No. 10-7304

IN THE

Supreme Court of the United States

In re JAMES H. ROANE, JR.,

Petitioner.

PETITION FOR WRIT OF HABEAS CORPUS
IN A FEDERAL CAPITAL CASE

BRIEF IN SUPPORT OF PETITIONER FILED BY AMICUS CURIAE THE INNOCENCE NETWORK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

Constitution and Statutes

Other Authorities

PAGE

INTEREST OF *AMICUS CURIAE*

The Innocence Network is an affiliation of over sixty organizations world-wide, dedicated to providing *pro bono* legal and investigative services to individuals whose actual innocence of the crimes of which they have been convicted may be established in post-conviction proceedings.[1] Only organizations that devote substantial resources to the representation of convicted persons with claims of innocence are eligible for membership in the network. The Innocence Network works to redress the causes of wrongful convictions and has represented hundreds of individuals wrongfully convicted and imprisoned for crimes they did not commit. Experience in these cases demonstrates that proof of innocence is often untidy, untimely, and defies bright-line procedural strictures. The Innocence Network has an important institutional purpose in securing meaningful merits review of actual innocence claims based on newly discovered evidence.[2] This case is significant to The Innocence Network because it is a hallmark of our judicial system that actual innocence must prevail over procedural expediency, particularly when the final and irrevocable sentence of death is imposed.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given appropriate notice and have consented to the filing of this brief. Such consents are being lodged herewith.

[2] The member entities are listed in the Appendix.

SUMMARY OF ARGUMENT

Petitioner James H. Roane, Jr. was convicted of the murder of Douglas Moody in furtherance of a "continuing criminal enterprise" and received a death sentence. Mr. Roane consistently has asserted his innocence for Mr. Moody's murder and, at trial, presented some evidence indicating the actual killer was Keith Barley, a violent young drug dealer. New evidence conclusively establishes that Mr. Barley, in fact, killed Mr. Moody because he owed Mr. Barley money for drugs. In sum, this evidence, which a court or jury has not considered, shows that the Government's evidence of guilt is scientifically unsupportable, that an unimpeached, uncompromised eyewitness clearly saw Mr. Barley kill Mr. Moody, and that Mr. Barley confessed to three people that he killed Mr. Moody. Together with the alibi evidence that the Fourth Circuit, although not the district court, viewed as insufficient when viewed alone, the new, additional evidence makes it clear that Mr. Roane is innocent of the murder for which he was convicted.

The Innocence Network writes to urge the Court to exercise its jurisdiction over Mr. Roane's petition for writ of *habeas corpus*, consider his case and transfer the petition to the district court for a hearing to determine Mr. Roane's issues of fact. This case involves Mr. Roane's claim of actual innocence for the murder of Mr. Moody based on new evidence—a claim that no court has yet considered. Despite the fact that Mr. Roane may be executed for a crime he did not commit, the Fourth Circuit did not allow the district court to conduct an evidentiary hearing at which the evi-

dence of Mr. Roane's innocence and the essential wrongfulness of his death sentence could be presented and considered. Mr. Roane must be allowed to present his evidence of actual innocence, as well as his critical separate claim that the death of Mr. Moody had nothing to do with a "continuing criminal enterprise." A claim of actual innocence should be reviewed at least once.[3] Here, the risk of barring further review is the execution of an actually innocent person. Such an execution violates the Eighth Amendment. "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring in judgment). Mr. Roane has not lost the protection of the Constitution because he has been convicted. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). "[I]f the Constitution renders the fact or timing of [Mr. Roane's] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.*

[3] The same is true of Mr. Roane's claim that the original conclusion that Mr. Moody's murder was in furtherance of a "continuing criminal enterprise" was a terrible mistake, resulting from inaccurate arguments by the Government and ineffective assistance of defense counsel.

ARGUMENT

I. New Evidence Establishes That Mr. Roane Is Innocent Of The Murder Of Mr. Moody.

Mr. Roane and his co-defendants were tried on charges that included murder in furtherance of a "continuing criminal enterprise." Mr. Roane received a death sentence for the murder of Mr. Moody. According to one court, the evidence of Mr. Roane's guilt "was neither undisputed nor overwhelming . . . ." *United States v. Roane*, No. 3:92-CR-00068, at 10 (E.D. Va. May 1, 2003) (A254).[4] Nevertheless, the Fourth Circuit affirmed Mr. Roane's conviction and death sentence. *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996) (A126).

Mr. Roane sought post-conviction relief under 28 U.S.C. § 2255, alleging, in part, that trial counsel was ineffective for failing to present evidence of an alibi defense. After an evidentiary hearing, the district court vacated Mr. Roane's conviction for Mr. Moody's murder, concluding that trial counsel was ineffective for failing to reasonably investigate and present evidence of Mr. Roane's alibi for the night of Mr. Moody's death. *United States v. Roane*, No. 3:92-CR-00068 (E.D. Va. May 1, 2003) (A244). The Fourth Circuit reversed. *United States v. Roane*, 378 F.3d 382 (4th Cir. 2004) (A258).

[4] References to "A[page number]" are references to exhibits and earlier court opinions included in the Appendix to Petition for Writ of Habeas Corpus, which Mr. Roane submitted with his Petition.

However, recently obtained new evidence all but certainly proves that Mr. Moody was killed by Mr. Barley and was not killed by Mr. Roane. This evidence is described in Mr. Roane's habeas petition with this Court and some of it is discussed below. To have a court consider this evidence, Mr. Roane filed in the Fourth Circuit a motion for authorization to file a second habeas petition under 28 U.S.C. § 2255(h). Mr. Roane accompanied his claim of innocence with an assertion of constitutional error at trial, asserting that trial counsel was ineffective in pursuing the alibi defense. The Fourth Circuit summarily denied the motion because Mr. Roane "failed to make the necessary showing [of innocence] under § 2255(h)(1)." *In re Roane*, No. 09-8 (4th Cir. July 13, 2010); *see* 28 U.S.C. § 2255(h)(1) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain . . . newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"). The Fourth Circuit decision is not reviewable by this Court through a petition for writ of certiorari. *See* 28 U.S.C. 2244(b)(3)(E). Thus, Mr. Roane has brought an original petition for *habeas corpus* under the Supreme Court's original jurisdiction. 28 U.S.C. § 2241.

Mr. Roane's new evidence establishes that Mr. Barley, not Mr. Roane, killed Mr. Moody. The new evidence includes unequivocal evidence that identifies Mr. Barley as the killer. Ms. Gina Taylor, perhaps the key unimpeached witness in the case,

did not identify Mr. Barley as the murderer at trial although she now states she clearly observed Mr. Barley fatally attacking Mr. Moody. She did this, she now states, because she reasonably feared violent retribution from Mr. Barley; however, he is now dead and can no longer hurt her. Declaration of Gina Taylor ¶¶ 2, 7, 9, A11-A12. Two other persons, including Mr. Barley's best friend, also recently identified Mr. Barley as Mr. Moody's killer. Declaration of Lloyd McDaniels ¶ 6, A14; Declaration of Willie Coley ¶ 5, A17.

Additional evidence demonstrates that the Government's theory of the case is scientifically unsupportable and wholly inconsistent with the "eyewitness" testimony on which the Government's case rested. In part, two witnesses testified at trial that Mr. Roane used a wide knife, a military or butcher knife, to stab Mr. Moody. Declaration of Dr. Marcella F. Fierro ¶ 6, A54. However, examination of the stab wounds shows that they were made by a blade only 1/2 to 3/4 inch in width. *Id.* If asked at trial, Dr. Fierro would have testified that this eyewitness testimony was inconsistent with the physical evidence. *Id.* New evidence also has been provided contradicting the government's evidence that Mr. Moody jumped through a window and undermines the accuracy of the witnesses who testified on that point at trial. Declaration of R. Robert Tressel, A57-A59.

Despite his compelling showing that he is actually innocent, Mr. Roane has been denied a hearing at which the evidence could be presented and considered, and faces execution. This denial of an opportunity to present the evidence raises Eighth Amendment concerns. The substantial likelihood

of executing an innocent man compels the exercise of this Court's jurisdiction and the transfer of Mr. Roane's petition to the district court for consideration.

II. Long-Standing Eighth Amendment Jurisprudence Militates Against The Execution Of An Actually Innocent Person.

The Eighth Amendment provides that "cruel and unusual punishments" shall not be inflicted. U.S. Const. amend. VIII. The Amendment proscribes "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002). This "protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). "The Eighth Amendment stands to assure that the State's power to punish is 'exercised within the limits of civilized standards.'" *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)). The Eighth Amendment protects "nothing less than the dignity of man." *Trop*, 356 U.S. at 100; *accord Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976) (plurality opinion) ("[T]he basic concept of human dignity [is] at the core of the Amendment."). To determine whether a punishment is cruel and unusual, a court must look beyond historical conceptions to evolving standards of decency that mark the progress of a

maturing society. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy*, 128 S. Ct. at 2649 (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

The Court has recognized that an individual's "punishment must be tailored to his personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801 (1982). A person's culpability is a factor to be considered in determining whether a punishment rises to the level of a cruel and unusual punishment that the Eighth Amendment does not permit. The death penalty, therefore, is limited to offenders who commit the most serious crimes "and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319). An actually innocent person has no culpability for the crime for which he was sentenced. Following these principles, execution of an actually innocent person is impermissible and violates the Eighth Amendment.

In *Herrera v. Collins*, 506 U.S. 390 (1993), a majority of the justices of this Court agreed that the execution of an innocent person violates the Constitution. "[E]xecuting the innocent is inconsistent with the Constitution. Regardless of the verbal formula employed—. . . —the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Id.* at 419 (O'Connor, J., joined by Kennedy, J., concurring).

"[I]t plainly is violative of the Eighth Amendment to execute a person who is actually innocent. . . . The protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced." *Id.* at 431 (Blackmun, J., joined by Stevens and Souter, J.J, dissenting) *See id.* ("the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence"). As the opinions of these five justices demonstrate, the Eighth Amendment prohibits the execution of an actually innocent person.

In deciding Herrera's claim, the Court assumed, without deciding, "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . . ." *Id.* at 417. The Court denied relief based on a determination that Herrera's showing of actual innocence fell short of a standard that "would necessarily be extraordinarily high." *Id.* at 417-18; *see House v. Bell*, 547 U.S. 518 (2006) (concluding, "much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require," petitioner did not satisfy it).

Three years later, the Court considered a petitioner's claim of actual innocence that he raised to avoid a procedural bar to consideration of his constitutional claim of ineffective assistance of counsel at trial. *Schlup v. Delo*, 513 U.S. 298, 316 (1995). The Court recognized that a petitioner who presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial" should be allowed to pass through "the gate-

way" and have an opportunity to argue the merits of the underlying constitutional claims. *Id.* Allowing a showing of actual innocence as a gateway for presentation of an otherwise procedurally barred constitutional claim operated to preclude a "miscarriage of justice that would result from the execution of a person who is actually innocent." *Id.* at 301; *see Kuhlman v. Wilson*, 477 U.S. 436, 452 (1986) ("a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated").

Most recently, the Court has again acknowledged that an actually innocent person has a powerful and legitimate interest in obtaining release from a death sentence. *In re Davis*, 130 S. Ct. 1 (2009). The Court's action in *Davis* indicates that the Court will not permit the execution of an actually innocent person. Mr. Davis sought permission from the Eleventh Circuit to file a second *habeas* petition, asserting that his execution would violate the Eighth and Fourteenth Amendments because he is actually innocent of the murder of which he was convicted. *In re Davis*, 565 F.3d 810, 813 (11th Cir. 2009). A divided panel of the Eleventh Circuit denied Mr. Davis permission to assert the claim. *Id.* at 827. The dissenting judge concluded that "[t]o execute Davis, in the face of a significant amount of proffered evidence, that may establish his actual innocence, is unconscionable and unconstitutional." *Id.* (Barkett, J., dissenting).

Mr. Davis then filed his petition for writ of *habeas corpus* in this Court. This Court ordered the petition transferred to the district court "for

hearing and determination" and to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." *Davis*, 130 S. Ct. at 1. The concurring justices elaborated:

> [The dissent] concludes that Congress chose to foreclose relief and that the Constitution permits this. But imagine a petitioner in Davis's situation who possesses new evidence conclusively and definitely proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning.

Id. at 2 (Stevens, J., joined by Ginsburg and Breyer, J.J., concurring). A hearing was required to avoid the "substantial risk of putting an innocent man to death . . . ." *Id.* at 1 (Stevens, J. joined by Ginsberg and Breyer, J.J., concurring). "Decisions of this Court clearly support the proposition that it 'would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person." *Id.* at 1-2 (Stevens, J., joined by Ginsberg and Breyer, J.J., concurring) (quoting *Davis*, 565 F.3d at 830 (Barkett, J., dissenting)).

Absent a full evidentiary hearing on his claim that he is actually innocent of Mr. Moody's murder, there is at minimum a substantial risk that an innocent person will be executed. No execution should be tainted by doubt that a person is innocent. *See In re Winship*, 397 U.S. 358, 364 (1970)

("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."). As in *Davis*, this Court must transfer the petition to the district court for a hearing. Execution of a person without "the requisite culpability" is an "Eighth Amendment violation" that must be "remedied by any court that has the power to find the facts and vacate the sentence." *Cabana v. Bullock*, 474 U.S. 376, 386 (1986), *abrogated on other grounds*, *Pope v. Illinois*, 481 U.S. 497 (1987). Any hearing before the district court must allow for a full consideration of all the evidence, including Mr. Roane's new evidence. Mr. Roane's execution would grievously offend the Constitution because it would violate his right under the Eighth Amendment to be free from cruel and unusual punishment.

III. There Exists Substantial New Evidence Proving That The Basis For Mr. Roane's Death Sentence Is Unfounded, Even If He Were Guilty Of The Underlying Crime.

Mr. Roane's death-eligibility for the murder of Mr. Moody was premised upon 21 U.S.C. § 848(e)(1)(A), which states:

> [A]ny person engaging in or working in furtherance of a continuing criminal enterprise . . . who intentionally kills or counsels, commands, induces, procures or causes the intentional killing of an individual and such killing results may be sentenced to death . . . .

As pointed out by Mr. Roane's counsel, *Habeas* Petition at 27, the Government cannot establish death penalty eligibility under the foregoing provision merely by showing that Mr. Roane committed a murder while he was part of a continuing criminal enterprise ("CCE"). For Mr. Roane to be death-eligible, the murder must have been committed with a "substantive connection" between the killing and the CCE; there must exist a killing committed in "furtherance of the CCE's purposes." *Tipton*, 90 F. 3d at 887 (A152) (cited in Petitioner's *Habeas* petition at 27). The lower court found that a substantive connection between the killing and the enterprise was established if the killing either silenced potential informants or witnesses, eliminated supposed drug trafficking rivals, or punished underlings for various drug-trafficking misfeasances. *Id.* The new evidence clearly shows that Mr. Moody was neither a potential informant or a witness, nor was he a drug trafficking rival or an underling of the CCE. Therefore, the Fourth Circuit's basis for affirming the eligibility of the death penalty in Mr. Roane's case is factually unsupported and should be reversed and the case remanded for further consideration of the evidence.

There is no need to go over the persuasive evidence presented by Mr. Roane in support of the fact that Mr. Moody neither was a rival drug dealer nor did he occupy a position in any way relevant to the CCE of which Mr. Roane is alleged to have been a part. Nor is there the need for amicus to point out—as Petitioner has, very eloquently—that but for the constitutionally significant ineffective assistance of trial counsel, the facts about

Mr. Moody would have been produced for the trial court in the case, rendering Mr. Roane ineligible for the death penalty. The reach of the CCE death-eligibility statute—the so-called "drug kingpin" inclusion in the federal death penalty—was targeted at organizers of drug-dealing conspiracies who defended their illegal operation against both law enforcement and potential competitors in the field. The ordinary operations of a drug-selling conspiracy, the delivery of illegal drugs to users and the collection of illegal payments from users for the provided drugs, was neither the focus of the statute nor properly should it have been, because to make all drug-related killings eligible for the federal death penalty would have been substantially over-inclusive in theory, and in practice would have inundated the federal courts with death-eligible cases. This was neither the Congressional intent nor would it be wise public policy. The legislative intent was to focus on drug cartel leadership in defense of the illegal operation itself, and thus the statute's inclusion not only of killing but on those who "counsel, command, induce, procure or cause" the killing.

For this reason alone, because the newly-discovered facts preclude Mr. Roane from death eligibility, a transfer to the district court for a proceeding to determine his death eligibility under the statute is morally and constitutionally required, even if it were to be wrongly determined that Mr. Roane killed Mr. Moody.

IV. Society's "Evolving Standards Of Decency" Bar Execution Of The Innocent.

The touchstone of Eighth Amendment jurisprudence is Chief Justice Earl Warren's elegant axiom in *Trop v. Dulles:* "the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Here, summarily executing Mr. Roane without a full and fair hearing in which Mr. Roane could make a truly persuasive demonstration that he is actually innocent contravenes the Court's "evolving standards of decency" test.

At the core of the Eighth Amendment jurisprudence is the belief that as society "progresses" and becomes more enlightened, so too does the Eighth Amendment, as an instrument to eliminate the "barbaric" vestiges of an earlier and more vengeful time.[5] This inherent "morality" underpinning the doctrine of the Eighth Amendment is echoed in Chief Justice Warren's affirmation that the meaning of the Cruel and Unusual Punishments Clause may be "progressive," and "may acquire meaning as public opinion becomes enlightened by humane justice." *Trop*, 356 U.S at 86, 101. In addition, "the basic policy reflected in [the words "cruel and unusual"] is firmly established in the Anglo-American tradition of criminal justice" which is "nothing less than the dignity of man." *Id.* at 100. Indeed, "[w]hile the State has the

[5] *See e.g.*, John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment As A Bar to Cruel Innovation,* 102 Nw. U. L. Rev. 1739-1826 (2008).

power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.*

Subsequently, in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), the Court established the general principles under which an Eighth Amendment "cruel and unusual punishment" claim is analyzed. In *Gregg*, the Court pointed to the "long history of acceptance" of the death penalty, from the time the Bill of Rights was ratified, to the twentieth century. *Id.* at 176-77. Yet, the Eighth Amendment also must be interpreted "in a flexible and dynamic manner," endowing it with fuller, more contemporary "meaning as public opinion becomes enlightened by a humane justice." *Id.* at 171 (quoting *Weems*, 217 U.S at 378).

Over time, the Court developed the "objective indicia" of current standards of decency. *See e.g., McClesky v. Kemp,* 481 U.S. 279, 300 (1987); *Gregg,* 428 U.S. at 181. The Court also brings to bear its "own independent judgment" in determining a proportionate punishment. *See e.g., Roper,* 543 U.S. at 564 ("[t]he beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislature that have addressed the question. . . . We then must determine, in the exercise of our independent judgment, whether the death penalty is a disproportionate punishment for juveniles."); *see also Atkins,* 536 U.S. at 313 ("[I]n cases involving a consensus, our own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.").

Following its decision in *Herrera*, the Court also has been willing to look to other "objective evidence of contemporary values" in its analysis of Eighth Amendment claims, including the use of statistics. *See, e.g., Kennedy*, 128 S. Ct. at 2658 ("There are measures of consensus other than legislation. Statistics about the number of executions may inform the consideration whether capital punishment for the crime of child rape is regarded as unacceptable in our society.")

Yet, as the Eighth Amendment jurisprudence has matured, so too has the public's concern about erroneous convictions, including in cases of faulty eyewitness identifications.[6] Since *Herrera* was decided, the country has become skeptical of the infallibility of the criminal justice system as shown by state statutory enactments and public opinion. Indeed, according to a national public opinion poll conducted in 2007, the public is losing confidence in the death penalty.[7] People are deeply concerned about the risk of executing the innocent, about the fairness of the process, and about the inability of capital punishment to accomplish its basic purposes.[8] Most Americans believe that innocent people have already been executed, that the death penalty is not a deterrent

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[6] *See* The Innocence Project, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php/ (last accessed Nov. 30, 2010).

[7] Richard C. Dieter, Death Penalty Info. Ctr., *A Crisis of Confidence: Americans' Doubts About the Death Penalty* (2007), http://www.deathpenaltyinfo.org/CoC.pdf/.

[8] *Id.* at 3.

to crime, and that a moratorium should be placed on all executions.[9]

The statistics are staggering. Since 1973, there have been no fewer than 139 exonerations in capital cases in 26 states.[10] This has grown from an average of 3.1 exonerations from 1973 through 1999, to an average of 5.1 exonerations from 2000 through 2007.[11] In addition, to date, there have been 261 DNA exonerations for crimes including murder and rape.[12] In DNA exoneration cases, eyewitness misidentification testimony—as in Mr. Roane's case—was a factor in 75 percent of the cases, making it the leading cause of wrongful convictions.[13] A recent study of the first 250 DNA exonerations uncovered that 40 of the first 250 DNA exonerations relied on false confessions where 6 of these 40 were death row prisoners.[14] Fifty-two of the first 250 (or 21%) had informant testimony such as that found in Mr. Roane's case.[15] Not only are false confessions and eyewit-

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[9] *Id.*

[10] *See* Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/innocence-and-death-penalty/ (last accessed Nov. 30, 2010).

[11] *Id.*

[12] The Innocence Project, http://www.innocenceproject.org (last accessed Nov. 30, 2010).

[13] *See* The Innocence Project, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php/ (last accessed Nov. 30, 2010).

[14] *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (2010).

[15] Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 124 (2011) (Harvard Univ. Press, available April 2011) (on file with author).

ness testimony problematic but scientific testimony used by the prosecution is often faulty. One hundred fifty-six of the DNA exonerees had forensic experts testify during their trials. In 60% of these trials forensic analysts called by the prosecution provided invalid testimony.[16]

In response to the public's concern about erroneous convictions based on faulty eyewitness identifications, Wisconsin, New Jersey, Maryland, and North Carolina enacted state statutes requiring law enforcement agencies to reform the administration of eyewitness identifications.[17] In 2007, Vermont, West Virginia and Georgia created task forces to review eyewitness identification procedures.[18]

Several states also have severely limited the use of the death penalty. In 2009, Maryland enacted a law limiting the death penalty to first degree murder cases with biological or DNA evidence, videotaped voluntary confessions or video linking defendants to a crime.[19] Also in 2009, New Mexico banned the death penalty in all cases, over concerns about imperfections in the criminal justice system, bringing the total to 16 states that have abolished the death penalty.[20] More recently, in

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[16] *See* Brandon L. Garrett and Peter J. Neufeld, *Invalid Forensic Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 9 (2009).

[17] *See* The Innocence Project, http://www.innocenceproject.org/news/LawView5.php/ (last accessed Nov. 30, 2010).

[18] *Id.*

[19] *See* 2009 Md. Laws 186.

[20] *See* Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/states-and-without-death-penalty/ (last accessed Nov. 30, 2010).

August 2010, a Texas Blue Ribbon panel issued its report and recommendations to the Texas legislature, including the endorsement of proposals that would require police to follow sound protocols for collecting eyewitness evidence in lineups.[21] The panel recommended these changes to eliminate the procedural hurdles that prevent courts from considering new evidence in post-conviction proceedings, even if the courts have already previously rejected an inmate's state *habeas corpus* appeal. In addition, legislators and governors in the states of Montana, Kansas, Connecticut and Colorado have initiated reviews of their respective death penalty statutes.[22]

Indeed, in the wake of 139 death row exonerations, 250 DNA exonerations, the groundswell of legislative reform, and this Court's pronouncement in *Davis*, denying Mr. Roane an evidentiary hearing in the face of a substantial likelihood of actual innocence contravenes society's "evolving standards of decency." 130 S. Ct. at 1.

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[21] *See Timothy Cole Advisory Panel on Wrongful Convictions: Report to the Texas Task Force on Indigent Defense* (2007), http://www.courts.state.tx.us/tfid/pdf/FINALTCAPreport.pdf; *see also* The Justice Project, http://www.thejusticeproject.org/ (last accessed Nov. 30, 2010).

[22] *See* John Milburn (Associated Press), The Wichita Eagle, *Kansas Senate to review death penalty: The Senate Judiciary will discuss a proposal for no new cases after July 1*, Jan. 19, 2010 (available at http://www.kansas.com/2010/01/19/1142464/senate-to-review-death-penalty.html) (last accessed Nov. 30, 2010).

V. An Evidentiary Hearing Is Required To Assess Mr. Roane's Claim.

Finally, as this Court recently pronounced in *Davis*, "the substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing." *Davis*, 130 S. Ct. at 1. At his hearing, Mr. Roane should be allowed to present evidence, including evidence that could not have been adduced at trial, and more importantly, old evidence that is now informed by new testimony. Indeed, Mr. Roane must be allowed to present all relevant substantial evidence to prove his innocence. Anything less will invite arbitrariness and error in considering his innocence, and in the district court's determination of whether Mr. Roane is innocent of the murder of Mr. Moody, the murder for which he is to be put to death.

CONCLUSION

Accordingly, The Innocence Network urges the Court to exercise its jurisdiction over Mr. Roane's petition for a writ of *habeas corpus* and transfer the petition to the district court.

Respectfully submitted,

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