No. 07-343

IN THE
Supreme Court of the United States

PATRICK KENNEDY,
Petitioner,

v.

LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND TWELVE INNOCENCE PROJECTS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with more than 12,000 direct members and 35,000 affiliate members from all 50 states.[1] Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files amicus curiae briefs on various issues, including Eighth Amendment limitations on capital sentences, in this Court and other courts. *See, e.g., Roper* v. *Simmons*, 543 U.S. 551 (2005).

The Twelve Innocence Projects, which are listed individually in the Appendix, investigate and litigate claims of wrongful conviction, particularly on behalf of indigent prisoners and death row inmates for whom postconviction DNA testing can provide conclusive proof of innocence. Amici pioneered the post-conviction DNA litigation model that has to date exonerated 213 innocent persons, including more than a dozen individuals wrongly convicted of non-homicide rape of a

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[1] Pursuant to Supreme Court Rule 37.6, the amici curiae certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

child. The Innocence Projects served as counsel or provided critical assistance in a majority of these cases, and in the course of this work, have seen inaccurate identifications and other failures by child witnesses contribute to convictions of innocent people for child rape. The Innocence Projects have an interest in ensuring that the legal system takes proper account of the limitations and weaknesses of child testimony. Submission of this brief is also consistent with their general mission to prevent future wrongful convictions by improving the truth-seeking functions of the criminal justice system.

INTRODUCTION

Child sexual abuse and rape are among "the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987). Because convictions for these utterly repugnant crimes often rest principally on the testimony of children, such cases raise difficult questions concerning the reliability of child witnesses, the risk that trial proceedings will inflict additional trauma on young victims, and defendants' constitutional rights to confront and cross-examine witnesses. In recent decades, legislatures and courts have responded to a sharp increase in reported cases of sexual abuse and rape of minors by relaxing various historical rules of procedure and evidence in order to facilitate criminal prosecutions where the victims and central witnesses are children.

Although many children, including victims of sexual abuse, are able to recall events accurately and to testify honestly about them, extensive social science research has documented common reliability problems with child testimony that call into question the broader reliability of child rape convictions and sentences. The core problem, supported by an overwhelming consensus in the literature, is that children are susceptible to suggestion in ways that adults are not. This makes child witnesses particularly vulnerable to questioning by parents, police, teachers, medical professionals, and other adults who may approach an interview with preconceptions and/or use suggestive questions or techniques. Even well-meaning adults who interact with or treat child victims may shape their testimony unintentionally. Moreover, social science research strongly suggests that some children who make false accusations following suggestive interviews come to genuinely and

permanently believe their accusations, and that recantation of accusations may be a normal and relatively common phenomenon even among victims who initially tell the truth about their abuse. In light of such behaviors, it is perhaps little surprise that researchers cannot readily detect false testimony or identify particular categories of child witnesses who are particularly susceptible to suggestion. Therefore, children may offer convincing testimony that is so substantially shaped by the suggestions of adults as to be unreliable.

Allowing juries to impose the death penalty based on evidence presenting such serious reliability concerns—particularly when admitted pursuant to relaxed evidentiary and procedural requirements—cannot be squared with established precedent. This Court has consistently sought to ensure that the death penalty is applied cautiously and fairly, only to the worst of the worst offenders. *See, e.g.*, *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (citation omitted)). In addition, the Court's Eighth Amendment decisions have repeatedly demanded heightened reliability in capital cases in part to guard against the risk that an innocent defendant might be put to death. *See Johnson* v. *Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." (citations omitted)); *see also Herrera* v. *Collins*, 506 U.S. 390, 407 n.5 (1993) (acknowledging "the importance of

ensuring the reliability of the guilt determination in capital cases in the first instance").

Against this constitutional requirement of "measured, consistent application and fairness to the accused" in death-eligible prosecutions, *Eddings* v. *Oklahoma*, 455 U.S. 104, 111 (1982), child rape cases lack the reliability needed for the irremediable penalty of death. As in *Roper* and *Atkins* v. *Virginia*, 536 U.S. 304 (2002), where certain characteristics of the defendants created special risks of wrongful execution, the Court should hold that the Constitution categorically forbids imposition of the death penalty for child rape where no death occurs—a heinous crime to be sure, but one in which the evidence often relied upon creates special risks of wrongful execution.

ARGUMENT

I. CHILD WITNESS TESTIMONY IS CENTRAL TO MOST CHILD SEXUAL ABUSE AND RAPE PROSECUTIONS

Child sexual abuse convictions are often "based primarily, if not solely, on the word of the victims involved." Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2118 (1996). These prosecutions are frequently "'she said, he said' cases that ultimately rely upon the jury's assessment of the relative credibility of opposing witnesses." *Ex parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. App. 2005) (Cochran, J., concurring). Although many jurisdictions once imposed a corroboration requirement for testimony by children in sexual abuse cases, such rules have been abolished in nearly every jurisdiction since the 1980s. Bruck et al., *The Child and the Law*, in 4 *Handbook of Child Psychology* 777 (Renninger & Sigel eds., 6th ed., 2006). Accordingly, convictions may now hinge entirely on the per-

ceived credibility of a child witness. *See, e.g.*, *State* v. *Polkey*, 529 So. 2d 474, 476 (La. Ct. App. 1988).

Child testimony is particularly essential because medical evidence of child sexual abuse and rape is frequently unavailable, "either because of the nature of the abuse or because children heal quickly and the crime is often reported well after it occurred." Raeder, *Comments on Child Abuse Litigation in a "Testimonial" World: The Intersection of Competency, Hearsay, and Confrontation*, 82 Ind. L.J. 1009, 1009 (2007); *see, e.g.*, *United States* v. *Charley*, 189 F.3d 1251, 1263 (10th Cir. 1999) (summarizing expert testimony that physical exams appear normal in "90 percent" of suspected child sexual abuse cases and that it would be surprising to find a traumatized area after more than 72 hours); *State* v. *Williams*, 950 So. 2d 126, 130 (La. Ct. App.), *writ denied*, 966 So. 2d 599 (La. 2007) (summarizing expert testimony that penetration often leaves no physical evidence because child tissues heal quickly); *State* v. *Johnson*, 652 So. 2d 1069, 1072 (La. Ct. App. 1995) (summarizing expert testimony that evidence of trauma during child rape examinations is unusual because children heal quickly). Therefore, "the determination of sexual abuse can rarely rely on a physical examination alone and [the] consideration of all the components of the investigation—*especially the information obtained from the child—is essential.*" McCann et al., *Genital Findings in Prepubertal Girls Selected for Nonabuse: A Descriptive Study*, 86 Pediatrics 428, 438 (1990) (emphasis added).

II. SOCIAL SCIENCE RESEARCH DEMONSTRATES THAT CHILD WITNESSES CAN LACK THE RELIABILITY NEEDED TO SUPPORT A DEATH SENTENCE

Extensive social science research demonstrates that child witnesses are susceptible to suggestion in ways and to a degree that adults are not. As a result of this unique vulnerability, children can be led, inadvertently or maliciously, to allege that they have been sexually abused when in fact they have not, or to misidentify their abuser.

A. A Consensus In The Scientific Community Confirms That Children Are Susceptible To Suggestion

Decades of research and dozens of studies establish that while young children are capable of being accurate witnesses, they are also particularly likely to confirm allegations posed by suggestive interviewers, even when those allegations are false.[2] When confronted with many common elements of criminal investigations, such as leading or repeated questions and pressurized or repeated interviews,[3] many children will give—and in some instances even come to believe—whatever they perceive to be the account the interviewer is seeking. Notably, this process can occur even when the inter-

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[2] To be sure, children are not "invariably suggestible." 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §1.10[A] (2005). The literature also establishes that many children are capable of providing accurate testimony and that "[c]hildren can resist suggestive questions" in some instances. *Id.*

[3] "In legal contexts, exposure to repeated questions and interviews is common for many child witnesses." Quas et al., *Repeated Questions, Deception, and Children's True and False Reports of Body Touch*, 12 Child Maltreatment 60, 61 (2007).

viewer (who might be a law enforcement officer, medical professional, teacher or parent) lacks any improper intent and is genuinely seeking to elicit a truthful account from the child.

Courts have recognized the unreliability of child testimony. This Court has acknowledged in the child abuse context the need to expose "the false accuser, or reveal the child coached by a malevolent adult." *Coy* v. *Iowa*, 487 U.S. 1012, 1020 (1988).[4] Justice Scalia has likewise noted that there are "'special' reasons" to be suspicious of child testimony, for "studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality." *Maryland* v. *Craig*, 497 U.S. 836, 868 (1990) (Scalia, J., dissenting). Lower courts have also recognized that child testimony can be unreliable. *See Washington* v. *Schriver*, 255 F.3d 45, 57 (2d Cir. 2001) (noting that "[a]n emerging consensus in the case law relies upon scientific studies to conclude that suggestibility and improper interviewing techniques are serious issues with child witnesses"); *see also Fowler* v. *Sacramento County Sheriff's Dep't*, 421 F.3d 1027, 1039 n.7 (9th Cir. 2005) ("We note fur-

[4] In *Idaho* v. *Wright*, 497 U.S. 805 (1990), which was not a death penalty case, this Court cited a treatise for the proposition that "use of leading questions with children, when appropriate, does not necessarily render responses untrustworthy." *Id.* at 819 (citing J. Myers, *Child Witness Law and Practice* § 4.6, pp. 129-134 (1987)). The Court nevertheless implicitly recognized that leading questions can be very damaging to the reliability of child witnesses. *See id.* (noting that certain safeguards, including the avoidance of leading questions, "may well enhance the reliability of out-of-court statements of children regarding sexual abuse," but declining to hold that particular interview procedures were constitutionally required).

ther that fantasy by child witnesses is well-documented."); *Danaipour* v. *McLarey*, 386 F.3d 289, 298 (1st Cir. 2004) (noting that "statements by a young child, even if accurately recounted by an adult, may not reflect the truth" for reasons including coaching, repeated inquiry, and a child's desire for attention).

Indeed, within the child-development research community, "there is an overwhelming consensus that children are suggestible." Ceci & Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 36 (2000); *see also* Anderson, 69 S. Cal. L. Rev. at 2146 (describing a "consensus in the social-science literature" on this point). Researchers debate the quantum of suggestion needed to alter a child's account and, as a policy matter, whether the benefits of eliciting recollections from child victims and admitting them in criminal proceedings outweigh the risk of erroneous convictions. *Compare* Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 Cornell L. Rev. 1004 (1999) (arguing that a class of researchers overstate the ease with which children can be induced to make false allegations of sexual abuse and understate the harms of failing to prosecute alleged abusers), *with* Ceci & Friedman, 86 Cornell L. Rev. 33 (responding to Lyon). But even the most ardent defenders of child testimony concede that this susceptibility of children to suggestion by adults can lead to allegations of abuse against innocent people. *See*, *e.g.*, Goodman, *Children's Eyewitness Memory: A Modern History and Contemporary Commentary*, 62 J. of Soc. Issues 811, 818 (2006) (acknowledging that, in the 1990s, "[i]t became increasingly clear … that there were conditions under which

children were susceptible to false suggestion, even about child abuse");[5] Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 Law & Contemp. Probs., No. 1, 3, 30 (2002) (recognizing a slew of factors that may "taint" a child's report).[6]

Although there are differences on questions of degree, there is strong support in the literature for the proposition that several techniques, used independently, or especially in combination, can seriously impair the reliability of child testimony:

- Children are particularly susceptible to influence from leading questions. When researchers in one study used leading questions to ask girls whether they had been sexually touched during a medical examination, 8% of the girls falsely reported having been touched. *See* Saywitz et al., *Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse*, 59 J. Consulting & Clinical Psychol. 682, 687 (1991). Other studies have shown even more significant effects from leading questions. *See, e.g.*, Peterson & Bell, *Children's Memory for Traumatic Injury*, 67 Child Dev. 3045, 3059 (1996) (finding that children made roughly five times as many errors in response to directed questions as compared to open-ended ones when asked about non-abuse related but

[5] Professor Goodman has been described as "the scholar most favored by child advocates," Ceci & Freidman, 86 Cornell L. Rev. at 46, and as the "researcher-heroine of the child protection movement," Lyon, 84 Cornell L. Rev. at 1015.

[6] Professor Myers is a leading defender of child testimony. *See* Ceci & Friedman, 86 Cornell L. Rev. at 35.

serious injuries). Even researchers who defend child testimony acknowledge that "there is no denying that suggestive questions can undermine accuracy." 1 Myers, § 1.15[K].

- "Children are sometimes more suggestible when questioned by an authority figure." *Id.* at § 1.10[B]. This may be because children believe adult authority figures are omniscient and truthful, which would suggest to them that their own perceptions are inaccurate; children may also just want to be accommodating to the adult. *See* Ceci & Bruck, *Jeopardy in the Courtroom* 258-259 (1995); *see also* Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 Duke L.J. 691, 692 (1991) (noting that children "are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe").

- Children can give incorrect answers when they are led to believe under questioning that their initial answers were wrong. In one study, children were told that they were not doing well after they had accurately denied that an incident had taken place. Those children were then nearly three times as likely as un-reinforced children to agree to a plausible but false suggestion posed in a follow-up question. Moreover, these children were more than ten times likelier to agree to a fantastic false suggestion. *See* Garven et al., *Allegations of Wrongdoing: The Effects of Reinforcement on Children's Mundane and Fantastic Claims*, 85 J. Applied Psychol. 38, 41-43 (2000).

- Children may make false allegations after repeated interviews if they believe that authority figures

will not accept their denials. After all, children, unlike adults, "are required to continue until the adult decides to terminate." Ceci & Bruck, *Jeopardy in the Courtroom*, at 259. For instance, an eleven-year-old boy from Jordan, Minnesota, accused his parents of abuse after investigators continued to press him following his repeated denials of abuse over a series of interviews. He later explained that he made the allegation because he was "just sick of being badgered." *See* Ceci et al., *Unwarranted Assumptions About Children's Testimonial Accuracy*, 3 Ann. Rev. of Clinical Psychol. 311, 319 (2007); *see also Craig*, 497 U.S. at 868 (Scalia, J., dissenting) (referring to the "tragic" investigations in Jordan, Minnesota).

- An interviewer may induce a false accusation from a child by telling her that her friends have already made that same accusation. *See* Myers et al., 65 L. & Contemp. Probs., No. 1, at 30 (noting that "peer pressure" can be a source of "taint" in children's reports). Children are also prone to recount experiences they heard from their peers as if they were their own. In one study, children claimed to be witnesses to an incident that they had only heard about from other students at the same rate as the actual witnesses. *See* Principe et al., *Believing Is Seeing: How Rumors Can Engender False Memories in Preschoolers*, 17 Psychol. Sci. 243, 243 (2006).

- Children may make false allegations against someone whom they have heard discussed in a negative light. One frequently cited study found that 11% of five- and six-year-old children, after hearing prejudicial remarks regarding a particular individual, made false allegations against that individual and

maintained those allegations even when challenged by the interviewer. *See* Ceci & Bruck, *Jeopardy in the Courtroom*, at 131.

- Preschool-aged children may make allegations without fully comprehending what they are alleging. *See* Ceci & Bruck, *Children's Suggestibility: Characteristics & Mechanisms*, in 34 *Advances in Child Dev. & Behav.* 247, 253 (Kail ed., 2006) (noting that children may provide answers to yes or no questions "even though they may not know the answer or understand the question").

- Children may allege abuse after coaching from an adult. *See, e.g.*, Ceci et al., *Children's Allegations of Sexual Abuse: Forensic and Scientific Issues*, 1 Psychol. Pub. Pol'y & L. 494, 506 (1995) ("No one familiar with the scientific research ought to doubt that some children could be brought to make false claims of sexual abuse if powerful adults pursue them repeatedly with [suggestive] enjoinders."); *see also Coy*, 487 U.S. at 1020 (acknowledging the risk of child "false accuser[s]" and "coach[ing] by a malevolent adult"); *cf.* Quas et al., 12 Child Maltreatment at 64 (finding that children instructed to lie can do so fairly effectively).

Recent research indicates that the period of vulnerability to many of the conditions for suggestion extends well beyond preschool ages, and includes children who are near the upper bound of Louisiana's capital rape statute. *See* La. Rev. Stat. Ann. § 14:42(A)(4). While older children are less suggestible than preschoolers, they are still significantly more suggestible than older witnesses. *See* Warren & Marsil, *Why Children's Suggestibility Remains a Serious Concern*, 65 Law & Contemp. Probs., No. 1, 127, 127-131 (2002) (col-

lecting studies). "In the past few years, it has become more apparent that … suggestibility levels remain high throughout the elementary school years." Bruck & Melnyk, *Individual Differences in Child Suggestibility: A Review and Synthesis*, 18 Applied Cognitive Psychol. 947, 948 (2004) (citation omitted); *see* Bruck & Ceci, *Forensic Developmental Psychology: Unveiling Four Common Misconceptions*, 13 Current Directions in Psychol. Sci. 229, 231 (2004) ("Susceptibility to suggestion is highly common in middle childhood[.]"); *cf.* Myers, § 1.10[A] ("By the time children near adolescence, most children approach adult levels of suggestibility.").

B. Suggestive Interviewing Techniques Remain Common In Child Sex Abuse Cases

Despite a general awareness among child development professionals that the testimony of child witnesses can be influenced by adults, "there is good reason to believe the use of highly suggestive questions remains very common, and that these questions present a significant possibility that children will make false allegations even on matters such as sexual abuse." Ceci & Friedman, 86 Cornell L. Rev. at 36. At least four factors support this conclusion.

First, the existing empirical evidence confirms that suggestive interviews continue to occur. For example, one researcher, while disputing the overall impact of leading questions on reports of child abuse, acknowledges that "the limited observational research on real-world interviews demonstrates that interviewers ask few open-ended questions, many specific questions, and some leading questions." Lyon, 84 Cornell L. Rev. at 1036; *see id* (stating that across three studies, "approximately ten percent of interviewers' questions are

'suggestive,' and an average interview contained from five to ten suggestive statements"); Ceci & Friedman, 86 Cornell L. Rev. at 66 n.168 (analyzing data and concluding that "some particularly troublesome techniques, though usually constituting a small part of the interaction in any given interview, are extremely common"); Warren & Marsil, 65 Law & Contemp. Probs., No. 1, at 144-45 (collecting studies).

Second, although efforts have been made to train professional interviewers to avoid interview techniques that direct children to a particular account, this training has often proved unsuccessful. *See* Warren & Marsil, 65 Law & Contemp. Probs. No. 1, at 144-145. In fact, several studies indicate that interviewers persist in using suggestive techniques even after receiving training instructing them in how to conduct less risky interviews. "Extant research thus demonstrates that interviewer training is effective in reducing problematic questioning techniques only when training is both intensive and extensive, and only when it includes practice, individualized feedback, and follow-up." *Id.* at 147.

Third, suggestibility is not limited to formal interviews. "Suggestions may be made by parents, other adults, or other children prior to the first formal investigative interview or between repeated forensic or clinical interviews." *Id.* at 134. Indeed, "[o]fficial investigators may be trained to avoid suggestiveness; most parents and teachers are not." Ceci & Friedman, 86 Cornell L. Rev. at 59. Therefore, in some cases, by the time the professional interviewer encounters the witness, the damage may already have been done.

Some parental suggestion may be inadvertent or well-intentioned. *Cf.* Poole & Lindsay, *Assessing the Accuracy of Young Children's Reports: Lessons from*

the Investigation of Child Sexual Abuse, 7 Applied & Preventive Psychol. 1, 4 (1998) (citing a studying finding that mild and unintentional suggestion from a parent can affect children's reports outside of the abuse context). However, the dangers of parental suggestion are particularly acute in cases in which child custody and divorce are implicated. *See* Ceci & Bruck, *Jeopardy in the Courtroom*, at 33 (analyzing studies and concluding that, despite some studies to the contrary, "the rates of false reports [of abuse] are higher among divorced families").

Finally, some interviewers, supported by a cadre of researchers, have no desire to abandon leading questions and other potentially prejudicial techniques, at least not completely. This group ardently believes that "sexually abused children do not readily disclose their abuse because of shame, guilt, and fear," Bruck & Ceci, 13 Current Directions in Psychol. Sci. at 229,[7] and that "young children[] [have] difficulty responding to open-ended questions," 1 Myers, at §1.15[K]. Therefore, they insist that leading questions can be necessary to persuade genuine abuse victims to disclose their experiences. *See id.* For example, some researchers have concluded that "although there is a risk of increased error with doll-aided directed questions, there is an *even greater* risk that not asking about [abuse] leaves the majority of [abuse] unreported." Saywitz et al., 59 J. Consulting & Clinical Psychol. at 690 (emphasis added);

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[7] Ceci and Bruck, among others, dispute the contention that children do not readily disclose. *See, e.g.*, Bruck & Ceci, 13 Current Directions in Psychol. Sci. at 229. Regardless of which side has the better of this argument, it is sufficient to note here that some professionals advocate continued use of potentially prejudicial interview techniques.

see also Lyon, 84 Cornell L. Rev. at 1082 (criticizing researchers who emphasize the weaknesses of children's testimony for failing to recognize the need to "minimize false acquittals as well as false convictions").

Even if these researchers' policy arguments in favor of limited use of suggestive interview techniques are correct, there is general agreement in the field that such an approach produces an increased risk of false testimony.

C. False Testimony By Children Is Not Readily Detectible

The social science literature confirms that false testimony produced by suggestion is not immediately recognizable as such, and that the adversarial criminal justice system cannot be relied upon to expose such testimony.

When children bend to suggestion and offer inaccurate accounts, their "false reports are not simply repetitions or monosyllabic responses to leading questions. Under some conditions, their answers go well beyond the suggestion and incorporate additional details and emotions." Ceci & Bruck, 34 *Advances in Child Dev. & Behav.* at 261. Likewise, "linguistic markers do not consistently differentiate true from false narratives that emerge from repeated suggestive interviews." *Id.* In fact, children offering false testimony motivated by suggestion can give very compelling accounts, complete with supplemental detail beyond what was originally suggested. *See* Bruck et al., *The Nature of Children's True and False Narratives*, 22 Developmental Rev. 520, 547 (2002) (finding that increases in inaccuracy brought about through suggestive interview techniques

correlated with increases in the persuasiveness of those accounts).

Moreover, in some cases, children who make false accusations following suggestive interviews genuinely and permanently come to believe their own accusations. *See* Ackil & Zaragoza, *Memorial Consequences of Forced Confabulation: Age Differences in Susceptibility to False Memories*, 34 Developmental Psychol. 1358, 1369 (1998) (finding that forcing children to provide false accounts can lead them to recall the false accounts as true and concluding that "the results certainly suggest that the surest way to preserve the integrity of children's memories is to avoid pressuring them to discuss incidents that may not have transpired"); Ceci & Bruck, 34 *Advances in Child Dev. & Behav.* at 62 ("At times, suggestive interviewing techniques result in false beliefs. Children who incorporate the suggestions of their interviewers come to truly believe that they were victims."). Because these witnesses fully believe that they are testifying truthfully, additional questioning is unlikely to prompt them to retract their accusations, and their accounts are unlikely to seem fabricated.

Research confirms that children who make false reports following suggestive interviews tell their stories convincingly. In one study, videotapes were made of children, some giving true reports and others making false allegations following suggestive interviews. When shown the tapes, "[e]xperts who conduct research on the reliability of children's reports, who provide therapy to children suspected of having been abused, and who carry out law enforcement interviews with children, generally failed to detect which of the children's claims were accurate and which were not, despite being confident in their judgments." Ceci &

Bruck, 34 *Advances in Child Dev. & Behav.* at 260-261. In another study, children ages seven to nine were instructed to lie to adult mock jurors, who proved largely unable to detect the falsehoods. *See* Quas et al., 12 Child Maltreatment at 61 (discussing Orcutt et al., *Detecting Deception in Children's Testimony: Fact Finders' Ability to Reach the Truth in Open Court and Closed-Circuit Trials*, 25 Law & Human Behav. 339 (2001)).

Nor can the dangers of false testimony be eliminated by identifying particular types of children as suggestible. "With the exception of children with [mental retardation], the scientific evidence suggests that one cannot, at present, identify individual children who are most at risk for heightened suggestibility. Even when effects are found, these are not large and would not reliably identify or suggest to the court that a specific child's profile indicates high or low suggestibility." Bruck & Melnyk, 18 Applied Cognitive Psychol. at 990; *see* Warren & Marsil, 65 Law & Contemp. Probs., No. 1, at 139 (noting that "individual difference research cannot now, and perhaps never should be," used to identify particular children as suggestible).

Finally, recantation is widely understood to be normal behavior for genuine abuse victims, and not simply for accusers whose allegations were a product of suggestion. This understanding significantly undercuts what in other instances would be a valuable indicator of false accusations. While percentages vary widely across studies, several studies have found that more than 20% of children who allege abuse later recant. *See* London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?*, 11 Psychol. Pub. Pol'y & L. 194, 216-219 (2005) (collecting studies); Lyon, *Scientific Support for*

Expert Testimony on Child Sexual Abuse Accommodation, in *Critical Issues in Child Sexual Abuse* 107, 128-130 (Conte ed., 2002) (same); *see also United States* v. *Rouse*, 329 F. Supp. 2d 1077, 1080 (D.S.D. 2004) (summarizing expert witness testimony that "published studies show the rate of recantation varies from 3% to 27% of children who have reported sexual abuse").

According to the most often cited theory for the cause of such recantation rates, Child Sexual Abuse Accommodation Syndrome (CSAAS), recantation is a natural step in the disclosure process in genuine abuse cases and is brought on by shame, guilt and fear over disclosure. *See* Malloy et al., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. Am. Acad. of Child & Adolescent Psychiatry 162, 163 (2007); Bruck & Ceci, 13 Current Directions in Psychol. Sci. at 229. Indeed, a recent study found a recantation rate of 23.1% and concluded that recantation is associated with familial pressure to recant, not false allegations. *See* Malloy et al., 46 J. Am. Acad. of Child & Adolescent Psychiatry at 162.

Some researchers contend that expert testimony should be allowed where an accuser has changed his or her account because "it is important for jurors to hear that a surprising number of sexually abused children retract their allegations." Lyon, *Scientific Support for Expert Testimony on Child Sexual Abuse Accommodation*, at 107. While rules vary across jurisdictions, "[m]ost courts allow child sexual abuse accommodation testimony to rebut attacks on a child's credibility." *Id.* at 110 (citation omitted). Louisiana, for example, allows expert testimony "for the limited purpose of rebutting attacks on the victim's credibility based on inconsistent statements, limited disclosures, or recantations," *State* v. *Foret*, 628 So. 2d 1116, 1129 (La. 1993), but prohibits

testimony "'directly concerning the particular victim's credibility,'" *id.* at 1130 (quoting *State* v. *Spigarolo*, 556 A.2d 112, 123 (Conn. 1989)).

CSAAS has been criticized by researchers who suggest that genuine abuse victims recant only rarely and that studies finding high levels of recantation may erroneously treat false allegations of abuse as true allegations. *See* London et al., 11 Psychol. Pub. Pol'y & L. at 216-219; *see also Gersten* v. *Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005) (concluding that CSAAS is not scientifically valid as a "generalized explanation of children's reactions to sexual abuse").

Regardless of which side has the better of this academic dispute, death sentences for a crime with such high recantation rates should not be countenanced. If the CSAAS theory is correct, the diminished significance of a recantation, emphasized to the jury by an expert witness, adds an arbitrariness that unacceptably heightens the risk of wrongful executions. On the other hand, if high recantation levels demonstrate that false claims are all too common, death sentences for child rape lack the reliability demanded by the Eighth Amendment.

D. Children Have Made False Allegations Of Sexual Abuse Because Of Suggestion In Numerous Actual Cases

Suggestion does not merely lead children to make false reports in controlled studies performed in psychology labs; suggestion has led children to make false criminal accusations, with tragic consequences. For example, in 1984, Frederico Macias was convicted of capital felony murder, largely on the testimony of a nine-year-old witness named Jennifer F. Ceci & Bruck, *Jeopardy in the Courtroom*, at 17-18. Testifying at a

stay of execution hearing four years later, Jennifer described the process that had elicited her original accusation:

> Because different people asked me so many different questions about what I saw, I became confused. I thought I might have seen something that would be helpful to the police. I didn't realize that it would be so important. I thought they wanted me to be certain, so I said I was certain even though I wasn't. Originally, I think I told the police just what I saw. But the more questions I was asked, the more confused I became. I answered questions I wasn't certain about because I wanted to help the adults.

Id. at 304. After nine years on death row, Macias secured habeas relief. *See Martinez-Macias* v. *Collins*, 979 F.2d 1067 (5th Cir. 1992). When the prosecution represented the case, a new grand jury found insufficient evidence to indict. *See* Cohen, *The Difference A Million Makes*, Time, June 9, 1995, at 43.

The precise frequency at which children make false accusations because of factors like those described by Jennifer F. is not known and, to the extent it goes undetected, is by its very nature unknowable. *Cf.* Ceci & Bruck, *Jeopardy in the Courtroom*, at 31 (noting that attempts to quantify false allegations of child abuse overall are likely to omit cases where allegations are "the result of subtle adult coaching or other faulty interviewing techniques"). It is clear, however, that suggestive interviews have on multiple occasions led children to make false allegations of abuse.

Perhaps most famously, "[d]uring the 1980s, a series of highly publicized 'daycare ritual abuse cases'

erupted across the United States." Garven et al., 85 J. Applied Psychol. at 38. In Manhattan Beach, California, for example, children at the McMartin Preschool who were suggestively interviewed accused seven of their teachers of sexually abusing them (though no one was convicted). *See id.* Many of the daycare abuse cases in other communities did lead to convictions, but after the scope of suggestive interviewing techniques used in the investigations was exposed, more than half of the convictions were overturned on appeal. *See* Hayward & Mashberg, *Upheaval in '80s Put the Spotlight on Child Abuse*, Boston Herald, Dec. 3, 1995, at 23; Rabinowitz, *No Crueler Tyrannies* 10-21 (2003) (discussing the conviction and successful appeal of daycare teacher Margaret Kelly Michaels).

Numerous other examples outside the daycare context can be found as well. "Wenatchee Washington seems to have been among the many towns engulfed by sexual witchhunts in the 1980's and 1990's," and after forty-three people had been charged with 29,727 counts of abuse, "few charges stood up in court except against the government's own witness." *Devereaux* v. *Abbey*, 263 F.3d 1070, 1083 (9th Cir. 2001) (en banc) (Kleinfeld, J., concurring in part, dissenting in part). Likewise, John Stoll spent twenty years in a California prison following his conviction for abusing six children, including his own son. After four of the children ultimately acknowledged that their trial testimony had been false and a fifth claimed to have no memory of molestation, Stoll was released because "improper interview techniques" employed by the investigating officers "created a substantial risk that [the abuse victims'] trial testimony was unreliable." *Stoll* v. *County of Kern*, No. 1:1:05-cv-01059, 2007 WL 2815032, at *2 (E.D. Cal. Sept. 25, 2007).

Many of the same techniques that can impel children who have never been molested to allege abuse can also cause genuinely abused children to misidentify their assailant. In particular, research strongly demonstrates that children are likely to find lineup procedures suggestive and to identify one of the individuals presented, even if the actual perpetrator is not included in the lineup. "Although children over the age of five years typically perform as well as adults when the culprit is present in the lineup, children consistently produce a much higher rate of false positives in culprit-absent lineups." Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide For Law Enforcement*, 53 Ark. L. Rev. 231, 263 n.125 (2000); *see* Ross et al., *Children's Susceptibility to Misidentifying a Familiar Bystander From a Lineup: When Younger is Better*, 30 Law & Hum. Behav. 249, 250 (2006) (citing studies for the proposition that in lineups, "younger children tend to make fewer correct rejections than adults").

Justice Blackmun recognized the potential problems with eyewitness identifications by children in his dissent in *Arizona* v. *Youngblood*, 488 U.S. 51 (1988). The principal evidence that Larry Youngblood had raped a young child was the testimony of the ten-year-old victim who had picked Youngblood out of a photographic lineup. *Id.* at 53. Justice Blackmun observed: "Studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults." *Id.* at 72 n.8 (1988). Youngblood was exonerated by DNA evidence twelve years after this Court affirmed his conviction. *See* Whitaker, *DNA Frees Inmate Years After Justices Rejected Plea*, N.Y. Times, Aug. 11, 2000, at A12.

Youngblood's experience is not unique. For example, Marvin Mitchell, Jimmy Ray Bromgard, and Ronnie Bullock were all exonerated by DNA evidence after serving many years is prison for allegedly sexually assaulting young children who had identified them in lineups. *See Mitchell* v. *City of Boston*, 130 F. Supp. 2d 201, 204-206 (D. Mass. 2001); *State* v. *Bromgard*, 866 P.2d 1140, 1141 (Mont. 1993); *People* v. *Bullock*, 507 N.E.2d 44, 45-46 (Ill. App. Ct. 1987); *Former Convict Wins Clemency in Rape Case*, Chi. Trib., Mar. 29, 1998, at C3; *Exonerated of Rape, Man Gets $3.5 Million*, Chi. Trib., Jan. 12, 2008, at C4.

III. EVIDENTIARY PROCEDURES EMPLOYED IN MANY CHILD RAPE CASES ADD FURTHER UNRELIABILITY

Despite serious concerns about the reliability of child testimony, courts and legislatures over several decades have relaxed evidentiary and procedural requirements in child sexual abuse and rape prosecutions in an effort to balance competing public policy interests and to protect victims from further trauma. States have abolished corroboration rules and categorical bars against testimony by young children in criminal court proceedings and have relaxed confrontation procedures and hearsay standards. *See generally* Bruck et al., *The Child and the Law*, at 777; Anderson, 69 S. Cal. L. Rev. at 2122-2129. This Court has upheld some of these modifications in a non-death case, *Maryland* v. *Craig*, 497 U.S. at 857 (upholding testimony by closed circuit television), but these procedural changes are far more problematic in death-penalty cases.

Starting with "the irreducible literal meaning of the [Confrontation] Clause," for example, this Court has held that the Sixth Amendment generally "guarantees the defendant a face-to-face meeting with wit-

nesses appearing before the trier of fact." *Coy* v. *Iowa*, 487 U.S. at 1016, 1021. *Craig* approved certain limitations on the right to confront child witnesses, holding that states may use closed circuit television or other methods of "rigorous adversarial testing" short of "face-to-face confrontation" where a court makes a case-specific finding that there is potential for trauma to child witnesses from testifying in open court. 497 U.S. at 857. Yet as this Court has recognized, limitations on the right to face-to-face confrontation have a real impact upon "'the perception as well as the reality of fairness'" in criminal proceedings. *Coy*, 487 U.S. at 1019 (citation omitted). "[F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult." *Id.* Even with two-way closed circuit television, "something is lost in the translation" during "virtual" confrontations, such that "a defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom." *United States* v. *Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005).[8]

[8] In *Craig* itself, the child witness was questioned by the prosecutor and defense attorney in a separate room, while the judge, jury, and defendant observed on video monitor. *Id.* at 841-842. At least one court has held that the Confrontation Clause is satisfied where the defendant had an opportunity to submit written interrogatories to be read to a child witness by a neutral and detached questioner and videotaped prior to trial. *See Rangel* v. *State*, 199 S.W.3d 523, 536 (Tex. App. 2006) (analyzing procedures under *Crawford* v. *Washington*, 541 U.S. 36 (2004)), *pet. for review dismissed as improvidently granted*, No. PD-0447-06, 2008 WL 375446 (Tex. Crim. App. Feb. 13, 2008).

The reliability of convictions for child rape and sexual abuse is further undermined by the fact that hearsay statements are a "dominant feature" of such litigation. Raeder, 82 Ind. L.J. at 1009. The hearsay rule regards out-of-court declarations as inherently suspect because they were not made under oath or subject to cross-examination and other trial safeguards. *See, e.g.*, *Williamson* v. *United States*, 512 U.S. 594, 598 (1994); *Chambers* v. *Mississippi*, 410 U.S. 284, 298 (1973). Admission of hearsay may also implicate the Confrontation Clause; for instance, admission of "testimonial" hearsay statements made during prior court proceedings, police investigations, and similar circumstances is permitted under *Crawford* v. *Washington*, 541 U.S. 36 (2004), only if the witnesses are available for cross examination or if the witnesses are deemed "unavailable" *and* there was a prior opportunity for cross-examination.

Despite these concerns, courts have relaxed hearsay rules applicable to statements by child witnesses in several ways. First, they have admitted plainly testimonial hearsay by child witnesses who take the stand but whose lack of memory, communication skills, or composure to answer even basic questions makes them functionally unavailable for cross-examination by defendants. *See, e.g.*, *People* v. *Sharp*, 825 N.E.2d 706, 712-713 (Ill. App. Ct. 2005) (upholding admission of audiotape of and testimony concerning child witness interview with child advocacy worker after witness was unable to respond to five direct examination questions about key events); *State* v. *Price*, 146 P.3d 1183, 1192-1193 (Wash. 2006) (en banc) (upholding admission of child witness's statement to investigating police officer where witness repeatedly testified on direct that she

forgot defendant's actions and her previous statements about them).[9]

Although *United States* v. *Owens*, 484 U.S. 554, 560 (1988), and *California* v. *Green*, 399 U.S. 149, 166-168 (1970), held generally that the Confrontation Clause is satisfied where a witness is made available for cross-examination concerning a prior out-of-court statement, it is questionable whether the ability to challenge a young (and often emotionally distraught) child's failure of memory provides defendants with a "realistic weapon[]" as those cases envisioned. *Owens*, 484 U.S. at 560; *see also Green*, 399 U.S. at 159, 161 (holding admission of hearsay permissible "as long as the defendant is assured of full and effective cross-examination" at trial so as to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement"). "Unlike the situation when an adult acts on the witness stand in an way that raises questions about that person's ability or willingness to proceed, similar conduct

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[9] *See also, e.g.*, *State* v. *Salazar*, 166 P.3d 107, 108-110 (Ariz. Ct. App. 2007) (upholding playing of recorded interview with police to refresh child witness's memory after she refused to answer questions and testified that she did not remember prior statements to police); *In re S.L.G.*, No. A06-1254, 2007 WL 2609801, at *2, *4 (Minn. Ct. App. Sept. 11, 2007) (unpublished) (upholding admission of an out-of-court statement to a "forensic interviewer" where child took stand but was unable to testify as to details of alleged assault, and holding that statement was not testimonial).

Similarly, in this case, one piece of critical evidence was a videotaped interview that the victim L.H. gave to officials at the Child Advocacy Center. While L.H. took the stand at trial, she quickly "lost her composure," and was unable to describe the rape to the jury. Pet. App. 15a. The Louisiana Supreme Court nevertheless upheld the admission of the videotape, concluding that L.H. was sufficiently "available" under *Crawford*. *Id.* 35a-36a.

by a child who has apparently been tragically victimized can only be examined delicately, if at all." Mosteller, *Testing the Testimonial Concept and Exceptions to Confrontation: "A Little Child Shall Lead Them*," 82 Ind. L.J. 917, 921 (2007). Thus, although this Court has generally rejected arguments that the Confrontation Clause guarantees defendants a particular level of effectiveness in cross-examination, *see, e.g.*, *Delaware* v. *Fensterer*, 474 U.S. 15, 19-20 (1985) (per curiam), the admission of hearsay statements by effectively unavailable child witnesses results in the "principal evil" at which the Confrontation Clause was directed: the "use of *ex parte* examinations as evidence against the accused" without an adequate opportunity to cross-examine the witness *either* at the time the statements were made *or* at trial, *Crawford*, 541 U.S. at 50, 57.

Second, courts also regularly admit hearsay in child abuse and rape cases by finding that the particular statement—such as an accusatory declaration made by a child to a family member or medical examiner—constitutes non-testimonial hearsay under *Crawford*. Many such decisions raise serious questions about the distinction between "testimonial" and "nontestimonial" statements under *Crawford* and its progeny. *See, e.g.*, *State* v. *Bobadilla*, 709 N.W.2d 243, 256 (Minn.) (statement to child-protection worker in presence of law enforcement officer was nontestimonial), *cert. denied*, 127 S. Ct. (2006).[10] Moreover, courts and legislatures have

[10] *See also People* v. *Geno*, 683 N.W.2d 687, 692 (Mich. Ct. App. 2004) (statement to the director of a children's sexual assault center held nontestimonial); *In re S.L.G.*, 2007 WL 2609801, at *1, *4 (statement to advocate described as a "forensic interviewer" held nontestimonial).

broadened traditional hearsay exceptions for purposes of child sexual abuse and rape prosecutions far beyond what is permitted with regard to adults. *See generally* 2 Myers, ch. 7.

For example, a number of decisions apply the "excited utterance" exception to statements made by child witnesses days or even weeks after an alleged incident of sexual abuse, even though adult statements must generally be made immediately while still under the stress of the shocking event. *See, e.g., In re D.M.*, 822 N.E.2d 433, 437 (Ohio Ct. App. 2004) ("The excited-utterance hearsay exception is treated differently when the declarant is an alleged sexually abused child; the test is extremely liberal.").[11] Similarly, courts have relaxed various parameters of the "medical treatment" exception for child witnesses. *See, e.g., United States* v. *DeNoyer*, 811 F.2d 436, 438 (8th Cir. 1987) (overriding rule that statements regarding abuser's identity are inadmissible and emphasizing that "in cases involving young child witnesses, the administration of justice is served by the admission of statements made in a more relaxed environment without the possible harm of [a] traumatic courtroom encounter").[12] Many states have

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[11] *See also, e.g., State* v. *Thomas*, 460 S.E.2d 349, 353 (N.C. Ct. App. 1995) (holding that a statement made four or five days after alleged abuse constituted an excited utterance, but ruling admission erroneous on other grounds); *State* v. *Huntington*, 575 N.W.2d 268, 273 (Wis. 1998) (emphasizing the "'compelling need'" for admission of hearsay in certain child sexual abuse cases and holding that statements made two weeks after alleged abuse constituted excited utterances (citation omitted)).

[12] *See also In re Personal Restraint Pet. of Grasso*, 84 P.3d 859, 868-869 (Wash. 2004) (children's statements to medical providers admissible without showing that the child understands the statements to be needed for treatment).

also enacted hearsay exceptions that are specifically designed to facilitate admission of out-of-court statements by child witnesses, particularly in sexual abuse and rape prosecutions. *See, e.g.*, La. Rev. Stat. Ann. § 15:440.2-4 (creating a hearsay exception for court-ordered videotaped statements by children who may have been witnesses or victims of crime).

These modifications to traditional evidentiary and procedural requirements represent a series of difficult policy choices made by courts and legislatures in favor of prosecuting child sexual abuse allegations. But whatever the balance struck on these issues as a matter of general social policy, these rules take on an added significance where child rape is treated as a death-eligible crime. Particularly when combined with the serious reliability issues raised by child testimony generally, the cumulative effect of these modifications is to reduce face-to-face confrontation and opportunities for effective cross-examination in cases involving child sexual abuse and rape. As this Court has previously acknowledged even in the non-death context, the "denial or significant diminution" of confrontation and cross-examination rights "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers*, 410 U.S. at 295 (citation omitted).

IV. Child Rape Cases, Therefore, Present Special And Unacceptable Risks Of Wrongful Execution

Far from satisfying this Court's demands for heightened "reliability in decisions involving death," *Spaziano* v. *Florida*, 468 U.S. 447, 456 (1984), child rape prosecutions pose heightened risks of wrongful execution. These reliability problems are comparable to the ones cited by this Court in *Roper* v. *Simmons* and *Atkins* v. *Virginia*, when it held that the Eighth Amend-

ment categorically forbids imposition of the death penalty in cases involving defendants under eighteen or with mental retardation, respectively. For instance, *Atkins* found a "special risk of wrongful execution" due to the fact that defendants with mental retardation "are typically poor witnesses" and may be prone to false confession. 536 U.S. at 321. And *Roper* concluded that the risks of wrongful execution were unacceptably high where even "trained psychiatrists with the advantage of clinical testing[,] observation [and] diagnostic expertise" could not reliably differentiate between juvenile offenders whose crimes reflected immaturity and those whose crimes were the product of antisocial personality disorder. 543 U.S. at 573.

While the risks in child rape cases derive from the particular characteristics of the victims/witnesses rather than of the defendants, a categorical ban against the death penalty is also warranted here in light of the unacceptable risks of wrongful conviction and execution. Furthermore, one of the perverse effects of the Louisiana sentencing regime is that admittedly guilty offenders have strong incentives to plead guilty quickly to avoid the death penalty, while defendants who steadfastly maintain their innocence must risk death to defend themselves at trial.[13] Although this criticism may be lodged against the death penalty in general, it is particularly troubling when, as has occurred in Louisiana,

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[13] For discussions of empirical evidence regarding plea bargaining and its effect on the arbitrariness of the death penalty, *see, e.g.*, Hoffman et al., *Plea Bargaining in the Shadow of Death*, 69 Fordham L. Rev. 2313, 2359-2360 (2001); Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2097-2098 (2000); O'Brien, *Capital Defense Lawyers: The Good, the Bad, and the Ugly*, 105 Mich. L. Rev. 1067, 1083-1084 (2007).

the only defendants who face the death penalty are those who refuse to accept a plea bargain to life imprisonment. *See* Pet. Br. 40. As a result, there is an intolerably high risk that Louisiana's sentencing regime will result in the execution of innocent defendants.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted.

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APPENDIX

The Innocence Project amici are:

The Innocence Project, Inc.

Center on Wrongful Convictions

Pace Post-Conviction Project

Arizona Justice Project

Midwest Innocence Project

Innocence Project of Florida, Inc.

North Carolina Center on Actual Innocence

Wisconsin Innocence Project

Texas Innocence Network

Medill Innocence Project

Northern Arizona Justice Project

Innocence Project of New Orleans