No. 22-7337

In the
Supreme Court of the United States

TOFOREST ONESHA JOHNSON,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to
the Alabama Court of Criminal Appeals

BRIEF FOR THE INNOCENCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Wrongful convictions are not an "'unreal dream'—[but] instead an undeniable reality." Jessica Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 738 (2016) (citation omitted); *see, e.g.*, *Elonis v. United States*, 575 U.S. 723, 742 (2015) (Alito, J., concurring in part and dissenting in part) (observing that if certain criminal-procedure protections are not followed "a defendant may be wrongly convicted"); *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring in the judgment) ("[A]bundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses."); *cf. Glossip v. Gross*, 576 U.S. 863, 895 (2015) (Scalia, J., concurring) (convictions can be "unreliable").[2]

The Innocence Project is a non-profit organization and law-school clinic dedicated primarily to providing *pro bono* legal services to indigent prisoners whose actual innocence may be established through post-conviction evidence. Its mission is to free the staggering number of innocent people who remain

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[1] Pursuant to Supreme Court Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amicus* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties received notice of the intent to file this brief at least ten days before its filing.

[2] To date, 192 death-row inmates have been exonerated. *See Innocence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence (last visited May 19, 2023).

incarcerated and to bring reform to the system responsible for their unjust imprisonment.

For more than thirty years, the Innocence Project has fulfilled this mission by helping courts identify the signs of wrongful convictions and prevent future injustice. It has provided representation or assistance in most of the 375 DNA exonerations in the United States, as well as numerous exonerations based on constitutional violations.[3] The Innocence Project also works to prevent future miscarriages of justice by researching the root causes of wrongful convictions, participating as *amicus curiae* in cases of broader significance, and pursuing reform initiatives designed to enhance the truth-seeking function of the criminal-justice system. As a leading national advocate for the imprisoned, the Innocence Project is dedicated to improving the criminal-justice system and has a compelling interest in ensuring the fundamental dignity of those held in our nation's prisons.

The Innocence Project files this brief as *amicus curiae* to urge the Court to grant certiorari because this capital case presents numerous warning signs—far beyond the alleged *Brady* violation—that strongly point to Petitioner Toforest Johnson's innocence.

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[3] Since its founding in 1992, the Innocence Project has been involved in 243 exonerations. *See* INNOCENCE PROJECT, https://innocenceproject.org/exonerations-data/ (last visited May 19, 2023).

INTRODUCTION AND SUMMARY OF ARGUMENT

If ever a case bore the hallmarks of a wrongful conviction, Toforest Johnson's is it. Inconsistent prosecutorial theories, a prosecution that depends on a single "earwitness" identification (who was paid an undisclosed reward for her testimony, no less), and later-expressed prosecutorial doubt about the strength of the case . . . this case checks all the boxes.

Indeed, the signs of wrongful conviction fairly cry out from the record. Individually, each warrants a new trial—but together, they cannot be easily swept away, particularly now that both the lead trial prosecutor and the current district attorney support Johnson's request for a new trial. The Innocence Project respectfully urges the Court to grant the petition for certiorari.

* * *

Over the course of grand-jury proceedings and four trials, the State of Alabama presented *at least five different, contradictory theories* of who shot Deputy Sheriff William Hardy. This prosecutorial tactic is suspect in general. But here, it virtually ensures that the State knowingly prosecuted at least one innocent person—the forensic evidence and witness testimony made clear that this was a single-shooter crime.

The State's case against Johnson, who has always maintained his innocence, depended on the testimony of Violet Ellison, who claims to have overheard Johnson confess to the crime on a three-way phone call. Eye- or ear-witness identifications are generally unreliable, but here, doubly so: Ellison was not present when the crime occurred; she claimed to

overhear facts that were inconsistent with the physical evidence, the State's prosecutorial theories, and even her own notes; she was paid by the State for her testimony after she testified, in an undisclosed payment; and although she identified Johnson based on overhearing a phone call, she did not know him and did not know his voice.

Considering these facts, it is unsurprising that the lead trial prosecutor has expressed doubt about the strength of the State's case and that the current district attorney, following an independent review, now supports a new trial "in the interest of justice."[4]

Each of these aspects of Johnson's case is a hallmark of wrongful conviction, a red flag that should stop reviewing courts in their tracks. All of them *combined in a single case* should create unavoidable doubt in the outcome of the trial.

ARGUMENT

The Court should grant review because the troubling case against Toforest Johnson is not limited to a *Brady* violation—the case was incredibly weak from the start and is only made weaker in the light of the State's suppressed evidence. Johnson correctly argues that the court below should have found, consistent with the evidence, that the State suppressed evidence that Violet Ellison testified for a reward that she anticipated receiving at the time of

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[4] *See* C3. Supp-3 11. This brief employs the same record citation conventions as the petition for certiorari. "T.C." and "T.R." refer to the trial record. "C." and "R." refer to the record from the initial post-conviction proceedings. "C1." and "R1." refer to the first remand record. "C2." and "R2." refer to the second remand record. "C3." and "R3." refer to the third remand record.

her testimony. This Court should correct that error because the disclosure of the ulterior motive of the State's star witness would have shattered the already weak case against Johnson. Indeed, the conclusion of the district attorney's recent review of the case highlights the materiality of that suppression.

I. Disclosure of Ellison's ulterior motive for testifying would have demolished an already weak case.

A correct resolution of the *Brady* claim is especially important because Johnson's case bears so many hallmarks of a wrongful conviction. This will be significant at the merits stage because if this Court agrees with Johnson that the State suppressed the evidence of Ellison's motive for testifying, the next step in the *Brady* analysis—either on remand or in this Court, *see* Pet. 23–25—is whether the disclosure would have made a different result "'reasonab[ly] probab[le].'" *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 472 U.S. 667, 682 (1985)). This materiality standard is met when the suppressed evidence would produce a "significantly weaker case" for the prosecution, based on the "cumulative effect of the evidence." *Kyles v. Whitley*, 514 U.S. 419, 440–41, 454 (1995).

The Court should grant certiorari here because the *Brady* violation described in the petition is just one of many troubling aspects of the prosecution's case against Toforest Johnson.

The discussion below reveals just how weak the case for conviction was in the first place. Johnson's case displays *four* hallmarks of a wrongful conviction. All of them should independently undermine

confidence in the trial's outcome, but together—in combination with the suppressed *Brady* evidence—they are devastating to the State's case:

- The State's inconsistent prosecutorial theories show that no forensic evidence pointed to Johnson and emphasize that Ellison's testimony was essential to his eventual conviction. *See infra* Part II.A.
- Eyewitness or earwitness identification is problematic in general—and Ellison's identification was particularly suspect—yet the State relied on Ellison's testimony as the lynchpin of its case. This highlights both the influence her identification likely exerted on the jury and the significance of impeaching it. *See infra* Part II.B.
- The real danger of conviction based on incentivized witness testimony stresses the importance of safeguards, such as disclosure, cross-examination, and a cautionary jury instruction—but none of that happened here. *See infra* Part II.C.
- The lead prosecutor's own belief that the case against Johnson was not strong because it rested on Ellison's testimony—an opinion affirmed more recently by an independent re-investigation—confirms that the disclosure of the promised reward would have dramatically weakened Ellison's already unreliable testimony. Indeed, the district attorney's recent review expressly identifies the suppression of the reward as a reason why a new trial is necessary. *See infra* Part II.D.

The non-disclosure of Ellison's motive to testify for reward money is just one disquieting piece of a concerningly weak case for conviction.

II. This case bears numerous hallmarks of a wrongful conviction.

A. The State pursued inconsistent prosecutorial theories.

Prosecutors must "search for truth in criminal trials," *Strickler v. Greene*, 527 U.S. 263, 281 (1999), and have a corresponding "duty to refrain from improper methods calculated to produce a wrongful conviction," *Berger v. United States*, 295 U.S. 78, 88 (1935). *See also Ramos v. Louisiana*, 590 U.S. ----, 140 S. Ct. 1390, 1401 (2020) (recognizing the constitutional importance of "safeguarding against overzealous prosecutions"). That responsibility precludes advancing inconsistent theories on the same facts about the same crime, when only one person can be responsible. Doing otherwise promotes unreliability in convictions and is incompatible with the constitutional mandate that a prosecutor's obligation "is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88.

The State presented five different theories, over the course of three years, regarding who killed Deputy Hardy. *See* C3. Supp-3 10 ¶ 1; *see also generally* C3. Supp-1 63. The inconsistent theories were particularly problematic because the forensic evidence, supported by the testimony of State witnesses, made clear that *a single shooter* fired two shots in rapid succession from *the same gun*. *See* T.R. 389, 545–51, 886–87.

First, in January 1996, the lead detective testified before the grand jury that his investigation revealed that Ardragus Ford and Omar Berry shot Deputy Hardy. C3. 495. *Second*, in November 1997, at Ardragus Ford's first trial, the State advanced the theory that Ford was the shooter. C3. Supp-1 63. *Third*, at Johnson's first trial in December 1997, the State argued that Johnson pulled the trigger and killed Deputy Hardy. C3. Supp-1 63. *Fourth*, at Johnson's second trial in August 1998—the trial that led to his wrongful conviction, which is the basis of this petition—the State proceeded on the theory that *both* Johnson *and* Quintez Wilson shot Deputy Hardy. C3. Supp-1 63; T.R. 903–04. *Fifth*, and finally, in Ardragus Ford's second trial in June 1999 (*i.e.*, *after* Johnson was convicted), the State returned to the theory that Ford shot Deputy Hardy. C3. Supp-1 63.

This history—which begins and ends with the State advancing the theory, embraced by the State's lead detective, that Ardragus Ford killed Deputy Hardy—proves that the State has prosecuted at least one innocent person in connection with the crime. That cannot be squared with a "search for truth."[5]

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[5] *Cf. Bradshaw v. Stumpf*, 545 U.S. 175, 186–88 (2005) (holding prosecutor's use of inconsistent theories could have affected defendant's sentencing and remanding for consideration of whether it violated due process); *see also Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring) (inconsistent theories of the same crime "reduce criminal trials to mere gamesmanship and rob them of their supposed purpose of a search for truth"); *Thompson v. Calderon*, 120 F.3d 1045, 1058–59 (9th Cir. 1997) (en banc) (holding that it violates due process for the State to argue in one defendant's trial that he alone committed a murder, then argue in a subsequent trial that another defendant actually committed the same crime), *vacated*

The concept that inconsistent prosecutorial theories can lead to a wrongful conviction is not theoretical—it unfortunately happens. In *Bankhead v. State*, 182 S.W.3d 253, 259 (Mo. Ct. App. 2006), for example, the court affirmed vacatur of a murder conviction because the State "selectively presented contradictory evidence and arguments in three different cases depending upon which defendant was before the trial court." And in *Smith v. Groose*, 205 F.3d 1045, 1051–54 (8th Cir. 2000), the Eighth Circuit vacated a murder conviction because "[t]he State's use of factually contradictory theories . . . fatally infected [the] conviction."

That inconsistent prosecutorial theories similarly infected this capital case is the first wrongful-conviction hallmark that reveals the weakness of the case against Johnson—and that should give pause as to his trial's outcome and the significance of Ellison's non-disclosed motive to testify. In fact, *five months after* Violet Ellison approached the police with her story implicating Johnson, the State's lead detective provided sworn testimony to the grand jury that *someone else* killed Deputy Hardy. C3. 488; T.R. 693. In other words, the lead detective's grand-jury testimony shows that the State itself did not believe

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on other grounds, 523 U.S. 538 (1998); Michael Q. English, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525, 528 (1999) ("[A] prosecutor violates both the Due Process Clause and her ethical obligations when she argues inconsistent factual theories of a crime in successive trials without taking affirmative steps to repudiate the factual theory used in the first trial.").

Ellison's testimony, even though it eventually formed the basis of the case against Johnson.

B. The State relied on an unreliable "earwitness identification."

This case involves "earwitness identification"—*i.e.*, Ellison testified that she *overheard* Johnson admit, on a three-way phone call, to involvement in the crime.[6] In fact, Ellison was the State's star witness: The prosecution described her expected testimony in detail at the climax of its opening statement, exhorting the jury that if they found Ellison to be someone "they c[ould] trust," then they would "be convinced" that Johnson shot Deputy Hardy.[7]

Yet, earwitness identification is an identification method even less reliable than its troubled cousin, *eyewitness* identification. *Nearly half* of death-row exonerations have involved this sort of false "secondary confession"—*i.e.*, a statement made by a third-party about someone else's supposed (but later proved to be false) admission of guilt.[8] That number

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[6] *See* T.R. 312–16 (State's opening), 663–719 (V. Ellison testimony), 905–11 (State's closing).

[7] T.R. 316 ("I want you to listen to Mrs. Ellison, I want you to pay attention to her testimony. Look at her, ask yourself if she is a person that you would trust, that you can trust, that you believe if there is any way that she could have gotten the information that she tells you from anywhere else other than [Johnson]. And I submit to you that if you do that, at the close of this case you'll be convinced . . . .").

[8] *See* Jessica K. Swanner & Denise R. Beike, *Incentives Increase the Rate of False but Not True Secondary Confessions from Informants with an Allegiance to a Suspect,* 34 LAW & HUM. BEHAV. 418 (2010) (noting that false secondary confessions were "present in 46% of the wrongful convictions in death row cases").

alone is staggering, but in light of the fact that Johnson was convicted on the basis of a single earwitness, who overheard a phone call in which Johnson purportedly confessed to the crime—even though the witness had never met him and did not know his voice (T.R. 713–14; C3. Supp-1 64 (citing C3.202–03))—the presence of earwitness identification should be a huge red flag.

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Witness identification is problematic—not just in earwitness identifications, but even in the far more common (but no more reliable) realm of eyewitness identification. *See, e.g.*, *Perry v. New Hampshire*, 565 U.S. 228, 244–45 (2012) ("We do not doubt either the importance or the fallibility of eyewitness identifications." (citing "studies showing that eyewitness misidentifications are the leading cause of wrongful convictions" and "research indicating that as many as one in three eyewitness identifications is inaccurate")); *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."). The Innocence Project's work has revealed that mistaken *eyewitness* identifications contributed to approximately 69% of the 375 wrongful convictions in the United States that have been overturned by post-conviction DNA evidence.[9]

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[9] *How Eyewitness Misidentification Can Send Innocent People to Prison*, INNOCENCE PROJECT, https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/ (last visited May 19, 2023). The pairing between mistaken eyewitness identification and wrongful conviction is not limited to cases where innocence is proven by DNA evidence,

This propensity of mistaken eyewitness identification to lead to wrongful convictions is just as prevalent in capital cases. In fact, the Center on Wrongful Convictions conducted a study of eighty-six defendants who were sentenced to death after *Furman v. Georgia*, 408 U.S. 238 (1972), but were later exonerated, and they concluded that eyewitness testimony played a role in forty-six of those eighty-six wrongful convictions.[10] *More than half.* And, as in this case, in thirty-three of those forty-six cases, eyewitness (or, here, earwitness) testimony was *the only evidence* connecting the defendant to the crime.[11]

Simply put, convictions (like this one) that are based on the testimony of a single witness are unreliable, even when (unlike here) those witnesses were present at the scene, and even when (again, unlike here) the witnesses were themselves the victims of the crime.[12] There are numerous examples

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of course. As of April 2014, 75% of the 1,365 exonerations examined by the National Registry of Exonerations involved some type of false identification. *See* Kaitlin Jackson & Samuel Gross, *Tainted Identifications*, NAT'L REGISTRY OF EXONERATIONS (Sept. 22, 2016), https://www.law.umich.edu/special/exoneration/Pages/taintedids.aspx.

[10] *See* Rob Warden, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row*, CTR. ON WRONGFUL CONVICTIONS, NW. L. SCH. at 2–3 (May 2, 2001), https://files.deathpenaltyinfo.org/legacy/files/pdf/StudyCWC2001.pdf.

[11] *Ibid.*

[12] *See generally* Sara Conway, *A New Era of Eyewitness Identification Law: Putting Eyewitness Testimony on Trial*, 50 NEW ENG. L. REV. 81 (2015); *see also, e.g.*, Thomas Albright & Jed Rakoff, *Eyewitnesses Aren't as Reliable as You Might Think*, WASH. POST (Jan. 13, 2015), https://www.washingtonpost.com/

of the dangers of relying so heavily on witness identifications—again, even when the witness is *the actual victim*—but to highlight just a few:

- In Jefferson County, Alabama, Freddie Lee Gaines was convicted of second-degree murder. A survivor of the shooting identified Gaines, but years later, another man confessed, and Gaines's conviction was vacated.[13]
- In Bronx County, New York, James Anderson was identified by the victim as the intruder who threatened her with a knife and burgled her apartment. Anderson insisted that he had been hospitalized at the time, but a jury convicted him. Before sentencing, hospital records arrived corroborating Anderson's story; his convictions were vacated.[14]
- In Dallas County, Texas, a rape victim identified Larry Fuller as her attacker and a

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opinions/eyewitnesses-arent-as-reliable-as-you-might-think/2015/01/30/fe1bc26c-7a74-11e4-9a27-6fdbc612bff8_story.html (noting that "accounts of events promulgated by attorneys and news media" can reinforce a witness's beliefs regardless of the accuracy of the identification); NAT'L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 2 (Nat'l Academies Press 2014) ("The fidelity of our memories to actual events may be compromised by many factors at all stages of processing, from encoding to storage to retrieval.").

[13] Stephanie Denzel, *Freddie Lee Gaines*, NAT'L REGISTRY OF EXONERATIONS (before June 2012) https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3226.

[14] Maurice Possley, *James C. Anderson*, NAT'L REGISTRY OF EXONERATIONS (Feb. 16, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4378.

> forensic analyst testified that Fuller could not be excluded. Eighteen years later, DNA testing excluded Fuller, and his conviction was vacated.[15]

Earwitnesses who (as in this case) identify a suspect based solely on hearing the suspect's voice—especially when they do not know the suspect or his voice—are even less reliable than eyewitnesses. *See, e.g.*, Cindy E. Laub, Lindsey E. Wylie, & Brian H. Bornstein, *Can The Courts Tell An Ear From An Eye? Legal Approaches to Voice Identification Evidence*, 37 LAW & PSYCHOL. REV. 119, 124–25 (2013) ("[V]oice recognition by itself is poor, such that earwitness identifications are less accurate than eyewitness identifications."); Christopher Sherrin, *Earwitness Evidence: The Reliability of Voice Identifications*, 52 OSGOODE HALL L.J. 819, 822 (2015) (collecting studies identifying earwitness testimony as "extremely inaccurate[] and likely to produce high false identifications" (internal quotations omitted)).

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That is the kind of notoriously unreliable witness testimony that put Toforest Johnson on death row. Both times that Johnson was on trial, the State's case hinged on Ellison's testimony. *See* C3. Supp-3 11 ¶ 4; T.R. 316, 905–16; C3. Supp-1 63. Yet, Ellison was not present when the murder occurred, so she was not an eyewitness. *See* C3. Supp-1 63–64; C3. Supp-3 11 ¶ 4. Her contribution to the evidence was far more attenuated: She listened in on a three-way phone call

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[15] The Innocence Project, *Larry Fuller*, NAT'L REGISTRY OF EXONERATIONS (before June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3224.

initiated by her daughter, and she testified that she overheard a man who said his name was "Toforest" say he shot Deputy Hardy and that another man had shot a second time. *See* T.R. 668–85, 711; C3. Supp-1 63–64.

That testimony was, of course, inconsistent with the physical evidence; as already explained in Part II.A above (*see also* T.R. 545, 551, 886–87), there was only one shooter, not two different people who shot as Ellison testified (T.R. 683–84, 711). Moreover, like unreliable eyewitness testimony later shown to have contributed to a wrongful conviction, Ellison's testimony is rife with other indicia of unreliability. She had never met Toforest Johnson and did not know his voice. T.R. 713–14; C3. Supp-1 64 (citing C3.202–03). And, critically, she had heard media coverage of the murder and Johnson's status as a suspect *before* she overheard the conversation about which she testified. C3. Supp-1 72–73 (citing T.R. 667, 706–07, 711; C3. 134–137). The influence of that knowledge on the significance Ellison attached to what she thought she heard is reflected in her own allegedly contemporaneous notes of the eavesdropped conversation, in which she identified the person she overheard speaking as "Johnson," despite the fact that she later testified that the speaker referred to himself only as "Toforest." C3. Supp-1 73–74 (citing T.R. 717; C3. 537–40).

Just as can occur even with eyewitnesses, Ellison was influenced by reports about the case, and her recollection of what she heard was not hers alone. Those facts further evidence the weakness of the case against Johnson and should undermine confidence in his conviction.

C. The State's star witness was incentivized to provide testimony leading to a conviction.

Incentivized witnesses are yet another hallmark of wrongful convictions. Any incentive offered to a witness is highly relevant because "[i]ncentives provide a motive to lie." *See* Swanner, *supra*, at 427. To protect against tainted testimony, statutes and professional-conduct codes prevent inducement or payment, other than reimbursement of actual expenses, to any witness testifying under oath. *See e.g.*, 18 U.S.C. § 201(c)(2); ALA. R. OF PROF'L CONDUCT 3.4(b).

The dangers of incentivized witnesses are present with *all* witnesses who are offered an incentive, but in capital cases, where life and liberty are on the line, the consequences of introducing those dangers into trial are much more serious. *Cf. Ford v. Wainwright*, 477 U.S. 399, 411 (1986) ("[D]eath is different."). So, the State's promise to pay a reward—and its later, undisclosed payment to Ellison—for testimony leading to a conviction for Deputy Hardy's murder is another huge red flag in this case.

Historically, it has been assumed that dangers from incentives given to witnesses are "adequately mitigated by disclosure, cross-examination, and cautionary jury instructions." Christopher T. Robertson & D. Alex Winkelman, *Incentives, Lies, and Disclosure*, 20 U. PA. J. CONST. L. 33, 42 (2017) (internal quotations omitted). The undeniable reality is that innocent people have been and continue to be convicted based on the testimony of witnesses who have an incentive to help obtain a conviction. *See* Swanner, *supra*, at 418.

This danger is even more acute when the prosecution fails to disclose a witness's incentive. Non-disclosure prevents the jury from learning about evidence that renders the witness's testimony potentially unreliable. It also forecloses the defense from effectively cross-examining the witness and precludes the defense and the trial court from recognizing the need for a cautionary jury instruction. Thus, Johnson's petition rightly argues that the State's suppression of evidence about Ellison's incentive to testify warrants reversal.

Indeed, here, not only was there a motive for Ellison to fabricate what she heard—because the State offered to pay a financial reward for helpful information—but the State never disclosed Ellison's knowledge of the offer and instead emphasized, in both opening and closing the trial, that she *came forward on her own* and that she *had no reason to lie*. *See* T.R. 316 (opening); T.R. 905–11 (closing); *see also supra* n. 7; C3. Supp-1 64. Not so.[16]

The (hidden) incentive payment to Ellison brands Johnson's case with yet another hallmark of wrongful conviction.

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[16] Johnson's trial counsel requested the disclosure of *Brady* material and the trial court ordered discovery (*see* C3. 482–87), but the State never disclosed anything, before or during trial, that connected Ellison to the reward offer. Moreover, not only did she have a financial motive for testifying, but Ellison and the victim's wife had known each other for more than fifteen years. *See* C1. Supp-1 242. The State's promise of a reward for assisting in the successful prosecution of someone for the murder of her friend's husband made Ellison's testimony doubly unreliable.

D. The prosecutors now doubt the validity of Johnson's conviction.

In the light of a prosecutor's charge to pursue justice, not convictions, prosecutorial doubt about the reliability of a conviction, or the strength of the State's case, should not be taken lightly. *See, e.g.*, *Young v. United States*, 315 U.S. 257, 258 (1942) ("The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. . . . The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight . . . .").

The Innocence Project has found over the course of its more than thirty years that when a prosecutor becomes convinced of holes in the State's case, that is a crucial tipping point. Indeed, when prosecutors arrive at doubts about the strength of their case *on their own*, that is a particularly (and extremely) powerful indicator of a wrongful conviction. When that happens, the reasons for the doubt should be extensively examined, and the prosecution should be encouraged to reconsider the case. Innocent people can walk free: The exonerations of Glenn Ford in Louisiana and Frank Sealie in Alabama are just two examples that evidence the point.[17]

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[17] *See Ex-Louisiana Prosecutor Apologizes for 'the misery I have caused' Freed Inmate*, GUARDIAN (Mar. 25, 2015, 4:20 PM), https://www.theguardian.com/us-news/2015/mar/25/former-louisiana-prosecutor-exonerated-death-row-inmate-apologizes; Maurice Possley, *Frank Sealie*, NAT'L REGISTRY OF EXONERATIONS (last updated Oct. 31, 2016), https://www.law.

There is serious prosecutorial doubt here too. Both the lead prosecutor in Johnson's trial, Jeff Wallace, and the current Jefferson County district attorney, Danny Carr, have expressed their concerns about the validity of Johnson's conviction. That is incredibly significant and another powerful indicator of a wrongful conviction—particularly alongside the other evidentiary issues that have surfaced in the years since Johnson's conviction.

Lead Trial Prosecutor Jeff Wallace. Wallace was the lead prosecutor at Johnson's trial. He has since testified under oath that he "[did not] think the State's case [against Johnson] was very strong, because it depended on the testimony of Violet Ellison." *See* C3. 455.[18]

That is a telling concession because without Ellison's testimony, there would have been no case against Johnson. It also recognizes that the State's dependence on a single earwitness identification, by a witness whom the State promised to pay for her testimony (without informing the defense or the jury), introduces serious reliability problems and leads to the increased risk that an innocent man will be punished for someone else's crime.

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umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4659.

[18] *See also* Radley Balko, *An Illusion of Justice: The Baffling Conviction and Death Sentence of Toforest Johnson Reveal a Broken System*, WASH. POST (Sept. 5, 2019), https://www.washingtonpost.com/opinions/2019/09/05/an-alabama-man-has-been-death-row-years-he-is-almost-certainly-innocent/?arc404=true.

According to a recent filing by the district attorney's office, Wallace continues to "express[] concerns about this case" and "supports [Johnson's] request" for a new trial. C3. Supp-3 11 ¶ 5.

District Attorney Danny Carr. The prosecutorial doubt extends beyond the original trial team. In June 2020, the current Jefferson County district attorney, having "determined that [his office's] duty to seek justice requires intervention in this case," filed a brief in support of Johnson, asking the circuit court to "in the interest of justice . . . grant[] a new trial." C3. Supp-3 10–11.

The district attorney's filing was the culmination of a nine-months-long, independent review of this case that included meeting with Wallace, "reviewing the case files, interviewing witnesses, and consulting with the family of Deputy Hardy."[19] *See* C3. Supp-3 at 11 ¶ 5. In addition to reinforcing Wallace's continued "concerns about this case," the district attorney was moved by, among other things, these various wrongful-conviction hallmarks—*e.g.*, the inconsistent prosecutorial theories, the significance of Ellison's earwitness testimony, and the fact that Ellison "was subsequently paid $5,000 which was never mentioned during trial." C3. Supp-3 10–11 ¶¶ 1, 4–5. Indeed, the fact that the district attorney expressly highlighted the *Brady* violation that is the subject of this petition is powerful evidence of the materiality of that suppressed evidence.

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[19] Beth Shelburne, *District Attorney Urges New Trial for Man on Alabama's Death Row*, WBRC (June 12, 2020, 12:22 PM), https://www.wbrc.com/2020/06/12/district-attorney-urges-new-trial-man-alabamas-death-row/.

The Court should give "great weight" to Wallace's lingering concerns and the district attorney's independent review of this case. *Young*, 315 U.S. at 258. These sorts of conviction integrity reviews are crucial to the legitimacy of the criminal-justice system. Increasingly, prosecutors have exercised their duty to ensure justice—and to remedy unjust convictions—by establishing formal conviction-integrity-review units. *See Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976).[20] And the mission could not be more important: Wrongful convictions distort the criminal-justice system by punishing the innocent while the guilty go free. Conviction integrity reviews, such as District Attorney Carr's independent review in this case, exist to fix that distortion.

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Against that backdrop—(1) a prosecution pursued via inconsistent theories of who committed the crime; (2) a conviction secured on the back of testimony from a single earwitness, who identified the defendant (whom she did not know) by overhearing his voice

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[20] As of May 2023, at least seven states have established statewide "Conviction Integrity Units" or "Conviction Review Units" that work to prevent, identify, and remedy false convictions. In addition to statewide Conviction Integrity Units, at least ninety independent units have been established by prosecutor's offices around the nation. *See Conviction Integrity Units*, NAT'L REGISTRY OF EXONERATIONS, https:// www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx (last visited May 3, 2023). These units have helped to exonerate more than 461 people in the last decade alone. *See* Tom Jackman, *Va. Attorney General Launches Conviction Integrity Unit to Identify Wrongful Convictions*, WASH. POST (Jan. 16, 2021), https://www.washingtonpost. com/crime-law/2021/01/16/herring-wrongful-convictions/.

while eavesdropping on a phone call; (3) a publicized reward for testimony leading to a conviction that was later paid out in an undisclosed payment; (4) a case so tenuous that even the prosecutor decries it as weak and a conviction that the district attorney's office no longer stands behind—the Court's review takes on heightened significance.

Dozens of innocent people have been convicted in cases that present *just one* hallmark of wrongful conviction. Here, the presence of *all* of these hallmarks *in a single case* cries out for relief for Toforest Johnson—particularly in the light of the district attorney's support for a new trial, predicated in part on the very subject of this petition, following his recently completed independent review of the case.

CONCLUSION

The Innocence Project is proud to have assisted in freeing hundreds of innocent people since 1992, and it is working to free those still-wrongfully-incarcerated people who have been convicted despite their innocence. In that spirit, the Innocence Project respectfully urges this Court to consider Johnson's petition for a writ of certiorari against the backdrop of the numerous troubling indicia of a wrongful conviction that his capital case presents, and to grant the petition.

Respectfully submitted,

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