

No. 08-1443

IN THE
Supreme Court of the United States

IN RE

TROY ANTHONY DAVIS,

Petitioner

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE
UNITED STATES SUPREME COURT

**MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE NAACP, FRANCE SENATOR,
ROBERT BADINTER, AND PRESIDENT OF THE
PARIS BAR CHRISTIAN CHARRIÈRE BOURNAZEL,
AND BRIEF OF AMICI CURIAE IN SUPPORT OF
PETITIONER TROY ANTHONY DAVIS**

DEIRDRE O'CONNOR
LAW OFFICE OF DEIRDRE O'CONNOR
1911 Firmona Avenue
P.O. Box 4099
Redondo Beach, CA 90278
(310) 780-4522

Counsel for Amici Curiae

223016



COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

**MOTION FOR LEAVE TO FILE BRIEF
OF *AMICI CURIAE* IN SUPPORT OF
PETITIONER TROY ANTHONY DAVIS**

Pursuant to Supreme Court Rule 37, *Amici Curiae*, described below, respectfully move for leave to file a brief in support of Petitioner, Troy Anthony Davis. *Amici* share an tremendous concern that the machinery of death – troubling as it is, from their perspective, for a host of reasons – is especially alarming here when Mr. Davis has yet to receive an evidentiary hearing to determine whether, based on the totality of the evidence, confidence in this verdict that will soon end his life is gravely misplaced.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has challenged the imposition of the death penalty and its unjust application on African Americans through its litigation, resolutions and legislative agenda. Robert Badinter, France Senator, former president of the Constitutional Council (1986-1995), former Minister of Justice (1981-1986), and author of many books on the death penalty joins Christian Charrière Bournazel, President of the Paris Bar, on behalf of his organization – founding member of the World Coalition against death penalty, and the NAACP on this brief out of concern that basic freedoms are challenged whenever the principles of a fair hearing are denied.

For the reasons stated herein, above *Amici Curiae* hereby request that their motion for leave to file be granted.

Respectfully submitted,

DEIRDRE O'CONNOR
LAW OFFICE OF DEIRDRE O'CONNOR
1911 Firmona Avenue
P.O. Box 4099
Redondo Beach, CA 90278
(310) 780-4522

Counsel for Amici Curiae

STATEMENT

The Georgia Supreme Court's opinion was premised on the reliability of evidence before the jury.* Likewise, the Eleventh Circuit's majority opinion honored the guilty verdict without pausing to examine the seriously flawed testimony upon which it was based.** In an innocence case, the question is not whether the jurors, at one time, accepted the testimony of all or some of these witnesses. Every wrongfully convicted person has had the misfortune of having twelve jurors rely on faulty evidence. Rather, the question is whether the testimony, objectively speaking, was deserving of the juror's trust.

* In weighing this new evidence, we do not ignore the testimony presented at trial, and, in fact, we favor that original testimony over the new. . . . At trial, the jury had the benefit of hearing from witnesses and investigators close to the time of the murder, including both Davis and Coles claiming the other was guilty. We simply cannot disregard the jury's verdict in this case.

Davis v. State, 283 Ga. 438 (2008).

** [R]eviewing the record as a whole, [we] remain unpersuaded[of Davis' innocence]. To begin with, four eyewitnesses to Officer MacPhail's murder testified at the trial and identified Davis as the shooter: Steve Sanders, Harriet Murray, Antoine Williams, and Dorothy Ferrell. . . . [B]oth Sanders and Murray unambiguously identified Davis as the shooter of Officer MacPhail, and their identifications remain intact. . . .

In re Davis, 2009 U.S. App. LEXIS 8101 (2009).

QUESTION PRESENTED

Assuming that the innocent have a constitutional right not to be executed, can the State deny the condemned the opportunity to establish a freestanding innocence claim by refusing to conduct an evidentiary hearing when the reliability of the evidence – old and new – cannot be determined in its absence?

TABLE OF CONTENTS

	<i>Page</i>
STATEMENT	i
QUESTION PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vi
INTEREST OF AMICI CURIAE	1
FACTUAL BACKGROUND	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. THE FLAWED IDENTIFICATION PROCEDURE WAS THE EQUI- VALENT OF SAYING “HERE IS OUR SUSPECT; NOW LET’S SEE IF YOU CAN PICK HIM OUT”	7
II. THE REENACTMENT WAS THE EQUIVALENT OF TELLING YOUNG AND MURRAY “COLES IS DEFINIT- ELY NOT THE SHOOTER; NOW LET’S SEE IF YOU CAN AGREE ON WHERE DAVIS WAS STANDING WHEN HE SHOT MACPHAIL”	9

Contents

	<i>Page</i>
III. THE CHALLENGING VIEWING CONDITIONS AND THE REPORTED OBSERVATIONS BY THE WITNESSES EXPOSE THE UNRELIABILITY OF THEIR SUBSEQUENT IDENTIFICATIONS	13
A. The Undisputed Viewing Conditions and the Circumstances of the Crime Undermined the Ability to Encode Sufficient Detail to Permit Later Recognition	13
B. Taken Individually, Each Eyewitness Was Unreliable	14
i. Sanders' twice-admitted unequivocal inability to identify the shooter rendered his in-court identification, two years later, highly incredible.	14
ii. The reenactment explains the progression of Murray's original statement implicating Coles to her ultimate untrustworthy in-court identification of Davis	15
iii. Ferrell was too far away to see the face of the shooter	16

Contents

	<i>Page</i>
IV. THE LOWER COURTS' RELIANCE ON THESE QUESTIONABLE IDENTIFICATIONS BY CONTAMINATED WITNESSES IS MISPLACED AND IT INCORRECTLY ASSUMES THE JURY WAS SUFFICIENTLY EQUIPPED TO ACCURATELY ASSESS THE RELIABILITY OF THIS EVIDENCE.	17
A. Studies Show that Jurors Do Not Intuitively Know How Memory Works and Typically Harbor Many Misconceptions.	17
B. Davis' Jurors Were Not Properly Vetted or Educated to Meet the Unique Challenges of Assessing the Reliability of These Eyewitness Identifications	19
C. Davis' Misinformed Jurors Relied on Witness Confidence as a Predictor of Accuracy, as Did the Lower Courts When Denying Davis an Evidentiary Hearing.	21
CONCLUSION	25

TABLE OF CITED AUTHORITIES

Cases	<i>Page</i>
<i>Brodes v. State</i> , 250 Ga. App. 323, 551 S.E.2d 757 (2001)	20
<i>Brodes v. State</i> , 279 Ga. 435, 614 S.E.2d 766 (2005)	21, 23
<i>Foster v. California</i> , 394 U.S. 440 (1969)	8-9
<i>Hager v. United States</i> , 856 A.2d 1143 (D.C. 2004)	20
<i>House v. Bell</i> , 547 U.S. 518 (2006)	4, 6
<i>McDonough Power Equip. v. Greenwood</i> , 464 U.S. 548 (1984)	19
<i>Simmons v. United States</i> , 390 U.S. 377 (1968) ..	8
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982)	19
<i>State v. Copeland</i> , 226 S.W.3d 287 (Tenn. 2007) ..	20
<i>Stovall v. Denno</i> , 388 U.S. 293 (1967)	8
<i>United States v. Brownlee</i> , 454 F.3d 131 (3d Cir. 2006)	20

Cited Authorities

	<i>Page</i>
<i>United States v. Wade</i> , 388 U.S. 218 (1967)	8, 24
<i>Watkins v. Sowders</i> , 449 U.S. 341 (1981)	22
Other Authorities	
Amy L. Bradfield and Gary Wells, “ <i>The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria</i> ,” 24 <i>Law & Hum. Behavior</i> 581 (2000)	22
Amy L. Bradfield, et al., <i>The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty And Identification Accuracy</i> , 87 <i>Journal of Applied Psychology</i> 112 (2002)	23
Brian L. Cutler et al., <i>The Reliability of Eyewitness Identification</i> , 11 <i>Law & Hum. Behav.</i> 233 (1987)	23
Christian A. Meissner and John C. Brigham, <i>Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, Psychology, Public Policy, and Law</i> , Vol. 7, No. 1, 3-35 (2001)	21
Daniel Brown et al., <i>Memory, Trauma Treatment, and the Law</i> 212-251 (1998)	10

Cited Authorities

	<i>Page</i>
Douglas & Steblay, <i>Memory Distortion in Eyewitness: A Meta-Analysis of the Post-Identification Feedback Effect</i> , 20 <i>App. Cognitive Psychol.</i> 991 (2006)	23
Elizabeth F. Loftus & James M. Doyle, <i>Eyewitness Testimony Civil and Criminal (Eyewitness Testimony)</i> (3rd ed. 1997 and Cumulative Supp. 2005).	10, 19, 21
Gary L. Wells, et al., “ <i>Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads</i> ,” 22 <i>Law & Hum. Behav.</i> 603 (1998)	22-23
Gary L. Wells & Amy L. Bradfield, “ <i>Good, You Identified the Suspect</i> ”: <i>Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience</i> , 83 <i>J. Applied Psychol.</i> 360 (1998)	23
Geoffrey Loftus, & E.M. Harley, <i>Why Is It Easier to Identify Someone Close Than Far Away</i> , 12 <i>Psychonomic Bull. & Rev.</i> 43 (2005)	16
Gerrie, et al., False memories, in N. Brewer and K. Williams (Eds.), <i>Psychology and Law: An Empirical Perspective</i> . New York: Guilford Press (2005)	15

Cited Authorities

	<i>Page</i>
International Association of Chiefs of Police, <i>Training Key #600</i>	11, 25
J. S. Shaw, et al., <i>Co-witness information can have immediate effects on eyewitness memory reports.</i> , 5 <i>Law and Hum. Behavior</i> 503-23 (1997)	10
Kenneth A. Deffenbacher, et al., <i>A Meta- Analytic Review of the Effects of High Stress on Eyewitness Memory</i> , 28 <i>Law and Human Behavior</i> 687 (2004)	14
Kenneth A. Deffenbacher, et al., <i>Mugshot exposure effects: Retroactive interference, mugshot commitment, source confusion, and unconscious transference.</i> , 30 <i>Law and Human Behavior</i> 287-307 (2006)	9
Kenneth A. Deffenbacher, <i>Eyewitness Accuracy and Confidence</i> , 4 <i>Law & Hum. Behav.</i> 243 (1980)	23
Kenneth R. Weingardt et al., <i>Misinformation Revisited: New Evidence on the Suggestibility of Memory</i> , 23 <i>Memory & Cognition</i> 72-82 (1995)	10
Memon, A., et al., <i>Exposure duration: Effects on eyewitness accuracy and confidence</i> , 94 <i>British Journal of Psychology</i> 339-354 (2003)	14

Cited Authorities

	<i>Page</i>
Michael F. Brown, <i>Interviewing Techniques in Criminal investigation: law and practice</i> , Butterworth-Heinemann 2d Ed at p. 144 (2001)	11
R. A. Wise, & M. A. Safer, <i>What US judges know and believe about eyewitness testimony</i> , 18 <i>Applied Cognitive Psychology</i> 427-443 (2004)	25
Richard S. Schmechel, et al., <i>Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence</i> , 46 <i>Jurimetrics J.</i> 177-214 (2006)	17, 18, 19
Tanja R. Benton, et al., <i>Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts</i> , 10 <i>Appl. Cognit. Psychol.</i> 115 (2006)	14, 17, 18
Turtle, Lindsay, Wells, <i>Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case</i> , 1 <i>Canadian Journal of Police and Security Services</i> 5-18 (2003)	20
United States Air Force Safety Investigation Board Witness Interview Guidelines	11

Cited Authorities

	<i>Page</i>
United States Department of Justice, <i>Eyewitness Evidence: A Guide for Law Enforcement</i>	11

INTEREST OF AMICI CURIAE¹

Amici are “members of a civilized society” who agree with Circuit Judge Barkett that “executing an innocent person would be an atrocious violation of our Constitution and the principles upon which it is based.” The relevant backgrounds of the *Amici* are summarized in the accompanying Motion for Leave to File *Amicus Curiae* Brief, and are incorporated here.

Assuming a freestanding innocence claim, the interest of *amici* is to point out the fallacy of a presumption integral to the lower courts’ opinions: that the jury convicted Troy Davis based on reliable evidence. This flawed presumption has twice enabled a slim majority of judges to dispense with the need for an evidentiary hearing and instead allow the State to move forward with the execution of a man despite substantial evidence of his innocence.

Davis’ conviction rests on evidence which is objectively unreliable; a point which Davis’ current lawyers could have established – and still can – were Davis afforded an evidentiary hearing. *Amici* urge this Court to compel an evidentiary hearing to examine – for the first time in a court of law – the reliability of the original guilt determination in light of all the evidence.

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or their counsel made a monetary contribution to its preparation or submission.

FACTUAL BACKGROUND

*The Crime*²

Late one night, in a dimly-lit parking lot, over the span of a few seconds, a homeless man was assaulted and a police officer was killed by one of three black men, all of whom fled immediately.

The Selection Process & the Reenactment

Based on the untested word of Sylvester “Redd” Coles, the police assembled a photo array with Davis’ photo (petitioner’s exhibit #20), which was available for viewing on August 19; yet, none of the percipient witnesses were asked to view it until 5 to 10 days later, after Davis’ highly-publicized surrendered on August 23, and during which time the police prominently displayed wanted posters with *the same photo*. Petitioner’s exhibit #21. The photo was also broadcast on the nightly news programs and in the print media, and the police used the photo when they canvassed the neighborhood. In other words, Davis had become a familiar face prior to any identification procedure.

Dorothy Ferrell – the woman who stood at least 160’ away from the shooting – was shown the photo when the detectives canvassed the neighborhood the day following the shooting. Ferrell also watched news footage the night of Davis’ surrender, which showed Davis handcuffed as several police ushered him to the police car. Trial Exhibit #1. A few days later she viewed the photo array and selected Davis.

² *Amici* incorporate petitioner’s statement of facts.

Antione Williams – the night porter at Burger King – looked at the wanted poster displayed at his place of employment for up to 10 days before being asked to make a selection from the photo array. He selected Davis, but was only 60% sure.

Stephen Sanders – the front-seat passenger in the van at the drive-thru window – told the police within hours after the shooting, unequivocally, that he “wouldn’t recognize [the shooter] again except for his clothes.” One month later, long after Davis’ arrest, the police asked Sanders if he had any newfound confidence in his ability to identify the shooter. Sanders did not. The detectives were sufficiently convinced of Sanders’ inability to accurately choose among the five photos one month after the shooting that they never presented him with the photo array then or at any point prior to trial.

Harriet Murray – Larry Young’s companion – who told police that the man who shot MacPhail was the same man who followed, harassed, and threatened to shoot Young immediately before he retrieved a gun from his waistband and pistol whipped Young, participated in group reenactment of the crime prior to viewing the photo array. The police brought Young, Darrell Collins, and Coles to the Burger King parking lot “and instructed them to position themselves where they were when Young was assaulted. None of them seemed to agree on where they were standing when the assault occurred.” *Detective Ramsey’s police report*, page 49. The police then recruited Murray to join them to “see if she could place everyone in the positions that she saw them in when Young was assaulted.” *Id.* She repositioned people according to her memory, but had trouble “putting a

face” to the two men standing in front of Young. After the reenactment, Murray viewed the photo array. She selected Davis as “one of the three guys at the incident. [Though, she could not] put exactly what position he was in.”

SUMMARY OF ARGUMENT

[In an innocence case, the] court *must consider all the evidence, old and new, incriminating and exculpatory*, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.

House v. Bell, 547 U.S. 518, 538 (2006) (emphasis added; internal quotation marks and citations omitted). When “new evidence so requires, [the court’s assessment] may include consideration of the credibility of the witnesses presented at trial.” *Id.* 547 U.S. at 538-39 (internal quotation marks and citations omitted).

The failure of lower courts to grant Davis an evidentiary hearing precluded any meaningful assessment of the relative strength and weakness of the evidence supporting innocence or guilt. Instead, both lower courts – by a slim majority – put blind faith on a record built on the word of witnesses who, themselves, no longer stand by it. As pointed out in the dissenting opinions, the denial of an evidentiary hearing inescapably paved the way for the execution of a possibly innocent man.

[T]his Court’s approach in extraordinary motions for new trials based on new evidence

is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to death.

Davis v. State, supra, 283 Ga. at (2008) (Sears, C.J., dissenting).

To execute Davis, in the face of a significant amount of proffered evidence that may establish his actual innocence, is unconscionable and unconstitutional.

In re Davis, 2009 U.S. App. LEXIS 8101 (Barkett, J., dissenting).

In Davis' case, the strength of his evidence of innocence, which includes seven recantations and five witnesses identifying Coles as the shooter, is directly informed by the unreliable nature of the specific eyewitness evidence offered at his trial and our present-day understanding of factors affecting reliability.³ The science of eyewitness identification, and our criminal justice system's understanding of it, has evolved and expanded considerably in recent years. When Davis' jury evaluated this evidence, they did so without exposure to or understanding of modern accepted science; indeed, the defense failed even to present the science then available. Viewed through the lens of today's science,

³ Amici are not suggesting that *all* eyewitness identification is unreliable; only that, due to the undisputed attendant circumstances and the flawed identification procedures, *these* eyewitness identifications were highly unreliable.

the unreliability of the eyewitness evidence used in this case – particularly the stranger eyewitness identifications – is apparent. Under *House*, the unreliability of the identification evidence enhances the significance and probative force of the new evidence of innocence.

In sum, these jurors – uneducated in the dangers of faulty eyewitness evidence and likely harboring many misconceptions about memory and factors affecting the accuracy of identifications – were presented with seemingly compelling, but scientifically unreliable, evidence of Davis’ guilt. The eyewitness identification procedures in this case were so unduly suggestive that a person completely unconnected to this crime could have easily picked the police suspect. Prior to their selection, the witnesses were informed that Davis was the police suspect and were repeatedly exposed to the same photo of Davis which would later be used in the photo array. Given this highly suggestive process, it was inevitable that the witnesses would select the police suspect.

Further, some eyewitnesses expressed great confidence despite very tentative original identifications or, in the case of Sanders, a complete inability to identify the shooter until two years after the incident. Two confident witnesses made identifications that defied mortal powers of perception and recall and, as such, had to be based on something other than true recognition. In stark contrast to today’s recognition that confidence is *not* a valid measure of accuracy, jurors were instructed by the court that witness confidence was a legitimate consideration when assessing reliability.

Science and the undisputed facts of this case would lead an impartial fact-finder to conclude that the four stranger identifications are highly unreliable evidence of guilt.

ARGUMENT

I. THE FLAWED IDENTIFICATION PROCEDURE WAS THE EQUIVALENT OF SAYING “HERE IS OUR SUSPECT; NOW LET’S SEE IF YOU CAN PICK HIM OUT”

The day after the shooting, the police publicly announced Davis as their suspect. They saturated the neighborhood, the media, and the witnesses’ place of employment with the Davis’ photo for several days. The police chose not to show the photo array to the witnesses for 5-10 days; a decision that ultimately led to pre-identification exposure. Ferrell was exposed to Davis’ image on at least two occasions prior to viewing the photo array. Williams had 10 days exposure to Davis’ photo at work before the police eventually showed Williams the photo array containing the very same picture. Sanders viewed Davis’ picture the day before he made his remarkable in-court identification. It is of no consequence whether this sequence of events was one of planned manipulation, misguided practice, or indifference. The fact of the matter is that each witness knew who the police suspected and, more importantly, what their suspect looked like.

Justice Brennan observed forty years ago that “the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of

justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined.” *United States v. Wade*, 388 U.S. 218, 229 (1967).

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a *brief glimpse* of a criminal, or may have seen him *under poor conditions*. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the *police display to the witness only the picture of a single individual* who generally resembles the person he saw[] . . .

Simmons v. United States, 390 U.S. 377, 383-384 (1968) (emphasis added).

The exposure to Davis’ photo, prior to the presentation of the *official* photo array, by witnesses who had a *brief glimpse* of the shooter *under poor conditions* was both avoidable and impermissibly suggestive. *Id.*; see also *Stovall v. Denno*, 388 U.S. 293 (1967) (the single display of suspect is widely condemned). Even had the “police *subsequently* follow[ed] the most correct photographic identification procedures” it would not undo the damage done by the prior exposure. See *Foster v. California*, 394 U.S. 440

(1969); *see also* Kenneth A. Deffenbacher, et al., *Mugshot exposure effects: Retroactive interference, mugshot commitment, source confusion, and unconscious transference.*, 30 *Law and Human Behavior* 287-307 (2006). “The suggestive elements in this identification procedure made it all but inevitable [the witnesses] would identify petitioner whether or not he was in fact ‘the man’ [who shot MacPhail].” *Foster, supra*, 394 U.S. at 443.

II. THE REENACTMENT WAS THE EQUIVALENT OF TELLING YOUNG AND MURRAY “COLES IS DEFINITELY NOT THE SHOOTER; NOW LET’S SEE IF YOU CAN AGREE ON WHERE DAVIS WAS STANDING WHEN HE SHOT MACPHAIL”

It is undisputed that Coles was the instigator and the only one of the three to threaten Young. According to Murray’s original statement, Coles was the one who reached into his waistband, pulled out a gun, struck Young, and then shot MacPhail.

One of the guys said, “You don’t know me, don’t walk away from me, I’ll shoot you,” and then he started digging down his shirt, then the other two got closer, when he started pulling the gun out . . .

See also Georgia Attorney General’s 2008 Brief in Opposition to Certiorari at p. 23 (stating Coles threatened to shoot Young while digging into his pants).

In an admitted attempt by the police to reconcile discrepancies among the witnesses and to generate “agreement” over where people were positioned, the police required Young, Murray, Collins, and Coles to collectively reenact the crime. Implicit in this group collaboration, and, specifically, Coles and Collin’s participation, was the clear message to the witnesses Murray and Young that the police considered neither Coles nor Collins the shooter. It was just as improper for the police to suggest to the witnesses that neither Coles (now implicated by five witnesses) nor Collins were the shooter as it was for them to announce the culprit as Davis.⁴

It is well documented that witness memory is contaminated by post-event information received from extraneous sources, such as police and other witnesses. *See e.g.*, Daniel Brown et al., *Memory, Trauma Treatment, and the Law* 212-251 (1998); Elizabeth F. Loftus, *Eyewitness Testimony*, at 52-109 (1996 ed.); Kenneth R. Weingardt et al., *Misinformation Revisited: New Evidence on the Suggestibility of Memory*, 23 *Memory & Cognition* 72-82 (1995); J. S. Shaw, et al., *Co-witness information can have immediate effects on eyewitness memory reports.*, 5 *Law and Hum. Behavior* 503-23 (1997) (“when participants received incorrect information about a co-witness’s response, they were significantly more likely to give that incorrect response than if they received no co-witness information.”).

⁴ *Amici* do not suggest that Collins was the shooter, only that it was improper for the police to inform witnesses that Collins was not the shooter.

The obvious danger of witness collaboration or any investigation technique which permits witnesses to “compare notes” is that it allows for witnesses to contaminate other witness’s memory, thereby undermining the integrity of the investigation. Indeed, law enforcement agencies across the country recognize the dangers of allowing commingling of witnesses and specifically counsel against the practice. *See e.g.*, United States Department of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* available at <http://www.ncjrs.gov/pdffiles1/nij/178240.pdf> (1999) (during an investigation police should separate witnesses and “instruct them to avoid discussing details of the incident with other witnesses”); International Association of Chiefs of Police, *Training Key #600: Eyewitness Identification*, found at <http://www.theiacp.org/PublicationsGuides/TrainingKeys/tabid/452/Default.aspx>, (same); Michael F. Brown, *Interviewing Techniques* in *Criminal investigation: law and practice*, Butterworth-Heinemann 2d Ed at p. 144 (2001) (“Witnesses must be separated to prevent them from comparing recollections about how an event occurred. When a crime occurs, a sequence of acts takes place, usually in a matter of seconds. Each witness sees and remembers different parts of the total event. If witnesses have the opportunity to discuss the events with each other, individual, distinct recollections may merge”); United States Air Force Safety Investigation Board Witness Interview Guidelines, http://www.au.af.mil/au/awc/awcgate/af/witness_interview_roe.doc (“[I]nterviews are not dialogues; interviewers who share information gained from other witnesses or other aspects of their investigation are violating the privileged nature of that information, and may be tainting their

witness' recollection as well. "Prompting" and leading questions are easy traps to fall into, and must be avoided.").

Moreover, this is precisely the type of post-event feedback that would greatly alter the witnesses' memory – or "version," in the case of an unscrupulous witness – of events; as it did in this case.⁵ Prior to the reenactment Coles conveniently claimed that he was not even standing close enough to Young to strike him⁶ – a point contradicted by all other percipient witnesses.⁷ Coles' subsequently modified his version to correspond with other witnesses at the reenactment; at trial he admitted standing face-to-face with Young, still demanding the beer and arguing when Young was struck. The reenactment also caused Murray to move away from her original statement – that the man who started the fight, ended it – and closer to the police theory that Davis inexplicably – without so much as word between Davis and Young – took up Coles' cause.

⁵ See Petitioner's Brief at pp 5, 7 for additional changes in Coles and Murray's accounts following the reenactment.

⁶ Coles repeatedly told police that he stood in the middle of the parking lot while Davis ran up to Young, standing near the drive-thru window.

⁷ Every other witness described the "arguer" (later identified as Coles) as within arm's reach of Young until the time that he was struck.

**III. THE CHALLENGING VIEWING CONDITIONS
AND THE REPORTED OBSERVATIONS
BY THE WITNESSES EXPOSE THE
UNRELIABILITY OF THEIR SUBSEQUENT
IDENTIFICATIONS**

***A. The Undisputed Viewing Conditions and the
Circumstances of the Crime Undermined the
Ability to Encode Sufficient Detail to Permit
Later Recognition***

This sudden unexpected murder and assault occurred in a dimly-lit parking lot late at night and was witnessed by people who were operating under the stress of being in the line of fire.

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

Other factors, known to negatively impact the reliability of eyewitness identifications, are implicated here. First, the assault of Young is what first captured the attention of the stranger eyewitnesses. MacPhail

was shot within seconds of that assault. The shooter fled immediately. The incident, as described by witness Daniel Kinsman, was “over as soon as it began.” The overwhelming majority of social scientists agree that the less time an eyewitness has to observe an event, the less well he or she will remember it. Tanja Rapus Benton, et al., *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts (Eyewitness Memory is Still Not Common Sense)*, 10 Appl. Cognit. Psychol. 115 (2006); see Memon, A., et al., *Exposure duration: Effects on eyewitness accuracy and confidence*, 94 British Journal of Psychology 339-354 (2003). Additionally, very high levels of stress impair the accuracy of eyewitness testimony. See Kenneth A. Deffenbacher, et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 Law and Human Behavior 687 (2004).

B. Taken Individually, Each Eyewitness Was Unreliable

- i. Sanders’ twice-admitted unequivocal inability to identify the shooter rendered his in-court identification, two years later, highly incredible.**

Sanders is the most unreliable of all the stranger eyewitnesses and, yet, a slim majority of the Georgia Supreme Court and the Eleventh Circuit presumed his testimony sufficient to support Davis’ guilt. *Davis v. State*, 283 Ga. 438, 447 (2008); *In re Davis*, 2009 U.S. App. LEXIS 8101 (2009). Neither majority opinion took notice of Sanders’ unequivocal statement on the night

of the shooting that he “wouldn’t recognize [the shooter] again except for his clothes.” Nor did they deal with the fact that Sanders remained uncertain *one month later* when again pressed by detectives. Notably, the detectives were sufficiently convinced of Sanders’ inability to recognize the shooter that they never presented Sanders – or any of his companions – with the photo array.

Memory does not improve over time; on the contrary, the overwhelming weight of the scientific literature shows that memory fades precipitously soon after the event and then levels off. *See* Gerrie, et al., False memories, in N. Brewer and K. Williams (Eds.), *Psychology and Law: An Empirical Perspective*. New York: Guilford Press (pp. 222-253) (2005) (“We have known for over 100 years that memories fade, sometimes rapidly, in a function known as the forgetting curve. . . . [and] that as memories fade, they also become more susceptible to suggestion.”). Moreover, in-court identifications are the most suggestive of all options available.

ii. The reenactment explains the progression of Murray’s original statement implicating Coles to her ultimate untrustworthy in-court identification of Davis

Murray’s detailed statement of her observations that night clearly established that the man who started this fight, ended it. She described Young being hassled by one man [later identified as Coles]. Murray watched that same man reach into his waistband, pull out a gun, and then strike Young in the head before shooting MacPhail.

At least that was her memory until the reenactment. Initially, Murray resisted the overwhelmingly suggestive implication that another man – Davis – inexplicably intervened and finished Coles’ fight. She repeatedly told the officers during the reenactment that, although she remembered the relative positions of the three men near Young, she could not “put a face” to the two men standing in front of Coles. Importantly, Murray did not identify Davis as the shooter when she selected his photo; she merely said Davis was at the scene. At trial, she finally put Davis’ face where the detectives wanted it – on the body of the shooter.

iii. Ferrell was too far away to see the face of the shooter

Dorothy Ferrell testified at Davis’ trial that she recognized a *complete stranger* whom she viewed briefly from a distance of at least 160 feet. Science shows that it is not humanly possible. See Geoffrey Loftus, & E.M. Harley, *Why Is It Easier to Identify Someone Close Than Far Away*, 12 Psychonomic Bull. & Rev. 43 (2005). In 2005, a scientific study found that, at distances greater than twenty five feet, face perception diminishes. *Id.* At distances of approximately 150 feet, accurate face identification for people with normal vision drops to zero. *Id.* The only plausible explanation is that she did not recognize Davis from the lot that night, but rather accepted the suggestion when the police displayed a single photo of Davis to her a few days after the shooting.

IV. THE LOWER COURTS' RELIANCE ON THESE QUESTIONABLE IDENTIFICATIONS BY CONTAMINATED WITNESSES IS MISPLACED AND IT INCORRECTLY ASSUMES THE JURY WAS SUFFICIENTLY EQUIPPED TO ACCURATELY ASSESS THE RELIABILITY OF THIS EVIDENCE.

[F]or jurors to fairly assess whether [an identification] is accurate, they must understand memory's complexity, selectivity, and malleability. Jurors must also understand what specific factors affect perception and encoding of memories, what factors can pollute memory, and what factors in the re-creation process can distort a witness' "memory" of an event."

Richard S. Schmechel, et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence (Beyond the Ken)*, 46 *Jurimetrics J.* 177–214 (2006).

A. *Studies Show that Jurors Do Not Intuitively Know How Memory Works and Typically Harbor Many Misconceptions.*

Several studies show that many jurors do not intuitively know how memory works or what factors can affect accuracy. *Beyond the Ken, supra*, 46 *Jurimetrics J.* 177–214. "[R]esearch on this topic show that lay knowledge of eyewitness behaviour is not only limited in scope but also highly inaccurate." *Eyewitness Memory is Still Not Common Sense, supra*, 10 *Appl. Cognit. Psychol.* 115.

In one study, prospective jurors were surveyed to determine the extent to which their understanding of various eyewitness issues corresponded with that of the experts. *Id.* Overall, jurors' impressions diverged from the experts on 87% of the 30 distinct topic areas covered, including factors where there was very little disagreement among the experts. *Id.*, at 121. For instance, 95% of experts agree that confidence is malleable – i.e., “[a]n eyewitness’s confidence can be influenced by factors that are unrelated to identification accuracy” – yet, only half of the jurors believed that to be true. *Id.* Jurors’ lay understanding was also significantly at odds with experts’ conclusions pertaining to confidence accuracy relation, mug shot-induced bias, effect of post-event information and wording of questions, exposure time, cross-racial bias, forgetting curve, color perception at night – all of which were germane to the identifications in Davis’ trial. *Id.*, at 121, 129-130.

Another survey showed that jurors often do not understand that human memory does not record events like a video recorder, that the act of remembering is reconstructive, and that memory can also be altered through the reconstruction process. *Beyond the Ken, supra*, 46 *Jurimetrics J.* 177–214. Nearly half of potential jurors surveyed thought the “witness on the stand is effectively narrating a video recording of events that she can see in her ‘mind’s eye’ for the jury.” *Id.*, at 196.

[A] substantial number of jurors come to each trial with basic misunderstandings about the way memory works in general and about

specific factors that can affect the reliability of eyewitness identifications.

Id., at 204.

Thus, the average juror requires “an alternative source of information.” Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony Civil and Criminal (Eyewitness Testimony)* § 1-3(3rd ed. 1997 and Cumulative Supp. 2005).

B. Davis’ Jurors Were Not Properly Vetted or Educated to Meet the Unique Challenges of Assessing the Reliability of These Eyewitness Identifications

One touchstone of a fair trial is an impartial trier of fact – “a jury *capable* and willing to decide the case solely on the evidence before it.” *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

McDonough Power Equip. v. Greenwood, 464 U.S. 548, 555 (1984).

Critically, the capacity of these jurors to evaluate the reliability of eyewitness testimony was never explored. Although the trial court invited counsel to ask jurors whatever they needed to ask, no questions were posed to unearth jurors’ preconceived notions or misconceptions on how human memory works.⁸ On this

⁸ Instead, the voir dire consisted of little more than death qualifying each juror. (T. 121-132; 205-207, 239-245; 289-291, 304-318; 337-339, 378-399; 416-423; 450-459; 468-475, 487-495.) There was not a single voir dire question about eyewitness identification.

record, we will never know which of the many misconceptions these jurors deliberated under – any of which would have rendered them *incapable* of accurately assessing the reliability of these eyewitnesses. Further, the defense did not educate jurors during trial, via expert testimony or relevant empirical studies.⁹ Likewise, there was no evidence presented regarding best practices in eyewitness identification procedures.¹⁰

⁹ Georgia recognizes that cross-examination is not a substitute to the empirical evidence supporting the misidentification defense. *Brodes v. State*, 250 Ga. App. 323; 551 S.E.2d 757 (2001). In Georgia, like a growing number of jurisdictions, it is an abuse of discretion to refuse expert testimony on pertinent eyewitness issues that would have “aided the jury in evaluating the reliability of the [] identifications” if there were “no other effective means” to “illustrate the potential weaknesses of the [] identifications.” *Id.* 250 Ga. at 325; *See, e.g., State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007) (reversing conviction where expert testimony was improperly excluded, observing that with respect to the state of the science, “Times have changed.”); *United States v. Brownlee*, 454 F.3d 131, 142 (3d Cir. 2006) (reversing conviction where expert testimony was excluded, noting potential unreliability of eyewitness identification evidence and “[e]ven more problematic, the fact that “jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable.”) (internal citation and quotation omitted); *Hager v. United States*, 856 A.2d 1143, 1149 (D.C. 2004) (acknowledging that where eyewitness identification evidence is central to the government’s case, exclusion of expert testimony may be an abuse of discretion).

¹⁰ *See e.g., Turtle, Lindsay, Wells, Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case*, 1 Canadian Journal of Police and Security Services 5-18 (2003).

To make matters worse, although jury instructions “are the lamp to guide the jury’s feet in journeying through the testimony in search of a legal verdict,” no cautionary instructions were offered to guide the jurors. *See Brodes v. State*, 279 Ga. 435; 614 S.E.2d 766 (2005).

The responsibility to decide Davis’ fate was foisted upon jurors without educating them about key eyewitness identification about which the average juror harbors many common misconceptions, in a case where a host of non-intuitive factors were present.¹¹

C. Davis’ Misinformed Jurors Relied on Witness Confidence as a Predictor of Accuracy, as Did the Lower Courts When Denying Davis an Evidentiary Hearing.

Davis’ jurors were specifically instructed to consider witness confidence when evaluating the reliability of the eyewitnesses. T.1580. The impact of this misleading and scientifically erroneous instruction on a group of uninformed jurors cannot be overstated.

An unequivocal identification from a confident eyewitness is powerful evidence of guilt. Studies show that jurors are more impressed by eyewitness testimony than by forensic evidence, such as fingerprints, handwriting comparisons, or DNA. E. Loftus, *Eyewitness Testimony*, *supra*, at § 1-5.

¹¹ In addition to factors discussed herein, cross-racial effect (Sanders) was a factor in this case. Christian A. Meissner and John C. Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, *Psychology, Public Policy, and Law*, Vol. 7, No. 1, 3-35 (2001).

[D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries. Juries seem most receptive to, and not inclined to discredit, testimony of a witness who states that he saw the defendant commit the crime.

Eyewitness testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says “That’s the one!”

Watkins v. Sowders, 449 U.S. 341 (1981) (Brennan, J., dissenting, joined by Marshall, J.) (emphasis in the original; internal quotation marks and footnotes omitted).

Research consistently demonstrates that the *degree of confidence* shown during testimony with regard to eyewitness identification is the single largest factor affecting whether observers believe that the identification is accurate. See A. Bradfield and G. Wells, “*The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five Biggers Criteria*,” 24 *Law & Hum. Behavior* 581, 582 (2000); G. Wells, M. Small & S. Penrod et al., “*Eyewitness Identification Procedures: Recommendations for Lineups and*

Photospreads,” 22 Law & Hum. Behav. 603, 619-20 (1998) (surveys and studies show that people believe strong relation exists between eyewitness confidence and accuracy); Brian L. Cutler et al., *The Reliability of Eyewitness Identification*, 11 Law & Hum. Behav. 233, 234 (1987); K. A. Deffenbacher, *Eyewitness Accuracy and Confidence*, 4 L. & Hum. Behav. 243, 258 (1980).

However, a confident witness at trial is *not* more likely to be correct in her identification. Decades of scientific studies have shown no meaningful correlation between confidence expressed at trial and accuracy of the original identification. Cutler, et al., *The Reliability of Eyewitness Identification*, *supra*, 11 at 234; Deffenbacher, *Eyewitness Accuracy and Confidence*, *supra*, at p. 258. Further, research shows that witnesses are susceptible to police suggestion, and witness receiving confirming feedback report greater certainty in their identifications – even though incorrect – than those witnesses who received no feedback. See Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: *Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience*, 83 J. Applied Psychol. 360 (1998); Amy L. Bradfield, et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty And Identification Accuracy*, 87 Journal of Applied Psychology 112 (2002). Douglas & Steblay, *Memory Distortion in Eyewitness: A Meta-Analysis of the Post-Identification Feedback Effect*, 20 App. Cognitive Psychol. 991 (2006). In 2005, the Georgia Supreme Court recognized the scientific research and held it improper for courts to instruct jurors to consider witness confidence when assessing reliability. *Brodes v. State*, 279 Ga. 435; 614 S.E.2d 766 (2005).

Davis' Jurors – operating under an erroneous court-sanctioned assumption that confidence is an accurate predictor of accuracy and unaware of confidence malleability – were confronted with three eyewitnesses who, though originally having made very tentative selections or unable to make any identification, nonetheless expressed or implied great confidence at trial.

Ferrell was standing too far to see the face of the shooter, yet she professed great certainty at trial. “Well, I’m real sure, positive sure, that that is him, and you know, it’s not a mistaken identity.” T. 1027. What the jury did not know was that *before the day was out* Ferrell admitted her “confident” identification was perjured. *See* Petitioner’s Brief at pp. 5-6. Although Williams was only 60% sure when he first selected Davis in 1989, he conveyed far more confidence when he unhesitatingly identified Davis at trial. T. 964, 971, 973. Jurors did not understand that “it is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on.” *Wade*, 388 U. S. at p. 229. Sanders was certain he could not identify the shooter that night or a month later; nonetheless, he made an in-court identification with absolutely certainty – “. . . you don’t forget someone that stands over and shoots someone.” Ironically, the most dubious eyewitness had the peculiar distinction of being the most confident. The jurors did not know that, one month after the shooting, the police remained sufficiently convinced in Sanders’ inability to choose *their suspect* from a group of five photos that they decided not to take that risk. Indeed, the police were unwilling to *risk* showing the array to any of Sanders’

companions – all out-of-towners, who presumably did not experience extensive exposure to Davis' image.

Jurors likely put great weight on these three contaminated identifications for no other reason than that the witnesses expressed great confidence at trial. Indeed, recent lower court decisions point to Sanders' confident identification as sufficient proof of Davis' guilt. That the lower courts presumed Sanders' confidence is indicative of his accuracy simply illustrates that judges are not immune to this misconception. *See* R. A. Wise, & M. A. Safer, *What US judges know and believe about eyewitness testimony*, 18 *Applied Cognitive Psychology* 427–443 (2004).

CONCLUSION

Of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately.

International Association of Chiefs of Police, *Training Key #600, Eyewitness Identification, supra.*

Here, witnesses – contaminated by highly suggestive police procedures – were presented to misinformed jurors, who were unaware of critical eyewitness issues needed to properly assess the evidence. It should come as no surprise that a conviction based on such highly unreliable evidence would eventually unravel. Now that it has, this Court should ensure that the truth prevails.

Respectfully submitted,

DEIRDRE O'CONNOR
LAW OFFICE OF DEIRDRE O'CONNOR
1911 Firmona Avenue
P.O. Box 4099
Redondo Beach, CA 90278
(310) 780-4522

Counsel for Amici Curiae

