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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
TENTH JUDICIAL CIRCUIT
CRIMINAL DIVISION

TOFOREST O. JOHNSON,	)	
	)	
Petitioner,	)	
v.	)	
	)	**CASE NO: CC-1996-386.61**
STATE OF ALABAMA,	)	
	)	
Respondent.	)	
	)	

THE INNOCENCE PROJECT'S *AMICUS CURIAE* BRIEF
IN SUPPORT OF PETITIONER

Wrongful convictions are no longer an "'unreal dream'—[but] instead an undeniable reality."[1] Jessica Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 738 (2016).

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—and a compensated earwitness at that—and later-expressed prosecutorial doubt about the strength of the case . . . Toforest Johnson's case checks all of these boxes.

* * *

The Innocence Project's mission is to free the staggering number of innocent people who remain incarcerated and to bring reform to the system responsible for their unjust imprisonment.[2]

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[1] To date, 185 people have been exonerated from death row after a wrongful conviction. *See* Death Penalty Information Center, *Innocence*, https://deathpenaltyinfo.org/policy-issues/innocence (last visited Feb. 19, 2021).

[2] As explained in the accompanying motion for leave to file this brief, 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. The Innocence Project has provided representation or assistance in most of the 375

For almost 30 years, the Innocence Project has fulfilled this mission by helping courts identify the signs of wrongful convictions and prevent future injustice.

In this case, the signs of wrongful conviction fairly cry out from all over the record. These signs—each of which individually should be enough for the Court to grant a new trial—cannot be easily swept away, as the Jefferson County District Attorney's recent filing asking the Court to grant Mr. Johnson a new trial recognizes. Therefore, the Innocence Project respectfully urges the Court to assess Mr. Johnson's recent Rule 32 petition in the context of the many characteristics of a wrongful conviction that Mr. Johnson's case presents and grant Mr. Johnson a new trial.

ANATOMY OF A WRONGFUL CONVICTION

The State presented over the course of four trials *at least five different, contradictory theories* of who shot Deputy William Hardy. This prosecutorial tactic virtually ensures that the State is knowingly prosecuting at least one innocent person.

The State's case against Mr. Johnson—who has *always* maintained his innocence—depended entirely on the testimony of Violet Ellison, who was not present when the crime occurred, whose knowledge of the case was influenced by media reports and other sources before

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DNA exonerations in the United States, as well as numerous exonerations based on constitutional violations. *See* Innocence Project, https://innocenceproject.org/dna-exonerations-in-the-united-states/. The Innocence Project also seeks to prevent future miscarriages of justice by researching their causes, participating as *amicus curiae* in cases of broader significance to the criminal justice system, and pursuing reform initiatives designed to enhance the truth-seeking function of the criminal justice system. The Innocence Project's work both serves as a check on the awesome power of the state over criminal defendants and helps ensure a safer and more just society. The Innocence Project frequently challenges the constitutionality of procedures and practices that implicate the rights of incarcerated populations. As a leading national advocate for the imprisoned that has represented numerous individuals who have spent years, even decades, in solitary confinement, 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 previously filed a similar amicus brief in this case in support of Toforest Johnson but is filing again in light of the changed procedural posture of the case.

she came forward, and who was paid by the State for her testimony, a fact that was never presented to the defense or the jury at the time of trial. Indeed—and these facts are, candidly, difficult to wrap one's mind around—although Ms. Ellison contends that she overheard part of a phone call on which she supposedly heard Mr. Johnson confess to the crime, she did not know Mr. Johnson, did not know who he was, and *did not even know his voice* (before or after that phone call). It is not surprising, then, that the lead prosecutor in Mr. Johnson's case has expressed doubt about the strength of the State's case against Mr. Johnson. And the District Attorney has recently echoed this doubt in asking, "in the interest of justice," the Court to grant Mr. Johnson a new trial. *See* Jefferson Cnty. Dist. Att'y's *Amicus Curiae* Br. In Support of Pet'r (Doc. 326) (June 12, 2020) ("DA Carr Filing"), at 2.

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

I. Inconsistent Prosecutorial Theories

A prosecutor's job is to "search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Thus, a prosecutor has a corresponding "duty to refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88 (1935). That responsibility precludes advancing inconsistent theories on the same facts about the same crime, when only one person can be responsible. Doing otherwise, as the State did in searching for a conviction in this case, is improper, promotes unreliability in convictions, and is completely incompatible with the rule that "in a criminal prosecution [the obligation of the prosecutor] is not that it shall win a case, but that justice shall be done." *Id.* at 88.

Over the course of three years, the State presented five different theories regarding who killed Deputy Hardy. *See* DA Carr Filing ¶ 1; *see also generally* Pet'r Post-Hr'g Br. at 5. The

inconsistent theories were particularly problematic because it was clear early on that *a single shooter* fired two shots in rapid succession from *the same gun*. *See* TR 389, 886–87. *First*, in January 1996, the lead detective testified under oath in grand jury proceedings that his investigation revealed that Ardragus Ford and Omar Berry shot Deputy Hardy. Pet'r Exh. 21, at 6.[3] *Second*, in November 1997, at Ardragus Ford's first trial, the State advanced the theory that Ford was the shooter. *Third*, at Mr. Johnson's first trial in December 1997, the State argued that Mr. Johnson pulled the trigger and killed Deputy Hardy. *Fourth*, at Mr. Johnson's second trial in August 1998, the State proceeded on the theory that *both* Mr. Johnson and Quintez Wilson shot Deputy Hardy. *Fifth*, and finally, in Ardragus Ford's second trial in June 1999, the State returned to the theory that Ford shot Deputy Hardy.

This history—beginning and ending with the State advancing the theory that Ardragus Ford killed Deputy Hardy, and where there is no dispute that there was a single shooter using a single gun—proves that the State has prosecuted at least one innocent man in connection with Deputy Hardy's murder. That cannot be squared with a "search for truth" or the imposition of anything like justice, and is constitutionally unsound. *See 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 arguing in a subsequent trial that another defendant actually committed the same crime), *vacated on other*

[3] Detective Richardson provided this testimony five months *after* Violet Ellison came forward to the police with her story implicating Johnson. The lead detective's grand jury testimony shows that the State itself did not believe Ellison's testimony, even though it eventually formed the basis of the entire case against Johnson.

grounds, 523 U.S. 538 (1998); *see also* 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."). Because "death is different," *Ford v. Wainwright*, 477 U.S. 399, 411 (1986), the use of inconsistent prosecutorial theories is particularly antithetical to the increased need for reliability in capital cases.

The concept that inconsistent prosecutorial theories can lead to wrongful convictions is not theoretical—it unfortunately happens. *See, e.g.*, *Bankhead v. State*, 182 S.W.3d 253, 259 (Mo. Ct. App. 2006) (affirming order vacating murder conviction because the State "selectively presented contradictory evidence and arguments in three different cases depending upon which defendant was before the trial court"); *Smith v. Groose*, 205 F.3d 1045, 1051–54 (8th Cir. 2000) (vacating murder conviction because "[t]he State's use of factually contradictory theories . . . fatally infected [the] conviction"). That inconsistent prosecutorial theories similarly infected Mr. Johnson's case is the first wrongful-conviction hallmark that should give the Court pause.

II. Unreliable Witness Identification

This case involves "earwitness identification," in which a witness testified she heard the defendant admit involvement in the crime. This is an identification method even less reliable than 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.[4] That number alone is staggering, but in light of

[4] *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.

the fact that Toforest Johnson was convicted on the basis of *a single earwitness*, Violet Ellison, who purportedly overheard a phone call in which Johnson purportedly confessed to the crime—even though Ms. Ellison had never met Johnson, did not know him (or even who he was), and did not know his voice—the presence of earwitness identification in this case should be a huge red flag.

That is so because witness identification is problematic: not just in earwitness identifications, but even in the far more common—but no more reliable—realm of eyewitness 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 overturned by post-conviction DNA evidence.[5] 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 86 defendants who were sentenced to death after *Furman v. Georgia* but were later exonerated, and they concluded that eyewitness testimony played a role in 46 of those 86 wrongful convictions. More than half. And in 33 of those 46 cases, like in this case, eyewitness (or, here, earwitness) testimony was *the only evidence* connecting the defendant

418 (2010) (noting that false secondary confessions were "present in 46% of the wrongful convictions in death row cases" (citations omitted)).

[5] The pairing between mistaken eyewitness identification and wrongful conviction is not limited to cases where innocence is proven by DNA evidence, of course. As of April 2014, 75% of 1,365 exonerations examined by the National Registry of Exonerations involved some type of false identification. *See* Kaitlin Jackson & Samuel Gross, *Tainted Identifications*, The Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/taintedids.aspx (Sept. 22, 2016); *see also* Innocence Project, *How eyewitness misidentification can send innocent people to prison*, https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/ (last visited Feb. 24, 2021).

to the crime.[6] Simply put, convictions based on the testimony of a single witness are unreliable, even when (unlike here) those witnesses were present at the scene, and even when the witnesses (again, unlike here) were themselves the victims of the crime.[7]

Two local examples illustrate the dangers of relying so heavily on witness identifications:

- In Jefferson County, Freddie Lee Gaines was convicted of second-degree murder. At his trial, one of the three victims (who had survived the shooting) testified that Mr. Gaines shot the victims. In 1990, another man provided a detailed confession to the 1972 murders, and Mr. Gaines's conviction was vacated.[8]

- In Madison County, a survivor of an attack testified that Timothy Gurley and two other men splashed him with gasoline and lit him on fire. Mr. Gurley denied involvement, but the jury convicted him of attempted murder and arson. The next year, the survivor recanted his identification of Mr. Gurley and admitted that while he was unconscious for several weeks after the fire, his family and others filled his head with false memories. Subsequently, the court vacated the conviction and dismissed the charges against Mr. Gurley.[9]

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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, his voice, or (again, as in this case) *they*

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

[7] *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*, THE WASHINGTON POST, Jan 13, 2015, https://www.washingtonpost.com/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 (The 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.").

[8] Stephanie Denzel, *Freddie Lee Gaines*, The Nat'l Registry of Exonerations (before June 2012) https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3226.

[9] Maurice Possley, *Timothy Gurley*, The Nat'l Registry of Exonerations (July 5, 2016) https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4931.

have never even met the suspect—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 OSGOOD HALL L.J. 819, 822 (collecting studies identifying earwitness testimony as "extremely inaccurate[] and likely to produce high false identifications" (internal quotations omitted)).

That is the kind of notoriously unreliable witness testimony that put Toforest Johnson on death row. In each of Mr. Johnson's two trials for the murder of Deputy Hardy, the prosecution's case hinged on Ms. Ellison's testimony. *See* DA Carr Filing ¶ 4; Pet'r Post-Hr'g Br. 5. Ms. Ellison was not present when the murder occurred, so she was not an eyewitness. *See id.* at 5–6; DA Carr Filing ¶ 4. Her contribution to the evidence was more attenuated: She listened in on a phone call initiated by her daughter, and she contends 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* Pet'r Post-Hr'g Br. 5–6. That testimony was, of course, inconsistent with the physical evidence—as already explained in Part I above (*see also See* TR 389, 886–87), there was only one shooter, not two different people who shot, as Ms. Ellison suggested. Moreover, like unreliable eyewitness testimony later shown to have contributed to a wrongful conviction, Ms. Ellison's testimony is rife with other indicia of unreliability. *See generally id.* (citing Pet'r Exh. 50–51). She did not know Toforest Johnson and did not know what his voice sounded like. *Id.* But, critically, she had heard media coverage of the murder and Mr. Johnson's status as a suspect. Pet'r Post-Hr'g Br. 14–15 (citing TR. 667, 706–07, 711). When she overheard the conversation about which she testified,

she had already been tainted by these news reports. *Id.* The influence of the media reports on the significance Ms. Ellison attached to what she thought she heard is reflected in her own notes of the conversation, in which she identified the person she heard speaking as "Johnson," despite the fact that she says she heard the speaker refer to himself only as "Toforest." Pet'r Post-Hr'g Br. 14–15 (citing TR. 667, 706–07, 717; Pet'r Exhs. 24, 25).

As the above-referenced research has proven can occur even with eyewitnesses, Ms. Ellison was subconsciously influenced by the media reports about Mr. Johnson, and her recollection of what she heard was not hers alone. Those facts also should give the Court pause.

III. Prosecutorial Doubt

In 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 almost 30 years that it is a crucial tipping point when a prosecutor becomes convinced of holes in the State's case. Indeed, when prosecutors arrive at doubts about the strength of their case *on their own*, that is a particularly (and extremely) powerful indicator of wrongful conviction: The reasons for the doubt should be extensively considered, and the prosecution should be encouraged to reconsider the case. Innocent

people can walk free when this happens. The recent exonerations of Glenn Ford in Louisiana and Frank Sealie here in Alabama evidence the point.[10]

There is serious prosecutorial doubt here too, of course—both the original lead prosecutor in Mr. Johnson's trial, Jeff Wallace, and the current Jefferson County District Attorney, Danny Carr, have taken the important step of expressing their concern about the continued viability of the verdict in this case. That is incredibly significant and should be a tipping point—another powerful indicator of a wrongful conviction, particularly in light of all the other evidentiary issues with the State's case that have come to light in the years since Mr. Johnson's conviction.

Lead Trial Prosecutor Jeff Wallace. Jeff Wallace was the State's lead prosecutor in Mr. Johnson's trial. In 2014, Wallace testified under oath that he "[did not] think the State's case [against Mr. Johnson] was very strong . . . because it depended on the testimony of Violet Ellison." *See* Pet'r Post-Hr'g Br. 23 (citing Pet'r Exh. 12, at 15).[11] This is a telling concession because without Ms. Ellison's testimony, there would have been no case against Mr. Johnson. It also recognizes that the State's dependence on a single earwitness identification, by a witness who the State paid 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. According to the District Attorney's recent filing, Wallace continues to

[10] *See* The Guardian, *Ex-Louisiana prosecutor apologizes for 'the misery I have caused' freed inmate*, (Mar. 25, 2015), https://www.theguardian.com/us-news/2015/mar/25/former-louisiana-prosecutor-exonerated-death-row-inmate-apologizes; Maurice Possley, *Frank Sealie*, The Nat'l Registry of Exonerations, (last updated Oct. 31, 2016), https://www.law.umich.edu/special/exoneration/Pages/ casedetail.aspx?caseid=4659.

[11] *See also* Radley Balko, *An illusion of justice: The baffling conviction and death sentence of Toforest Johnson reveal a broken system*, THE WASHINGTON 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.

"express[] concerns about this case" and "supports [Mr. Johnson's] request" for a new trial. DA Carr Filing ¶ 5.

District Attorney Danny Carr. But the prosecutorial doubt in this case extends beyond the original trial team. On June 12, 2020, the current Jefferson County District Attorney, having "determined that its duty to seek justice requires intervention in this case," filed a brief in support of Mr. Johnson in which it asked the Court to "in the interest of justice . . . grant[] a new trial." *Id.* at 1–2. The District Attorney's filing was the culmination of a *nine-months-long*, independent review of this case that included meeting with Wallace (*id.* ¶ 5), and "reviewing the case files, interviewing witnesses, and consulting with the family of Deputy Hardy."[12] In addition to reinforcing Wallace's continued "concerns about this case," the District Attorney was moved by, among other things, the several wrongful-conviction hallmarks described above—*e.g.*, the inconsistent prosecutorial theories, the significance of Violet Ellison's earwitness testimony, and the fact that Ellison "was subsequently paid $5,000 which was never mentioned during trial." DA Carr Filing ¶¶ 1, 4–5.

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 across the nation 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).[13] Here, the District Attorney undertook its review of Mr. Johnson's

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

[13] As of February 2021, at least seven states have established state-wide "Conviction Integrity Units" or "Conviction Review Units" that work to prevent, identify, and remedy false convictions.

case before the Office's recent decisions to establish conviction review units in both the Birmingham and Bessemer Divisions,[14] a precursor to the formal process these units will undertake to identify and remedy wrongful convictions. 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—a prosecution secured via inconsistent theories of who committed the crime, a conviction secured on the back of testimony from a single earwitness who identified the defendant by hearing his voice for the first time on a phone call after having been promised payment for testimony leading to a conviction, a liability case so tenuous that even the prosecutor says it was not strong, and a conviction that the District Attorney's office no longer stands behind—the Court's review of Mr. Johnson's Rule 32 petition takes on heightened significance. Dozens of innocent people have been convicted in cases that present *just one* of these hallmarks of wrongful conviction. Here, of course, the presence of *all* of these hallmarks *in a single case*—

In addition to statewide Conviction Integrity Units, at least 73 independent units have been established by prosecutor's offices around the nation. *See* The Nat'l Registry of Exonerations, *Conviction Integrity Units*, https://www.law.umich.edu/special/exoneration/Pages/ConvictionIntegrityUnits.aspx#:~:text=A%20Conviction%20Integrity%20Unit%20(CIU,Conviction%20Review%20Units%20(CRUs) (last visited February 19, 2021). 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*, THE WASHINGTON POST, January 16, 2021, https://www.washingtonpost.com/crime-law/2021/01/16/herring-wrongful-convictions/.

[14] *See* Carol Robinson, *'We seek justice': Jefferson County district attorneys to tackle wrongful convictions*, AL.com, November 30, 2020, https://www.al.com/news/birmingham/2020/11/we-seek-justice-jefferson-county-district-attorneys-to-tackle-wrongful-convictions.html; *see also* Associated Press, *Prosecutors Start Conviction Review Unit*, US NEWS AND WORLD REPORT, December 5, 2020, https://www.usnews.com/news/best-states/alabama/articles/2020-12-05/prosecutors-start-conviction-review-units.

particularly in light of the Jefferson County District Attorney's recent filing asking the Court to grant a new trial—cries out for relief for Toforest Johnson.

CONCLUSION

The Innocence Project is proud to have set itself, for the last nearly 30 years, to the work of freeing those still-wrongfully-incarcerated people who have been convicted despite their innocence. In that spirit, the Innocence Project respectfully urges this Court to consider the numerous troubling indicia of wrongful convictions that Mr. Johnson's case presents and grant Mr. Johnson's Rule 32 petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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