1381 (2006). The group that received neutral instructions—an explicit statement "that the culprit may or may not be present in the lineup"—incorrectly identified a member of the lineup only 13% of the time, whereas the group that received instructions bearing the hallmarks of bias and inducement—a suggestion "that a lineup member should be selected"—incorrectly identified a member of the lineup over *four times* as often, 56% of the time. *Id.* at 1383. Due to the influence of biased instructions, "[t]here is a broad consensus" that identification procedures should be preceded by prophylactic witness instructions—such as "that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification." *State v. Henderson*, 27 A.3d 872, 897 (N.J. 2011).

Moreover, biased instructions necessarily create an even greater risk of misidentification in the show-up context, where the witness has only two options—to identify or not identify the suspect—as opposed to in the context of a proper lineup, where the witness has several more options—to identify or not identify the suspect or to identify one (or more) of the fillers. *See State v. Ledbetter*, 881 A.2d 290 (Conn. 2005) (holding that when a positive identification is made at a show-up in the absence of an instruction to the eyewitness that the perpetrator may not be present, the jury must be warned that this failure increased the probability of a

misidentification); *State v. Dubose*, 699 N.W.2d 582 (Wis. 2005) (holding that where a show-up is necessary, lineup administrators should tell witnesses that the real suspect may or may not be present and that the investigation will continue regardless of the result of the impending lineup procedure). That the officers conducting the identification procedure instructed Sirevaag in a manner inducing him not only to make an identification, but to make an identification of a particular suspect in a show-procedure markedly underscores the suggestiveness of the procedure.

II. THE ADMISSION OF THE EYEWITNESS IDENTIFICATION EVIDENCE VIOLATED DUE PROCESS BECAUSE IT BORE NO INDICIA OF RELIABILITY NEEDED TO OVERCOME THE SUGGESTIVENESS OF THE IDENTIFICATION PROCEDURE.

Because Sirevaag's identification followed a suggestive confrontation procedure, evidence of that identification should have been admitted only if "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Biggers*, 409 U.S. at 199. To determine if an identification is reliable despite a suggestive procedure, the *Biggers* Court identified five factors for courts to consider: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's description of the criminal prior to the confrontation; (4) the witness's level of certainty about the identification; and (5) the length of time between the crime and the confrontation. *Id.* at 199-200; *see also United States v.*

Drake, 543 F.3d 1080, 1088-89 (9th Cir. 2008) (applying *Biggers* factors); *Ponce v. Cupp*, 735 F.2d 333, 336 (9th Cir. 1984) (same).

Overwhelming scientific research indicates that at least four of the five *Biggers* factors weigh in favor of Petitioner-Appellant Bolin and against the district court's conclusion. The body of social science research concerning the accuracy of eyewitness testimony is robust and reliable. It has been reviewed, replicated, and retested, and is generally accepted in the research community. *See, e.g., United States v. Langford*, 802 F.2d 1176, 1184 (9th Cir. 1986) ("[T]he scientific study of eyewitness identification has become a respected and sophisticated one."); *Young v. Conway*, 698 F.3d 69, 78-79 (2d Cir. 2012) (noting the court's reference to "an extensive body of scientific literature" on eyewitness identification). It has also been tested for external validity, which determines the extent to which a finding can be generalized across different subjects and settings. Steven Penrod & Brian H. Bornstein, *Generalizing Eyewitness Reliability Research*, *in* 2 *Handbook of Eyewitness Psychology: Memory for People* 529, 551 (Rod C. L. Lindsay et al. eds., 2013) ("Eyewitness researchers and the courts can . . . be reasonably certain that the findings do generalize to genuine eyewitness situations."). Courts thus routinely rely on this research in evaluating proceedings involving eyewitness testimony. *See, e.g., Perry v. New Hampshire*, 565 U.S. 228, 263 (2012) (Sotomayor, J., dissenting) (noting that "[o]ver the past three decades, more than

two thousand studies related to eyewitness identification have been published," and that the "empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country" (quotation marks and citations omitted)); *Wade*, 388 U.S. at 235 (citing "one of the most comprehensive studies of [eyewitness] identification" to explore "the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification").

A. *Biggers* Factors Nos. 1 & 2: Sirevaag's opportunity to observe the suspect at the crime scene and the degree of attention he paid were insufficient to support a reliable identification.

The first two *Biggers* factors address the conditions under which the eyewitness initially observed the suspect: "the opportunity of the witness to view the criminal at the time of the crime" and "the witness' degree of attention." *Biggers*, 409 U.S. at 199. Both influence the physiological processes that affect the accuracy of eyewitness identifications by impairing the ability to accurately observe and recall visual details about a suspect. *See, e.g.*, Ryan J. Fitzgerald et al., *Change Detection Inflates Confidence on a Subsequent Recognition Task*, 19 Memory 879, 879-80 (2011) ("A face viewed under good encoding conditions"—such as "exposure duration" and "perspective"—"is more likely to be remembered than a face viewed under poor encoding conditions."). Here, circumstances that diminished Sirevaag's ability to observe, process, and recall the suspect's

appearance—known as "estimator variables in eyewitness performance," which "moderate face recognition"—include the viewing angle, the light level, the viewing distance, the lack of attention paid by Sirevaag, and the fact that the suspect and Sirevaag were members of different racial groups. Otto H. MacLin et al., *Race, Arousal, Attention, Exposure, and Delay*, 7 Psychol. Pub. Pol'y & L. 134, 135 (2001).

First, the viewing angle hindered Sirevaag's ability to fully observe the suspect. Sirevaag was able to view the suspect only at a side angle, observing only his right side but never his full face. Jury Trial Transcript Volume VIII — Morning Session 30-31, ECF No. 153-3 [hereinafter Sirevaag Cross AM]; Sirevaag Cross PM, at 48-49. An eyewitness's perception of a face "viewed directly from the front differs considerably—with changes in aspect ratio and relative placement of facial features—from . . . [that of] a face viewed from an oblique side angle." Nat'l Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* 56 (2014). For instance, one scientific experiment found that when eyewitnesses were shown faces from a side angle instead of head-on, misidentifications increased by 29%. *See* Fiona N. Newell et al., *Recognizing Unfamiliar Faces: The Effects of Distinctiveness and View*, 52 Q.J. Experimental Psychol. 509, 523, 528 (1999); *see also id.* at 530 (finding a "clear disadvantage for recognition of profile views"). Another study characterized "the profile view"

as "bad for many tasks, including face identification . . . because important information such as the configuration of internal features is not visible." Harold Hill et al., *Information and Viewpoint Dependence in Face Recognition*, 62 Cognition 201, 204-05 (1997). Because Sirevaag was able to view only one side of the suspect's face, his opportunity to observe the suspect was limited in a key way that inhibits the ability to make an identification.

Second, the light level and viewing distance likely hindered Sirevaag's ability to reliably identify the suspect. By his own account, though he testified that he did not "have any difficulty in seeing the man," Sirevaag Direct 36, and it was "light outside," the "sun was not up," such that the light level approximated "dusk," when he arrived at the job site around 5:30 AM on July 15, 1995, Transcript of Preliminary Hearing 158-59; Sirevaag Cross AM, at 7. Studies have established "a systematic decrease of [facial] recognition performance with . . . decreasing illumination" and explained that the "quality" of an eyewitness identification "critically depends on the conditions in which the criminal was observed." Marloes de Jong et al., *Familiar Face Recognition as a Function of Distance and Illumination: A Practical Tool for Use in the Courtroom*, 11 Psychol., Crime & L. 87, 87 (2005). Researchers designed one study against the background principle that "the probability of correctly recognizing faces of unknown persons . . . [is] a function of distance and illumination during original

viewing." *Id.* In that study, researchers observed a "steep drop" in facial recognition of *familiar* faces beginning at a distance of 12 meters—or about 40 feet, the distance from which Sirevaag first observed the suspect, who was obviously unfamiliar to him. *Id.* at 95; Transcript of Preliminary Hearing 133. The researchers also concluded that they could characterize as "reliable" only recognitions of *familiar* faces based on observations of no more than 12 meters and *only if* the light level was "at least 30 lux," equivalent to a room with bad illumination. de Jong et al., *supra*, at 91, 95. Sirevaag's observation of the suspect before the sun was up and from a distance at which recognition of *familiar* faces has been found to steeply drop off indicates that the conditions rendered his later identification of Bolin less than reliable.

Third, the relative lack of attention Sirevaag paid to the suspect at the time of the crime likely diminished his ability to accurately identify the suspect later. Sirevaag's testimony shows that he did not know a crime had occurred until after his opportunity to view the suspect had passed, *see* Sirevaag Cross AM, at 49-50, and that he had only 20 or 30 seconds in total to observe the suspect, *id.* at 28; Transcript of Preliminary Hearing 173. He further acknowledged that he "had no reason to" look around the job site when he arrived to see if anyone was there. Transcript of Preliminary Hearing 165. Even witnesses with a "*significant* opportunity to view the culprit [might have] little reason to attend closely" because

they "often do not realize that they have witnessed a crime until after the culprit has fled." Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 282 (2003) (emphasis added). Researchers have found that not knowing a crime has occurred substantially decreases the probability that a witness will correctly identify the culprit. In one study, eyewitnesses to a serious crime correctly identified the culprit 56.3% of the time when informed beforehand that they would be witnessing a crime, but only 12.5% of the time when informed after the fact. Michael R. Leippe et al., *Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification*, 63 J. Applied Psychol. 345, 348 (1978). That Sirevaag did not know a crime had occurred when he observed the suspect, and admittedly did not pay close attention to the suspect during his brief observation of him, considerably diminished the likelihood that his later identification was correct.

Finally, scientific findings underscore the significant likelihood of error that accompanies attempts—as here—at identification of a person whose race differs from that of the eyewitness. *See* Nat'l Research Council, *supra*, at 96. There is considerable evidence that memory for "other-race faces" is inferior to memory for "own race faces." Robert K. Bothwell et al., *Cross-Racial Identification*, 15 Personality & Soc. Psychol. Bull. 19, 19, 23 (1989); *see also* Tara Anthony et al., *Cross-Racial Facial Identification: A Social Cognitive Integration*, 18 Personality

& Soc. Psychol. Bull. 296, 299 (1992). Also known as the "cross-race effect," this "robust phenomenon," MacLin et al., *supra*, at 135, has been found to explain as much as 42% of erroneous eyewitness identifications in exoneration cases studied, Nat'l Research Council, *supra*, at 96 (citing Edwin Grimsley, The Innocence Project, Inc., *What Wrongful Convictions Teach Us About Racial Inequality* (Sept. 26, 2012), https://www.innocenceproject.org/what-wrongful-convictions-teach-us-about-racial-inequality).

In addition to its pervasiveness, the cross-racial misidentification effect dramatically increases false identifications. One study aggregating data from thirty-nine different research articles concluded that eyewitnesses were 56% more likely to falsely believe they had seen a face before if that face was not of their race. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 Psychol., Pub. Pol. & L. 3, 15 (2001). Further, the effect is compounded by other factors present here: It is even more pronounced where "a Caucasian eyewitness identifies an African-American suspect." Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 Fed. Cts. L. Rev. 1, 14 (2007). And it is "significantly" magnified by reduced duration of viewing exposure, which researchers have found "increase[d] . . . the proportion of false

alarm responses to other-race faces." Nat'l Research Council, *supra*, at 96 (citing Meissner & Brigham, *supra*, at 19-20).

This phenomenon is explained at least partially by a finding that witnesses are "likely to perceive more similarity among other-race individuals than among same-race persons." John C. Brigham & Roy S. Malpass, *The Role of Experience and Contact in the Recognition of Faces of Own- and Other-Race Persons*, 41 J. Soc. Issues 139, 147 (1985). Two studies found that in performing a task approximating lineup construction, both "blacks and whites exhibited an own-race bias by choosing more other-race than own-race photos as reasonably similar to the target person." *Id.* "Both groups also spent significantly more evaluation time per own-race photo chosen than per other-race photo chosen." *Id.* In other words, there appears to be a somewhat diminished ability to detect differences among other-race faces than own-race faces, rendering cross-racial identifications inherently more suspect. That Sirevaag's identification of Bolin was cross-racial further undermines its reliability.

B. *Biggers* Factor No. 3: Scientific research confirms that the discrepancies between Sirevaag's description of the suspect and Bolin's appearance support the conclusion that his identification was unreliable.

The third *Biggers* factor addresses the eyewitness's initial description of the suspect. It concerns the description of the suspect *first* given to police because that description is more likely to be accurate than any subsequent description: The

"[r]ate of memory loss for an unfamiliar face is greatest right after the encounter and then levels off over time." Kenneth A. Deffenbacher et al., *Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 148 (2008). In one study, for example, researchers found that the "memory strength for [a] once-seen face loses 15% of its strength in the first 10 min" after the initial viewing. *Id.* at 146; *see also id.* at 139 (conducting an analysis of fifty-three facial memory studies and finding a "highly reliable association . . between longer [delays] and positive forgetting of once-seen faces").

Given the relative reliability of an initial description, a mismatch between an initial description and the defendant's actual appearance is a highly significant indicator of a later identification's unreliability. Unsurprisingly, studies have found that the greater the description mismatch, the greater the likelihood that the identification is inaccurate. *See* Christian A. Meissner et al., *A Theoretical Review and Meta-Analysis of the Description-Identification Relationship in Memory for Faces*, 20 Eur. J. Cognitive Psychol. 414, 431, 435 (2008). This has also been found to be a common problem among exoneration cases: A study of 161 of the first 190 DNA-based exonerations involving eyewitness misidentifications revealed that there was a substantial mismatch between the descriptions provided by eyewitnesses and the actual appearances of the innocent defendants in 62% of

the cases (100 out of 161). *See* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48, 68-69 (2011).

Sirevaag's identification of Bolin suffers from this indicia of unreliability as well. The description he initially provided to the police did not match Bolin's appearance. Sirevaag originally said that the suspect was twenty to thirty years old, six feet tall, and 230 pounds. Sirevaag Cross AM at 42, 44-45. By contrast, at the time Bolin was quite a bit older and smaller in stature—at 39 years old, five feet nine inches, and 195 pounds. *See* Fourth Amended Petition for Writ of Habeas Corpus 92-93, ECF No. 138. Further, Sirevaag reported that the suspect he observed had a tattoo on his right arm, and he drew a picture of it for police officers at the scene. Sirevaag Cross AM, at 46. Although Bolin does have a tattoo on his right arm, at trial Sirevaag acknowledged that Bolin's tattoo "[d]oesn't look similar" to the tattoo he drew the day of the crime scene. *Id.* Indeed, at trial one of the investigating officers also noted Sirevaag's "confusion" about the tattoo—that in trying to draw the tattoo at the station, he drew "kind of a peak to begin with, and then he stopped and he was puzzled as he tried to fill in the bottom," and that "[h]e just was not sure." Jury Trial Transcript Volume XVII — Morning Session 71, ECF No. 158-3. Sirevaag's original description of the suspect and drawing of his tattoo are more likely to be accurate than his later identification. This is particularly so given that the identification followed a

suggestive procedure. The mismatch strongly indicates that Sirevaag's identification is unreliable.

C. *Biggers* Factor No. 4: Scientific research confirms that Sirevaag's uncertainty about his initial identification strongly suggests that his identification is unreliable.

The fourth *Biggers* factor addresses an eyewitness's uncertainty about his initial identification. Scientific research has demonstrated that "when eyewitnesses are tested using appropriate identification procedures, the confidence they express can be, and usually is, a highly reliable indicator of accuracy." John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psychol. Sci. Pub. Int. 10, 11 (2017). But when identification procedures are suggestive, signals other than the witness's memory interfere: "In that case, the confidence of the witness is not based purely on the strength of the memory signal. If the confidence statement is based on considerations other than [memory], . . . [the] confidence-accuracy relation no longer holds." *Id.* at 47. The same is not true for low levels of confidence, which directly correlate with low accuracy irrespective of suggestiveness: "[L]ow-confidence initial IDs *always* signal low accuracy—whether the identification procedure was pristine or not." *Id.* at 14.

Sirevaag's uncertainty about his initial identification signals a likelihood of particularly low accuracy. *First*, the suggestiveness of the identification procedure

failed to produce a high-confidence positive identification at the time of the show-up confrontation *or* in the identification he made after leaving the center—however misplaced that confidence would have been. After police emphasized the importance of Sirevaag making an identification and presented Bolin in an inherently suggestive, single-suspect show-up procedure, and Sirevaag observed only Bolin with and without his shirt, Sirevaag was *still* unable to positively identify Bolin with certainty. He could say only "that on a scale of one to 10," "he was five." Jury Trial Transcript Volume X — Morning Session 29, ECF No. 154-3. And then, when he made the identification of Bolin an hour after leaving the detention center, he expressed only 70 to 80% certainty.

Such a lack of confidence strongly suggests that an identification is not reliable regardless of the procedure's suggestiveness. Eyewitnesses supplying an identification with low confidence have been found to correctly identify the suspect only 13% of the time. Wixted & Wells, *supra*, at 47. Sirevaag's lack of confidence, despite the police's use of a procedure widely condemned for its suggestiveness, powerfully undermines his ultimate identification of Bolin.

Second, nor do Sirevaag's later expressions of greater confidence weigh in favor of reliability. While Sirevaag positively identified Bolin as the suspect at trial, Sirevaag Direct 36-37, and at pretrial hearings, scientific research has found that "only an *initial* confidence statement—one that is made *before* there is much

opportunity for confidence contamination to occur—provides reliable information," Wixted & Wells, *supra*, at 50-51 (emphases added). Confidence contamination occurs through a phenomenon known as "confidence inflation." *Id.* at 18. Even simple comments to a witness who has made a mistaken identification—e.g., "Good, you identified the suspect"—can lead to an immediate and significant boost in the witness's confidence. *Id.* One study concluded that eyewitnesses' confidence in their *mistaken* identifications was inflated by almost a full standard deviation following such a comment—a "large effect." Nancy K. Steblay et al., *The Eyewitness Post Identification Feedback Effect 15 Years Later: Theoretical and Policy Implications*, 20 Psychol., Pub. Pol. & L. 1, 5 (2014).

Here, Sirevaag expressed no confidence in his ability to make an identification during the confrontation procedure, and ultimately made the identification only after the police detectives began handling Bolin as a suspect and photographing him, *see* Officer Hefner Cross 23; only after asking officers several times what other evidence they had in the case, Sirevaag Cross PM, at 45; and only after leaving the facility. The police detectives' behavior provided Sirevaag feedback that his identification was correct—akin to stating, "Good, you identified the suspect"—which undoubtedly contributed to inflating his confidence. Yet, not only did his confidence level not reach 100%, it reached only 70-80%, leaving

significant room for error. His later expressions of confidence in court are thus specious indicators of reliability.

D. *Biggers* Factor No. 5: This factor is neutral.

The fifth *Biggers* factor addresses the length of time between the crime and the subsequent identification—known as the "retention interval." John T. Wixted et al., *The Effect of Retention Interval on the Eyewitness Identification Confidence-Accuracy Relationship*, 5 J. Applied Res. Memory & Cognition 192, 192 (2016). Scientific research has shown that the passage of time has a doubly deteriorating impact on reliability of identification: It both degrades accurate memories and heightens confidence in inaccurate memories. Deffenbacher et al., *supra*, at 148.

Here, the short interval between the crime and the identification at the police station—one day, Sirevaag Cross PM, at 22-23—weighs neither for nor against reliability. While a long retention interval generally indicates that an eyewitness identification is unreliable, a short retention interval does not necessarily indicate the reverse—especially when the eyewitness expresses uncertainty. *See* Wixted et al., *supra*, at 197. This is because "low-confidence initial IDs *always* signal low accuracy—whether the identification procedure was pristine or not." Wixted & Wells, *supra*, at 14. Researchers have found that eyewitnesses making a 50-60% confident identification *immediately* after perceiving a face were *less* likely to be correct—45% of the time, or 40 out of 89 subjects—than incorrect. *See* James

Sauer et al., *The Effect of Retention Interval on the Confidence-Accuracy Relationship for Eyewitness Identification*, 34 Law Hum. Behav. 337, 342-43 (2010). For tentative or uncertain identifications like Sirevaag's, the length of the retention interval has only a negligible effect on reliability.

III. THE IN-COURT IDENTIFICATION AT TRIAL WAS AT LEAST AS UNRELIABLE AS THE OUT-OF-COURT IDENTIFICATION.

All the reasons that Sirevaag's out-of-court identification was unreliable apply equally, if not more forcefully, to his in-court identification of Bolin at trial. The circumstances of his initial observation of the suspect and the suggestiveness of the show-up procedure during which he identified Bolin each have just as great a mitigating effect on the accuracy of the in-court as the out-of-court identification.[5] And the Ninth Circuit has recognized that the suggestiveness of the identification procedure may have a greater effect on in-court identifications: "The

[5] *See United States v. Domina*, 784 F.2d 1361, 1367 (9th Cir. 1986) (noting that the *Biggers* reliability factors "may also preclude a later in-court identification that was tainted by [an] earlier suggestive procedure[]"). While two circuit courts have recently held that initial identifications that take place in court are excluded from due process review because they are not "arranged by law enforcement" as required under *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012), *see United States v. Thomas*, 849 F.3d 906 (10th Cir. 2017), *petition for cert. filed*, No. 16-9389 (U.S. May 31, 2017); *accord United States v. Whatley*, 719 F.3d 1206, 1214-17 (11th Cir. 2013), that view has been called into question, *see United States v. Morgan*, No. CR 16-0196 (ESH), 2017 WL 1277419, at *3 (D.D.C. Apr. 4, 2017) ("An in-court identification of defendant would be 'arranged by law enforcement' because the government chose to bring this particular defendant to trial and would be choosing to ask the witness for an identification at his trial." (citation omitted) (quoting *Perry*, 565 U.S. at 248)).

concern with in-court identification, where there has been suggestive pretrial identification, is that the witness later identifies the person in court, not from his or her recollection of observations at the time of the crime charged, but from the suggestive pretrial identification." *United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986).

The passage of time between the initial observation of the suspect and the trial also compounds those effects contributing to unreliability. Not only does it both degrade accurate memories and heighten confidence in inaccurate memories, Deffenbacher et al., *supra*, at 148, but it can also mean, in the context of a criminal adjudication, multiple opportunities to make an identification of the defendant, which can further boost misplaced confidence. Where, as here, an eyewitness is asked to identify a suspect "repeatedly," such as during an identification procedure, a preliminary hearing, a pretrial hearing, and again at trial,[6] the memory signal "is likely to feel stronger to the eyewitness each time he or she encounters the person." Wixted & Wells, *supra*, at 47. But that perceived signal strength "is the result of repeated presentations of the suspect rather than the strength of the initial memory." *Id.*

[6] Here, in addition to during the out-of-court identification procedure, Sirevaag was asked to identify Bolin in two separate hearings as well as at trial, for a total of four times. *See* Transcript of Preliminary Hearing 193; Transcript of Evidentiary Hearing 37, ECF No. 226.

Researchers have explained this phenomenon by identifying "multiple ways in which a witness's memory for a criminal can be redirected onto a new face during repeated identification procedures." Nancy K. Steblay & Jennifer E. Dysart, *Repeated Eyewitness Identification Procedures with the Same Suspect*, 5 J. Applied Res. Memory & Cognition 284, 285 (2016). In other words, "exposure to new faces (e.g., an innocent suspect) at the first identification task may prompt carry-over effects that damage the fidelity of eyewitness evidence at the next identification task." *Id.* One possible explanation for this is that "consistent selections of the same suspect across repeated identification procedures may indicate reliable witness memory for the guilty culprit, but it may also result from *commitment* to a false recollection of an identified innocent suspect." *Id.* (citation omitted).

Researchers have also observed this problem among DNA-based exoneration cases involving eyewitness misidentification: "[M]ost of the DNA exonerees who were misidentified by an eyewitness were, at the outset of the investigation, identified with low confidence. It was only later, in court and in front of the jury, that the initial low-confidence ID somehow morphed into a high-confidence ID." Wixted & Wells, *supra*, at 13 (citation omitted). And the Ninth Circuit has warned of the threat posed by this phenomenon more broadly: "There is a danger that the identification in court may only be a confirmation of the earlier

identification, with much greater certainty expressed in court than initially." *Domina*, 784 F.2d at 1368.

Finally, "[a]n in-court identification is inherently suggestive, tantamount to a high-pressure show-up." Steblay & Dysart, *supra*, at 287. While an in-court identification could reliably stem from "original memory of the crime," "it is also likely that the in-court identification is the result" of any of three types of errors: "an error of familiarity (source confusion), commitment to a prior identification decision, and/or simple deduction on the part of the witness." *Id.* Researchers familiar with these errors advocate that "an attempt by an eyewitness to identify the perpetrator in court based on 'memory of the crime' should be viewed with skepticism." *Id.*

For these reasons, Sirevaag's identification of Bolin at trial was at least as unreliable as his out-of-court identification, and likely significantly more so.

IV. EYEWITNESS TESTIMONY HAS TREMENDOUS PREJUDICIAL POTENTIAL.

Overwhelming scientific research demonstrates that jurors place inordinate weight on eyewitness testimony. *See* Jennifer N. Sigler & James V. Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002) (finding that conviction rates by mock juries increased from 49% to 68% when a single eyewitness account was added). Indeed, identification evidence "has been shown to be comparable to or more impactive than physical evidence, character

evidence, polygraph evidence, and even sometimes confession evidence." Melissa Boyce et al., *Belief of Eyewitness Identification Evidence*, *in* 2 *Handbook of Eyewitness Psychology: Memory for People* 501, 505 (Rod C. L. Lindsay et al. eds., 2007) (citations omitted). Moreover, eyewitness testimony can have a perverse, compounding effect: "The existence of eyewitness identification evidence increases the perceived strength of the other evidence presented," despite that evidence's independent probative value. *Id.*

Jurors also overestimate the accuracy of eyewitness evidence. John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 Law & Hum. Behav. 19, 28 (1983). This mistake likely derives from jurors' tendency to "rely heavily on eyewitness factors that are *not* good indicators of accuracy." Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System? A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, *in* 2 *Handbook of Eyewitness Psychology: Memory for People* 453, 484 (Rod C. L. Lindsay et al. eds., 2007). Social scientists theorize that jurors rely heavily on factors not correlative of accuracy because many of the scientific principles explaining the unreliability of eyewitness testimony are counterintuitive. *See* Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 Psychol., Pub. Pol'y & L. 909, 921 (1995). One study found that a substantial

number of jurors at trial have "basic misunderstandings about the way memory works in general and about specific factors that can affect the reliability of eyewitness identifications." Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 204 (2006). In other words, jurors tend not to be able to accurately discriminate between correct and mistaken eyewitnesses, *and* jurors frequently place great stock in the testimony of even mistaken eyewitnesses. Leippe, *supra*, at 925.

Further, jurors are unduly compelled by a witness's certainty in her identification. "[M]ock-juror studies have found that confidence has a major influence on mock-jurors' assessments of witness credibility and verdicts." Neil Brewer & Gary L. Wells, *The Confidence-Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target-Absent Base Rates*, 12 J. Experimental Psychol.: Applied 11, 11 (2006). One study found that the confidence a witness expressed in her identification in a mock trial erased any otherwise mitigating effect the observation circumstances—such as lighting, distance, or angle—might have had on the jurors' verdict. *See* Clark, *supra*, at 1149 ("[S]ensitivity to the variation in the opportunity to observe was wiped away for witnesses who expressed high confidence."). In this case, Sirevaag testified that he had become "sure" of his identification of Bolin after he left the detention center, Sirevaag Cross PM at 45, and he also made a positive identification of

Bolin in court, Sirevaag Direct at 73. The impact of Sirevaag's confidence in his identification cannot be underestimated because jurors tend to confound certainty and accuracy. *E.g.*, *State v. Romero*, 922 A.2d 693, 702 (N.J. 2007) ("Jurors likely will believe eyewitness testimony 'when it is offered with a high level of confidence . . . .'").

These effects may explain the outsized role eyewitness misidentification has played in cases that ultimately resulted in exoneration. In a recent study, eyewitness misidentifications were involved in *75%* of cases where modern DNA evidence later proved innocence. *See* Edwin Grimsley, The Innocence Project, Inc., *What Wrongful Convictions Teach Us About Racial Inequality* (Sept. 26, 2012), https://www.innocenceproject.org/what-wrongful-convictions-teach-us-about-racial-inequality/. And 42% of those cases involved, like here, cross-racial misidentifications. *Id.*

In short, it is likely that testimony regarding Sirevaag's identification of Bolin—particularly Sirevaag's own testimony—had a disproportionate impact on the jury and that the jurors erroneously relied on Sirevaag's certainty as an indicator of accuracy. The enormously prejudicial impact of this eyewitness evidence thus likely had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quotation marks omitted).

CONCLUSION

In sum, overwhelming scientific research indicates that the eyewitness identification evidence presented at trial bore none of the relevant markers of reliability needed to overcome the inherent suggestiveness of the identification procedure, and the admission of that evidence carried enormous prejudicial potential, as jurors have been shown to place excessive and undue weight on eyewitness testimony even where reasonably called into question.

Date: September 6, 2017

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