

IN THE SUPREME COURT OF GEORGIA

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| STATE OF GEORGIA | : | |
| | : | |
| Appellee | : | No. S07A-1758 |
| v. | : | Chatham County |
| | : | No.089-2467-H |
| | : | |
| TROY ANTHONY DAVIS | : | |
| | : | |
| Appellant | : | |

BRIEF OF THE GEORGIA INNOCENCE PROJECT
AS AMICUS CURIAE
IN SUPPORT OF APPELLANT

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I. Interest of Innocence Network as Amicus Curiae

The Innocence Network ("Network") is an association of thirty member organizations dedicated to providing *pro bono* legal and investigative services to indigent prisoners whose actual innocence may be established by post-conviction evidence.¹ The Network currently represents hundreds of prisoners with innocence claims in all fifty States and the District of Columbia. The Network also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system.

II. Summary of Argument

Since the first DNA exoneration of a convicted prisoner in 1989, it has become clear that wrongful convictions are far

¹ The Network's members include: Arizona Justice Project; Association in Defense of the Wrongly Convicted; Barbara C. Salken Criminal Justice Clinic; California & Hawaii Innocence Project; Center on Wrongful Convictions; Cooley Innocence Project; Downstate Illinois Innocence Project; Georgia Innocence Project; Indiana University School of Law Clinic, Wrongful Conviction Component; Idaho Innocence Project; Innocence Project of Florida; Innocence Project New Orleans; Innocence Project Northwest Clinic; Innocence Project of Minnesota; Innocence Project of Texas; Iowa/Nebraska Innocence Project; Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project; Justice Brandeis Innocence Project; Kentucky Innocence Project; Maryland Office of the Public Defender Innocence Project; Medill Innocence Project; Mid-Atlantic Innocence Project; Midwestern Innocence Project; New England Innocence Project; North Carolina Center on Actual Innocence; Northern Arizona Justice Project; Northern California Innocence Project; Office of the Public Defender, State of Delaware; Rocky Mountain Innocence Project; Second Look Program; Texas Center for Actual Innocence; Texas Innocence Network; The Innocence Project, Inc.; The University of Leeds Innocence Project; and Wisconsin Innocence Project.

more common than anyone ever imagined. Not every wrongfully convicted person is lucky enough to have access to DNA which will demonstrate their innocence—many are convicted on witness testimony alone. The ability to use DNA evidence to test convictions has raised questions about the reliability of this evidence in light of its prominent role in the wrongful conviction epidemic.

One kind of evidence that the Network's work has cast considerable doubt on is eyewitness testimony. Mistaken eyewitness identification is "the single greatest cause of wrongful convictions nationwide."² To date, the Network and others have used DNA to exonerate 208 individuals who were wrongly convicted, and in 77% of those cases, mistaken eyewitness testimony was the cause of the wrongful conviction.³ Eyewitness testimony can be rendered unreliable by factors that occur during the incident, such as the presence of a weapon, or by factors that occur subsequently, such as suggestive lineups. "[E]yewitness testimony is very believable and can wield considerable influence over the decisions reached by a jury," so

² The Innocence Project, *Understand the Causes: Eyewitness Misidentification*, at <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited November 1, 2007) [hereinafter *Eyewitness Misidentification*].

³ *General Overview of Eyewitness Testimony: Hearing on HR 352 Before the H. Comm. on Eyewitness Identification Procedures*, 149th Sess. (Ga. 2007) (comments of Rep. Stephanie Stucky-Benfield), available at http://www.legis.ga.gov/legis/2007_08/house/communications/07study/4/resources.html [hereinafter *Hearings*].

it can be a short road from a mistaken eyewitness identification to a wrongful conviction.⁴

The present case comes before this Court at a time of great skepticism in Georgia about eyewitness testimony. Since 1999, six prisoners have been exonerated based on DNA evidence in this state alone.⁵ All six men were convicted because of faulty eyewitness testimony.⁶ These recent exonerations have spurred the Georgia legislature to hold hearings on the reliability of eyewitness testimony, and to consider passing statewide standards for eyewitness identification procedures.⁷ Of great significance here, during the legislative hearings, State Representative Stephanie Stuckey-Benfield raised concerns about the eyewitness evidence against Troy Davis.⁸

Another kind of evidence that recent exonerations have called into question is statements and testimony obtained through police coercion. The Network has found that police misconduct is a factor in at least 15% of exoneration cases.⁹ When police

⁴ *Brodes v. State*, 279 Ga. 435, 440, 614 S.E.2d 766, 770 (2005) (citing *State v. Dyle*, 899 S.W.2d 697, 609 (Tenn. 1995)).

⁵ *Hearings*, *supra* note 3.

⁶ *Id.*

⁷ *See generally, id.*

⁸ *Id.* (comments of Rep. Stephanie Stucky-Benfield).

⁹ The Innocence Project, *Understand the Causes: Government Misconduct*, at <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Nov. 1, 2007) [hereinafter *Government Misconduct*].

question witnesses, even a difference in wording or intonation that indicates the desired answer can lead a witness to provide incorrect information. Neuschatz Aff. at 7. When the police use more coercive tactics, such as not allowing a witness to leave until they provide a certain account of the incident, the resulting statement may reflect a desire to end the uncomfortable interrogation, rather actual knowledge of the events.

A third kind of evidence that the Network has found contributes to wrongful convictions is the use of informant testimony. The Network has found that informant testimony, such as testimony by jailhouse informant that the accused confessed, is responsible for over 15% of wrongful convictions.¹⁰ The reliability of informant testimony is suspect because such witnesses have strong incentives to lie. In exchange for testimony, witnesses may receive leniency, financial reward, and privileges while incarcerated, or they may benefit by deflecting attention from themselves if they are suspects. All of these motivations diminish the credibility of an informant's testimony.

All three of these leading causes of wrongful convictions were present in Troy Davis's case. There was no physical evidence linking Troy Davis to the crimes for which he was convicted; rather, his convictions rested solely on the testimony of witnesses, the majority of whom have since recanted. Post-trial affidavits by these witnesses—in which they renounce

¹⁰ The Innocence Project, *Understand the Causes: Informants*, at www.innocenceproject.org/understand/Snitches-Informants.php [hereinafter *Informants*].

their testimony—reveal three major problems with the trial that sent Troy Davis to death row: (1) eyewitness testimony was influenced by suggestive photo arrays, and pre-identification media exposure to Troy Davis’s photograph; (2) statements and testimony from eyewitnesses were the result of suggestive and coercive interrogation techniques designed to incriminate Troy Davis; and (3) testimony by informants who claimed Troy Davis had confessed was false and done exclusively for the informants’ personal gain.¹¹ In short, almost all incriminating evidence that was once offered to convict Troy Davis has now been repudiated.

The post-trial affidavits also reveal convincing new evidence indicating that the prosecution’s main witness, Sylvester “Red” Coles, was in fact the real killer. This evidence includes both sworn statements by additional witnesses who did not come forward at the time of the trial, and statements by individuals who have since heard Coles confess.

The Network files this *amicus* brief in support of Troy Davis’s Extraordinary Motion for New Trial because the evidence used to convict Troy Davis was entirely unreliable and raises a real question of his actual innocence.¹² This is an unfortunate case where, in the noble effort to solve a police killing, investigative officers too quickly believed the statements of a highly suspect witness that Troy Davis was the shooter. As a

¹¹ Both informants have now recanted their testimony. See App. 13-14.

¹² We hereby incorporate by reference the facts summarized in the Appellant’s Brief.

result, they pressured witnesses to fabricate statements against Troy Davis or to identify him with a certainty they did not actually possess. In light of the tainted trial testimony, and the powerful new testimony that has come to light since his conviction, *amicus* asks that Troy Davis's Extraordinary Motion for New Trial be granted.

III. Argument

Ten eyewitnesses and two informants testified against Troy Davis at trial. An astonishing *nine* of those twelve have revealed in subsequent affidavits that their testimony was false or inaccurate. These recantations have cast light on the improper procedures used by police to secure eyewitness identifications and testimony against Troy Davis, and the personal motivations of the informants to fabricate his alleged confessions.

A. Red Coles, One of the Only Witnesses Who Has Not Recanted, Is the Likely Killer.

The primary reason that Troy Davis became a suspect in Officer MacPhail's murder was Sylvester Coles. The day after the shooting, Coles approached the police with his lawyer in tow and implicated Troy Davis. Tr. vol. IV at 915-18, 949. Coles had the most to gain by doing so—he was the most obvious suspect in both the assault on Larry Young and subsequent shooting. Affidavits from new witnesses and from persons who have since heard Coles confess make clear that Coles is the likely killer of Officer MacPhail.

Often in wrongful conviction cases, subsequent investigation reveals that the actual perpetrator testified falsely against the innocent defendant or otherwise implicated the defendant to the police. For instance, in *Kyles v. Whitley*, the United States Supreme Court reversed a defendant's capital murder conviction, because evidence withheld by the prosecution about the state's informant strongly suggested the informant committed the crime.¹³ Like Coles, the informant in *Kyles* approached the police and implicated the defendant, and led them to evidence of the crime. Here, the situation is similar. Indeed, the police even invited Coles to participate in a "reenactment" of the events for the benefit of other witnesses, during which Coles played the role of an *innocent* bystander. Neuschatz Aff. at 15. As in this case, the police in *Kyles* failed to investigate the informant despite numerous indications that he was the actual perpetrator.¹⁴

Just this year in New Jersey, the conviction of Byron Halsey was overturned when DNA evidence linked state's witness Clifton Hall to the murders supposedly committed by Halsey.¹⁵ Halsey, an innocent man, convicted largely on the testimony of the actual rapist and murderer, spent 19 years in prison. Like Coles, Clifton Hall was also an obvious suspect in the murder—he

¹³ 514 U.S. 419, 454 (1995).

¹⁴ *Kyles*, 514 U.S. at 425-28.

¹⁵ Tina Kelley, *DNA in Murders Frees Inmate After 19 Years*, N.Y. Times, May 16, 2007, at B1.

lived next door to the victims and had given Byron Halsey a ride several hours before the murder.

Coles was the only witness who claimed to have seen the entire incident from beginning to end. Although he was at the scene of the crime, he claimed not to have had a gun, and therefore not to be a suspect in the shooting. Tr. vol. IV at 927.¹⁶ Since Troy Davis's conviction, however, two witnesses—Tonya Johnson and Anita Saddler—have submitted affidavits stating that they saw Coles hide a gun on the night of the shooting *after* Officer MacPhail was shot. In her affidavit, Johnson—who lived near the scene of the shooting—reveals that Coles talked to her right after the shooting and asked her to hold his gun. When she refused, Coles "took both guns next door to an empty house and put them inside the screen door and shut the door." *Id.* Although Johnson did testify at trial that Coles looked "in a panic and nervous" when she saw him after the shooting, she failed to tell investigators that he was carrying a gun. App. 8 at 1-2. In her affidavit, Johnson explained that she omitted this from her story because Coles threatened her after the incident: Coles "wanted to make sure that [she] did not tell the police about the guns he hid." *Id.* at 1. Saddler, an acquaintance of Johnson who with Johnson on the night of the shooting, confirms Johnson's statements in her affidavit, stating that when Coles came to Johnson's house, he "had a gun which was stuck into his shorts." App. 9 at 2-3.

¹⁶ Coles had a prior felony conviction for carrying a concealed weapon. Tr. vol. IV at 929.

Since Troy Davis's conviction, three separate witnesses have come forward with affidavits that they heard Coles confess to shooting Officer MacPhail. Anthony Hargrove, a longtime friend of Coles, stated that roughly a year after Officer MacPhail's death, Coles told him that "he killed a policeman and a guy named Troy took the fall for it." App. 5 at 1. Shirley Riley, another friend of Coles, submitted an affidavit stating that when she asked Coles if he was involved in the shooting, he responded that "he did shoot the officer." App. 6 at 1. Finally, Darold Taylor met Coles years after the shooting. After hearing rumors that Coles had been the one who shot Officer MacPhail, Taylor asked him about it, and Coles "admitted . . . that he was the one who killed the officer . . ." App. 7 at 6.

A number of Network cases have culminated in confessions by the real killer. Marvin Anderson was convicted in Virginia of rape, forcible sodomy and abduction. Six years after the crime, the real perpetrator came forward and confessed to authorities in an effort to clear Anderson's name. Unfortunately, courts refused to exonerate Anderson until a new state law was passed 13 years later, requiring them to test DNA evidence from the case.¹⁷ Another exoneree, Ryan Matthews, was sentenced to death in Louisiana for killing someone during an armed robbery. The real perpetrator, neighborhood resident Rondell Love, began bragging to friends after Matthews's trial that he had committed

¹⁷ The Innocence Project, *Know the Cases: Marvin Anderson*, at <http://www.innocenceproject.org/Content/49.php> (last visited Nov. 11, 2007).

the murder. Matthews, however, was lucky enough to have access to DNA evidence, which revealed that Love was in fact the real killer.¹⁸

B. Most Testifying Witnesses Have Now Recanted Their Incriminating Statements Against Troy Davis, the Majority of Which Were the Product of Suggestive and Coercive Police Tactics.

As in the *Kyles* case, the new evidence in Troy Davis's case "reveal[s] a remarkably uncritical attitude on the part of the police" toward Coles's version of events.¹⁹ From the moment Coles implicated Troy Davis as the killer, police had only one goal: to find Troy Davis and obtain the testimony necessary to convict him. In the heated environment of an investigation in which a police officer was murdered, the police focused narrowly on Troy Davis, despite the fact that subsequent witness interviews revealed doubts both as to the identity of the shooter and the credibility of Coles. As a result, the prosecution and conviction of Troy Davis suffered from a number of flaws: (1) mistaken eyewitness identifications resulting from suggestive identification techniques; (2) unreliable testimony from witnesses who were coerced by police into implicating Troy Davis; and (3) testimony from informants who had no interest in telling the truth, but rather wanted to implicate Troy Davis for personal gain.

¹⁸ The Innocence Project, *Know the Cases: Ryan Matthews*, at <http://www.innocenceproject.org/Content/206.php> (last visited Nov. 11, 2007).

¹⁹ 514 U.S. at 445.

We now know that police tactics, rather than eyewitness certainty, led to the conviction of Troy Davis because so many of the original witnesses have recanted their testimony. When witnesses for the state recant their trial testimony, "it casts doubt on the proof used to convict and the correctness of the guilty verdict."²⁰ Indeed, courts in other jurisdictions routinely recognize the need for a new trial, or, at the very least, an evidentiary hearing, where credible, post-trial recantations suggest that one or more material witnesses for the prosecution offered false or inaccurate testimony at trial.²¹

While post-trial declarations generally are "entitled to much less regard than sworn testimony delivered at the trial,"²² this case presents the unusual circumstance in which post-trial recantations bear far greater indicia of reliability than the testimony at trial. The sheer number of these recanting witnesses and the consistency of their explanations for their false testimony at trial strongly support the believability of their recantations and undermine their testimony at trial. Moreover, the testimony of the two witnesses who have not yet recanted their trial testimony—Sylvester Coles and Stephen

²⁰ *Drake v. State*, 248 Ga. 891, 897, 287 S.E.2d 180, 184 (1982) (Hill, J. concurring specially).

²¹ *See, e.g., State v. Brigman*, 632 S.E.2d 498, 508-09 (N.C. App. 2006); *People v. Wong*, 784 N.Y.S.2d 158, 160-61 (N.Y. App. Div. 3d Dep't 2004); *Adams v. State*, 792 A.2d 809, 816-17 (Conn. 2002); *State v. Robillard*, 508 A.2d 709, 712-13 (Vt. 1986).

²² *Head v. State*, 256 Ga. App. 624, 628, 569 S.E.2d 548, 552 (2002).

Saunders—could not, by themselves, possibly have supported Troy Davis's conviction. As such, the recanted testimony unquestionably led to Troy Davis's conviction, and the absence of this false testimony would almost certainly have led to a different outcome at trial.

It is not unusual for the witnesses against wrongfully convicted individuals to recant their testimony. For example, Kenneth Adams, one of the notorious, wrongly-convicted "Ford Heights Four," was convicted largely on the strength of eyewitness testimony. Several years later, however, the prosecution's main eyewitness recanted her story, saying she had made it up because she felt pressured by police.²³ Gary Dotson was convicted of aggravated kidnapping and rape in 1979. The victim, who had identified him as the perpetrator, subsequently recanted her testimony, saying she had made it up to hide a sexual encounter with her boyfriend, but an Illinois judge refused to consider the recantation, saying she was more believable in her original testimony.²⁴ Recantations, especially when they occur en masse, can be the first sign that a conviction has been obtained wrongfully and they should be heeded.

²³ The Innocence Project, *Know the Cases: Kenneth Adams*, at <http://www.innocenceproject.org/Content/46.php> (last visited Nov. 11, 2007) [hereinafter *Kenneth Adams*].

²⁴ The Innocence Project, *Know the Cases: Gary Dotson*, at <http://www.innocenceproject.org/Content/89.php> (last visited Nov. 11, 2007).

1. Post-Trial Affidavits Reveal that Most of the Eyewitness Testimony Was the Product of Suggestive Identification and Interrogation Techniques.

Three consistent themes emerge from the post-trial affidavits of witnesses who testified against Troy Davis: (1) many eyewitnesses claimed to be much more certain of their identifications than they actually were; (2) the photo arrays and other techniques used to identify Troy Davis were extremely suggestive; and (3) statements made by eyewitnesses were the product of police pressure and coercion. Once witnesses made their initial identifications and statements, most felt obligated to maintain their stories out of fear of perjury charges.

Courts have held that admission of "unreliable identification evidence obtained by police through unnecessarily suggestive procedures violates a defendant's right to due process."²⁵ This Court has also recognized "the fallibility of eyewitness identification and the danger of relying too heavily on eyewitness identification as absolute proof of a defendant's guilt."²⁶ In so doing, the Court acknowledged the large body of social science research demonstrating that eyewitness

²⁵ See, e.g., *Bernell Juluke v. Cain*, 134 Fed. Appx. 684, 689 (5th Cir. 2005) (citing *Neil v. Biggers*, 409 U.S. 188, 198 (1972)).

²⁶ *Brodes*, 279 Ga. at 441, 614 S.E.2d at 770 (quoting *Rimmer v. State*, 825 So.2d 304, 337 (Fla. 2002) (reversing conviction and ordering new trial because the court allowed the jury to could consider eyewitness certainty in assessing the reliability of identification)).

identifications are highly unreliable, particularly when the techniques used to produce them are unduly suggestive.²⁷

Scientists have found that two types of factors affect the reliability of eyewitness identifications.²⁸ The first type includes the circumstances surrounding the event, such as stress placed on the witness,²⁹ lighting conditions, distance, and the races of the witness and perpetrator.

The second category includes the circumstances of the identification, such as the presence of subtly suggestive procedures used in lineups and photo arrays. For example, researchers have found that when a witness is told before viewing a lineup that the culprit may not be there, it greatly affects the accuracy of an identification; such an instruction has reduced mistaken identifications by over 40% in lineups where the culprit was not present.³⁰ Researchers also have found that when witnesses view a suspect's photograph before they make their identification, there is a grave risk that they may wrongly identify that person because their features look familiar. Neuschatz Aff. at 7. Additionally, persons administering a lineup who know the suspect's identity often provide

²⁷ *Id.* at 440-41, 614 S.E.2d at 770-71.

²⁸ *Eyewitness Misidentification*, *supra* note 2; Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, *Annu. Rev. Psychol.* (2003).

²⁹ For instance, studies have shown that "the presence of a weapon reduces the chances that the eyewitness can identify the holder of the weapon." Wells & Olson, *supra* note 28, at 282

³⁰ Wells & Olson, *supra* note 28, at 286.

unintentional clues to the witness, or signal that the witness has correctly identified the suspect, thereby increasing the witness's confidence in his or her identification when they may have initially been unsure about it.³¹

The conviction of the first death row inmate to be exonerated by DNA, Kirk Bloodsworth, rested primarily on five eyewitnesses identifying him as being with the victim prior to her murder. After seven years in jail, Bloodsworth was exonerated by DNA evidence excluding him from the crime.³² Since then, the Network has exonerated numerous wrongfully convicted individuals who were sent to jail by mistaken eyewitness identification, including several individuals in Georgia. In 1982, Robert Clark was convicted in Georgia of rape, kidnapping and armed robbery on the strength of an eyewitness who picked him out of a live lineup after she had seen his photo. Clark was the only man whose photo was shown who also appeared in the lineup.³³ Nearly 25 years later, DNA evidence demonstrated he did not do it.

³¹ Wells & Olson, *supra* note 28, at 289; Neuschatz Aff. at 9-10.

³² See *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Nat'l Inst. Just., Off. Just. Programs, U.S. Dep't Just., NC J161258, at 35-7, at <http://www.ncjrs.org/pdffiles/dnaevid.pdf> (June 1996); James Dao, *In Same Case, DNA Clears Convict and Finds Suspect*, N.Y. Times, Sept. 6, 2003, at A7.

³³ The Innocence Project, *Know the Cases: Robert Clark*, at <http://www.innocenceproject.org/Content/71.php> (last visited Nov. 12, 2007) [hereinafter *Robert Clark*].

Courts have acknowledged that coerced witness testimony is also extremely unreliable. "Coerced witness testimony raises serious questions about the integrity of the fact finding process."³⁴ The Network has found that police pressure on witnesses can be a significant factor in wrongful convictions. In Kenneth Adams's case, the main witness made up her testimony because of police pressure.³⁵ Similarly, the eyewitness against another exoneree, Albert Johnson, later claimed she had only identified Johnson because she was pressured to do so by police.³⁶

The United States Supreme Court has long recognized that some pre-trial procedures may be so suggestive that they violate due process.³⁷ Such violations occur because "the government is unnecessarily creating unreliable evidence that, if introduced at trial, will increase the possibility of a miscarriage of justice."³⁸ Where police interrogations and identification procedures are so suggestive that they determine

³⁴ *Berg v. Morris*, 483 F. Supp. 179, 184 (E.D.Cal. 1980) (finding that a judge's threats of perjury charges to a defense witness violated due process because they deprived the defendant of the ability to present witnesses).

³⁵ *Kenneth Adams*, *supra* note 23.

³⁶ The Innocence Project, *Know the Cases: Albert Johnson*, at <http://www.innocenceproject.org/Content/185.php> (last visited Nov. 12, 2007).

³⁷ *See, e.g., Neil v. Biggers*, 409 U.S. 188, 198 (1972) ("[s]uggestive confrontations are disapproved because they increase the likelihood of misidentification").

³⁸ Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. Rev. 105, 138 (1997).

the resulting statement or identification, the introduction of that evidence at trial must be deemed a violation of due process.

The affidavits from the eyewitnesses all reveal that both improper identification techniques and police coercion permeated the Troy Davis investigation. Indeed, the affidavits demonstrate that they were the motivating factor in almost every piece of evidence introduced at trial against Troy Davis.

Dorothy Ferrell

Dorothy Ferrell, who was staying at a motel near the Burger King, witnessed the scene immediately after the shooting. At trial, she identified Troy Davis as the man who shot Officer MacPhail. Tr. vol. IV at 1024. But her affidavit shows that her trial testimony was the product of both a suggestive identification procedure and police pressure.

At trial, Ferrell testified that during the police investigation, she picked Troy Davis out of a photo array of six or seven black males. *Id.* at 133. In her post-trial affidavit, however, Ferrell revealed that this was not true. Rather, sometime after the shooting, a detective came to her house, showed her a single photograph of Troy Davis, and told her that "other witnesses had identified Troy Davis as being the shooter." App. 18 at 6-8. It is important to note that by the time she was shown this photograph, she had already seen Troy Davis's mugshot in the media. Neuschatz Aff. at 9-11. Ferrell also stated that she "didn't see who shot the officer." App. 18 at 10.

Ferrell explained that she originally told police that Troy Davis was the shooter out of fear. When she was shown a

photograph of Troy Davis by a police detective and asked to identify him as the shooter—after he threatened to arrest her—Ferrell said that she felt she had to tell the police what they wanted to hear. App. 18 at 6-9. She explained that she was pregnant and on parole, and was “scared that if I didn’t cooperate with the detective, then he might find a way to have me locked up again.” *Id.* at 9. When she was contacted to testify at the trial, she kept to her original story out of fear of being charged with perjury: “I talked to two lawyers . . . They each told me I could get charged with perjury. One of the lawyers told me I could get up to 10 years . . . I had four children at that time and I was taking care of them myself. I couldn’t go back to jail.” *Id.* at 11-12.

Larry Young

Larry Young was the homeless man who was beaten by the same person who killed Officer MacPhail. *See generally*, App. 17. At trial, Young testified against Troy Davis, suggesting that he remembered the evening well and describing the man who hit him at length. Tr. vol. IV at 817. However, in his subsequent affidavit, he confesses that he never had any clear memory of that night, and that his testimony was the result of police coercion. App. 17 at 3-4.

As a threshold matter, it is highly unlikely that Young could clearly recall the details of that evening. By his own admission, he had been drinking that day and his blood tests showed him to be legally intoxicated. App. 17 at 3; Br. of Appellant at 15. He also suffered a severe head wound and a

blood clot as a result of the beating. Nevertheless, after the incident, the police badgered Young until he told them he could remember what happened. App. 17 at 3-4. After being handcuffed and locked in a police car for an hour, the police interrogated him at a police station for three hours, depriving him of medical attention until he told them what they wanted to hear. *Id.* at 2-3. Young said that they "kept asking me what had happened . . . and I kept telling them that I didn't know. Young said "The cops . . . made it clear that we weren't leaving until I told them what they wanted to hear." *Id.* at 3-4. This led to his desperate confirmation of the police's version of events: "they suggested answers and I would give them what they wanted." *Id.* at 4.

Young stated in his affidavit that, in actuality, "I have never been able to make sense of what happened that night," and that it remains "as much a blur now as it was then." *Id.* His trial testimony about that evening did not reflect his memories of the incident: it reflected his deep desire to end police questioning and obtain medical treatment for his severe injury. Yet the circumstances of his statement were not divulged to the jury, which could not therefore have realized how unreliable it was.

Harriet Murray

Harriet Murray, Larry Young's girlfriend at the time, also testified against Troy Davis at trial. She identified him in court and testified that she had picked his picture out of a photo array during the investigation. Tr. vol. IV at 862. But

the original circumstances under which she witnessed the incident and the suggestive techniques used during the identification procedure call her identification into question.

When Officer MacPhail was killed, Murray was standing near the Burger King trying to help Young. Murray and Young had been drinking that evening. *Id.* at 842. Murray was also under severe stress at the time of the shooting—not only was she in the presence of a gun, but she was dealing with the brutal beating of her boyfriend. Both alcohol and stress have been found negatively to impact the reliability of eyewitness identifications. Neuschatz Aff. at 5-6, 14-15.³⁹ Murray's ability to identify the actual shooter was further undermined by the police procedures used during her photo identification. The police did not ask Murray to make an identification until five days after the shooting. They did not instruct Murray that the suspect might not be in the lineup. Murray said she identified Troy Davis through a process of elimination, which implies that she believed the killer must have been in the lineup, and used rationale rather than her own memory to identify him. Neuschatz Aff. at 14-15. All of these factors led to an unreliable identification and gave Murray the false impression that she remembered the incident well and had correctly identified the perpetrator.

Antoine Williams

At Troy Davis's trial, Antoine Williams testified that he identified Troy Davis from a photographic lineup during the

³⁹ See also Wells & Olson, *supra* note 28.

investigation. But Williams' subsequent affidavit shows that this identification was the product of a number of suggestive procedures. Moreover, his affidavit reveals that the statement he made to police, which was read into the record at trial, was written and dictated entirely by the police.

Williams was affected by the stress of the shooting. Indeed, in his affidavit he stated that "[a]s soon as I heard the shot and saw the officer go down, I ducked down under the dash of my car. I was scared for my life." App. 20 at 2. He also viewed the shooting through his car windows, which he stated had "the two darkest [possible] shades of tint" on them. *Id.* These circumstances raise serious doubt as to whether Williams could have made any identification, let alone an accurate one.

The identification he did make is extremely suspicious. The police showed him a photographic array of five black men ten days after the incident, long after Williams's memory would have begun to fade. Tr. vol. IV at 963; Neuschatz Aff. at 14. Prior to the lineup, Williams had seen Troy Davis's photograph on wanted posters. Neuschatz Aff. at 12. In his subsequent affidavit, Williams admits that his identification was unreliable and that even when he pointed to Troy Davis in court, "I was totally unsure whether he was the person who shot the officer . . . I have no idea what the person who shot the officer looks like." App 20 at 3-4. Williams also states in his affidavit that he told the police officers that he could not see anything that night, but did not read the statement they wrote for him because he could not read. *Id.* at 3. The statement contained a

number of details about the evening, such as the color of the shooter's shirt, which Williams now says he never knew and never told to the police. Nevertheless, that entire statement was read aloud into the record at Troy Davis's trial for the consideration of jurors. Tr. vol. IV at 960.

Benjamin Gordon

Sixteen year old Benjamin Gordon was a guest at the party in Cloverdale where Michael Cooper was shot. He testified against Troy Davis in court. Tr. vol. IV at 1201. But in his affidavit, he maintained that he never saw Troy Davis do anything wrong, and that he only signed a statement because the police threatened to charge him with the crime. App. 25 at 4.

Gordon explained that police officers dragged him from his house, handcuffed him, and put a nightstick under his neck. *Id.* at 3. He had just sixteen and "was scared as hell." *Id.* at 3-4. Gordon said that police interrogated him for several hours, and "told me that I was going to the electric chair." App. 25 at 4. Then, "[a]fter four or five hours, they told me to sign some papers. I just wanted to get the hell out of there." *Id.* It is clear from his affidavit that Gordon's statement did not represent what he saw. Yet at trial, the prosecutor read it almost in its entirety during Gordon's testimony. Tr. vol. IV at 1201-1203.

Darrell Collins

Sixteen year old Darrell Collins was a guest at the party in Cloverdale, as well as a witness to Coles' attack of Young. App. 16 at 1-3. At Troy Davis's trial, Collins testified

that he saw Troy slap Young.⁴⁰ Tr. vol. V at 1124. In his affidavit, however, Collins admits that he lied about this because he was afraid of the police. *Id.* at 3. He said that when the police questioned him, they "started yelling at me" and "telling me that I was an accessory to murder and that I would pay like Troy . . . if I didn't tell them what they wanted to hear." *Id.* Collins even "told them that it was Red and not Troy who was messing with [Young], but they didn't want to hear that." *Id.* at 4. Finally, he said the officers would "tell me things that they said happened and I would repeat whatever they said. . . whether it was true or not. I just wanted to go home." *Id.*

* * * * *

A common thread runs through all of the eyewitness testimony in the Troy Davis case. The police, "totally consumed with the obsession to 'get' [the suspect], created a situation which was indeed an invitation to [the witness] to commit perjury."⁴¹ Confronted by so much consistent witness testimony, the jury was convinced of Troy Davis's guilt, unaware that they

⁴⁰ At trial, Collins did say that Troy Davis was not the shooter, and that the police had coerced him into giving a false statement. However, he still lied about Troy striking Young. Because witnesses mostly agreed that the same man who struck Young also killed MacPhail, Collins's made-up testimony was still damning. Br. App. at 4.

⁴¹ *United States v. Baresh*, 595 F. Supp. 1132, 1137 (S.D.Tex. 1984) (finding that the admission of witness testimony violated the due process clause when the government's single-minded pursuit of one suspect prompted the suspect's co-conspirator to fabricate additional details for favorable treatment).

were hearing, over and over again from different witnesses, a story manufactured entirely by the police.

2. Post-Trial Affidavits from The Informants Who Testified That Troy Davis Confessed Reveal that They Lied to the Jury.

Two non-eyewitnesses who claimed to have heard Troy Davis confess also testified at his trial. Both were informants-witnesses who had something to gain from giving incriminating information about Troy Davis to the police. It is undeniable that Troy Davis's wrongful conviction was partially the result of their testimony. Both informants have since recanted their statements in post-trial affidavits.

Neither informant should have been allowed to testify at trial. Testimony of witnesses with incentives to lie is one of the foremost factors in wrongful convictions. Indeed, false testimony from informants has been found to be the leading cause of wrongful convictions in capital cases,⁴² and the second leading cause of wrongful convictions exonerated by DNA testing.⁴³ Examples abound of witnesses testifying falsely for personal gain.⁴⁴ A study of wrongful convictions from 1989 to 2003 found

⁴² A study by the Northwestern University School of Law Center on Wrongful Convictions found that since 1970, testimony of informants has been involved in 45.9% of 111 death row exonerations. See *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row 3* (Winter 2004-2005), at www.law.northwestern.edu/wrongfulconvictions.

⁴³ In over 15% of wrongful convictions exonerated by DNA testing, an informant or jailhouse snitch has testified against the defendant. *Informants, supra* note 10.

⁴⁴ See Center on Wrongful Convictions, *supra* note 98; The Justice Project, *Jailhouse Snitch Testimony: A Policy Review*

that perjury occurred in 57% of wrongful convictions for murder.⁴⁵ In the 1989-1990 Los Angeles Grand Jury investigation following a scandal involving the frequent use of false jailhouse confessions, the grand jury found "repeated instances of perjury and providing false information to law enforcement."⁴⁶ They noted that "[w]ith one exception, each informant who testified [before the grand jury] claimed he himself had committed perjury or provided false information incriminating another inmate one or more times."⁴⁷

Informant testimony has been a factor in multiple cases where defendants have either been exonerated. For example, in the case of the Marietta Seven, seven people were convicted of a 1971 double murder in Georgia based largely on the testimony of an informant who claimed to be an accomplice. During post-conviction relief proceedings, evidence revealed that the informant was actually out of the state when the murders occurred. The court threw out the convictions and the informant

8-13 (2007), at www.thejusticeproject.org; Alexandra Natapoff, Comment, *The Faces of Wrongful Conviction Symposium: Beyond Unreliable: How Snitches Contribute to Wrongful Conviction*, 37 Golden Gate U.L. Rev. 107, 109-10 (2006).

⁴⁵ Samuel Gross et al., *Exonerations in the United States 1989 Through 2003* 20 (Apr. 19, 2004), at <http://www.internationaljusticeproject.org/pdfs/ExonerationsReport4.19.04.pdf>.

⁴⁶ Report of the 1989-90 Los Angeles Grand Jury, June 26, 1990, at 16.

⁴⁷ *Id.*

ultimately confessed to lying about the defendants' involvement in the crime.⁴⁸

The concern over the reliability of informant testimony has led a number of jurisdictions, including at least two state supreme courts, to consider restrictions on such testimony at trial.⁴⁹ Illinois, for example, now requires the court in capital cases to conduct a hearing to determine whether a jailhouse informant's testimony is reliable.⁵⁰ Unless the prosecution can show this by a preponderance of the evidence, that testimony will

⁴⁸ *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975); The Justice Project, *supra* note 45, at 8-11. Both Ron Williamson and Dennis Fritz were convicted in a 1988 rape and murder in Oklahoma. A jailhouse informant came forward one day before the prosecution would have had to drop charges against Fritz, and claimed that Fritz had confessed to the murder while in jail. Another informant claimed that Williamson had threatened to harm his mother as he had the victim. Both Fritz and Williamson were exonerated by DNA testing in 1999, after serving eleven years in prison for a crime they did not commit

⁴⁹ See *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993) (vacating conviction and requiring hearing on informant's credibility); *State v. Patterson*, 886 A.2d 777 (Conn. 2005) (holding that defendant was entitled to a "special credibility" jury instruction for an informant's testimony where the informant had received benefits from the state and noting that "the testimony of such an informant, like that of an accomplice, is inevitably suspect"); *D'Agostino v. State*, 823 P.2d 283, 285 (Nev. 1992) (holding that a jailhouse snitch's testimony could not be heard by the jury unless the trial judge concluded that the snitch's testimony had "a sufficient indicia of reliability" and noting that the practice of using jailhouse informants should be "examined more carefully"); *Dodd v. State*, 993 P.2d 778 (Okla. Crim. App. 2000) (reversing defendant's conviction because trial court refused to admit certain impeachment evidence against jailhouse informant).

⁵⁰ 725 Ill. Comp. St. 5/115-21 (2003).

not be admitted at trial.⁵¹ Georgia, along with a number of states, including California, New York and Texas, has enacted legislation requiring corroboration when the only witness is an accomplice,⁵² and this Court has recognized the "attendant corruption of the truth-seeking process" when witnesses receive benefits for their testimony.⁵³

From their subsequent affidavits, it is now clear that both of the informant witnesses who allegedly heard Troy Davis confess had strong personal motivations to give false testimony.

Kevin McQueen, a jailhouse informant, testified at trial that, while in prison, Troy Davis confessed to being involved in the Cloverdale shooting and to shooting Officer MacPhail. During trial, outside the presence of the jury, the Chief Assistant District Attorney told the court that McQueen "might have been a snitch" "in other cases," Tr. vol. V at 1228, and that he might be considered an agent of the State if that were interpreted broadly. *Id.* at 1228-29. McQueen has since recanted his testimony, explaining that he told the State that Troy Davis confessed because McQueen "wanted so bad to get even with [Davis]" for a confrontation they had in prison. App. 13 at 1. McQueen further explained that he maintained this story "because I was afraid of being charged with perjury if I changed

⁵¹ *Id.*

⁵² O.C.G.A. 24-4-8.

⁵³ See *Schofield v. Palmer*, 279 Ga. 848, 853, 621 S.E.2d 726, 731 (2005) (vacating defendant's conviction because state suppressed material evidence of key witness' receiving payment for testimony).

it and told the truth," and "I was out of jail when I testified and didn't want to go back." *Id.* at 2. The information that McQueen had testified against Troy Davis because McQueen was mad at him, and that McQueen may be a career jailhouse informant, strongly undermines the credibility of McQueen's trial testimony.

Jeffrey Sapp testified that the day after the shooting, Troy Davis confessed to shooting Officer MacPhail. Tr. vol. V at 1248-49, 1251. Sapp has since explained that he originally told the officers that Troy Davis confessed because "I got tired of [the police] harassing me, and they made it clear that the only way they would leave me alone [wa]s if I told them what they wanted to hear." App. 14 at 2. Sapp also stated that his testimony regarding Troy Davis's confession "wasn't true," and that "Troy never said anything like it." *Id.*

C. The In-Court Identification by Stephen Saunders, First Made Two Years After the Shooting, Was Completely Unreliable.

The post-trial affidavits from both eyewitnesses and informants eviscerate virtually all of the original evidence against Troy Davis. The only evidence remaining, aside from the clearly unreliable testimony of Coles, is a shaky in-court identification made by Stephen Saunders.

In-court identifications are "one of the most egregious and biased forms of identification." Neuschatz Aff. at 11. At trial, Saunders, an Air Force employee who had witnessed the shooting from a nearby van, identified Troy Davis as the killer. Tr. vol. IV at 982-83. Saunders was unable to positively identify the suspect when the shooting occurred. Indeed, he

stated that he "wouldn't recognize [the assailant or the other two men] again except for their clothes."⁵⁴ But two years later at Troy Davis's trial, Saunders pointed at him across the courtroom and identified him as the killer.

Because "it is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant,"⁵⁵ several courts have held these identifications to a higher standard for admissibility. The Fifth Circuit, for example, determines whether an in-court identification poses a "very substantial likelihood of misidentification" by looking at five factors: "(1) the opportunity of the witness to observe the criminal . . . (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the witness's level of certainty; and (5) the time between the [event] and the identification."⁵⁶ Saunders's in-court identification meets none of these standards—he had little opportunity to observe the crime, his impression was hindered by fear and alcohol, he gave no pre-trial description of the suspect, he was completely

⁵⁴ The statements of the other passengers in the van also call Saunders' already shaky in-court identification of Appellant into considerable question. Daniel Kinsman, who was seated directly behind Sanders in the van stated that he was "confident that [he] would not have been able to make any identification...due to the poor lighting and the chaotic nature of the scene." App. 12 at 1. Sergeant Robert Grizzard, who was seated immediately next to Saunders, testified at trial that he could not identify the perpetrator. Br. of Appellant at 20.

⁵⁵ *United States v. Lang*, 2007 U.S. App. LEXIS 14088 at *15 (5th Cir. June 14, 2007).

⁵⁶ *Lang*, 2007 U.S. App. at *15-16.

uncertain at the time of the incident, and the in-court identification occurred two years later. Neuschatz Aff. at 12. The admission of his in-court identification was unreliable, highly prejudicial and a clear violation of Troy Davis's due process rights.

D. A Much More Reliable Eyewitness than Saunders Has Come Forward With Testimony That Supports Troy Davis's Innocence.

Gary Hargrove was an acquaintance of both Troy Davis and Coles. Although he did not testify at trial, he was at the scene the night of the shooting. In stark contrast to Saunders's poor perspective, Hargrove was actually in the Burger King parking lot on the night of the shooting. He saw Coles standing over Officer MacPhail's body moments after the shooting, while a man who "looked like Troy Davis" ran away from the scene. App. 1 at 1. Hargrove kept this information to himself at the time of the shooting and Troy Davis's trial because he was "on parole at the time and was out past [his] curfew [and] didn't want [his] parole officer to find out." *Id.* If allowed to testify, his account would be much more reliable than the remaining evidence against Troy Davis, and would unquestionable support Troy Davis's innocence.

IV. Conclusion

For the foregoing reasons, *Amicus* urges the Court to grant Troy Davis's Extraordinary Motion for New Trial.

Respectfully Submitted,

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