

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY WHITEWATER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether a photo lineup violates due process where law enforcement – by including only one person (the defendant) who matches the suspect’s race or ethnicity – racially isolates the defendant.

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Anthony Whitewater petitions the Court for a writ of certiorari to review the United States Court of Appeals for the Eighth Circuit's January 3, 2018 opinion and judgment.

Opinions Below

The decision of the United States Court of Appeals affirming Whitewater's conviction is published at 879 F.3d 289 (8th Cir. 2018). A copy of the decision is appended to this Petition. (App. 1A)

Jurisdiction

The judgment of the Eighth Circuit Court of Appeals was entered on January 3, 2018. Mr. Whitewater invokes this Court's jurisdiction under 28 U.S.C. § 1254(a), having timely filed this petition for a writ of certiorari within ninety days of the Eighth Circuit's decision.

Constitutional Provision Involved

U.S. Const., AMEND. V: “No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]”

Statement of the Case

Petitioner Anthony Whitewater, a Native American, was convicted of shooting at two other Native Americans on a Native American reservation. An FBI agent created a photo lineup from a national photo database with six subjects, only one of which – Petitioner – was definitely a Native American. Both Native American witnesses quickly picked Petitioner out of the lineup and identified him in court, even though one of them later testified he had not even seen the shooter.

On May 2, 2016, Jason Miller and Vincent Wolfe, Native Americans living on the Omaha Indian Reservation, drove to a party on the adjacent Winnebago Indian Reservation. At the party, the men encountered Petitioner Anthony Whitewater. As Mr. Miller and Mr. Wolfe watched, Mr. Whitewater was ejected from the party after he got into a fight.

Soon after Mr. Whitewater’s exit, Mr. Miller and Mr. Wolfe left the party and, having put some gas into Miller’s black Chevy Tahoe, began the drive south from Winnebago, Nebraska (on the Winnebago reservation) to Walthill, Nebraska (on the Omaha reservation). South of Winnebago, Mr. Miller testified that a blue SUV pulled alongside them on the driver’s side. Mr. Miller testified that the SUV’s passenger hung out of the passenger-side window, shouted at them, and brandished a handgun. Miller

testified that the passenger fired two shots into the air. Then, as Miller and Wolfe sped away, the blue SUV gave chase with its passenger firing rounds at and into the back of the Tahoe all the way into Walthill. As Miller drove, Wolfe called 911.

As the two SUVs approached Walthill, Officer Ansley Griffin, who was traveling north, spotted them speeding, flipped a U-turn, and, having caught up to the trailing blue SUV, pulled it over in Walthill. The driver was Marcus Blackhawk. There was no passenger. Meanwhile, Miller and Wolfe stopped at Wolfe's home in Walthill and met the police there. A preliminary breath test of Jason Miller revealed a blood-alcohol content of 0.190. On May 3, 2016, neither Miller nor Wolfe were able to name the shooter to the police.

FBI Special Agent (SA) Stephen Friend was assigned the case. Within 36 hours, SA Friend had interviewed both Miller and Wolfe. According to Friend, both men provided "virtually identical descriptions" of the shooter: a "Native American male, tattoo on the throat, dark hair, squinty eyes, and black flop hat with green marijuana leaves."

Based upon tips, SA Friend identified Anthony Whitewater as a suspect. Because Whitewater had a neck tattoo, SA Friend asked an FBI "photography person" (his term) to assemble a six-person sequential photo lineup to be shown to Miller and Wolfe. *See* Government Exhibits ("G.E.") 47-52; Addendum at 5A-10A.¹

¹ G.E. 47 corresponds with Photo #1. G.E. 48 is Photo #2. G.E. 49 is Photo #3. G.E. 50 is Photo #4 (Anthony Whitewater). G.E. 51 is Photo #5. G.E. 52 is Photo #6.

SA Friend did not know the race or ethnicity of the five men depicted in G.E. 47, 48, 49, 51, and 52. SA Friend did not know whether these men were Native American. He conceded later that the photographs were drawn from a national database and that he did not know whether the other men lived on either the Winnebago or Omaha Indian Reservations. SA Friend did not know if any of their neck tattoos had cultural or tribal significance. SA Friend also testified at a hearing on a motion *in limine* that the combined population of Winnebago and Omaha reservations was “somewhere in the area of 1500 to 2,000.”

The FBI “photography person” did not testify at either the hearing on the motion *in limine* or at trial.

Six weeks after the shooting, SA Friend met with Miller and Wolfe separately and showed them the six photos. Miller and Wolfe both identified Photo #4, Anthony Whitewater, a Native American living on the Winnebago Indian Reservation, as the shooter.

On June 22, 2016, a grand jury seated in the District of Nebraska returned a three-count Indictment that charged Anthony Whitewater and co-defendant Marcus Blackhawk with assault with a dangerous weapon, a violation of 18 U.S.C. §§ 113(a)(3), 1153, and 2, and use of a firearm during a crime of violence, a violation of 18 U.S.C. § 924(c). Mr. Whitewater was also charged with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g).

The district court denied Mr. Whitewater’s motion *in limine* to preclude testimony about the lineups and any in-court identification. Specifically, the district

court found that “[t]he individuals are all males appearing to range from about 20 years of age to as much as 50 years of age. They are all dark-skinned, olive-skinned individuals with very short black hair. And they all have neck tattoos. I do not find that the lineup is unconstitutionally misleading.”

Over defense objection, Mr. Miller testified before the jury that he had been shown a photo lineup and, from it, identified Anthony Whitewater as the shooter.

Taylor Morris, the young man with whom Anthony Whitewater fought at the party, testified that he was friends with Antonio Baker and Cody Chilson, two local Native American men with throat tattoos who knew the woman who threw the party.

Vincent Wolfe testified that he had never met or seen Anthony Whitewater before May 2, 2016. After some prompting by the prosecutor, Mr. Wolfe testified that he had identified Anthony Whitewater in a photo lineup and then, almost seamlessly, identified Mr. Whitewater in court. Mr. Wolfe also testified that Cody Chilson – one of the local Native American men who Taylor Morris had testified had a neck tattoo – was at the party.

Jason Miller testified that since the event he had spoken to Vincent Wolfe almost every day. Vincent Wolfe testified that he never saw the shooter and that he relied upon Miller having told him that it was the guy from the party.

Special Agent Friend testified a second time about the process for assembling the lineup, this time before the jury. He told the jury that the photo lineup was shown to both Miller and Wolfe on June 17, 2016 and that both men had chosen Mr. Whitewater as the shooter. On cross-examination, SA Friend told the jury that he did

not know whether any of the men in G.E. 47-49 and 51-52 were Native Americans, whether they lived on the Omaha or Winnebago reservations, or whether their neck tattoos were tribal or bore any cultural significance. SA Friend testified that the only photograph in the lineup who was definitely a Native American, who definitely lived on the reservation was G.E. 50/Photo #4, *i.e.*, Anthony Whitewater.

The jury found Mr. Whitewater guilty on all counts. On January 23, 2017, the district court sentenced him to 240 months of imprisonment to be followed by three years of supervised release. The district court also found that, by committing a new crime, Mr. Whitewater had violated the terms of his supervised release and imposed a consecutive sentence of 12 months and one day.

The Decision of the Court of Appeals

Anthony Whitewater appealed his conviction, arguing that the lineup was impermissibly suggestive and created a substantial likelihood of irreparable misidentification. Specifically, Whitewater argued that he, as the only Native American in the lineup, stuck out as the *only* plausible choice for Miller and Wolfe, two Native Americans tasked with identifying their assailant on a Native American reservation.

On January 3, 2018, the Eighth Circuit Court of Appeals affirmed, concluding that “a photo lineup is not suggestive ‘solely because the display did not depict persons of the same race or ethnic group.’” 879 F.3d at 292 (*quoting United States v. Wilson*, 787 F.2d 375, 385 (8th Cir. 1986)).

Mr. Whitewater seeks a writ of certiorari from the Eighth Circuit’s decision.

Reasons for Granting the Petition

I. This Court should grant review of this case to establish definitively that, for a lineup to satisfy due process, the defendant must not be the only person of the race or ethnicity described by the witness.

Justice Brennan wrote, “There is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J. dissenting).

Tension exists between this Court’s holdings in *Neil v. Biggers*, 409 U.S. 188 (1972), which established a multi-factor test for evaluating lineup suggestivity, and *Stovall v. Denno*, 388 U.S. 293 (1977), which recognized the inherent suggestivity of having only one person of the suspect’s race or ethnicity in an out-of-court identification. As a result, lower courts have arrived at different outcomes in cases where law-enforcement officers conduct lineups in which the defendant stands out based upon race or ethnicity. Petitioner Anthony Whitewater asks the Court to grant certiorari and to craft a narrow, but bright-line, rule: where a witness has provided a definitive racial or ethnic description of a suspect and where law enforcement officers have sufficient the time to assemble a lineup, they may not racially or ethnically isolate the defendant in the lineup.

This Court, in *United States v. Wade*, 388 U.S. 218, 228-29 (1967), pointed out that “[s]uggestion can be created intentionally or unintentionally in many subtle ways.” The *Wade* Court noted that once a witness identifies a suspect in a lineup, he is “not likely to go back on his word later on, so that in practice the issue of identity

may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.” *Id.* at 229.

The admissibility of a pretrial identification by photograph uses a two-part test. *Simmons v. United States*, 390 U.S. 377, 384 (1968). First, the Court determines whether the identification procedure used was “impermissibly suggestive.” *Biggers*, 409 U.S. at 198. If the defendant meets his initial burden, the burden shifts to the government to prove that, despite the impermissible suggestivity, under the totality of the circumstances the suggestive procedure did not create a very substantial likelihood of irreparable misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). “[R]eliability is the linchpin in determining the admissibility of identification testimony.” *Brathwaite*, 432 U.S. at 114.

On June 17, 2016, the FBI had a number of options. It could have exclusively shown Jason Miller and Vincent Wolfe photographs of Native Americans. It could have exclusively shown photographs of residents of the Omaha and Winnebago reservations. At a minimum, the FBI could have shown Mr. Wolfe and Mr. Miller photographs of two additional people – Antonio Brown and Cody Chilson – local Native Americans with throat tattoos who lived on or near the reservation, at least one of whom had been seen at the party. Instead, the FBI pulled *five* photographs of men of unknown race or ethnicity and *one* photograph of Anthony Whitewater, who is an enrolled member of a Native American tribe, and showed these photographs to two Native American victims. Because Mr. Whitewater was the only person who fit the racial description

provided to the FBI by Miller and Wolfe, this lineup was impermissibly suggestive and offends due process. The impermissible suggestivity of the lineup was established conclusively by Vincent Wolfe's easy selection of Native American Anthony Whitewater when, as Wolfe testified later, *he had not even seen the shooter*.

The workability of *Biggers*'s totality-of-the-circumstances scheme depends upon courts of appeal consistently holding law enforcement accountable for racially suggestive lineups. That has not happened.

Here, for example, the FBI, the district court, and the Eighth Circuit Court of Appeals have used "olive-skinned" as a proxy for Anthony Whitewater's race, ethnicity, and heritage and disregarded how he, as the lone Native American, would stand out to two Native Americans living on an adjacent reservation. By ratifying this lineup process, the Eighth Circuit has reaffirmed that, in the Eighth Circuit, *Biggers* and *Brathwaite* allow law enforcement to racially isolate defendants so long as they are a similar shade, *i.e.*, close enough. This standard reflects a fundamental misapprehension of the concept of "race" and turns the concept of "suggestivity" on its head.

Since *Biggers*, the Eighth Circuit has held that it will not find an identification procedure is impermissibly suggestive "solely because the display did not depict persons of the same race or ethnic group." *United States v. Wilson*, 787 F.2d 375, 385 (8th Cir. 1986), *cert. denied*, 479 U.S. 857 (1986); *see also United States v. Whitney*, 787 F.2d 457, 459 (8th Cir. 1986) (in which the same Magistrate Judge as the *Wilson* case

found nothing impermissibly suggestive in a photo lineup with only one lightly complected African-American man and the Eighth Circuit affirmed).

The Eleventh Circuit has also ratified the use of a lineup where the defendant is the only person featured matching the race or ethnicity described by witnesses. In *Williams v. Weldon*, 826 F.2d 1018 (11th Cir. 1987), the Eleventh Circuit concluded that, “[a]lthough [the defendant] technically was the only black man in the lineup, the other members of the group had similar skin tone and facial characteristics” and, therefore, not impermissibly suggestive. *Id.* at 1021.

While the Eighth Circuit and the Eleventh Circuits have explicitly ratified this racial isolation in lineups, other courts have occasionally rejected the use of lineups in which the defendant stands out as the only member of the same race or ethnicity as the suspect. Even in these courts, however, the line between permissibly suggestive and impermissibly suggestive remains fuzzy.

For example, in *United States v. Fernandez*, 456 F.2d 638 (2d Cir. 1972), the Second Circuit found impermissibly suggestive the use of a six-photo lineup in which all six men were African-American, but only one – the defendant – had an “Afro” haircut and “extremely light skin.” *Id.* at 641. But in *United States v. Maldonado-Rivera*, 922 F.2d 934, 974 (2d Cir. 1990), officers showed a nine-photo array to a witness, who had described a suspect as a thirtysomething balding, bearded Puerto Rican man of small stature. Regarding the racial and ethnic composition of the array, the Second Circuit found that “[t]he ethnicity of the nine persons depicted is indeterminate, and the majority may well be Hispanic” and concluded, based upon this

and other similarities (facial hair, receding hairlines, etc.), that the lineup was not impermissibly suggestive.

The Ninth Circuit, in *Grant v. City of Long Beach*, 315 F.3d 1081 (9th Cir. 2002), reviewed a civil judgment against two police officers who had investigated and arrested Grant for a series of rapes. The officers had presented photo lineups to each of the nine victims, but only two – Haines and Dale – felt confident enough to make an identification. *Id.* at 1084. Haines described her attacker as a Hispanic man with dark skin tone and short hair. *Id.* Before Grant had been identified as a suspect, Haines had tentatively identified a different man from a photo lineup. *Id.* Dale described her attacker as a Caucasian male with olive-toned skin. *Id.* She, too, identified another assailant from a lineup before Grant became a suspect. *Id.* at 1084-85. After Grant became a suspect, however, the officers showed both women a photo lineup of lineup of five Hispanic males and one Caucasian male (Grant). Both women picked Grant. *Id.* at 1084, 1085. The Ninth Circuit, upholding the judgment against the officers, noted that “[r]ace is not an absolute litmus test for the constitutionality of a pretrial identification procedure[,]” but concluded that, in an investigation of Grant, a Caucasian, a lineup of five Hispanic males and one Caucasian male, weighed in favor of suggestiveness. *Id.* at 1087.

In *Bernal v. People*, 44 P.3d 184 (Colo. 2002), the Colorado Supreme Court, sitting *en banc*, granted certiorari to review whether Jesse Bernal’s due-process right to a fair trial was violated by the admission of an out-of-court photo-lineup

identification. In *Bernal*, witnesses to a credit-union robbery told police that the robber appeared to be a “Hispanic” male with a “medium” and “rough complexion” and “sound[ed] Hispanic.” 44 P.3d at 188. The police showed the witnesses a photo lineup with six color photographs of young men. “Bernal’s photograph appears to be the only photograph of an ‘Hispanic’ male, although one of the other photos could be perceived as also depicting an ‘Hispanic’ male.” *Id.* at 189. The Colorado Supreme Court, finding the array impermissibly suggestive, concluded that because “ethnicity was a controlling and overriding characteristic of the witnesses’ description of the robber[.]” the fact that “[t]he ethnicities of most of the other men in the photo array were conspicuously different, specifically not ‘Hispanic,’” from Bernal caused his photo to stand out. *Id.* at 193.

That district courts and courts of appeal have interpreted the *Biggers* factors to permit, under any circumstance, the racial isolation of a suspect in a lineup is troubling, particularly where, as in Petitioner Whitewater’s case, the race or ethnicity of the suspect was a critical part of the victims’s description.

This Court has itself insinuated that a lineup where only one individual matched the race of the suspect could be impermissibly suggestive. In *Stovall v. Denno*, 388 U.S. 293 (1967), this Court addressed the suggestivity of a single-person showup in the victim’s hospital room where the suspect, Mr. Stovall, was the lone African-American in the room and was handcuffed to a police officer. 388 U.S. at 295; *see also Perry v. New Hampshire*, 132 S.Ct. 716, 724 (2012) (discussing *Stovall* and

noting the “undeniab[le] suggestiv[ity]” of that showup). The *Stovall* Court, however, subjected its due-process analysis to a totality-of-the-circumstances test and concluded that the gravity of the witness’ injuries and her inability to move justified an “imperative” “immediate hospital confrontation.” 388 U.S. at 302. This Court in *Perry*, finding no due-process requirement for a preliminary reliability inquiry by the trial court, differentiated between inadvertent suggestivity and suggestivity caused by the police. 132 S.Ct at 726.

A bright-line rule prohibiting racial isolation in photo lineups squares with both *Stovall* and *Perry*. By requiring that, where a lineup is used and no exigency exists, multiple photos of people matching the suspect’s racial or ethnic description must be shown, this Court will give fuller meaning to the *Biggers* criteria and keep the focus upon law-enforcement conduct implicating due process.

II. The question presented is important.

As described above, at least two circuit courts of appeal have interpreted *Neil v. Biggers* to permit racial isolation in lineups. At least two other circuit courts have condemned the practice, but without articulating a bright-line rule. In both *Stovall* and *Perry*, this Court has expressed concern with the suggestivity of racial isolation in lineups and found due-process violations where law-enforcement conduct creates impermissible suggestivity.

In her *Perry* dissent, Justice Sotomayor pointed out that, “eyewitness misidentification is ‘the single greatest cause of wrongful convictions in this country.’”

132 S.Ct. at 738 (*quoting State v. Henderson*, 208 N.J. 208, 211 (2011)). She continued:

Researchers have found that a staggering 76 % of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness identification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures.

Id. at 738-39 (Sotomayor, J. dissenting) (internal footnotes omitted).

A bright-line rule prohibiting, as a violation of due process, the racial isolation of suspects by police-crafted lineups would not only relieve the tension created by this Court’s jurisprudence on lineups, but would establish inter-Circuit and federal-state uniformity on this constitutional question. Further, such a rule would “[have] the virtue of informing police and prosecutors with specificity as to what they may do” in conducting photo lineups. *See Illinois v. Perkins*, 496 U.S. 292, 308-09 (1990) (*quoting Fare v. Michael C.*, 442 U.S. 707, 718 (1979) wherein the Court explained the value of bright-line rules.)

Ensuring the accuracy of lineup identifications is critical to preventing wrongful convictions and upholding the integrity of criminal prosecutions. In 2018, with the internet and the widespread availability of stock photographs, any burden upon law enforcement would be nominal and radically outweighed by the ensuing value of accurate out-of-court identifications. As such, this Court should grant certiorari.

Conclusion

The practice of racially isolating defendants implicates both state action and confidence in jury verdicts. This practice creates an unacceptably high risk of wrongful convictions. As such, it is a recurring due-process issue of constitutional significance. This Court, confronted with varying outcomes of cases with similar facts across the Circuits, should grant Anthony Whitewater's Petition for a Writ of Certiorari and resolve this issue.

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