No. 15-650

# In the Supreme Court of the United States

SHONDA WALTER
*Petitioner*,

v.

COMMONWEALTH OF PENNSYLVANIA,
*Respondent*.

*ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA*

## BRIEF OF AMICUS CURIAE WITNESS TO INNOCENCE IN SUPPORT OF PETITIONER

JENIFER WICKS*
400 7th Street NW Suite 202
Washington, DC 20004
jenifer@jwickslaw.com
(202) 393-3004

*Counsel of record

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii
INTEREST OF THE AMICUS CURIAE ..... 1
SUMMARY OF ARGUMENT ..... 1
ARGUMENT ..... 2
I. Three Illustrative Cases ..... 2
A. Henry Lee McCollum ..... 3
B. Frank Lee Smith ..... 5
C. Ronald Williamson ..... 7
II. Despite Safeguards, Systemic Errors Persist, Resulting in Wrongful Convictions ..... 11
A. Inadequate representation ..... 12
B. Government misconduct ..... 13
C False confessions ..... 15
D. Unreliable forensic evidence ..... 16
E. Reliance on informants ..... 16
F. Eyewitness error ..... 18
CONCLUSION ..... 20

## TABLE OF AUTHORITIES

**CASES**

*Atkins v. Virginia*, 536 U.S. 304 (2002) ..... 2

*Berger v. United States*, 295 U.S. 78 (1935) ..... 13

*Brady v. Maryland*, 373 U.S. 83 (1963) ..... 13

*Cone v. Bell*, 556 U.S. 449 (2009) ..... 14

*Gore v. State*, 119 P.3d 1268 (Okla. 2005) ..... 11

*N. Marial Islands v. Bowie*, 243 F.3d 1109 (9th Cir. 2001) ..... 18

*On Lee v. United States*, 343 U.S. 747 (1952) ..... 18

*Smith v. State*, 515 So. 2d 182 (Fla. 1987) ..... 6

*State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993) ..... 5

*Strickland v. Washington*, 466 U.S. 668 (1984) ..... 12, 13

*United States v. Bagley*, 473 U.S. 667 (1985) ..... 14

*United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993) ..... 18

*Williamson v. State*, 812 P.2d 384 (Okla. 1991).....10

*Williamson v. State*, 905 P.2d 1135 (Okla. 1991) .. 10

*Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997) ..... 11

**OTHER AUTHORITIES**

ACAD. OF SCI., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (Feb. 18, 2009) ..... 16

BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE, 26-57 (Doubleday 2000) ..... 17

Bill Moushey, *Win at All Costs* (10-part series) Pittsburgh Post-Gazette (1998) ..... 15

Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 4 (2010) ..... 15

BRIAN CUTLER, & STEPHEN PENROD, MISTAKEN IDENTITY (Cambridge University Press 1995) .... 19

EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES (2010). ..... 13

G.D. LASSITER & JENNIFER J. RATCLIFF, EXPOSING COERCIVE INFLUENCES IN THE CRIMINAL JUSTICE SYSTEM IN INTERROGATIONS, CONFESSION AND ENTRAPMENT 1, 4 (G.D. Lassiter ed. 2004) ..... 15

George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 54 (2000) ..... 18

GISLI H. GUDJONNSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 631-662 (2003) ..... 15

Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 173 (1987) ..... 17

ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (April 2002) ..... 17

KATHLEEN RIDOLFI & MAURICE POSSLEY, NORTHERN CALIFORNIA INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 ..... 14

KATHLEEN RIDOLFI, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE: PROSECUTORIAL MISCONDUCT: A SYSTEM REVIEW (2007) ..... 14

Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win (Parts 1–5)*, Chicago Tribune (1999) ..... 14

Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429 (1998) ..... 16

STEVE WEINBERG ET AL., THE CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (2003) ..... 15

## INTEREST OF THE AMICUS CURIAE

Witness to Innocence (WTI) is a non-profit organization of exonerated death row survivors and their loved ones.[1] Through public speaking, testifying in state legislatures, media work, and active participation in the nation's cultural life, its members educate the public about wrongful convictions. WTI also provides an essential network of peer support for the exonerated, most of whom received no compensation or access to reentry services when released from death row. Witness to Innocence is particularly concerned with this case because its members have been personally impacted by the failures of the criminal justice system. WTI believes this brief can offer the Court its unique perspective on the death penalty in America.

## SUMMARY OF ARGUMENT

If the imposition of the death penalty is a profound contradiction in a nation founded on principles of justice, human rights, and civil liberties, it is even more so when death sentences are handed out to the innocent. Because the system has consistently failed to protect innocent people from wrongful conviction, the sentence of death violates

---

[1] Pursuant to Supreme Court Rule 37.3, the parties have consented to the filing of this brief. Pursuant to Rule 37.6, Witness to Innocence states that 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, or its counsel, made a monetary contribution intended to fund its preparation or submission.

the Eighth Amendment's prohibition against cruel and unusual punishment.

The American criminal justice system provides insufficient safeguards against the execution of innocent people. The death penalty is fraught with risk of fatal errors, most notably inadequate representation, government misconduct, false confessions, unreliable forensic evidence, reliance on informant testimony, and eyewitness error. Once convicted, a death row prisoner faces enormous obstacles in convincing the courts that he or she is innocent. As long as the death penalty remains a part of the American justice system, innocent people will continue to be sentenced to death. Some will be executed. It is inevitable. Ultimately, the abolition of the death penalty is the only guarantee against such tragic mistakes.

## ARGUMENT

### I. Three Illustrative Cases

The criminal justice system does not adequately protect innocent defendants. In 2002, this Court used the word "disturbing" to describe the number of instances in which individuals had been sentenced to death but later exonerated. *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002). At that time, there was evidence of approximately 60 exonerations in capital cases. Today, 156 people in 26 states have been released from death row upon evidence of their innocence. *See* http://www.deathpenaltyinfo.org/innocence-and-death-penalty.

Amicus highlights three illustrative cases, quoting facts as found by the state courts in affirming the convictions and death sentences. In

each, the courts responsible for ensuring these defendants were given fair trials were satisfied of their guilt, as evidenced by the factual portrayals in the appellate opinions. Yet each was ultimately exonerated. These cases are examples of what can and does go wrong.

### A. Henry Lee McCollum 30 years on death row

> On Sunday, 25 September 1983 at approximately 12:20 a.m., Ronnie Lee Buie noticed that his eleven-year-old daughter, Sabrina Buie, was missing from their home in Robeson County [North Carolina] when he returned home from working the midnight shift at a nearby business. On 26 September 1983, James Shaw, a friend of Ronnie Lee Buie, found Sabrina Buie's nude body in a soybean field. An autopsy was performed upon the body of Sabrina Buie. Linear abrasions on her back and buttocks revealed a pattern indicating that the body had been dragged over a rough surface. There was a tear or laceration deep within the victim's vagina and a tear or laceration in her anal canal. Petechial hemorrhaging, characterized as the bursting of small blood vessels caused by pressure, was observed in the victim's eyes. Similar hemorrhaging caused by a pressure mechanism was also observed in the heart and lungs. The brain appeared slightly swollen due to a lack of oxygen. A stick and pair of panties were wedged in the victim's throat, completely obstructing the airway. Dr. Deborah Radisch, Chief Assistant Medical Examiner for the

State of North Carolina, testified that the victim died of asphyxiation.

The defendant, Henry Lee McCollum, gave a statement to law enforcement officers on 28 September 1983.[2] In this statement, the defendant McCollum said that he saw Sabrina Buie and Darrell Suber come out of Suber's house at approximately 9:30 p.m. on 24 September 1983. McCollum, Chris Brown, Louis Moore and Leon Brown joined Sabrina Buie and Darrell Suber, and the group then went to a "little red house near the ballpark." The five males tried to convince Sabrina to have sexual intercourse with them, but she refused. Two of the males went to a store and purchased some beer. When they returned, the males discussed having sexual intercourse with Sabrina. Louis Moore refused to participate and left. The four remaining males and Sabrina then walked across a soybean field and sat in some bushes where they drank beer. Suber stated that he was going to have sexual intercourse with Sabrina. At this point, the defendant McCollum grabbed Sabrina's right arm and Leon Brown grabbed her left arm. Eleven-year-old Sabrina then began to yell, "Mommy, Mommy" and "Please don't do it. Stop." Suber then raped Sabrina while the defendant and Brown held her arms. Subsequently, each man raped Sabrina while

---

[2] No physical evidence tied Mr. McCollum or Mr. Brown, both African-American, as was the victim, to the crime. But a local teenager cast suspicion on Mr. McCollum, who with his half brother had recently moved from New Jersey and was considered an outsider. Katz & Eckholm, DNA Evidence Clears Two Men in 1983 Murder, N.Y. Times, Sept. 3, 2014, p. A1.

> the others held her. Leon Brown then sodomized the child while Chris Brown held her. After the men had raped and sodomized Sabrina, Suber said "we got to do something because she'll go uptown and tell the cops we raped her. We got to kill her to keep her from telling the cops on us." The defendant McCollum grabbed Sabrina's right arm while Leon Brown grabbed her left arm. Chris Brown knelt over Sabrina's head and pushed her panties down her throat with a stick while Leon Brown and the defendant held her down. After determining that the child was dead, the defendant and Chris Brown dragged her body away to a bean field to hide it from view.

*State v. McCollum*, 334 N.C. 208, 218-19, 433 S.E.2d 144, 149 (1993).

On September 2, 2014, thirty years after McCollum's convictions in this rape and murder, Superior Court Judge Douglas C. Sasser vacated his convictions and death sentence and ordered his release. Both McCollum and his half-brother Leon Brown were found to have been coerced into false confessions, in part due to their mental disabilities. DNA evidence implicated Roscoe Artis whose possible involvement had been overlooked even though he lived a block from the location of the discovery of the body of Sabrina; only weeks after the murder, Mr. Artis has also confessed to the rape and murder of an 18-year old girl in Red Springs.

### B. Frank Lee Smith
### 15 years on death row

> The victim, an eight-year-old female, was raped, sodomized, and beaten severely by a blunt instrument in her home at approximately 11 p.m. on April 14, 1985. She later died from the injuries. A rock used in the beating was found outside the room where the beating occurred. Two witnesses identified appellant as a man they had encountered in the street outside the home approximately thirty minutes before the crime. One of the witnesses testified that appellant made a homosexual solicitation to him and, when rebuffed, stated he would have to masturbate. The mother of the victim identified appellant as a man she saw leaning into the window when she returned home at approximately 11:30 p.m. and discovered the crime. Apparently as part of a burglary, a television set had been moved to the window where the appellant was seen. Appellant was arrested based on a composite drawing and identification by one of the witnesses after he returned to the neighborhood attempting to sell a television set. He waived his rights to remain silent and to have a lawyer present and denied he committed the crimes or had been in the neighborhood for months. However, when falsely told that the victim's young brother had seen him commit the crimes, appellant replied that the brother could not have seen him because it was too dark.

*Smith v. State*, 515 So.2d 182, 183 (Fla. 1987).

After the trial, the chief eyewitness recanted her

testimony. Nevertheless, Smith was scheduled for execution in 1990, but received a stay. Smith died of cancer on death row in January 2000. After Mr. Smith's death, prosecutor Carolyn McCann was told by the FBI lab which conducted the posthumous DNA tests that: "He has been excluded. He didn't do it." *See* http://articles.latimes.com/2000/dec/15/news/mn-421. Eddie Lee Mosley was confirmed by DNA testing as the rapist and murderer. *See* Requiem for Frank Lee Smith by Frontline. http://www.pbs.org/wgbh/pages/frontline/shows/smith/.

### C. Ronald Williamson 11 years on death row

On December 8, 1982, twenty-one (21) year old Debbie Carter was found dead in her garage apartment in Ada, Oklahoma. She was discovered by her father, who had come to check on her at her mother's request, fearing that something might be wrong. Walking up the stairs to the second floor apartment, Mr. Carter observed glass covering the landing and the screen door and front door standing wide open. Walking through to the bedroom, he found Debbie's body laying face down on the floor with a washcloth stuck in her mouth. The police were called and the investigation into the murder began.

* * *

Detective [Dennis] Smith . . . testified that on March 14, 1983, he interviewed the Appellant at his mother's home. When shown

a photograph of the decedent, Appellant stated that he thought he knew her but he was not sure. His mother said that she was sure Appellant had nothing to do with the murder as he was home that night by 10:00 p.m. The Appellant was asked for hair and saliva samples. He cooperated, voluntarily appearing at the police station to comply with the request.

* * *

Melvin Hett, forensic chemist with OSBI, also testified in detail to procedures and results in his analysis of hair and fibers retrieved from the crime scene. His results showed: (1) two (2) hairs found on the washcloth were microscopically consistent with scalp hairs from Appellant; (2) two (2) hairs found on the decedent's bedding were microscopically consistent with pubic hairs from the Appellant; (3) two (2) hairs found on the decedent's underwear were microscopically consistent with pubic hairs from Dennis Fritz; (4) seven (7) hairs found on the bedding were microscopically consistent with pubic hairs from Dennis Fritz; (5) two (2) hairs found on the washcloth were microscopically consistent with scalp hairs from Dennis Fritz.

* * *

The preliminary hearing testimony of Glen Gore, declared to be unavailable to testify at trial, was read to the jury. Mr. Gore testified that he saw both the decedent and the Appellant at the Coachlight Club during the early morning hours of December 8, 1982.

When he went up to the bar to get a drink, Debbie Carter asked him if he would "rescue" her. She told him the Appellant was "bugging" her. (Tr. 331) Later, around closing time, when the lights were being turned on, Gore saw the Appellant talking to the decedent.

* * *

Terri Holland was an inmate of the Pontotoc County jail from October 1984, until January 1985. She testified that she had overheard the Appellant, who was periodically in jail during that time, talk about the murder of Debbie Carter. Ms. Holland stated that she overheard Appellant remark to other prisoners that if Debbie Carter had cooperated with him he would never had to kill her.

Appellant described the crime stating that "he shoved a coke bottle up her ass and her panties down her throat." (Tr. 575) On another occasion, Ms. Holland overheard a telephone conversation between Appellant and his mother wherein Appellant threatened his mother, telling her if she did not do as he said that he would have to kill her like he did Debbie Carter.

* * *

[OSBI] Agent [Gary] Rogers stated that he interviewed the Appellant on May 9, 1987. After reading the Appellant the *Miranda* warning and receiving a waiver of his rights, Rogers questioned Appellant about the Carter homicide. Appellant told Rogers that he was at

> the Coachlight Club on December 8, 1982, when he saw a pretty girl and decided to follow her home. Rogers stated that Appellant started to continue his tale but then just stopped and paused for a few minutes. He resumed the conversation talking about another topic, but Agent Rogers brought him back to the subject of the homicide. Appellant said he had a dream about killing Debbie Carter. In the dream he was on top of her, with a cord around her neck, stabbed her repeatedly, and pulled the rope tight around her neck. Appellant paused and then stated that he was worried about what this would do to his family. After another long pause, Appellant said that Dennis Fritz was there with him, and that he went to the apartment with the intention of killing the decedent because she had made him mad. Appellant then looked to the floor and said "oh my god, ... you cannot expect me to confess." .... "I've got my family; I've got a nephew to protect, my mother and sister.... it'll tear them up—or my sister, it'll tear them up.... it can't hurt my mother, .. she's dead, you know, it's been on my mind since it happened." (Tr. 450) Appellant then requested an attorney and the interview ceased.

*Williamson v. State,* 812 P.2d 384, 390-93 (Okla. 1991) *order corrected*, 905 P.2d 1135 (Okla. 1991). Upon being convicted, Williamson was sentenced to death. In 1997, Williamson**'**s conviction was reversed by the Tenth Circuit Court of Appeals based on ineffective assistance of counsel and the State was ordered to retry him or permanently release him

from custody. *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997).

In preparation for the new trial, samples of hair and bodily fluids taken from Williamson and Fritz were submitted for the newly available DNA analysis. Williamson's defense counsel, Mark Barrett, also sought to interview Gore and obtain samples for DNA testing; Gore refused Barrett's request to provide samples of his hair and bodily fluids for DNA testing. The results of the DNA testing excluded Williamson as a donor of the sperm found in the victim and the case against him was ultimately dismissed. Subsequent DNA testing of samples taken from Gore showed he was the donor of the sperm found inside the victim. *See Gore v Oklahoma,* 119 P.3d 1268 (Okla. 2005).

## II. Despite Safeguards, Systemic Errors Persist, Resulting in Wrongful Convictions

These three examples demonstrate that critical errors, singly or in combination, can result in innocent people ending up on death row. Henry Lee McCollum was exonerated after DNA showed that police coerced two mentally disabled teenagers into confessing to a rape murder and ignored a suspect who truthfully confessed to a similar rape murder, based on an even younger informant. Frank Lee Smith was convicted based on his false confession and unreliable and untruthful testimony; DNA showed the error of the testimony. Ronald Williamson was granted a new trial based on ineffective assistance of his trial counsel and then available DNA testing showed that he was had been convicted based on the testimony of the actual rapist

and murderer as well as a jailhouse snitch, unreliable hair evidence, and his false confession.

The system is not infallible and the fact that these issues remain thirty-nine years after this Court decided *Gregg v Georgia,* shows that it is unlikely to ever be sufficiently "fixed" to eliminate the risk of executing the innocent.

### A. Inadequate representation

Despite the Sixth Amendment's guarantee of the effective assistance of counsel, including providing representation for indigent defendants, the lack of national standards for creating and funding this representation has left most states with inadequate, underfunded systems.[3] This systemic problem has led to reliance on overburdened, and sometimes incompetent defense lawyers, to represent the accused without adequate funding for investigators and experts, all of which can contribute to an inadequate defense, and, in turn, wrongful convictions.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set a two-prong test to determine ineffectiveness—counsel's representation must fall below an objective standard of reasonableness, and there must be reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. But, in evaluating the performance of counsel, this Court stated that courts "must be highly deferential…A court must indulge a strong presumption that

---

[3] THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009).

counsel's performance was within the wide range of reasonable professional assistance." *Id.*

The *Strickland* standard, as enforced by our courts, often fails to ensure that only the guilty are convicted. A review of published appeals among the DNA exonerations reveals that 54 exonerees (about 1 in 5) raised claims of ineffective assistance of counsel and courts rejected these claims in the overwhelming majority of cases. Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases* (2010).

### B. Government Misconduct

Eighty years ago, in reversing a conviction because of prosecutorial misconduct, this Court articulated the paramount obligation of a prosecutor: "[A] prosecutor has a duty to refrain from improper methods calculated to produce a wrongful conviction… [While he] may strike hard blows, he is not at liberty to strike foul ones." *Berger v United States,* 295 U.S. 78, 88 (1935). The Court emphasized the critical role the prosecutor plays in a judicial system like ours, one that is aimed at justice, not simply conviction: The prosecutor "is the representative… of a sovereignty whose… interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* Because the prosecutor had misstated evidence, bullied witnesses, put words into the mouth of a witness and intimated facts he knew were false, this Court overturned the conviction.

In *Brady v. Maryland,* 373 U.S. 83, 87 (1963), this Court held that due process requires the prosecution to turn over evidence favorable to the accused and

material to his guilt or punishment. *Brady*, this Court has long recognized, is among the most basic safeguards brigading a criminal defendant's fair trial right. *See Cone v. Bell*, 556 U.S. 449 (2009). *See also United States v. Bagley*, 473 U.S. 667 (1985) (Marshall, J., dissenting).

Unfortunately, the problem of prosecutorial misconduct persists; some prosecutors continue to use these very tactics to obtain convictions in capital cases. *See Connick v Thompson,* 563 U.S. (2011) (Ginsberg, J., dissenting)("As the trial record in the § 1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical. From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations."); KATHLEEN RIDOLFI & MAURICE POSSLEY, NORTHERN CALIFORNIA INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 *(2010) citing* JAMES LIEBMAN, JEFFREY FAGAN, AND VALERIE WEST, A BROKEN SYSTEM: ERRORS IN CAPITAL CAUSES 1973–1995 (2000) (reviewed 5,760 capital cases nationwide to examine prejudicial error, including prosecutorial misconduct); KATHLEEN RIDOLFI, CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE: PROSECUTORIAL MISCONDUCT: A SYSTEM REVIEW (2007) (reviewed all appeals alleging prosecutorial misconduct in California between 1996 and 2007 and reported the court findings and any subsequent prosecutorial disciplining); Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win (Parts 1–5)*, Chicago Tribune (1999) (reviewed court record and

appeals across the country between 1963 and 1999 to determine how many homicide convictions were overturned because of prosecutorial misconduct); Bill Moushey, *Win at All Costs* (10-part series) Pittsburgh Post-Gazette (1998) (review of federal prosecutorial misconduct across the country); STEVE WEINBERG ET AL., THE CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (2003).

### C. False Confessions

When a defendant has confessed or made admissions about a crime, the vast majority of police, prosecutors, and jurors see it as rock-solid evidence of guilt. Most people find it incomprehensible that someone would confess to a crime he or she did not commit. But, in 25 percent of all DNA exonerations, defendants have done just that—confessed to crimes that they did not commit. *See* Professor Steven Drizin's False Confession Blog (http://www.falseconfessions.org/blog/); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. LAW REV. 4 (2010); G.D. Lassiter & Jennifer J. Ratcliff, *Exposing Coercive Influences in the Criminal Justice System* in INTERROGATIONS, CONFESSION AND ENTRAPMENT 1, 4 (G.D. Lassiter ed. 2004); Gisli H. Gudjonnson, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 631-662 (2003) (citing nearly 800 articles in areas relating to false confessions and police interrogations); Saul M. Kassin & Gisli Gudjonnson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCH. SCI. IN THE PUB. INT. 35-59 (Nov. 2004); Richard A. Leo & Richard J. Ofshe, *The Consequences of False*

*Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998). Whatever the cause of this phenomenon, the prevalence of false confessions contributes to the high rate of wrongful convictions.

**D. Unreliable forensic evidence**

Since the late 1980s, DNA analysis has helped identify the guilty and exonerate the innocent. While DNA testing was refined following extensive scientific research, many other forensic techniques—such as hair microscopy, bite mark comparisons, firearm tool mark analysis and shoe print comparisons—have not been subjected to sufficiently rigorous scientific evaluation. Meanwhile, forensics techniques that have been properly validated—such as serology—are sometimes improperly conducted or inaccurately conveyed in trial testimony. In some cases, forensic analysts have fabricated results or engaged in other misconduct. While DNA exonerations assist us in exposing how invalid or improperly conducted forensics have contributed to wrongful convictions, DNA testing alone cannot solve the problem since it is estimated that at most 10% of all criminal cases involve biological evidence that could be subjected to DNA testing. *See, e.g.*, NAT'L ACAD. OF SCI., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (Feb. 18, 2009) (identifying problems in the forensic sciences).

**E. Reliance on informants**

A growing literature documents the inherent unreliability of compensated witnesses, cooperating

co-conspirators, "jailhouse snitches," and other types of informants. Numerous accounts of wrongful convictions based on perjurious informant testimony have emerged, and they have prompted official review of the practice of permitting compensated informant testimony. For example: (1) The founders of the Innocence Project discovered that twenty-one percent of the innocent defendants on death row were placed there by false informant testimony. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE, 26-57 (Doubleday 2000); (2) The Illinois Governor's Commission on Capital Punishment unanimously concluded that "[t]estimony from in-custody witnesses has often been shown to have been false, and several of the thirteen cases of men released from death row involved, at least in part, testimony from an in-custody informant." The Commission recommended the holding of reliability hearings to mitigate the chances of perjury, ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, CHAPTER 8 (April 2002); (3) Bedau and Radelet in their comprehensive historical study discovered that one-third of the 350 erroneous convictions they studies were due to "perjury by prosecution witnesses," twice as many as the next leading source—erroneous eyewitness identification—and stemming in large part from the prevalence of co-conspirator testimony. Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 173 (1987).

Courts likewise have recognized the inherent unreliability of compensated informants, going so far as to take judicial notice of their tendency to lie. "The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is

fraught with peril. This hazard is a matter 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned' and thus of which we can take judicial notice." *United States v. Bemal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). "Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison." *Id.*

Another court has noted that "[nlever has it been more true that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration." *Northern Marial Islands v. Bowie,* 243 F.3d 1109, 1123 (9th Cir. 2001). Indeed, long before "snitching" became a pervasive aspect of the criminal justice system, this Court recognized that "[tlhe use of informants, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *Lee v. United States,* 343 U.S. 747, 755 (1952).

Yet despite the unreliability of this type of evidence prosecutors continue to rely on informants to gain convictions. George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts,* 28 Pepp. L. Rev. 1, 54 (2000).

**F. Eyewitness error**

Eyewitness misidentification is the greatest contributing factor to wrongful convictions, playing a role in more than 70% of convictions overturned through DNA testing nationwide. Despite a high rate

of error (as many as 1 in 4 stranger eyewitness identifications are wrong), eyewitness identifications are considered some of the most powerful evidence against a suspect. But eyewitness identifications are subject to such a high rate of error because (1) witnesses are subject to high stress or anxiety; (2) the human memory tends to reconstruct incidents because humans do not have the capability to record memories like a video recorder; (3) witnesses often focus on weapons, not the identity of the perpetrator; (4) suggestive eyewitness identification procedures used by police or prosecutorial agencies; and (5) cross-racial eyewitness identifications are known to be incredibly suspect. *See, e.g.,* BRIAN CUTLER, B. & STEPHEN PENROD, MISTAKEN IDENTITY (Cambridge University Press 1995).

Yet, jurors treat eyewitness identification as compelling evidence, and are not always sensitive to the risk misidentification. *Id.* As long as prosecutions are reliant on identification evidence, there will always be a risk of a mistake.

## CONCLUSION

For these reasons, this Court should grant certiorari in this matter.

Respectfully submitted,

JENIFER WICKS
400 7th Street NW Suite 202
Washington, DC 20004
jenifer@jwickslaw.com
(202) 393-3004

Counsel of Record, Witness to Innocence