No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

JORDAAN CREQUE, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Throughout Jordaan Creque's capital murder trial, the State's lead witness, a police lieutenant, sat at counsel table with the prosecution. The State called the lieutenant as its last witness, and he recounted the testimony of several of the witnesses, delivered an account that conformed to theirs, and bolstered their credibility with his endorsement. Mr. Creque subsequently received a death sentence from a non-unanimous jury after a trial whose reliability was undermined by this summation and bolstering from the lead law enforcement witness.

These facts give rise to the following question:

> Where a law enforcement witness who has been seated at counsel table throughout trial gives testimony bolstering other witnesses' credibility and summarizing the State's case, do the resulting capital murder conviction and death sentence violate the defendant's rights to due process, trial by jury, and a reliable process in keeping with this Court's heightened standards in death penalty cases?

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PETITION FOR WRIT OF CERTIORARI

Jordaan Creque respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Creque's conviction and death sentence, Creque v. State, No. CR–13–0780, 2018 WL 798160 (Ala. Crim. App. Feb. 9, 2018), is not yet reported and is attached as Appendix A. That court's order denying rehearing is attached as Appendix B. The order of the Alabama Supreme Court denying Mr. Creque's petition for a writ of certiorari, Ex parte Creque, No. 1170803 (Ala. Sept. 21, 2018), is unreported and attached as Appendix C.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed Mr. Creque's conviction and death sentence on February 9, 2018. Creque v. State, No. CR–13–0780, 2018 WL 798160 (Ala. Crim. App. Feb. 9, 2018). On May 25, 2018, the Court of Criminal Appeals denied rehearing. The Alabama Supreme Court denied Mr. Creque's petition for a writ of certiorari on September 21, 2018. Ex parte Creque, No. 1170803 (Ala. Sept. 21, 2018). On December 4, 2018, Justice Thomas extended the time for filing this petition for a writ of certiorari to January 22, 2019. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In the early morning of August 24, 2011, after Jordaan Creque had consumed drugs and alcohol all day and gone nearly forty-eight hours without sleep, he arrived with Ezekiel Gholston and Cassandra Eldred at a parking lot near the Krystal

restaurant where Mr. Creque and Ms. Eldred worked. (R. 2285, 2258–67.)[1] Ms. Eldred remained in the car while Mr. Creque and Mr. Gholston walked to the restaurant. (R. 2285–89.)

While inside, they gained access to the cash being stored in the restaurant safe, and both Krystal employees who were working that night, Jeff Graff and Jessie Aguilar, were shot and killed with a gun Mr. Creque had purchased the day before. Mr. Creque, Mr. Gholston, and Ms. Eldred fled the scene in Ms. Eldred's car. (R. 2295–96.)

Later that morning, Mr. Creque, panicked, returned to the apartment where he was staying, woke up his girlfriend Brittany Orr, and injured himself with a razor and other household items. (R. 2304–06.) Mr. Creque and Ms. Orr then went to Decatur General Hospital, where Mr. Creque was admitted to the emergency room at 5:49 a.m. (St. Ex. 149.)

Mr. Creque told medical staff he saw someone get shot at Krystal, and the hospital called the police. (R. 1850, 1859.) At the hospital, Mr. Creque was interrogated by a police officer, Todd Pinion, and then by Lieutenant Rick Archer over the course of more than five hours. During the interrogation by Lt. Archer, hospital personnel sedated Mr. Creque with one milligram of intravenous Ativan, (R. 1738), a powerful psychoactive drug. Lt. Archer elicited a purported Miranda waiver shortly after the Ativan took effect, (C. 109), and he continued to interrogate Mr. Creque there for the

[1] "R." refers to the trial record. "C." refers to the clerk's record. "S." refers to the supplemental record. "St. Ex." refers to the State's trial exhibits, and "Def. Ex." refers to the defense trial exhibits.

next five and a half hours. (St. Ex. 136, 137.) The interrogation by Officer Pinion was not recorded, and only the first 45 minutes of the interview with Lt. Archer were recorded; the remainder of the five and a half hour interview was not recorded. (St. Ex. 136.)

Lt. Archer maintained that during the interrogation, Mr. Creque confessed to being the sole shooter (R. 2165), but this confession does not appear in the recorded portion of the interview. (St. Ex. 136.) Instead, the confession appears in a transcription Lt. Archer prepared, which he said reflected Mr. Creque's unrecorded statements. (R. 2164–79.)

Mr. Creque was then taken to the police station, where a videotape shows him fall asleep immediately, and then again more than five times over the next several minutes. (State's Ex. 137.) The videotape also shows Lt. Archer periodically rousing Mr. Creque by banging the table and ordering him to stand. (State's Ex. 137; R. 1985–86.) At the end of this video, Mr. Creque signed the statement drafted by Lt. Archer under circumstances later challenged by defense. (St. Ex. 137; R. 1985–86.)

Police later arrested Mr. Creque's codefendants and questioned them. (C. 534.) Two hundred and eighty-seven dollars was recovered from Ms. Eldred's residence, (R. 1633–34), and police found five hundred and ten dollars at the apartment Mr. Creque shared with Brittany Orr and her cousin. (R. 1620.) Mr. Gholston led police to the lake where he had disposed of the murder weapon; police recovered the weapon and later identified it as the gun used in this crime. (R. 2107–09.) All three individuals were charged with capital murder. (C. 43–45.) Mr. Creque was indicted on three

counts: two counts of capital murder for intentional murder during the course of a robbery, and one count of capital murder for intentional murder of two or more persons pursuant to one scheme or course of conduct. (C. 43.)

Mr. Creque is African American, and he was accused of killing a white man and a Latino man. The website of the local newspaper, The Decatur Daily, contained inflammatory and racially charged comments, including a call for Mr. Creque to be lynched "high from the oak tree outside the courthouse." (C. 410.)[2] Community members called for Mr. Creque's girlfriend – who was not facing trial – to be executed and his court-appointed defense attorneys to be hanged. (C. 391, 429.)[3] During voir dire, every prospective African American juror was struck, and Mr. Creque went to trial in front of an all-white jury.

The trial court invoked Ala. R. Evid. 615, sequestering witnesses. (R. 1174.) Lt. Archer, the lead investigator on the case and a witness for the State, remained in the courtroom, seated at counsel table with the prosecutor, hearing evidence throughout trial. The trial court did not voir dire the jury venire on whether it would credit law

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[2]Dozens of extraordinarily graphic comments calling for Mr. Creque to be tortured, executed, and lynched were posted in The Decatur Daily articles in 2011, 2012, and 2013. (See, e.g., C. 367 ("[T]ake him out behind the court house and shoot him"; "He needs to be FRIED![] without a trial!"; "Hang him and whoever else helped him high from the Krystal sign."); C. 435 ("HANG HIM but in public"); C. 419 ("find a big oak tree with a short rope and a long drop"); see also C. 391, 396, 410, 411, 413, 423, 425, 432, 437, 464.)

[3]Articles on news website AL.com contained similarly inflammatory comments calling for Mr. Creque to be tortured, executed, and lynched. (C. 443–44, 448–50, 452–56, 458, 460, 462.)

enforcement testimony more than other testimony; defense counsel alone conducted this voir dire after the trial court and prosecution failed to do so. (R. 369–70; 564–65; 834.) The trial court also failed to instruct the jury that it was not to give more credence to law enforcement officers than to other witnesses during its deliberations. (R. 2592–94.)

Mr. Creque did not dispute that he was involved in the crime or that he shot Mr. Graff (R. 2565–68), but he contended that the shooting was accidental and that Mr. Gholston shot Mr. Aguilar (R. 2565–68). Mr. Creque testified at trial that the plan to rob Krystal was Mr. Gholston's and that Mr. Creque participated because he believed he "was just going to stand to the side." (R. 2281.) Mr. Creque testified that while he and Mr. Gholston were in the parking lot, they saw Mr. Aguilar come out to smoke a cigarette, and Mr. Gholston approached him, brandishing the gun, and gained access to the restaurant through the door Mr. Aguilar had exited. (R. 2288–89.) Mr. Creque, who testified that he was not identifiable because his face and head were covered, followed. (R. 2287, 2290.) Mr. Creque testified that during the robbery, as he was attempting to usher Mr. Graff and Mr. Aguilar into a cooler, a brief struggle ensued during which he accidentally fired a single shot, (R. 2293–94), striking Mr. Graff in the neck. (R. 1712.) He further testified that, in shock because he had never fired a gun before, he stepped back (R. 2294), and as he did, Mr. Gholston grabbed the gun and fired four times in the direction of Jessie Aguilar (R. 2294–95), who was struck in the left side of his neck, the right side of his chest, the lower abdomen, and the right arm (R. 1672–78).

The State presented no testimony from Mr. Gholston and Ms. Eldred. Instead, it argued that circumstantial evidence, specifically the nature of Mr. Graff's wound (R. 1139–1213, 1233–81, 1297–1345, 1667–1715, 1749–75, 1787–1806), what it contended was Mr. Creque's admission of guilt to his girlfriend (R. 1942), the fact that Mr. Creque worked at Krystal (R. 2549), and his statements to police (St. Ex. 136, 137), proved that he deliberately shot both victims.

To support its theory, the State introduced testimony from Brittany Orr that she had dropped Mr. Creque off at Mr. Gholston's house, and that at the time he was wearing camouflage pants, a black tee shirt, and black shoes (R. 1939–40), and he had a gun with him (R. 1923–24). She testified that when he returned after the evening, Mr. Creque told her someone had been shot at Krystal (R. 1926), and she asked him "[d]id he do it," and he said, "Yes" (R. 1942–43). The State also called Mr. Gholston's cousin Rudy Holmes to testify. Mr. Holmes suggested that Mr. Creque had introduced the idea of the robbery. Mr. Holmes testified that Mr. Gholston and Mr. Creque were at his house when Mr. Creque called Mr. Gholston over to talk (R. 1442), and Mr. Holmes heard Mr. Creque "say something about he needed his money and he said something about Krystals." (R. 1444.) Mr. Holmes also testified that Mr. Creque used Mr. Holmes's phone to call Ms. Eldred (R. 1448–50), and that when Mr. Gholston returned home after being out, he "looked like he seen a ghost or just like he wasn't himself." (R. 1452.) The State introduced testimony from a number of Krystal employees, including testimony from Jessica Stover and Melanie Moose Balmas that they were supposed to work the night of the shooting but did not (R. 1415–17,

1426–29), and testimony from employee Terario Preston that Krystal had a security camera with a cable running to the wall (R. 1059–60).

The State called Lt. Archer to testify last. In Lt. Archer's testimony, which spanned two days, he gave a comprehensive overview of the evidence the State had presented. (R. 2065–2244.) His testimony covered the subjects every other witness had spoken about, reflecting and often explicitly referring to others' testimony. Lt. Archer recalled Mr. Holmes's testimony about Mr. Creque's use of his phone, and Lt. Archer told the jury that Mr. Holmes's account was consistent with his investigation. (R. 2096–98.) When the prosecutor asked what evidence Lt. Archer found that refuted Mr. Creque's account of the night's events, he replied, "Well, there was the testimony we've heard which was what we found out when we talked to Rudy about them going to his house and being there together." (R. 2136–37.) Lt. Archer reminded the jury that Brittany Orr had testified that she saw Mr. Gholston and Mr. Creque together on the night of the shooting (R. 2160) and that she injured Mr. Creque at his request (R. 2152). When asked who else was scheduled to work the night of the robbery, Lt. Archer said, "Melanie Moose and the other female. I forgot her name. She testified . . . The one that testified earlier that she had gone home early." (R. 2138–39.) When the prosecutor showed Lt. Archer a physical exhibit and asked him to explain it to the jury, Lt. Archer reminded them about testimony suggesting the security camera had been altered: "That's the security camera with the cord that's hanging down that we've heard testimony about . . . ." (R. 2144.)

Lt. Archer also discussed physical evidence in relation to Brittany Orr's

testimony, offering a speculative explanation to account for disparities between the two. When asked if he "recall[ed] Brittany Orr's testimony that" Mr. Creque had on camouflage pants the night of the shooting (R. 2139), Lt. Archer answered affirmatively, and he also agreed that he had heard Mr. Creque's statement that everyone was wearing black shirts (R. 2140). Lt. Archer explained to the jury that the police found black tee shirts and other clothing in the dumpster by Mr. Holmes's house. He noted, "the only thing we didn't find in the dumpster was . . . camouflage shorts . . . which of course not to say they weren't discarded elsewhere." (R. 2140–41.)

Lt. Archer gave his own opinion about Mr. Creque's credibility, telling the jury he credited the inculpatory parts of Mr. Creque's statements: "[H]is story had gotten to the point that there were a number of things in there that I believed were truthful . . . In other words, him saying I shot those people. That seemed pretty credible to me. Why else would he admit to that?" (R. 2165.)

At the conclusion of Lt. Archer's lengthy testimony, the prosecutor asked, "That man sitting right there, is he the one that told you that he robbed the Krystal and shot Jeff Graff and Jessie Aguilar?" (R. 2244.) Lt. Archer responded, "He is," and the State rested. (R. 2244.)

The defense contested the admissibility and reliability of the inculpatory statements, challenged the credibility of the arresting officers' testimony, and relied on a forensic expert who sought to testify that the physical evidence, particularly that relating to Mr. Graff's wound (R. 2412–84), supported the defense accidental shooting theory. (R. 2473–80.) The trial court precluded critical portions of the defendant's

expert opinion testimony. (R. 2473–80.) The trial court instructed the jury on the lesser-included offenses of felony murder and robbery as to the capital murder-robbery counts. (R. 2601–18.) The jury convicted Mr. Creque of capital murder on all three counts. (R. 2636–37.)

The conduct of at least one juror during the penalty phase demonstrated the success of the State's effort to depict Lt. Archer as an arbiter of credibility summarizing and assessing evidence for the jury's benefit. Over a weekend in the middle of the penalty phase, a juror, R.R., approached Lt. Archer in a sporting goods store, hugged him, told him he had done a "great job," and initiated a conversation about the case. (R. 2757–60.) R.R. told Lt. Archer that she sympathized with law enforcement and the victims' families, because, "[h]aving gone through that before myself, I know how hard it is." (R. 2759.) She told Lt. Archer, "I have some questions just out of curiosity . . . there are things that you know but we just couldn't hear about, and we really want to know about some of that." (R. 2760.)

Even after learning of this interaction the next day, the trial court did not question the jury on law enforcement bias, instruct the jury not to credit law enforcement witnesses because of their positions, or instruct R.R. that her conduct had been improper and she should refrain from talking to witnesses for the remainder of the trial. (R. 2763–68.) The court did not poll the jury to determine whether other jurors were exposed to extraneous contacts during the trial. This juror continued to serve on the case and ultimately participated in voting on the death sentence.

During the penalty phase, the court also prevented the defense from introducing

several relevant mitigation exhibits, including: a social history report (Def. Ex. 65) and timeline (Def. Ex. 73) prepared by a mitigation expert; the expert's timeline of Mr. Creque's drug use on the day of the offense (Def. Ex. 73); and the Department of Justice risk factors chart completed by the expert (Def. Ex. 75; R. 2776-80).

The evidence that was admitted detailed Mr. Creque's nomadic childhood, hospital records of numerous concussions and other injuries, sexual abuse by his father, a history of bedwetting and encopresis (a condition that required him to wear a diaper well into childhood), multiple untreated learning disabilities, the fact that his mother removed him from school at a young age, and his becoming the primary caregiver for his terminally-ill father during his teenage years. (R. 2679–2795; S. 1737–44.) Evidence also showed that Mr. Creque had an abusive relationship with his mother, who belittled him on the day of the offense, and that her abuse contributed to his drug use and participation in the crime. (R. 2904–05, 2908–11.)

The State relied on three aggravating circumstances: 1) the murder was committed during a robbery; 2) the defendant intentionally caused the death of two or more persons; and 3) the murder was heinous, atrocious, and cruel, because the victims suffered before death. (R. 2913, 2917–19.) Jurors were instructed many times, beginning in voir dire, that their verdict was merely a "recommendation" and the trial court would make the ultimate determination about the death penalty. (R. 277, 382, 722, 820-21, 2922, 2940–42.) A non-unanimous jury recommended death by a vote of 11-1. (R. 2951.)

The trial court held a sentencing hearing on January 15, 2013 (R. 2956–3038),

at which defense counsel presented additional evidence about Mr. Creque's upbringing. (R. 2978–80; S. 1898–1911.) Victims' family members Lois Graff and Marie Aguilar gave statements at the sentencing hearing. Ms. Graff told the trial court that she "d[id] not believe in capital punishment." (R. 3018.) Mr. Creque expressed remorse and apologized to the victims' families. (R. 3035–36.) The court sentenced Mr. Creque to death. (C. 550–51.)

II. PROCEEDINGS BELOW

On November 16, 2011, Jordaan Creque was indicted for two counts of capital murder during a robbery pursuant to Alabama Code § 13A-5-40(a)(4) and one count of capital murder for the deaths of two or more persons pursuant to Alabama Code § 13A-5-40(a)(10). (C. 43–44.) On October 11, 2013, the jury convicted Mr. Creque on these three counts. (C. 520.) On October 14, 2013, a non-unanimous jury returned a verdict recommending death by a vote of 11-1. (S. 2951.) On January 15, 2014, the trial court sentenced Mr. Creque to death. (R. 3037–38.)

Mr. Creque sought review in the Alabama Court of Criminal Appeals, which affirmed his conviction and death sentence on February 9, 2018. See Creque v. State, No. CR–13–0780, 2018 WL 798160 (Ala. Crim. App. Feb. 9, 2018). With respect to Lt. Archer's testimony, the Court of Criminal Appeals concluded that the State did not err in asking Lt. Archer to testify about evidence he had heard earlier in the trial. Creque, 2018 WL 798160, at *36–37. The court reasoned that a law enforcement officer testifying that his findings were consistent with the testimony of other witnesses he had heard did not amount to supporting that testimony or personally vouching for its

truthfulness. The court concluded that no authority held that testimony such as Archer's constituted improper bolstering, and so held that the trial court had committed no plain error in allowing this testimony. Id. The Court of Criminal Appeals then denied rehearing in the case, and the Alabama Supreme Court denied Mr. Creque's petition for a writ of certiorari. See Ex parte Creque, No. 1170803 (Ala. Sept. 21, 2018). Mr. Creque now respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review Because Testimony by a Law Enforcement Officer Who Had Been in the Courtroom Throughout Trial Summarizing the State's Case and Bolstering the State's Witnesses Usurped the Jury's Fact-Finding Role and Led to a Conviction and Death Sentence Based on Unreliable Evidence in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has long made clear that "questions of credibility, whether of a witness or a confession, are for the jury." Jackson v. Denno, 378 U.S. 368, 386 n.13 (1964). Here, Lt. Archer, the State's lead law enforcement witness, remained in the courtroom throughout trial, seated with the prosecution at counsel table. After hearing all other evidence the State presented, Lt. Archer got on the witness stand and summarized the State's entire case, implicitly and explicitly bolstering the credibility of other witnesses.

As this Court has explained, the State may not endorse witnesses' testimony. See United States v. Young, 470 U.S. 1, 18–19 (1985) (A government comment on the credibility of a witness "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."). In keeping with this principle and in order to preserve the Sixth Amendment right to trial by jury, federal courts of appeals have held that a law enforcement witness may not comment on other witnesses' credibility. See, e.g., United States v. Aviles-Colon, 536 F.3d 1, 21 n.13 (1st Cir. 2008) (condemning "testimony by a government agent to endorse the testimony of other witnesses" because it might "add the imprimatur of the government to those witnesses' testimony," and reversing on

other grounds); United States v. Forrester, 60 F.3d 52, 63 (2d Cir. 1995) (error where government solicited opinion from law enforcement witness about credibility of other witnesses, because "witnesses may not opine as to the credibility of the testimony of other witnesses at the trial" (quotation marks omitted)). Cf. United States v. Schmitz, 634 F.3d 1247, 1268 (11th Cir. 2011) (citing consensus among First, Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits that government cannot ask criminal defendant whether government witnesses are lying, because such questions "invade the province of the jury by forcing defendants to assess the credibility of others who have testified").

When Lt. Archer got on the stand here, he explicitly vouched for some of the evidence that had been introduced. He said that he believed the inculpatory statement Mr. Creque had allegedly given at the hospital (R. 2165), which was irreconcilable with Mr. Creque's in-court testimony. This endorsement violated the clear prohibition of Jackson and Young.

Lt. Archer also bolstered the credibility of important State witnesses by repeating portions of their testimony and saying his investigation had confirmed their accounts. Lt. Archer repeated and corroborated testimony from Brittany Orr, a key witness for the State. He bolstered her account of Mr. Creque's whereabouts on the night of the shooting (R. 2160), and he explained the disparity between her testimony and the physical evidence. He was able to tie up loose ends in the State's case by virtue of having heard her testimony in court (R. 2139–40). Testimony that explains physical evidence in relation to other witnesses' statements raises the concern that a witness

who has heard other evidence will be less truthful because of the temptation to tailor his statements to that evidence. See, e.g., Brooks v. Tennessee, 406 U.S. 605, 607 (1972) (acknowledging "'the occasional readiness of the interested person to adapt his testimony, when offered later, to victory rather than to veracity, so as to meet the necessities as laid open by prior witnesses'" (quoting 6 J. Wigmore, Evidence § 1869 (3d ed. 1940))); United States v. Pulley, 922 F.2d 1283, 1285 (6th Cir. 1991) (witness who testifies after others may "tailor[] his testimony to conform to the testimony of earlier witnesses"); United States v. Charles, 456 F.3d 249, 258 (1st Cir. 2009) (danger of witnesses hearing others' testimony is the risk of "fabrication, inaccuracy, and collusion" (internal quotation marks and citations omitted)).

Ms. Orr's credibility was a central issue at trial, most critically because she testified that Mr. Creque told her he had shot both victims, while the defense contested that Mr. Creque's statement was a general admission of involvement in the offense. (R. 1942–43 (Ms. Orr testified that she asked Mr. Creque "did he do it," and he said "yes," which she interpreted to mean that he shot both victims.).) The State relied on Ms. Orr heavily, calling her to the stand immediately before Lt. Archer. But there was ample reason for the jury to discredit her testimony. During direct examination by the prosecutor, Ms. Orr repeatedly gave no response to questions (R. 1901, 1903, 1904, 1913, 1924, 1927, 1928, 1929, 1933, 1936, 1941) or said she did not remember (R. 1894, 1895, 1902, 1917, 1919, 1923, 1924, 1928, 1930, 1936, 1939, 1941, 1942). For much of her testimony, Ms. Orr was able to answer only by reading from a police statement written in handwriting that was not hers. (See R. 1907–17, 1931, 1939–41;

see also R. 1907 (prosecutor telling Ms. Orr, "[r]ead that statement if you need to, the truthful statement you say you gave the police").) At one point, the prosecutor asked Ms. Orr whether she was sure of an answer, and she replied, "I'm guessing." (R. 1923.) Ms. Orr testified on direct and cross-examination that she had a vitamin deficiency that had caused both short- and long-term memory loss. (R. 1941, 1944–45.) She also testified about her regular drug use at the time of the events she was describing. (R. 1916–19; 1945–47.) Lt. Archer's bolstering was thus necessary to the State's effort to maintain Ms. Orr as a believable witness.

Lt. Archer similarly bolstered Mr. Holmes's testimony by corroborating and repeating it. (R. 2096; 2136–37.) Mr. Holmes is the cousin of Mr. Gholston, who Mr. Creque said orchestrated the robbery and shot Mr. Aguilar, and so Mr. Holmes had an incentive to testify in a way that exculpated Mr. Gholston and inculpated Mr. Creque. Lt. Archer's bolstering helped credit Mr. Holmes in the eyes of the jury and minimized the impact of this potential bias.

This bolstering was particularly powerful because it came from a law enforcement witness. See United States v. Rudberg, 122 F.3d 1199, 1204 (9th Cir. 1997) (observing danger of improperly influencing jury when vouching testimony comes from "a very experienced F.B.I. agent, a person whose position the jury might easily identify with the integrity of the United States"). The risk that the jury would improperly credit Lt. Archer's testimony was further heightened by his presence at counsel table. See United States v. Anagnos, 853 F.2d 1, 4 (1st Cir. 1988) ("A witness who sits side by side with counsel would seem implicitly vouched for."

(quotation marks and citations omitted)). The trial court took no steps to mitigate this danger. For example, the trial court did not voir dire the jury veniremembers about whether they would assign undue weight to law enforcement testimony. See Charles, 456 F.3d at 253 (concern about undue impact of law enforcement testimony lessened where "[d]uring voir dire, the court questioned the potential jurors about possible bias in favor of law enforcement witnesses.") Only defense counsel – who questioned veniremembers last, after the court and prosecution had finished – asked whether potential jurors would credit law enforcement officers and other witnesses equally. (R. 369–70; 564–65; 834.) The trial court could also have reduced the risk of the jury inappropriately weighting the testimony of a law enforcement officer who had been present throughout trial by instructing the jury not to do so. See Charles, 456 F.3d at 260 ("The court here carefully considered the issue of whether [the law enforcement officer]'s presence at counsel table could be prejudicial and took care to instruct the jury not to give his testimony greater weight than that of any other witness.") The trial court here gave no instruction relating to law enforcement witnesses. The jury thus heard nothing from the trial court suggesting that it should give other witnesses' testimony the same credence it gave to the testimony of Lt. Archer.

Finally, Lt. Archer's testimony was improper because he summarized the State's case from the witness stand, walking through the investigation and witness testimony in detail over two days. This summary presented the State's theory as evidence. See, e.g., United States v. Hawkins, 796 F.3d 843, 866 (8th Cir. 2015) (error to admit summary exhibit that "dramatically and provocatively reframe[d] witness testimony

in an argumentative manner" and contained credibility assessments of other witnesses); United States v. Nguyen, 504 F.3d 561, 572 (5th Cir. 2007) ("danger" of summary testimony is "allow[ing] the Government to repeat its entire case-in-chief shortly before jury deliberations," and "[s]ummary witnesses may not be used as a substitute for, or a supplement to, closing argument" (quotation marks and citation omitted)).

The Due Process Clause guarantees criminal defendants in state court some baseline of reliability for the evidence pursuant to which they can be convicted. See, e.g., Perry v. New Hampshire, 565 U.S. 228, 237 (2012) (Due Process Clause prevents defendant from being convicted based on evidence "so extremely unfair that its admission violates fundamental conceptions of justice") (quotation marks and citation omitted); Napue v. Illinois, 360 U.S. 264, 269 (1959) (due process violation for State knowingly to introduce false evidence or fail to correct it when it appears).

Moreover, this Court has consistently held that "there is a significant constitutional difference between the death penalty and lesser punishments." Beck v. Alabama, 447 U.S. 625, 637 (1980). Because death is different, the death penalty "must be reserved for the worst of crimes and limited in its instances of application." Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008). These restraints include the "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." Sumner v. Shuman, 483 U.S. 66, 72 (1987).

The conclusion of the Alabama Court of Criminal Appeals that determinations

of witness credibility were "properly left within the jury's province, and Archer's testimony cannot be considered an improper bolstering or vouching," Creque, 2018 WL 798160, at *36, is belied by the record.

In fact, by explicitly saying he credited Mr. Creque's confession and implicitly bolstering the credibility of other witnesses' testimony by referring to and repeating their statements, Lt. Archer invaded the province of the jury as fact-finder in violation of Mr. Creque's right to a jury trial under the Sixth Amendment.

Lt. Archer was a law enforcement witness whom the jury was likely to credit more than other witnesses, and the trial court took no steps to minimize this risk. Lt. Archer's testimony was thus likely to be more persuasive than other evidence, and, influenced by other witness accounts, it was less reliable. This evidence fell below the baseline of reliability required in any criminal trial, and it was particularly harmful in light of the heightened reliability standards this Court maintains before the State may impose death.

The state court's erroneous conclusion thus leaves intact a death sentence imposed on unreliable evidence, likely to be excessively credited by the jury, and that usurped the jury's role as fact-finder, in violation of Mr. Creque's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully Submitted,

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