

No. _____

IN THE
Supreme Court of the United States

CRAIG KEYON WHITE,

Petitioner,

v.

ROBERT W. FOX,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

- (1) Whether the unduly suggestive pretrial identification procedure and resulting unreliable identifications admitted against White at his criminal trial violated White's right to due process?
- (2) Whether White's Sixth Amendment right to counsel was violated by his trial counsel's failure to effectively challenge the eyewitness identifications admitted to prove White's guilt?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Craig Keyon White and Respondent Robert W. Fox, Warden of California Men's Colony in San Luis Obispo, California. The California Attorney General Represents Respondent.

White was convicted in Riverside County Superior Court in *People v. White*, case no. RIF10004243, Judge Michael B. Donner, presiding, in 2011. The reporter's transcript of trial can be found at district court docket no. 14, lodgment 1.

The California Court of Appeal affirmed the judgment on appeal in *People v. White*, No. E055529, on August 28, 2013 in an unpublished opinion. Petitioner's Appendix G attached hereto ("Pet. App.").

The California Supreme Court denied the petition for review in *People v. White*, case no. S213827 on November 26, 2013 in an unpublished opinion. Pet. App. F.

The California Supreme Court denied the petition for habeas corpus in *In re Craig Keyon White*, case no. S220863 on November 12, 2014 in an unpublished order. Pet. App. H.

The United States District Court for the Central District of California, Judge Manuel L. Real, presiding, denied the petition for habeas corpus in *White v. McDowell*, case no. 14-2480, on August 14, 2017. Pet. App. D.

The Ninth Circuit Court of Appeals affirmed the denial of habeas corpus relief in an unpublished memorandum in *White v. Fox*, case no. 17-56307, on December 13, 2019. Pet. App. A.

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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Craig Keyon White (“White” or “Petitioner”) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *White v. Fox*, No. 17-56307.

I. OPINIONS BELOW

The memorandum opinion of the Ninth Circuit Court of Appeals in *White v. Fox*, No. 17-56307 (Dec. 13, 2019), was not published. Petitioner’s Appendix (“Pet. App.”) A. The order of the United States District Court denying relief is also unreported. Pet. App. D. The California Supreme Court’s order denying the petition for review in *People v. White*, No. S213827 (Nov. 26, 2013) was unpublished. Pet. App. F. The California Court of Appeal’s reasoned decision on direct appeal, No. E055529 (Aug. 28, 2013) is unpublished. Pet. App. G.

II. JURISDICTION

The Ninth Circuit affirmed the district court’s dismissal of Archer’s habeas corpus petition filed pursuant to 28 U.S.C. § 2254 challenging his judgment of conviction by the California state court on December 13, 2019. Pet. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment to the U.S. Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

IV. STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Petitioner is in state custody at California Men's Colony in San Luis Obispo, California. He filed a habeas corpus petition under 28 U.S.C. § 2254 challenging the constitutionality of his convictions and sentence. The district court dismissed the petition on the merits with prejudice. Pet. App. D. The Ninth Circuit reviewed pursuant to 28 U.S.C. § 2253 and affirmed. Pet. App. A.

B. Facts Material to the Consideration of the Question Presented

1. The Trial

White was convicted of four counts of first-degree robbery (California Penal Code § 211), two counts of attempted robbery (California Penal Code §§ 664, 211) and one count of first-degree burglary (California Penal Code § 459). Pet. App. G.2.

The testimony at trial established that four or five men entered a house in the Moreno Valley between 11:30 p.m. and midnight on July 26, 2010, for the purpose of committing a robbery. Pet. App. G.3; Pet. App. I.193; Pet. App. K.98; Pet. App. L.388. The home's two residents, Dennis Estevez and Arian Ibarra Valdez were present at the time of the perpetrators' initial entry, as were their friend Marcus Harden and Estevez's girlfriend, Patricia Alvarado. Pet. App. G. During the course of the robbery, two more friends, Tyler Gonzalez and Jose Reyes, were admitted into the house. They were directed to lie on the floor. Ibarra Valdez,

Harden, and Alvarado were already on the floor at that time, directed to cover their heads and not look at the perpetrators. *Id.*

At trial, Ibarra Valdez described the perpetrator with the gun as African-American, with either a single ponytail dreadlock or two ponytails on either side of his head, an “intimidating grin” and no facial hair. Pet. App. K.101, 134, 137. Estevez testified the perpetrator with the gun was similar 5’7”, 130 pounds, and 20-35 years old, with a do-rag on his head. Pet. App. I.237-38. However, Estevez testified the perpetrator with the gun had a goatee. Pet. App. I.238. Harden described him as a “slim man” who looked like the actor Charlie Murphy, fairly tall, with a head covering. Pet. App. J.270, 284-85. Alvarado described him as black, with shiny or crooked teeth, and wearing a do-rag. Pet. App. L.390.

On August 16, 2010, White pawned a PlayStation 3 that had been taken in the robbery. Pet. App. G. To do so, he provided his fingerprint and state identification, and allowed his photograph to be taken. Pet. App. P.466; Pet. App. O.452. The pawn shop contract explicitly warned White the pawn shop was required to report the transaction to local law enforcement. Pet. App. O.449, 453-54; *see* Pet. App. P.246.

On the morning of September 2, 2010, Deputy Bodnar learned of the pawn shop transaction. Pet. App. P.245. Identifying White as a suspect based upon that transaction, Deputy Bodnar prepared a six-pack photo lineup with White’s picture in position 6. Pet. App. P.246, 444. That same day, he showed copies of the new six-pack to three of the victims: first to Estevez, then to Ibarra Valdez, and finally to

Alvarado. Pet. App. P.246. Each selected White in position 6 thirty-eight days after the crime. Pet. App. Q. Harden identified White from the same six-pack on September 10, 2010, forty-six days after the crime. *Id.*; Pet. App. P.252. Only Alvarado was able to specify White's role in the robbery as the perpetrator with the gun. Pet. App. L.562. Neither Estevez nor Ibarra Valdez was able to correlate White with a specific perpetrator. Pet. App. P.279.

The descriptive information on his identification suggested that White was 5'10, 158 pounds, and African-American. Pet. App. O.452. In 2010, he was 27 years old. Pet. App. O.464-65. When he was booked after his arrest on September 8, 2010, he was described as 5'7" and between 150-160 pounds. Pet. App. O.466. White has prominent neck tattoos and a stutter. Pet. App. M.518, 522-24; Pet. App. P.186; Pet. App. Q, Photo 6.

At trial, Ibarra Valdez, Estevez, Alvarado, and Harden each identified White in court as the man with the gun. Pet. App. I.195 (Estevez); Pet. App. J.270 (Harden); Pet. App. K.101 (Ibarra Valdez); Pet. App. L.391 (Alvarado). Ibarra Valdez variously testified that his identification was based on pictures he was shown by law enforcement, the fact that White was the defendant, and his facial structure and features as depicted in the six-pack, especially White's teeth. Pet. App. K.141-42, 176; Pet. App. O.183-84. He admitted requesting the deputy show him a picture of White's teeth, which he was provided, but later denied seeing the photograph before the prosecutor showed it to him the morning of his testimony. Pet. App. K.145, 186. He also admitted that perpetrator he was identifying looked

older on the night of the robbery than in the picture of White he identified from a six-pack. Pet. App. K.146. He told Deputy Bodnar that he didn't think White was the perpetrator, but that the perpetrator looked like White. Pet. App. K.147. He had no doubt his identification of White was accurate. Pet. App. K.111.

Estevez testified that at the time he identified White from a six-pack he was shown on September 2, 2010, he was 50 percent certain of the identification. Pet. App. I.213. By the time of trial, his certainty had increased to 100 percent. *Id.* Even at the time of trial, he reported having a "pretty vivid memory" of White's face. Pet. App. I.224.

Harden described the perpetrator with the gun as "fairly tall," "light to medium build, and a "much older" look. Pet. App. J.277. He estimated the certainty of his six-pack identification as 80 percent because the White's photo in the six-pack was "pretty crappy quality." Pet. App. J.278-79. Harden was "[a]bsolutely" certain of his identification by the time of trial. Pet. App. J.280.

Alvarado testified that she was face down on the floor through most of the incident, with a comforter over her head. Pet. App. L.392, 407. Like Ibarra Valdez, she had also requested to see a photograph of White's teeth. Pet. App. L.404. She testified on cross examination that she had seen the photograph of the teeth prior to making her six-pack identification. Pet. App. L.441. However, on redirect, she changed her testimony and said she had made the identification before seeing the photograph of the teeth. Pet. App. L.443-44.

Estevez and Reyes testified that the perpetrator's voices were not distinctive. Pet. App. I.236; Pet. App. O.264. Harden testified the perpetrator with the gun had a "raspy" or "gutter" voice, "scraggly" and "rough." Pet. App. J.277, 359. Gonzales reported that one of the perpetrators had a slight lisp. Pet. App. O.385.

White's sister, Marnisha Perkins, testified that White was with her on the night of the robbery. She recalled picking White up from the hospital on the evening of July 26, where his son had been born prematurely, and taking him to their mother's house. Pet. App. M.510. She picked him up that night between 8 p.m. and 9 p.m. Pet. App. M.515. They spoke together in the garage for some period of time. Pet. App. M.516-17, 532. Later, she saw him asleep on her mother's couch between the time she put her daughter to bed (around 10:30 p.m.) and the time she went to sleep (around 1 a.m.). *Id.* The next morning, she drove him to his house and his son was released from the hospital. Pet. App. M.510, 517. She further testified that White had a stutter. Pet. App. M.518, 522-23.

2. State Post-Conviction Proceedings

On direct appeal, White raised three claims to the California Court of Appeal: (1) evidentiary error in closing argument; (2) abuse of discretion for denial of White's motion under *Pitchess v. Superior Court*, 11 Cal. 3d 531 (1974), for personnel records for Deputy Bodnar; and (3) abuse of discretion for denying defense counsel's request for juror identifying information. The court of appeal denied each claim in a reasoned, unpublished opinion, and affirmed the judgment. Pet. App. G. The California Supreme Court denied a petition for review on November 26, 2013. Pet. App. F.

White raised the claims at issue in this appeal for the first time in a pro se petition for habeas corpus in superior court. It was denied on August 15, 2014 for failure to state a prima facie case for relief. Case No. 14-02480, U.S.D.C. Docket No. 7-2.

On August 28, 2014, White filed a pro se petition for habeas corpus in the California Supreme Court (Case No. S220863), raising the same claims. Case No. 14-02480, U.S.D.C. Docket No. 5. It was summarily denied on November 12, 2014. Pet. App. H.

3. Federal Court Proceedings

Acting pro se, White filed an original petition for habeas corpus in district court on August 28, 2014. Case No. 14-02480, U.S.D.C. Docket No. 1. He was ordered to amend his petition and did so on December 24, 2014. Case No. 14-02480, U.S.D.C. Docket Nos. 3, 5.

After the parties filed an answer and traverse, Magistrate Judge Gail J. Standish recommended the petition be denied. Pet. App. E. The Report and Recommendation was accepted by Judge Manuel Real on August 14, 2017. Pet. App. D.

V. REASONS FOR GRANTING THE WRIT

Craig White was convicted after four victim/eyewitnesses identified him in the course of a suggestive identification procedure in which the deputy knew White was a suspect, knew his position in the six-pack line-up, offered suggestive prompts to one witness without reading him the witness admonition, and failed to vary the suspect's position in the six-pack when showing it to other witnesses. The

identifications thus resulted from an impermissibly suggestive procedure. They are insufficiently reliable to overcome the taint of suggestiveness, based on numerous factors.

White's trial counsel was ineffective in challenging the identifications at trial. She should have but did not request a pre-trial hearing to exclude the identifications, though doing so would have put the burden on the prosecution to establish they were not the product of suggestion and that they were reliable. If counsel had done so, there is a reasonable probability the identifications would have been excluded.

A. Certiorari review is necessary because the identification procedure employed was unduly suggestive and resulted in unreliable identifications by all four eyewitnesses

A witness's in-court identification of a defendant after a pre-trial identification by photograph violates due process if (1) "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" and (2) the "corrupting effect of the suggestive identification procedure" outweighs the indicia of the identification's reliability. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Simmons v. United States*, 390 U.S. 377, 384 (1968).

1. The identification procedure employed was impermissibly suggestive

Deputy Bodnar was the lead investigator for the home invasion robbery. He identified White as a suspect on September 2, 2010, when he learned that White had pawned stolen property from the robbery. Pet. App. P.245-46. At the time he

created the six-pack involving White (hereinafter “the White six-pack”), he had already verified that White had a criminal history of home invasion robbery and that his appearance was consistent with the general descriptions provided by witnesses. Pet. App. P.246. Bodnar then personally conducted the witness identifications with four witnesses, knowing the suspect was in position 6. Pet. App. P.246-47.

Estevez was the first witness to look at the White six-pack. Pet. App. P.246. Bodnar did not read him the eyewitness admonishment aloud. Instead, he asked Estevez to read it himself “real quick.” Pet. App. P.343. Estevez did not immediately identify a suspect. Bodnar acknowledged that the photos were “kinda dark,” so he should take his time. Pet. App. P.343. Bodnar asked Estevez if there was anyone in the six-pack that “looks similar.” *Id.* Bodnar then told Estevez, “I see you — it kinda looks like you keep paying attention to one photograph to me. You keep looking back at the one.” *Id.* Knowing that Estevez was pointing to the individual Bodnar believed to be the perpetrator, Bodnar asked Estevez his level of confidence on a scale of 1 to 10. *Id.* Estevez reported his level of certainty as a 5, explaining that he didn’t recall the suspect having braids. *Id.* When Bodnar reminded him that braids were mentioned in the reports, Estevez explained that the person he’d seen with braids was “a stockier guy.” Pet. App. P.344. As a “favor,” Bodnar then asked Estevez to circle White’s picture in position 6. *Id.*

After obtaining the Estevez identification, Bodnar proceeded to show the White six-pack to Ibarra Valdez, Estevez’s roommate, and to Alvarado, Estevez’s

girlfriend. Pet. App. P.245. Bodnar did not remind Estevez not to speak to other witnesses.

Numerous factors render the Estevez identification “impermissibly suggestive” under *Simmons*. 390 U.S. at 384. First, Bodnar had personally identified the suspect and knew where his picture was located in the six-pack. Knowing that the suspect was in the six-pack, Bodnar urged Estevez to take his time, a suggestion that he had not made to Estevez in an earlier show-up. Pet. App. P.334-35, 343. He also knew when Estevez spent time looking at White’s photo, he was considering what Bodnar deemed the “correct” answer. It was highly suggestive for Bodnar to say anything at that point, much less suggest that White’s photo was the one Estevez should identify.

Estevez did not in fact affirmatively identify White’s photo as a perpetrator. Before Estevez made his identification, Bodnar changed the prompt to whether Estevez could identify anyone who looked “similar” to the perpetrator. Pet. App. P.343. It was only after the prompt changed that Bodnar noted that Estevez was focused on a particular photo—again, the photo that Bodnar knew to depict the suspect. *Id.*

The suggestiveness of the Estevez identification is further compounded by the fact that Bodnar did not read the eyewitness admonition. Instead, he merely asked Estevez to read it to himself “real quick.” Pet. App. P.343. Two problems result from this procedure: first, asking Estevez to read the admonition “real quick” suggested it was unimportant and not something Estevez needed to pay attention

to. Second, it risked that Estevez would overlook or forget the admonition that he was not supposed to tell other witnesses he had made an identification. Even after asking Estevez to identify other witnesses who should look at the six-pack, Bodnar failed to remind Estevez not to speak to them about his identification. Pet. App. P.344. That reminder was necessary under the circumstances. As Bodnar's roommate and girlfriend, Ibarra Valdez and Alvarado were people Estevez could be expected to speak to regularly.

Bodnar did not alter the position of White's photo in the subsequent lineups conducted with Ibarra Valdez, Alvarado, or Harden. Pet. App. Q. His failure to do so, combined with his own knowledge that White was in position 6, resulted in an impermissibly suggestive procedure that tainted all the identifications.

All four identifications were further tainted by the poor quality of the photographs Bodnar utilized in the White six-pack. They were, in his own words, "kinda dark." Pet. App. P.343. Harden described them as "pretty crappy quality." Pet. App. J.278-79. Indeed, looking at White's photo, it is clear that significant features are obscured, including whether he has facial hair and whether there is a tattoo on his neck.

Because the eyewitness identifications were each conducted using impermissibly suggestive procedures, this Court must consider whether they are actually reliable. They are not.

2. The resulting identifications are unreliable

The reliability of the identifications is analyzed under a totality of the circumstances test that considers five factors: (1) the opportunity of the witness to

view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972).

Two of these factors, the witness's degree of attention and the length of time between the crime and confrontation will be discussed first. The remaining factors will be discussed for each witness in turn.

a. The witness's degree of attention is not sufficient to outweigh the taint of the suggestive procedure

Numerous circumstances of the home invasion robbery would have reduced the witnesses' degree of attention, including the presence of a gun, the presence of multiple suspects, and the trauma inherent in being the victim of such an experience. This factor therefore does not outweigh the taint of the suggestive identification procedure.

(1) The presence of a gun impaired the ability of the witnesses to remember the perpetrators' faces

It is well established that the presence of a gun is a factor that tends to draw one's attention. *State v. Lawson*, 291 P.2d 673, 701 (Or. 2012); *see also* Pet. App. O.321, 637-40 (testimony of eyewitness identification expert).

Studies consistently show that the visible presence of a weapon during an encounter negatively affects memory for faces and identification accuracy because witnesses tend to focus their attention on the weapon instead of on the face or appearance of the perpetrator, or on other details of the encounter. That diminished attention factor

frequently impairs the witness's ability to encode things such as facial details into memory, resulting in decreased accuracy in later identifications.

Lawson, 291 P.2d at 701 (internal citation omitted).

All the witnesses observed one or more perpetrators with a gun. Estevez observed the first suspect holding a silver-plated semi-automatic handgun with “about a 4 in the barrel.” Pet. App. P.222. The same gun was held to Estevez’s head during the course of the robbery. *Id.* Like Estevez, Ibarra Valdez saw the gun and had it pointed at him. Pet. App. O.223. Alvarado observed the gun pointed at her boyfriend’s head. Pet. App. L.389. Harden’s attention was particularly drawn to the gun in the suspect’s hand. Like Estevez, he was able to describe the gun with specificity: “a large caliber chrome revolver.” Pet. App. P.192, 207. He was also able to state that the perpetrator held the gun in his right hand. *Id.*

(2) The number of suspects involved divided the witnesses’ attention

The presence of multiple suspects would have further divided the witnesses’ attention. Pet. App. P.318. Estevez in particular saw multiple suspects in his house, each of whom would have competed for his attention at various times. Pet. App. P.222-23. Ibarra Valdez also reported seeing all five suspects. Pet. App. P.223.

(3) The emotional trauma experienced during such an event also reduces attention

“High levels of stress or fear can have a negative effect on a witness’s ability to make accurate identifications. Although moderate amounts of stress may improve focus in some circumstances, research shows that high levels of stress significantly impair a witness’s ability to recognize faces and encode details into memory. When under high amounts of stress, witnesses are often unable to

remember particular details—like facial features or clothing—that are not immediately relevant to the basic survival response triggered by adrenaline and other hormones that are released in highly stressful situations.

Lawson, 291 P.2d at 700 (internal citation omitted).

The home invasion robbery here was indisputably traumatic to the eyewitnesses, who were all victims. Estevez had a gun to his head much of the time. Pet. App. I.637-40. Alvarado, who was face down under a blanket for much of the robbery, testified that she was shaking and “I never shook that much in my life.” Pet. App. L.398. She was later given a prescription for Xanax, an anti-anxiety drug. Pet. App. P.346; FDA CIV for Xanax at 1, *available at* https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/018276s052lbl.pdf. Harden reported being “scared” during the incident. Pet. App. P.192. One victim was so scared he evacuated his bowels during the crime. Pet. App. O.350.

b. The considerable length of time between crime and confrontation is not sufficient to outweigh the taint of the suggestive procedure

Estevez, Ibarra Valdez, and Alvarado each viewed the White six-pack 38 days after the crime. Pet. App. O.246; Pet. App. Q. Harden made his identification 46 days after the crime. Pet. App. O.247; Pet. App. Q. The “considerable delay” between the crime and the identifications does not support the reliability of his identification and cannot outweigh the taint of the suggestive procedure. *Swicegood v. Alabama*, 577 F.2d 1322, 1329 (5th Cir. 1978) (holding that lineup conducted 3 weeks after robbery was “a considerable delay”); *United States v. Mann*, 557 F.2d 1211, 1215 (5th Cir. 1977) (holding that where witness identified the suspect about

a month after their interaction, it did not support the reliability of the identification).

c. Other factors also do not support the reliability of the eyewitness identifications

Dennis Estevez. Although Estevez had the best opportunity of all the witnesses to observe the suspects, it remained limited. Estevez responded to a knock at his front door to find two suspects on his doorstep. Pet. App. P.222. Estevez saw the perpetrator with the gun standing behind another suspect he recognized as an acquaintance of an old roommate. *Id.* Once Estevez opened the door, the two perpetrators pushed their way in and the perpetrator with the gun “grabbed Estevez, got behind him, and put him in a choke hold.” Pet. App. P.222. Estevez testified that the perpetrator with the gun was behind him through much of the robbery. Pet. App. I.236. On the day following the robbery, Estevez described the perpetrator with the gun as “the older guy with the black du-rag and the black shirt.” Pet. App. P.222, 224. Estevez did not provide a physical description of any suspect on the night of the crime. Finally, Estevez stated his level of certainty at only 5 on a scale of 1 to 10. Pet. App. I.213; Pet. App. Q. Thus, Estevez’s opportunity to witness the suspect, the accuracy of his prior description, and level of certainty do not support the reliability of his identification.

Arian Ibarra Valdez. Ibarra Valdez observed two suspects forcing themselves into his residence, including the perpetrator with the gun. Pet. App. P.223. That perpetrator pointed a gun at Ibarra Valdez and ordered him to the ground. Ibarra Valdez complied by laying on his stomach. Ibarra Valdez observed the suspects

going through others' pockets and later observed three more suspects enter the residence. *Id.* It is not clear from Ibarra Valdez's initial report how much he was able to visually observe after he got on the ground. *Id.* Ibarra Valdez did not provide a physical description of any suspect on the night of the crime. Finally, Ibarra Valdez stated his level of certainty at only 5 on a scale of 1 to 10. Thus, Ibarra Valdez's opportunity to witness the suspect, the accuracy of his prior description, and level of certainty do not support the reliability of his identification.

Patricia Alvarado. Alvarado had a limited opportunity to witness the suspects during the robbery. Although she reported seeing two suspects, she could provide only a basic description of one of them. She reported seeing the first suspect as he entered the house with his hand behind Estevez's head. Estevez instructed them to get on the floor. She reported that in response "she grabbed the blanket from the couch, threw it over her head, and laid faced down on the floor." Pet. App. P.186.

Alvarado reported that, at some point, she peeked from under the blanket and saw a second suspect. He wore a gray or turquoise bandana over his face. He saw her looking at him and yelled at her to get down, at which point Alvarado reported she "immediately faced her head down and did not look up the remainder of the time the suspects were there." Pet. App. P.186.

Although Alvarado reported that two suspects looked through her pockets and attempted to pull down her pants, she did not identify either and provided no physical descriptions of the suspects involved in the interaction. Pet. App. P.186.

The only suspect for whom Alvarado provided a description was suspect two, whose face was obstructed by a bandana. She described that suspect as “about 25 years old, approximately 6'01", weighing about 200 lbs.” *Id.* Alvarado’s description is thus of a significantly larger man than White, who is between 5’7 and 5’10 and weighed 150-160 pounds. Finally, Alvarado stated her level of certainty at 8 on a scale of 1 to 10 thirty-eight days after the crime occurred. Pet. App. L. 358-59; Pet. App. Q. However, on the night of the crime, Alvarado reported she would be unable to identify any suspects. Pet. App. P.186. Thus, Alvarado’s opportunity to witness the suspect, the accuracy of her prior description, and level of certainty do not support the reliability of her identification.

Marcus Harden. Harden was engrossed in a movie when the suspects entered the house. Pet. App. P.192. His attention was drawn to the front door of the house when he heard a commotion. It was then that he saw the first suspect. He obeyed the suspect’s command to get on the ground. Harden reported that he heard but did not see the remaining suspects enter the house. Harden did not report seeing any other suspects on the night of the robbery. Other than a basic description of the first suspect, Harden’s observations that night were limited to what he heard. *Id.* Harden described the perpetrator with the gun as an African-American with “very ...dark skin,” 5'07" to 5'10", mid-twenties to late 30s, wearing a dark jacket. Pet. App. P.203-04. Although this description fits White, it is too generic to support the reliability of his identification. *Lawson*, 291 P.2d at 693 (“[N]onfacial features like race, height, weight, clothing, or hair color, generally lack

the level of distinction necessary to permit the witness to identify a specific person as the person whom the witness saw.”). Finally, Harden stated his level of certainty at 8 on a scale of 1 to 10. Pet. App. Q. However, when originally interviewed, Harden reported that he would be able to make an identification if shown a lineup with the perpetrator and “five white guys.” Pet. App. P.204. Otherwise, he stated he would not be able to make an identification because he only saw the perpetrator briefly. *Id.* Thus, Harden’s opportunity to witness the suspect, the accuracy of his prior description, and level of certainty do not support the reliability of his identification.

Other factors. White has a pronounced stutter. Pet. App. M.518, 522-24. Yet, Estevez testified that he heard all the perpetrators’ voices over the course of the robbery, and none struck him as distinctive. Pet. App. I.236. Jose Reyes, another victim, also testified that none of the voices he heard that night were distinctive. Pet. App. O.264. Tyler Gonzales described a voice with a slight lisp, not a stutter. Pet. App. O.385. Harden described the voice of the perpetrator of the gun as “raspy” or “gutter.” Pet. App. J.359. Like the others, he did not describe a stutter. *Id.* The fact that witnesses heard the perpetrator with a gun speak but did not observe him to stutter suggests that perpetrator was not White.

Given the totality of the circumstances, none of the eyewitness identifications is sufficiently reliable to outweigh the taint of the suggestive procedure. The state court was unreasonable not to find a prima facie case of a due process violation on

this record. Accordingly, White is entitled to relief on this claim, or at the very least, an evidentiary hearing.

B. Certiorari review is necessary because trial counsel rendered ineffective assistance in failing to effectively challenge the witness identifications

“Clearly established Supreme Court precedent provides a framework for examining Sixth Amendment ineffective assistance of counsel claims.” *Miles v. Ryan*, 713 F.3d 477, 486 (9th Cir. 2013) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To establish ineffectiveness, a petitioner must show: (1) that counsel’s performance “fell below an objective standard of reasonableness,” and (2) that counsel’s performance was prejudicial. *Strickland*, 466 U.S. at 687-88.

The prejudice analysis is cumulative. *Wiggins v. Smith*, 539 U.S. 510, 537-38 (2003) (holding that counsel’s multiple failures to investigate and present mitigating evidence “taken as a whole, ‘might well have influenced the jury’s appraisal’ of [the petitioner’s] moral culpability”).

1. Counsel performed deficiently by failing to challenge the identification procedures or introducing the audio recordings in which the witnesses originally identified White

“Effective trial counsel preserves claims to be considered on appeal . . . and in federal habeas proceedings.” *Martinez v. Ryan*, 566 U.S. 1, 13 (citing *Edwards v. Carpenter*, 529 U.S. 446 (2000)) (internal citations omitted).

A criminal defendant in California is entitled to a hearing on the admissibility of identification evidence for the purpose of challenging its admissibility. *People v. Citrino*, 11 Cal. App. 3d 778, 783 (1970). Had trial counsel filed a motion to exclude, the trial court would have been required to assess whether

the eyewitness identifications were the product of an impermissibly suggestive procedure. That assessment in turn would have placed the burden on the prosecution to prove that the identification procedures employed were not unduly suggestive. *Id.* at 783. If the court had found them to be so, the prosecution would have had to prove by clear and convincing evidence that the identifications were nevertheless reliable. *Id.* By foregoing a pre-trial challenge to the identifications, defense counsel failed to put the identification evidence to this important test before it was heard by a jury.

It is well known that “mistaken eyewitness identifications have played a role in a substantial number of wrongful convictions and unsolved crimes.” *People v. Sánchez*, 63 Cal. 4th 411, 498 (2016) (Liu, J., concurring); Cal. Senate Bill 923 § 1(b) (reflecting the legislative finding that “[e]yewitness misidentification is the leading contributor to wrongful convictions proven with DNA evidence nationally” and has “played a role in 12 out of 13 DNA-based exonerations in” California). Part of the problem with eyewitness identification evidence is that jurors’ ability to assess the credibility of such witnesses “is questionable” because “most eyewitnesses think they are telling the truth even when their testimony is inaccurate.” *People v. Reed*, 4 Cal. 5th 989, 1028 (2018) (Liu, J., dissenting) (citing Brad Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 48 (2011)). Thus, it is incumbent on defense counsel to challenge such identifications before they are heard by the jury.

Instead, defense counsel here allowed the eyewitness identifications to be admitted into evidence and relied on an eyewitness identification expert's general testimony about best practices and the reconstructive nature of memory. *See* Pet. App. G.4. Such testimony would have been far more effective in a pretrial challenge of the eyewitness identifications because it would have supported a conclusion that the procedure used in this case was impermissibly suggestive. Pet. App. O.610-15 (explaining the rationale behind blind administration and the impact of even inadvertent behavior on the part of the administrator). Nor was defense counsel faced with an either/or situation. Challenging the admissibility of the identifications would not have precluded the use of the same expert testimony in front of the jury and, if anything, would have allowed a "test run" of the strategy, which could have strengthened the presentation of evidence the jury ultimately heard.

Counsel also failed to offer the recordings of the eyewitness identifications so that the jury could have heard for itself the process by which they were made and the doubts of the witnesses at the time they made them, particularly Estevez. Estevez spent significant time looking at the six-pack before making his identification. Knowing that would have allowed the jury to conclude, guided by the eyewitness identification expert's testimony, that Estevez's identification was not reliable. Pet. App. O.621-22. Furthermore, it could have been used to show that Estevez's identification was premised on the appearance of White's hair in the

photograph (Pet. App. I.214, 241-42)—a feature that is not a sufficiently reliable trait to prove identity beyond a reasonable doubt.

2. Counsel’s deficient performance undermines confidence in the verdict

As demonstrated, the eyewitness identification procedures were impermissibly suggestive: Bodnar knew the suspect’s identity and where he appeared in the six-pack, Bodnar prompted Estevez to identify White, Bodnar failed to read Estevez the eyewitness admonition and diminished its importance to the witness, and Bodnar did not alter the position of White’s photo before showing the six-pack to Estevez’s roommate, girlfriend, and friend. *See, supra*, § V.A.1. The identifications were not sufficiently reliable to outweigh the taint of the suggestive procedure. *See, supra*, § V.A.2. There is therefore a reasonable probability that the four eyewitness identifications in this case would have been excluded. Without them, the only evidence of White’s guilt was his possession of one of the stolen items after the robbery. Trial counsel’s failure to challenge the identifications pre-trial was thus ineffective.

Without the identifications to rely on, there is every reason to believe the jury would have found White not guilty on the robbery charges. He had a strong alibi defense the jury would have credited. Pet. App. M; Pet. App. O.452-55. As it is, the jury deliberated 2 full days after a 3-day trial, an objective clue the guilty verdict was a difficult decision. *Thomas v. Chappell*, 678 F.3d 1086, 1103 (9th Cir. 2012); *Daniels v. Woodford*, 428 F.3d 1181, 1209-10 (9th Cir. 2005) (holding that the fact that “[t]he jury deliberated for two days before returning a verdict ... suggests that

the jury may have been influenced by [additional] evidence had it been offered” and concluding that “[t]his alone is sufficient for a finding of prejudice”); *Dyas v. Poole*, 317 F.3d 934, 936-37 (9th Cir. 2003) (per curiam) (holding that “the evidence against Dyas was not overwhelming, a fact reflected in the length of the jury’s deliberations,” where “the jury took 3–1/2 days to deliberate following Dyas’s 5–day trial”). The jury also requested after numerous readback requests, Pet. App. N, showing it struggled with its decision despite the four eyewitness identifications. *Thomas v. Chappell*, 678 F.3d 1086, 1103 (9th Cir. 2012); *Gantt v. Roe*, 389 F.3d 908, 916 (9th Cir. 2004); *see also Merolillo v. Yates*, 663 F.3d 444, 457 (9th Cir. 2011) (holding that a request for a readback of testimony “illustrates the difficulty presented by” the case). Finally, the eyewitness identifications were the central focus of closing argument. Indeed, the prosecution argued that the jury “could convict him beyond a reasonable doubt based on the six-pack photo lineups” alone. Pet. App. O.739. The prosecution’s emphasis also demonstrates that counsel’s failure to effectively challenge the eyewitness identifications was prejudicial. *See Maxwell v. Roe*, 628 F.3d 486, 508 (9th Cir. 2010).

VI. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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