No. 08-66

IN THE

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

STATE OF GEORGIA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE INNOCENCE PROJECT IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, Deirdre O'Connor[1] (Of Counsel) and Barry C. Scheck, Peter J. Neufeld, and David Loftis of the Innocence Project, Inc., ("the Project") hereby request leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the Supreme Court of Georgia. Petitioner Troy Davis has consented to the filing of this brief. Respondent State of Georgia has withheld consent.

As set forth in the accompanying brief, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing of evidence can yield conclusive proof of innocence.

The Project is greatly concerned that the Georgia Supreme Court has set an impossibly high standard preventing Mr. Davis and other innocent Georgians from having evidence of innocence heard. Accordingly, the Project respectfully requests leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

Deirdre O'Connor
Of Counsel of Record for
Innocence Project, Inc.

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[1] Deirdre O'Connor's application for admission to the United States Supreme Court bar has been processed. She is scheduled for admission on August 18, 2008.

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INTEREST OF AMICUS CURIAE[1]

The Innocence Project, Inc. ("the Project") is a nonprofit legal clinic and resource center created by Barry C. Scheck and Peter J. Neufeld. Founded at the Benjamin N. Cardozo School of Law in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing of evidence can yield conclusive proof of innocence. The Project pioneered the post-conviction DNA litigation model that has to date exonerated 218 innocent persons, and served as counsel or provided critical assistance in a majority of these cases.

The advent of forensic DNA testing and the use of such testing to review criminal convictions have provided scientific proof that our system convicts innocent people, and that wrongful convictions are not isolated or rare events. Although there are untold numbers of cases in which people have been wrongfully convicted but there is no DNA evidence that can scientifically prove their innocence, DNA testing has opened a window into wrongful convictions so that we may study the causes of this injustice and recommend

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[1] Counsel of record for all parties received notice of the *Amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner has consented to the Network's filing of this brief and Respondent has withheld consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

practices to minimize the chance of its occurrence. [2]

SUMMARY OF ARGUMENT

Innocence does not fade with the passage of time. Perjured testimony and other forms of unreliable evidence, though, often cannot withstand the test of time or the evolution of science. At the heart of the Troy Davis case are questions of innocence and fabricated evidence. Seven recanting witnesses – many of whom provided highly implausible testimony at trial – and the nine additional witnesses implicating Redd Coles, undermine our confidence in the verdict and compel a meaningful reexamination of all the evidence.

The Georgia Legislature created a state right to a new trial for the wrongfully convicted who can establish that new evidence of innocence "would probably produce a different verdict." O.C.G.A § 5-5-23; *Timberlake v. State,* 246 Ga. 488; 271 S.E.2d 792 (1980). By its terms it provided for a meaningful review of Mr. Davis case, and indeed a new trial. He received neither.

In *Davis,* the Georgia Supreme Court changed the statute's materiality standard to require proof of the *purest fabrication* in witness recantation cases. As interpreted, this is an unattainable measure that necessarily thwarts the statutorily conferred right to obtain relief from a wrongful conviction, thus denying due process

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[2] Appendix contains summary biographies of other signatories.

to anyone whose conviction was secured via perjured testimony.

As nearly half of the Georgia Supreme Court justices recognized, the purest fabrication standard is so "rigid" that the "fundamental question [of] whether or not an innocent person might have been convicted or even, as in this case, might be put to death" went unanswered. *App. A.* at 17a.

This decision creates a rule of law authorizing categorical denial of due process for innocence cases in Georgia. It gives the trial court complete freedom to dismiss evidence of innocence without evaluating its reliability, subverting the well-considered, truth-seeking function of post-conviction proceedings proscribed by the legislature. This new judicially-minted, purest fabrication standard will result in the imprudent disregard of reliable evidence of innocence.

Critically, the *Davis* majority, constricted by its own newly-crafted standard, ignored scientifically supported concerns that the evidence used to convict Mr. Davis was unreliable. The now-disavowed trial testimony included reports of perception and memory beyond human capacity. Even the two non-recanting witnesses, Redd Coles (who has now been identified by nine people as the shooter) and Stephen Sanders, presented inherently incredible and scientifically implausible testimony.

Evidence of innocence should not go unheard especially in a case, like Mr. Davis', where the conviction was based on scientifically unreliable evidence and the legislature has

provided a remedy to hear such claims. Deeply rooted in our notion of justice is the recognition of the court's duty to protect the innocent. A panoply of constitutional safeguards guarantees the accused a fair trial so that society can trust findings of guilt. The hallmark of a *fair* trial is its ability to successfully fulfill its truth-seeking function. In any quest for truth, the *reliability* of the evidence should take center stage. When new information surfaces after trial that causes reasonable people to lose confidence in the jury's guilty verdict – whether it is due to the ineffective performance of defense counsel, the failure of the prosecutor to disclose material evidence, or the realization that unreliable and false testimony resulted in the conviction of an innocent person – our commitment to justice and truth compels corrective action and a process through which that can occur. The Georgia legislature has provided an avenue for redress of such claims, but its Supreme Court arbitrarily and capriciously foreclosed claims stemming from perjury, and subsequent recantation.

The time has come for this Court to articulate the minimum requirements for a constitutionally adequate procedure so that claims of wrongful convictions based on fabricated testimony can be properly evaluated and innocent people protected.

ARGUMENT

I. A Deeply Divided Court Created A Rule Of Law Authorizing Categorical Denial Of Due

Process For Innocent Georgians Convicted On The Word Of Perjurers.

The Georgia legislature created a right to a new trial for any wrongfully convicted person who can establish that new evidence of innocence "would probably produce a different verdict." O.C.G.A § 5-5-23; *Timberlake v. State,* 246 Ga. 488; 271 S.E.2d 792 (1980). The Legislature did not limit or classify the new evidence, but rather broadly asserted that a petitioner could present "any material evidence" to meet this standard. This statute unambiguously creates a liberty interest by conferring the right to a new trial once the "substantive predicates' have been met."[3] *Board of Pardons v. Allen,* 482 U.S. 369 (1987). This right exists independent of the evidentiary cause of the wrongful conviction and recantation evidence that is "material" fits comfortably within the statute's ambit.

It is a well-established due process principle that once a state has created a statutory scheme affecting a litigant's rights and interests, it must provide "'a meaningful opportunity to be heard by removing obstacles to their full participation in judicial proceedings" *Tennessee v. Lane,* 541 U.S. 509, 523 (2004) (*citing Boddie v. Connecticut,* 401 U.S. 371, 379 (1971); *M.L.B. v. S.L.J.,* 519 U.S. 102 (1996)). Here, the court's arbitrary construction of the statute, under its rigid purest fabrication standard, imposes unconstitutional obstacles to full participation for those seeking relief from wrongful convictions based on

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[3] *Amici* incorporate by reference the petitioner's arguments on this point.

demonstrably false testimony. This arbitrary construction will undoubtedly have the innocent languish in prison, and unduly risks wrongful execution – concerns, which the post-conviction statutory scheme undoubtedly sought to address.

It is axiomatic that some witnesses commit perjury. And, despite the system's truth-seeking function, some perjurers get away with it. Mark Curriden, *The Lies Have It: Judges Maintain That Perjury Is on the Rise, but the Court System May Not Have Enough Resources to Stem the Tide*, A.B.A.J., May 1995, at 68; see also Jonathan Liebman and Joel Cohen, *Perjury and Civil Litigation*, 20 Litig. 43 (1994); Lisa Harris, Perjury Defeats Justice, *42 Wayne L. Rev. 1755 (1996)* ("Perjury has thus far evaded all solutions, is pervasive in the courtroom, and is on the increase."). *Id.* at 1755. Indeed, "[m]any lawyers answer that [perjury] is the natural result, and the tolerable cost, of an adversary system of justice." Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 Duq. L. Rev. 715 (1998). In *The Supreme Court on Trial: How the American Justice system Sacrifices Innocent Defendants*, George C. Thomas III concludes that "we have a problem with [ ] perjury" and other categories of false evidence. *Id.* at 39. "It is the too frequent failure of the adversary system itself that produces wrongful convictions." *Id.*.

For perjurers who are later moved to speak the truth, their recantations are received with a disproportionate skepticism that can perpetuate

eternal injustice.[4] Shawn Armbrust, *Reevaluating Recanting Witnesses: Why The Red-Headed Stepchild Of New Evidence Deserves Another Look*, 28 B.C. Third World L.J. 75 (2008); Daniel Medwed, *Anatomy Of A Wrongful Conviction: Theoretical Implications And Practical Solutions*, 51 Vill. L. Rev. 337 (2006); Alexandra Natapoff, *The Faces Of Wrongful Conviction Symposium: Beyond Unreliable: How Snitches Contribute To Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107 (2006); Brian Murray & Joseph C., *He Lies, You Die: Criminal Trials, Truth, Perjury, and Fairness*, 27 N.E. J. on Crim. & Civ. Con. 1 (2001); Sharon Cobb, *Gary Dotson As Victim: The Legal Response To Recanting Testimony*, 35 Emory L.J. 969 (1986); Janice J. Repka, *Rethinking The Standard For New Trial Motions Based Upon Recantations As Newly Discovered Evidence, 134 U. Pa. L. Rev. 1433* (1986); Daniel Wolf, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 Mich. L. Rev. 1925 (1985).

The Georgia Legislature developed a sound analytical framework for undertaking this problem

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[4] *Amici* acknowledge that not all recanting witnesses have committed perjury. Every recanter necessarily asserts that their trial testimony was inaccurate. Some were simply mistaken or improperly influenced to believe the falsity; their testimony was inaccurate, but honest. Others knowingly told an untruth. It is the latter ilk that is most prevalent in Mr. Davis case and the most troubling for courts. For simplicity sake, this brief uses perjurer interchangeably with recanting witness. *Amici* recognize that witnesses who lie out of fear prompted by police intimidation or out of concern that the true perpetrator will cause them harm are deserving of greater empathy than connoted by the label of perjurer.

within its statutory scheme. If the recantations were material, i.e., probably produce a different outcome, a new trial is required. The Georgia Supreme Court, however, arbitrarily placed its own effectively insurmountable hurdled onto such claims, requiring proof of the purest fabrication. Even worse, here, it decided that the failure to meet such a standard could be determined without a hearing though there were seven recantations.

Indeed, the Davis court held that each of the seven recantation "affidavits lack[ed] the type of materiality required to support an extraordinary motion for new trial, as they do not show the witnesses' trial testimony to have been the 'purest fabrication.'" *App. A.* at 7a; see also 8a-10a. It is hard to imagine any recantation – or collection of recantations – that could satisfy this standard. As noted by the dissent, the undeniable effect of the holding is to categorically exclude recantations. *App. A.* at 18a.

By definition, a recantation always involves a prior inconsistent version, e.g., "I lied when I said X, Y is really the truth." It can never, on its own, conclusively prove the falsity of the first version. The most to which a recantation can aspire is to *ultimately*, at trial, be the more persuasive of two competing versions of fact. Requiring proof of the purest fabrication as a threshold to justify a new trial necessarily translates into a categorical exclusion.

Indeed, the court's analysis in this very case demonstrates the impossibility of meeting its standard. The court parsed each statement individually trying to determine whether it alone

met the pure fabrication standard. It, however, refused to engage in reviewing the collective impact of the seven recantations taken together. Moreover, by deeming the evidence mere recantation, it did not properly weigh the scientific testimony. The statute, which requires an assessment of any material evidence, would require the court to weigh the impact of the statements collectively and in conjunction with the supporting scientific evidence.

The Georgia court denied even a hearing on the issue -- though, nonetheless, claiming not to foreclose the possibility of hearings to subsequent litigants. *App. A.* at 3a. But it is unclear what purpose a hearing would serve if the post-conviction court were not then authorized to make a finding that a recantation was sufficiently reliable to warrant a new trial. No matter how great the indicia of reliability, the recantation will always compete with the earlier version. A judge may find the recantation more credible, but could not find, as a matter of law, that the original version was the purest fabrication.

No longer tethered to any statutory moorings, post-conviction courts now have unfettered discretion to deny claims where there is objectively material evidence mandating a new trial. Indeed, in contradiction to legislative intent, it would now be an abuse of discretion in Georgia to grant a new trial if there is "material evidence" but no proof of the "purest fabrication." A trial court in DeKalb County, then, could grant a petitioner a new trial based on an ineffectiveness claim, but a trial court in Chatham County would have to deny such a right to a petitioner who

provides equally compelling evidence of innocence through recantation. Hence, Davis – a death row inmate with seven recanting witnesses and nine others implicating another – under the pure fabrication standard was arbitrarily denied his statutorily conferred right to a new trial. Indeed, he never received a hearing on the merits.

II. The Impossible High Purest Fabrication Standard Would Have Failed to Protect At Least Three Known Innocent Death Row Inmates Who Were Convicted Based On Perjured Testimony.

This standard's failure is already proven by cases of known innocents. At least three death penalty cases depended entirely on recantations to prove their innocence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003); *Ex parte Adams*, 768 S.W.2d 281 (1989); *Drake v. State*, 248 Ga. 891, 894 (1982). Each man ultimately found relief; two found relief in court, the Georgian from the Board of Pardons and Paroles. *Id.* All three men would have been executed under the purest fabrication standard.

Joseph Amrine was convicted and sentenced to death on the word of three prison inmates; all of whom ultimately recanted. If *Davis* were applied to *Amrine*, the court would have been forced to deny relief because the three recantations "do not show the witnesses' trial testimony to have been the 'purest fabrication.'" *App. A.* at 7a. Fortunately Amrine was wrongfully convicted in Missouri, not Georgia.

If proof of the purest fabrication were required in Randall Adams' case, he too would

have been executed. His conviction was based on several purported eyewitnesses. One, David Harris, later confessed and recanted his trial testimony against Adams. The court granted relief even though two other purported eyewitnesses did not recant. Adams would not have fared so well in Georgia. The belief that Harris "could subvert the ends of justice by falsely admitting the crime to others and then absenting himself" would have rendered Harris' confession meaningless. *App. A.* at 11a. Fortunately for Adams his ordeal took place in Dallas, Texas and not Savannah, Georgia.

Henry Drake was one of six *known* innocent Georgia death row inmates to ultimately secure his freedom. Drake was convicted based entirely on the uncharged perjury of the actual killer, William Campbell. The only way Drake could prove his innocence, beyond the alibi witnesses he presented at trial, was through Campbell's recantation. The Georgia Supreme Court denied him relief and held that the "effect of Campbell's new testimony was clearly to impeach the credibility of his earlier sworn statements." *Drake v. State*, 248 Ga. 891, 894 (1982).

Ultimately, Drake was pardoned.[5] Had he been required to meet the purest fabrication

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[5] The Eleventh Circuit ordered a new trial due to *Sandstrom* error and improper sentencing arguments. *Drake v. Kemp (Drake III)*, 762 F.2d 1449 (11th Cir. 1985). At retrial, he was convicted and sentenced to life. The Board freed Drake in November 1987, finding that Campbell lied. Hodes, William W., *Executing The Wrong Person*, 29 Loy. L.A. L. Rev. 1547; *Georgia's Death Row; Waiting to die.* Drake's reaction: "If I didn't have all those appeals, I'd be dead. I always thought

standard, it is unlikely that he would have been granted a hearing, which produced evidence that captured the attention of others and ultimately led to his freedom.

III. The Majority's Blind Adherence To This New Standard And Its Failure To Apply Today's Science To The Undisputed Facts, Which Demonstrate The Unreliability Of The Now-Disavowed Identification Evidence, Is Further Proof Of This Standard's Failure.

When today's accepted scientific truths are applied to the undisputed circumstances surrounding witnesses' initial observations, the reliability of their subsequent selection of Davis is greatly undermined. As a matter of science, key "estimator variables" and contaminating pre-identification exposure produced highly unreliable claims of recognition. Current science then constitutes intrinsic evidence supporting the recantations. The application of the purest fabrication standard, however, caused the court to ignore these studies, and fail to conduct hearings where these scientific studies could help establish the validity of the recantations. The court's blind adherence to the purest fabrication standard arbitrarily prevented it from considering objective proof supporting the reliability of the recantations.

A. The Court Ignored Recent Scientific Studies Establishing That The Undisputed Viewing Conditions And Circumstances Of This

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I'd be electrocuted. I worried they'd mix up the papers, and poof you're gone." *Id.*

Crime Precluded A Genuine Basis For Subsequent Recognition.

The uncontroverted evidence at trial demonstrated that the sudden unexpected assault and murder[6] in a poorly lit parking lot late at night[7] was witnessed by people under the extreme stress of being in the line of fire.[8] Scientific research demonstrates that heightened stress at the moment of perception reduces identification accuracy. Deffenbacher, K.A., et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law and Human Behavior 687 (2004). Science also confirms that which should appeal to common sense: event-related factors (e.g., duration, awareness of crime, lighting, distance/vantage point, the presence of a weapon, high levels of stress, intoxication, and other physical or mental limitations) affect the ability of a witness to accurately encode identifying information. Wells, G. L. & Olson, E. (2003). *Eyewitness identification.* Annual Review of Psychology, 54, 277-295.

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[6] Officer MacPhail was shot within seconds of the assault on Young. The shooter fled immediately.

[7] At the time of shooting the Burger King was closed and its exterior lights were turned off. The parking lot was dimly lit. According to Leo Bishop, Burger King's manager, there was enough light so that "you're not going to walk into anything or trip over anything." But it was too dark for Bishop to recognize the familiar officer as he laid in the parking lot until Bishop moved close enough (10-15 feet away) to see Officer MacPhail's uniform. The shooting occurred in "the worst area in the parking lot," as the street light on the corner was blocked by a large tree located directly underneath. According to Young, "I couldn't see, you, it was just dark, right the particular spot we were standing."

[8] Moreover, many were also intoxicated and/or injured.

1. The Extraordinarily Short Duration Of The Assault Of Young And Shooting Of Officer MacPhail Did Not Provide Sufficient Time To Encode Crucial Detail.

Common sense dictates, and science confirms, that the shorter the exposure the more difficult to encode enough information for later recognition. Memon, A., Hope, L., & Bull, R., *Exposure duration: Effects on eyewitness accuracy and confidence*, 94 British J. of Psychol. 339 (2003). The degree of a witness' attention as events unfold is as critical to the witness' ability to take in meaningful information as the duration of observation and proximity to the criminal. *See* Leippe, M.L. et al, *Crime Seriousness as a Determinant of Accuracy in Eyewitness Identifications,* 63 J. of Applied Pyschol. 345 (1978). If a witness is unaware that a crime is occurring, interactions or mere proximity will often not leave a lasting impression. A recent Cornell study illustrates the concept of *inattention blindness*. Researchers conducted a series of experiments in which pedestrians who were giving directions to someone posing as a lost tourist did not notice when, midway through the exchange, the sham tourist was replaced by another person altogether. *Blind to Change, Even as It Stares Us in the Face*, New York Times, April 1, 2008; see also Loftus, E., *Eyewitness Testimony*, Harvard University Press, 25-27 (1996). Duration, then, should be assessed in conjunction with the time period that the witness is *paying attention* to the perpetrator.

In this case, the pistol-whipping of Young first captured the attention of the stranger

eyewitnesses. Officer MacPhail was shot within seconds of the assault on Young. The shooter fled immediately. According to Daniel Kinsman, one of Sanders' military friends in the van, the incident was "over as soon as it began." *App. A.* at 13a.

2. The Presence And Discharge Of A Gun Took Focus Away From The Face Of The Shooter.

Forensic psychologists have documented that, during a crime, the witness' attention is drawn to any visible weapon and away from the culprit's facial and physical characteristics. Experiments involving videotaped robberies with some culprits brandishing a gun and others concealing it repeatedly demonstrated that eyewitness identifications were less accurate when the gun was brandished. This is known as weapon focus effect. In a recent meta-analysis, Dr. Nancy Steblay examined 19 studies of weapon focus effect and found that "[t]he presence of a weapon does make a significant difference in eyewitness performance . . . particularly in crimes of short duration in which a threatening weapon is visible." Steblay, N. M. *A Meta-Analytic Review of the Weapon Focus Effect,* 16 Law And Hum. Behav. 413, 420-21 (1992).

In this case, even if witnesses had not sought cover, they would have instinctively focused on the gun, not the shooter's face. Given the extremely short duration of this volatile crime in which witnesses were immediately made aware of the gun, the opportunity for meaningful observations were significantly diminished. The

well-documented weapon focus effect supports the probability that some influence *other than true recognition* accounted for the witnesses' subsequent selection.

In all probability, most witnesses did *not* maintain a vantage point once the gun was displayed. Common sense dictates that people will remove themselves from the line of fire.[9] The brief duration, the weapon, and the instinctive inclination toward self-preservation, renders Murray and Williams' purported ability to "recognize" the shooter incredibl[10]

3. It Is Scientifically Impossible For Ferrell To Subsequently Recognize A

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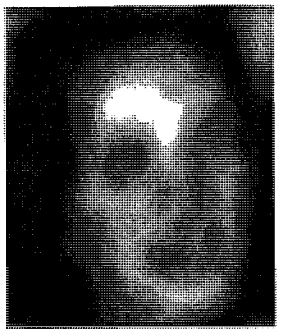
[9] Indeed, Redd's *threat* of producing a gun caused Murray and two unidentified companions to run for cover. The sound of gunfire caused Antoine Williams to seek shelter under the dash of his car. Securing their safety ended their period of observation.

[10] Though Stephen Sanders claimed he maintained visual contact after shots were fired, he candidly admitted that night that his observations were insufficient to enable identification. Sanders was seated in a van with seven U.S. Air Force buddies ordering food at the drive thru window after a night of partying. As Young was trying to get assistance from Sanders and his friends in the van, shots suddenly rang out. Bishop told his employees and the van's occupants to duck for cover.

Even assuming Sanders did not heed Bishop's advice, his inability to describe the shooter beyond "a black man in twenties" and his unequivocal assertion that he "wouldn't recognize them again" rendered his in-court identification two years later extremely implausible. Indeed, his selection is the most troubling of all in a field where the competition for that distinction is at an all-time high. Something other than true recognition was at work.

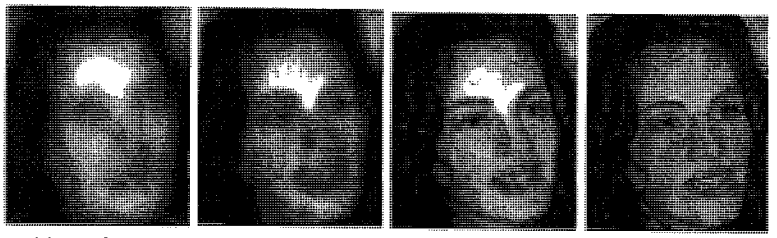
Stranger Seen In A Dimly Lit Parking Lot From 160 Feet Away.



A famous woman is depicted here as she would appear from a distance of 172 feet. The lack of sufficient visual details makes identifying her a challenge beyond our human capacity. As Dr. Geoffrey Loftus states:

> When you see anything at a distance the human visual system starts to lose small details. The greater the distance the coarser the detail you lose. . . . At 10 feet you might not be able to see individual eyelashes on a person's face. At 200 feet you would not even be able to see a person's eyes. At 500 feet you could see the person's head but just as one big blur. There is equivalence between size and blurriness. By making something smaller you lose the fine detail. Loftus, G.R. & Harley, E.M., *Why Is It Easier to Identify Someone Close Than Far Away,* 12 Psychonomic Bull. & Rev. 43 (2005).

As the photos below illustrate, a known face may be clearly recognizable at 5 feet or even 43 feet; however, at distance of 100 feet or more, the fine detail necessary for true recognition is lost so that even an easily recognizable face like Julia Roberts' is but a blur. If it were possible to *recognize* the blurred woman, then her name would have occurred to the viewer immediately.



172 feet 100 feet 43 feet 5 feet

Yet, Dorothy Ferrell testified at Davis' trial that she recognized a *complete stranger* whom she viewed briefly from a distance of at least 160 feet[11] as he quickly moved about in a poorly lit parking lot with a group of other black men. The only plausible explanation is that she did not *recognize* Davis from the lot that night, but, rather, accepted Detective Wilson's suggestion when he displayed a single photo of Davis to her a few days after the shooting.

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[11] Ferrell claimed she witnessed the event from the edge of the hotel parking lot, near a palm tree, where she remained for the duration. The Thunderbird Inn is located on the southeast corner of the intersection of Oglethorpe Avenue and Fahm Street. The Burger King parking lot is located on the northeast corner of the intersection of Oglethorpe Avenue and Fahm Street. There are two small palm trees at the hotel parking edge; one is 160 feet away from the location of shooting, the other 200.

B. The Court Did Not Consider The Scientifically Supported Probability That Witnesses Selected The Police Suspect During A Suggestive Identification Process, Which Created An Ideal Situation For Memory Source Error And False Identifications.

A true identification occurs when the witness *recognizes* the person as the actual perpetrator. When the police expose witnesses to the suspect's image prior to the "official" identification procedure and make it abundantly clear that he is *the* police suspect then the witnesses' subsequent selection of that man is likely the product of the *unnecessary suggestivity* and/or *memory source error.* In other words, the witnesses did not *recognize* the suspect; instead, they simply followed the lead of the police who were determined to build a case against Troy Davis. Depending on the witnesses' motives, they may have genuinely believed that the police suspect was the man that they observed (memory source error) or they may have acquiesced out of self-interest and implicated the suspect to appease the police (false identification). The court's categorical disqualification of the recantations caused it to fail to consider this undisputed and objective corroboration of those recantations.

1. The Saturation Of Davis' Image Exposed Witnesses To A Contaminant That Increased The Probability Of Memory Source Error And Rendered The Witnesses' Later Selection Of Davis Unreliable.

Memory source error occurs when a witness incorrectly attributes a familiar face to the wrong source because he unconsciously transfers memory of the familiar face from one context to another. A witness who has seen the suspect before may, through transference, mistake him for the perpetrator in a later photo array. Decades of scientific studies reveal that prior exposure to a suspect's image will make a subsequent selection of the suspect more likely. Dysart, J., Lindsay, R.C.L., Hammond, R., Dupuis, P, *Mugshot Exposure Prior to Lineup Identification: Interference, Transference, and Commitment Effects*, 86 Journal of Applied Psychology 1280 (2001); Loftus, E. F. & Greene, E., *Warning: Even memory for faces may be contagious*, 4 Law And Hum. Behav. 323 (1980). Ross, D. F., Ceci, S. J., Dunning. D., & Toglia, M. P., *Unconscious transference and mistaken identity: Toward a memory blending approach*, (1994) in Ross, D. F., Read, J.D., & Toglia, M. P. (Eds.) *Adult eyewitness memory: Current trends and developments* (Cambridge University Press 1994).

Prompted by Redd Coles' self-serving accusation against Davis, the police acquired Davis' photo on the evening of August 19, 1989. Yet, none of the witnesses were shown a photo array until August 24, 1989; some were not asked until August 28th and Sanders was not shown the

array until just before he testified at trial two years later. In the 5-10 day delay preceding the "official" identification process, the witnesses were repeatedly exposed to Davis' image in a variety of mediums, including Wanted Posters prominently displayed around Savannah and at their place of employment; a single photo display by Detective Wilson as he canvassed the neighborhood during the days immediately following the shooting; and through daily displays of Davis' image in print and televised news media.

Under those circumstances, even well-intentioned witnesses free from police intimidation could unconsciously transfer the memory of Davis' image.

2. Non-Blind Administration After Repeated Exposure To Davis' Image Destroyed The Procedural Protections Of A Properly Conducted Photo Array And Resulted In Unreliable Evidence Of Guilt.

The Court has long recognized the danger of misidentification brought about by suggestive identification procedures. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno* 388 U.S. 293 (1967). "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Wade*, 388 U.S. at 228. In *Stovall*, the Court recognized that the "the conduct of a confrontation" may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny due process of law. *Stovall*, 388 U.S. at 301-302.

Over the past four decades, scientific research has provided indisputable proof that eyewitnesses are vulnerable to police suggestions. See Douglas & Steblay, *Memory Distortion in Eyewitness: A Meta-Analysis of the Post-Identification Feedback Effect,* 20 App. Cognitive Psychol. 991 (2006); Bradfield, A.L & Wells, G.L., *'Good, You Identified the Suspect': Feedback to Eyewitnesses Distorts Their Reports Of the Witnessing Experience,* 83 J. Appl. Psychol. 360 (1998); Wells, G., et al, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,* 22 Law and Hum.Behav. 603 (1998). This research has led scientist to recommend "blind" administration of the identification process to avoid cues that may lead a witness to falsely identify an innocent person. *Id.*

"The reason for keeping the tester blind is to prevent the tester from *unintentionally* influencing the outcome of the results." Wells, 2006 Wis. L. Rev. at 629. Double-blind administration works not only to prevent the investigator from influencing which person the eyewitness picks, but also to prevent him from "influencing the certainty of the eyewitness" by giving the witness confirming feedback. *Id.*

It is also a well-settled that a single photo display of the primary suspect, in the absence of some emergency, is unnecessarily suggestive. *Manson v. Brathwaite,* 432 U.S. 98 (1976).

In this case, non-blind administrators conducted the photo arrays on *non-blind witnesses* – everyone knew who the suspect was. The prior extensive exposure to and disclosure of

the police suspect eliminated the intended procedural benefits of a using a photo array, i.e., to accurately measure true recognition. The resulting selections are unreliable because they do not measure the witnesses' recognition of the shooter. Even setting aside the consistent reports of heavy-handed police intimidation, these identifications were extraordinarily suggestive. From a scientific perspective, the suggestive nature of this process coupled with the poor viewing conditions rendered the selections extremely unreliable evidence of guilt.

CONCLUSION

The innocent take their wrongful convictions as they come. The means by which they can prove their innocence is beyond their control. In a case of perjured testimony, a recantation may be as good as it gets. Assessing the reliability of recanting witnesses can be achieved without denying an innocent person his right to relief. Georgia's categorical exclusion of seven recantations – which, taken together, present a consistent explanation for the false trial testimony and are objectively corroborated by science – and its refusal to hear other compelling evidence of innocence constitute a denial of due process and may result in the execution of an innocent man.

Respectfully submitted,

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