CAPITAL CASE

NOS. 10-949 & 10-950

In the

Supreme Court of the United States

TROY ANTHONY DAVIS,

APPELLANT/PETITIONER,

v.

CARL HUMPHREY,

APPELLEE/RESPONDENT.

On Appeal and Petition for a Writ of Certiorari to the United States District Court for the Southern District of Georgia

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

Blank Page

INTEREST OF *AMICUS CURIAE*[*]

The Innocence Project, Inc. is a non-profit legal clinic and criminal justice resource center. Founded at the Benjamin N. Cardozo School of Law in 1992, the Innocence Project is dedicated 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's work focuses on helping to exonerate long-incarcerated individuals through the use of DNA evidence. Its basic mission is to help free innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment. To date, forensic evidence has exonerated 266 people in the United States, including 17 who served time on death row, and the Innocence Project has served as counsel or provided critical assistance in a majority of these cases.

In addition to assisting wrongfully convicted persons, the Innocence Project seeks to prevent future wrongful convictions by researching their causes and pursuing judicial, legislative, and administrative reforms designed to enhance the truth-seeking functions of the criminal justice system. As one of the Nation's leading authorities

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[*] Pursuant to S. Ct. R. 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received notice of *amicus curiae*'s intention to file this brief at least 10 days before its due date. The parties have consented to the filing of this brief.

on wrongful convictions, the Innocence Project and its founders, Barry Scheck and Peter Neufeld, are frequently consulted by officials at the local, state, and federal levels. The Innocence Project's groundbreaking work in the use of post-conviction forensic technology has provided irrefutable proof that wrongful convictions are not isolated or rare events.

As discussed in more detail below, the Innocence Project has identified certain types of recurring errors in death penalty proceedings—including faulty eyewitness identification, misleading forensic evidence, and unreliable informant testimony—that play a substantial role in the wrongful conviction of innocent persons. Many of these errors plagued petitioner's trial in this case and, in the Innocent Project's judgment, were not appropriately handled by the district court under this Court's precedents. Moreover, as described in more detail below, the Innocence Project is deeply concerned that, in considering the question of petitioner's actual innocence, the district court failed to distinguish the proverbial forest from the trees. In particular, it ignored the cumulative force of the compelling evidence of actual innocence presented by petitioner by examining each piece of evidence in isolation and essentially ignoring the truly persuasive demonstration of actual innocence that is readily apparent when the evidence is considered as a whole. The Innocence Project has participated at earlier stages of this case and is concerned that, unless this Court notes probable jurisdiction and corrects the decision below, Georgia will execute a demonstrably innocent person.

More broadly, the Innocence Project has a strong interest in having this Court take advantage of the opportunity this case presents to provide essential and much-needed guidance to the lower courts on the legal issues that often arise in cases of actual innocence. As the district court recognized, *see* Pet. App. 112a–114a, and as detailed in petitioner's Jurisdictional Statement and Petition for Certiorari, this Court's decisions do not provide sufficient guidance to lower courts on how to approach claims of actual innocence, including claims involving confession evidence, scientific evidence proving the falsity of "facts" relied on by the prosecutor at trial, and recantation evidence. This case offers the Court an opportunity to provide such guidance. The Innocence Project thus urges the Court either to note probable jurisdiction or, in the alternative, to grant the petition for certiorari.

INRODUCTION AND SUMMARY OF ARGUMENT

This case crystallizes recurring issues seen by the Innocence Project in wrongful conviction cases and presents an important opportunity for the Court to provide guidance on how claims of actual innocence should be evaluated. As an initial matter, the district court improperly evaluated each piece of new evidence in isolation, without giving proper weight to the cumulative effect of the evidence as a whole. That evidence included a compelling showing (1) that a clear majority of the government's eyewitnesses recanted their testimony after trial and made clear that their initial testimony was the result of improper police pressure or coercion; (2) that someone else had confessed to the crime; and (3) that a new forensic report incorporating state-of-the-art ballistics testing disproved an essential "fact" on which the prosecution based its case. By failing to look at the cumulative effect of this evidence on the question of innocence, the court committed serious legal error.

Equally important, this error was compounded by the lower court's failure to properly analyze the evidence before it. For example, the district court erred by requiring petitioner to first call a confessor to the crime as a witness before he was permitted to present evidence of his confession through witness testimony. Even worse, when the petitioner sought to present the testimony of the confessor as required by the district court, the court barred the very testimony it held was necessary to hear witness testimony of the confession. Similarly, the district court failed to understand the import of objective

scientific evidence proving the falsity of a critical claim relied upon by the State during the trial. Finally, the court incorrectly evaluated recantation evidence in isolation without considering its credibility in light of a pattern of police coercion evidence. These errors—especially when considered in light of petitioner's substantial and compelling evidentiary showing of actual innocence—are reason to note probable jurisdiction or grant review.

ARGUMENT

I. This Case Presents An Important Opportunity For The Court To Clarify The Standards That Should Apply To Claims Of Actual Innocence.

The credibility of the criminal justice system depends upon the existence of a full range of safety valves to free the innocent when errors have occurred. Accessible judicial remedies for colorable claims of actual innocence serve this vital purpose. As this Court has noted, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup* v. *Delo*, 513 U.S. 298, 325 (1995). That is because "the central purpose of any system of criminal justice" is not just "to convict the guilty" but to "free the innocent." *Herrera* v. *Collins*, 506 U.S. 390, 398 (1993).

This Court has recognized that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional" and warrant habeas corpus relief. *Id.* at 417. Indeed, in light of the public's justified

concern that the ultimate sanction be applied as a condign punishment only in appropriate circumstances, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977).

This case presents an important opportunity to clarify how a lower court should reach the reasoned decision that this Court's precedents demand in death penalty cases where there has been a post-trial demonstration of actual innocence. Petitioner contends that the lower court applied the wrong standard of review for claims of actual innocence. The district court determined that the standard for an actual innocence claim is clear and convincing evidence in light of both the old evidence and new evidence presented at the hearing. Pet. App. 117a. Whatever the appropriate standard, however, the district court erred by failing to give appropriate weight to the totality of the overwhelming evidence of innocence before it. The district court instead appears to have considered and rejected each piece of new evidence in isolation and never appreciated the fact that, taken as a whole, the evidence provides a truly persuasive demonstration that Georgia is poised to execute an innocent man. The Court should thus grant review to confirm that, when confronted with a claim of actual innocence, lower courts should take care to look at the evidence as a whole and weigh the *totality* of the new evidence against the evidence used to convict the petitioner. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (exculpatory evidence must be "considered

collectively, not item by item); *see also, Banks v. Dretke*, 540 U.S. 668, 698-699 (2004).

Weighing the totality of the evidence is especially important in cases, like this one, where certain claims deserve especially careful consideration in light of their inevitable tendency to undermine confidence in the conviction. Indeed this Court has determined in other contexts that some types of claims raise particular concerns of reliability and require close scrutiny in the death penalty context. In *Chapman v. California,* 386 U.S. 18, (1967), this Court determined that the use of a forced confession against a defendant is a fundamentally different error than other types of errors claimed in criminal cases. *Id.* at 23. As the court explained, "there are some constitutional rights so basic to a fair trial that their infraction can *never* be treated as harmless error." *Id.* (emphasis added). A long line of cases has thus placed the use of a defendant's coerced confession at trial squarely in that category. *See also, Rose v. Clark,* 478 U.S. 570, 578, n. 6, (1986); *Lego v. Twomey*, 404 U.S. 477, 483 (1972), *New Jersey v. Portash,* 440 U.S. 450, 459 (1979), Mincey v. Arizona, 437 U.S. 385, 398 (1978). As this line of cases demonstrates, not all claims are created equal. Just like the claims raised in *Chapman* and its progeny, the claims raised by the petitioner here warrant that type of careful consideration that was not afforded by the district court.

With no physical evidence tying petitioner to the murder of Officer MacPhail, the State at trial largely relied on the testimony of nine "eyewitnesses" and a ballistics report tying petitioner to an earlier

shooting to secure his conviction. At the evidentiary hearing, however, petitioner presented (1) evidence that seven of the nine eyewitnesses had recanted their testimony and that six of these witnesses originally testified against petitioner because of police coercion and pressure; (2) new testimony from multiple witnesses that a third party—Mr. Sylvester "Redd" Coles—had confessed to each of them that he, and not petitioner, had murdered Officer MacPhail; and (3) new ballistics evidence that calls into question the identification of the petitioner as the killer and eviscerates the motive upon which petitioner's conviction rests. Each of these claims, standing alone, casts serious doubt on the reliability of petitioner's conviction. Taken together, the evidence provides a truly persuasive showing of innocence and overwhelming proof that no reasonable jury could have convicted petitioner. By committing legal error in its evidentiary rulings, however, and by weighing the materiality of each item of new evidence individually and failing to consider its cumulative effect, the district court gave short shrift to the evidence that establishes petitioner's innocence. This Court should grant probable jurisdiction or grant review to correct these errors and to provide clarity to lower courts about how to evaluate a claim of actual innocence.

II. The District Court Erred in its Application of the Standard for an Actual Innocence Claim in Its Review of the New Evidence Presented by the Petitioner.

The district court committed three fundamental legal errors in its application of the standard for an actual innocence claim. *First*, the court incorrectly

excluded the testimony of three confession witnesses who would testify that a third party committed the crime, without first calling the confessor as a witness. The court committed an even more grievous error by then denying the petitioner the opportunity to call the confessor as a witness. *Second*, the district court failed to consider the significance of post-conviction evidence proving the falsity of facts relied on by the state to secure petitioner's conviction. *Third*, the district court committed legal error by discrediting and reviewing in isolation the recantation evidence of multiple witnesses who described a consistent pattern of police pressure and coercion.

A. The District Court Erred In Precluding Evidence That Someone Else Had Confessed To The Crime.

This Court should take this opportunity to clarify that, because an actual innocence inquiry "is not bound by the rules of admissibility that would govern at trial," *Schlup,* 513 U.S. at 327, a party is not required to *call as his own witness* a confessor to the crime (or demonstrate that witness's unavailability to testify) before he may present evidence of the confession. As this Court has previously held, the rules of evidence should not be strictly applied to preclude reliable evidence of actual innocence. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 537–38 (2006); *Schlup,* 513 U.S. at 327. Furthermore, this Court should take the opportunity to clarify that in the event a lower court requires the testimony of the confessor, which *amicus curiae* does not believe is proper, the lower court is barred then

from denying the petitioner the right to present this allegedly required testimony.

Although the district court below acknowledged that it was required to "'consider *'all the evidence,'* old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial,'" Pet. App. 167a (Aug. 12, 2010 Order) (quoting *House*, 547 U.S. at 537-38) (emphasis in Order), it departed from that rule in a drastic, unprecedented fashion. In particular, the district court precluded Ms. Quinna Glover from testifying that Sylvester "Redd" Coles had told her that he—not petitioner—had shot and killed Officer MacPhail. According to the district court, Ms. Glover's testimony was inadmissible hearsay because petitioner had not called Mr. Coles to testify nor established that he was unavailable to testify. Pet. 17.

The district court's evidentiary ruling is inconsistent with this Court's decisions. A habeas corpus petitioner is not required to call as his own witness a confessor to a crime or to demonstrate that witness's unavailability to testify before the petitioner may present evidence of a confession. In *House,* for example, the confessor was a *state rebuttal witness. House,* 547 U.S. at 552. Nevertheless, this Court considered his out-of-court confession as substantive evidence "[o]f [the] most importance" and not as mere impeachment evidence. *Id.* at 549. Moreover, as this Court recently reiterated in *Sears v. Upton,* "reliable hearsay evidence" relevant to a key issue in a capital case "should not be excluded by rote application of a . . .

hearsay rule." *Sears v. Upton*, 130 S. Ct. 3259, 3263 n.6 (2010) (per curiam) (citations omitted). That directive is sound. It should apply with full force to hearsay confessions, which are often the most critical and probative evidence establishing a petitioner's actual innocence. *See, e.g.*, *House*, 547 U.S. at 549. As this Court has recognized, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

The district court's decision also conflicts with decisions of other courts. Indeed, it appears that the court below may be the first court ever to preclude purported hearsay evidence in support of a claim of actual innocence because the confessor was "available" to testify. To the contrary, as other courts have recognized, a "district court undertaking [an actual innocence inquiry] is not bound by the rules of admissibility and should make its assessment in light of all available evidence." *Royal v. Taylor*, 188 F.3d 239, 244 (4th Cir. 1999); *see also Doe v. Menefee*, 391 F.3d 147, 170 n.20 (2d Cir. 2004) (Sotomayor, J.).

In *Wright v. Marshall*, No. 98-10507, 2008 WL 2783288, at *12 (D. Mass. July 17, 2008), for example, the district court credited hearsay confession testimony despite the declarant's availability. At the habeas corpus evidentiary hearing in that case, a witness (Maria Rivera Ramos) testified that her former boyfriend (Allen Smalls) had confessed to the murder of Penny Anderson—a crime for which the petitioner had been

convicted. As the district court observed, Wright's actual innocence evidence "primarily consist[ed] of the affidavit and testimony of Maria Rivera Ramos, in particular, her contention that All[e]n Smalls told her 'I'm going to kill you just like I killed Penny.'" *Id.* at *10. The district court admitted Smalls' confession as substantive evidence, even though the state court had previously questioned its admissibility because "it was unclear whether Smalls, who had testified at the grand jury, was 'unavailable' to permit the admissibility of his hearsay statement." *Id.* at *7. The district court concluded that Ramos's testimony was "most significant," and "sufficient to establish a likelihood that reasonable jurors would have a reasonable doubt as to whether Wright or Smalls was the killer." *Id.* at *12.

In seeking to defend its improper hearsay ruling, the district court below suggested that "[p]etitioner was attempting to use the *House* rule to create an incomplete and deceptive record, perverting the purpose of the rule." Pet. App. 170a. This comment only underscores the district court's failure to fairly consider the evidence. There are a myriad of reasons a petitioner would not call the confessor as a witness, not the least of which concerns petitioner's ability to locate the witness. *See* Pet. Mot. for Reconsideration, Aff'd of Jeff Walsh (describing multiple unsuccessful attempts to locate and serve Mr. Coles with a subpoena to testify at the evidentiary hearing). The district court's job is to judge the credibility of the witnesses before it and not to dictate the testimony a petitioner may present.

The district court also concluded that, excluding the evidence was harmless because Ms. Glover's testimony was cumulative of other evidence. Pet. App. 146a n.82. By excluding Ms. Glover's testimony as cumulative, however, the district court had no opportunity to evaluate the credibility of her testimony. Later in its same decision, the district court highlighted the importance of live testimony to do just that. Pet. App. 139a (because recantation witness, Ms. Dorothy Ferrell, did not testify, it "den[ied] this Court the opportunity to personally assess her credibility.") Moreover, cumulative evidence of Mr. Coles confessions speaks to the weight of this evidence, by reinforcing or corroborating the testimony of the other confession witnesses. As this Court determined in *Fulminante*, that one witness has testified to a particular fact does not render other testimony on that point cumulative. *Arizona v. Fulminante*, 499 U.S. 279, 299 (1991). In *Fulminante*, the defense sought to exclude testimony from multiple witnesses that the defendant confessed to the crime because the evidence was cumulative. *Id.* But this Court held that a fact-finder "might have believed that the two confessions reinforced and corroborated each other.," And accordingly, "one confession was *not* merely cumulative of the other." *Id.*

By excluding critical confession testimony as hearsay and focusing on the weight of the confession witnesses in isolation, the district court failed to properly evaluate highly relevant evidence under a clear and convincing standard. Indeed, the district court's failure to consider Ms. Glover's testimony was especially prejudicial given the weakness of the

initial eyewitness testimony on which petitioner's conviction was based. As this Court has long recognized, the "annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Given the "vagaries of eyewitness identification," *id.*, the conduct of the police may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process of law. *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967).

The uncontroverted evidence at trial demonstrated that the assault and murder of Officer MacPhail occurred in a poorly lit parking lot late in the night and witnessed by people under the extreme stress of being in the line of fire. Moreover, it is clear that, in addition to consistent reports of heavy-handed police intimidation, the police engaged in suggestive identification procedures, exposing eyewitness to photos of petitioner that did not rely on a "blind" identification process. In these circumstances, all of the recantation evidence should have been given careful consideration because scientific research establishes that heightened stress significant reduces an eyewitnesses ability to accurately identify the perpetrator of a crime. *See* Deffenbacher, K.A., *et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law & Human Behavior 687 (2004). Moreover, scientific research has provided indisputable proof that eyewitnesses are vulnerable to police coercion and pressure. *See* Douglas & Steblay, *Memory Distortion in Eyewitness: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 App. Cognitive Psychol. 991 (2006); Badfield, A.L. &

Wells, G.L., *'Good, You Identified The Suspect:' Feedback to Eyewitnesses Distorts Their Reports of the Witnesses' Experience*, 83 J. Appl. Psychol. 360 (1998).

In an even more grievous error, the district court committed legal error by denying petitioners the opportunity to present the testimony of Mr. Coles – the very testimony the district court deemed necessary in order to admit the confession evidence. Pet. App. 171a. After the district court entered its unprecedented ruling regarding the exclusion of the confession witnesses, petitioners filed a Motion to Re-Open the Evidentiary Record in order to present testimony the testimony of Mr. Coles and the excluded witnesses. The district court's hearsay rulings mid-hearing thwarted Mr. Davis's right to a fair hearing, and petitioners sought to remedy this error by presenting the additional testimony the district court required. In a highly improper ruling, the district court denied petitioners this opportunity by finding the request untimely. *Id.* Legally, and practically, this evidence can not be ignored by the court after it required petitioners to present such evidence in order for the confession witnesses to testify. Accordingly, at the very least, this Court should remand the case to the district court to hear the testimony of Mr. Coles and the excluded confession witnesses Ms. Ferrell and Ms. Glover.

B. Post-Conviction Evidence Proving The Falsity of Critical "Facts" Relied On By The State Is Entitled To Careful Consideration.

The Court should also note probable jurisdiction or grant review to provide guidance to lower courts on the value of post-conviction evidence that proves the falsity of critical so called "facts" used to secure a conviction.

At petitioner's trial, the State introduced forensic evidence connecting the bullet used in an earlier shooting to the gun used later in the evening to kill Officer MacPhail at a Burger King parking lot. Pet. App. 155a–56a. Before Officer MacPhail was shot, petitioner and several other witnesses attended a party in Cloverdale where an individual was shot (but not killed) after an argument broke out amongst guests. *Id.* at 81a–82a. The forensic report at the time of petitioner's original trial concluded sufficient similarities in the bullets found in the two victims to conclude that they may have been fired from the same gun. *Id.*

The State employed this forensic evidence effectively at trial to both prove the identity of the killer (the petitioner) by tying the Cloverdale and Officer MacPhail shooting together, to ascribe a motive to petitioner, and to establish a possible murder weapon that was never recovered. *Id.* at 155a. In particular, the State used the evidence to identify the petitioner as the perpetrator in both the Cloverdale and Officer MacPhail shooting. *Id.* ("And then there are the silent witnesses in this case. Just as Davis . . . murdered Officer MacPhail, so also did

Troy Anthony Davis, using the same gun, shoot Michael Cooper and murder Officer MacPhail"). In addition, the State used the evidence to ascribe a motive to the petitioner, noting that he shot Officer MacPhail to avoid being arrested for the Cloverdale shooting, and further argued that this evidence undercut the defense's argument that Coles was responsible for the murder. *See* Jurisdictional Statement at 31.

At the evidentiary hearing, however, petitioner provided objective, scientific evidence—specifically, a 2007 Georgia Bureau of Investigation report—showing that, contrary to the State's arguments at trial, new state-of-the-art ballistics evidence proved that there were not "enough similarities in the bullets" to connect the two shootings. *See* Pet. EH Exh. 31. This new evidence eviscerates both the identification of the petitioner as the killer and the entire motive on which the prosecution asked the jury to convict. This evidence should have been seriously considered by the district court. Evidence showing motive to commit murder is a significant circumstance indicating guilt and is extremely powerful. Yet the district court rejected the evidence out of hand as simply not relevant. *See* Pet. App. 157a.

This Court should note probable jurisdiction or grant review to make clear that scientifically proven evidence that a conviction rests on false so-called "facts" deserves special consideration in an innocence determination. This proposition is supported by this Court's precedents concerning the use of fabricated evidence at criminal trials. The Court has long held that proof of deliberate

fabrication requires that a conviction be set aside unless the impact of the false evidence was truly harmless, *i.e.*, if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (citing authorities). That is a more exacting burden for the State to meet than when officials deliberately withhold material, exculpatory evidence from the defense. *See, e.g.*, *United States v. Bagley*, 473 U.S. 677, 682 (1985) (internal quotations omitted) (reversal warranted where there exists a "reasonable probability" that the jury's verdict "would have been different" had the material evidence been disclosed). The difference between the two standards confirms that there is something particularly offensive about allowing convictions predicated on false evidence to stand. This is not to say that proof that a trial was tainted by false evidence would automatically entitle a petitioner to the generous standard in this Court's fabrication-of-evidence cases. Nevertheless, the doctrinal foundation of those cases provides compelling grounds to give objective, scientifically disproven "facts" increased significance in the innocence analysis.

In 2009, the National Academy of Sciences ("NAS"), in response to a Congressional charge, issued a comprehensive report on the forensic science com-munity. *See* National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press 2009). The report presented a scathing assessment of forensic science, noting widespread failures in a variety of forensic

disciplines. The report attributed failures in individual cases to a range of serious problems, including lax oversight in the crime labs, unscientific methods, biased analysts, incompetence, and misconduct.

The NAS report stemmed in part from exonerations of the wrongfully convicted cases that confirm that forensic science errors have played a major role in convicting the innocent. Of the first 225 wrongful convictions overturned by DNA testing, more than 50% (116 cases) involved faulty forensic evidence that went undetected at the time of trial (if in fact a trial occurred). *See* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 12 (2009). The reasons for forensic errors in the innocence cases are manifold, but the pattern is consistent: a forensic analyst presents false, mistaken, or misleading testimony, and this testimony helps convict an innocent person.

Additionally, scientifically disproven so called "facts" invariably do more than invalidate forensic testimony relied upon by the jury. They also transform how a fact-finder views the entirety of the State's case, including both forensic and non-forensic evidence. This is most clearly demonstrated in what is viewed as the "simplest" of DNA cases: a sexual assault by a single perpetrator, in which the victim was not otherwise sexually active. In-court identification testimony by the victim at trial ("I'm positive he's the one who raped me") is well known to have an enormous impact on juries—and, in the pre-DNA era, it was often "confirmed" by serological analysis of the defendant's blood type. Yet over 75%

of DNA exonerations to date have involved rape convictions that were overturned upon conclusive, DNA evidence of innocence, despite the victim's eyewitness testimony at the original trial. In such cases, DNA tests revealing that the defendant was not the source of the semen immediately cast the once-"certain" identification in a wholly new light. It does not "erase" the victim or a witness's original testimony, of course, but it does eviscerate its persuasive force by providing scientific proof that the victim or a witness was honestly, but tragically, mistaken. *See* U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science*, NAT'L INST. JUST., NCJ161258 (June 1996) at 36; James Dao, *In Same Case, DNA Clears Convict and Finds Suspect,* N.Y. TIMES, Sept. 6, 2003, at A7; *see also* Barry Scheck, Peter Neufeld & Jim Dwyer, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 163–202 (New American Library ed., Dec. 2003).

So too here. The new ballistics evidence showing that the State's entire theory of motive was mistaken substantially undercuts the persuasive force of the evidence at trial. The district court improperly viewed this new ballistics evidence in isolation concluding that it was only relevant to the Cloverdale shooting. By failing to look at how this new evidence sheds new light on the MacPhail murder, especially in conjunction with the confession and recantation evidence, the district court committed legal error.

C. The District Court Failed To Understand The Importance Of Recantation Evidence Given The Consistent Pattern of Police Coercion.

This Court should either note probable jurisdiction or grant the petition to provide guidance to the lower courts on how to assess the importance of recantation evidence in an innocence claim. Courts should give more weight to this evidence in cases involving a consistent pattern of coercion by law enforcement officials. While *amicus curiae* agrees that recantation evidence is generally looked upon with suspicion, evidence of multiple recantations coupled with a pattern of police coercion is especially powerful and deserves careful consideration. In isolation, a single accusation of coercion is wholly different from a pattern of police threats and coercion. This pattern adds credibility to each accusation and to the recantations that the court below did not afford to them.

At the evidentiary hearing, petitioner presented recantation evidence from seven of the nine witnesses who at trial had either identified petitioner as the shooter or testified that he had confessed to the crime. The vast majority of these witnesses are unconnected to the petitioner. Six of the witnesses recount similar stories of police coercion and offers of incentives to provide testimony implicating the petitioner. *See* E. Hr'g Tr. vol. 1 at 16, 32, 54–60, 94–96, E. Hr'g Doc 3, Exh. 1, 5. Even more telling, these stories are corroborated by a tape recording of Savannah police officers threatening additional potential witnesses. *See* E. Hr'g. Tr. vol. 1 at 242–44; *see also* Pet. EH. Exh. 21-B.

Rather than addressing the cumulative nature of this evidence, the court below analyzed each assertion of coercion as an isolated incident. *See* Pet. App. 123a–144a. The lower courts' misunderstanding and failure to grasp the cumulative nature of the evidence is further exposed in its remarkable failure to make even a passing mention of the tape recording that captured police officers threatening potential witnesses in this case.

Moreover, given the established pattern of coercion evidence, it is disturbing how heavily the court below relied on testimony from the very officers and attorneys accused of employing coercion to discredit those accusations. Discrediting evidence of witness Antoine Williams' coercion, the court relied on testimony from the officers and prosecutors who interacted with him. *Id.* at 127a n.57. Discrediting evidence of witness Kevin McQueen's coercion, the court relied on testimony from the chief assistant district attorney to establish that the State offered no inducements for his testimony. *Id.* at 129a n.59. And discrediting evidence of witness Jeffery Sapp's coercion, the court relied on the testimony of the prosecutors and the officer Mr. Sapp accused of harassment. *Id.* at 132a.

Trial testimony induced by police pressure and coercion threaten the accuracy and reliability of the criminal justice system. The problem is a significant one. In the experience of the Innocence Project, false witness statements are consistently used as evidence to convict innocent persons. Indeed, a survey of cases from 1900 to 1995 shows that false witness testimony has resulted in at least 20% of known wrongful convictions. Adrian T. Grounds,

Understanding the Effects of Wrongful Imprisonment, 32 CRIME J. 1, 10 (2005).

Police officers and prosecutors hold tremendous power over witnesses and may easily and often unintentionally induce false testimony. In recent years improved DNA analysis resulted in the exoneration of 252 individuals, 42 of whom who falsely confessed to rapes and murders. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1052 (2009). These numbers do not capture the full extent of the problem as DNA evidence is not available in all cases. Indeed, 631 police officers were surveyed about their interrogation beliefs and practices, and overall, participants estimated that 4.78% of the self-incriminating statements they elicited were from innocents. Saul M. Kassin *et al.*, *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. & HUM. BEHAV. 381, 392–93 (2007). Psychological studies further expose the potential depth of this problem by revealing that individuals may be induced to falsely testify in exchange for privileges as basic as being allowed to sleep, eat, make a phone call, go home, or feed a drug habit. Saul M. Kassin, *The Psychology of Confessions*, ANNU. REV. LAW SOC. SCI. 4: 193, 195 (2008).

If innocent individuals who face criminal prosecution may be induced to make false confessions by law enforcement officials, it should come as no surprise that witnesses, informants, and accomplices, who have much less to lose, may also be induced to fabricate statements due to coercion or offers of preferential treatment. Shawn Armbrust,

Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look, 28 B.C. THIRD WORLD L.J. 75, 92 (2008). A study by the Innocence Project exposes the magnitude of the problem. As the study shows, informants, accomplices, and others who testify in response to incentives and coercion presented by law enforcement officials are the leading cause of wrongful capital convictions. *See* Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, THE INNOCENCE PROJECT 3 (2004). Even individuals who are not offered incentives are induced to provide false testimony by police officers or prosecutors.

Given law enforcement officials' potential to induce false statements, it is troubling that courts often overlook evidence of wrongdoing by these officials. A recent study by the Innocence Project compared 65 DNA exoneration cases involving documented appeals or civil suits addressing prosecutorial misconduct with a nationwide study by the Center of Public Integrity on prosecutorial misconduct. Based on this comparison, the Innocence Project found that an innocent person is nearly equally likely as the average defendant to prevail in a prosecutorial misconduct claim. Emily West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases*, THE INNOCENCE PROJECT 1 (2010).

The use of pressure, coercion, and incentives to induce false testimony and courts' consistent failure to fairly credit this evidence are unfortunate but reoccurring themes in wrongful conviction cases.

This Court should take this opportunity to provide guidance to lower courts on how to address those rare cases that present multiple recantation witnesses coupled with a credible pattern of police coercion. Under the clear and convincing standard, a proper review should have considered the heightened credibility of the multiple recantation witnesses in light of the pattern of police coercion and pressure.

CONCLUSION

For these reasons, the Court should either note probable jurisdiction or grant the petition for certiorari.

Respectfully submitted,

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