Colorado Supreme Court, 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case No. 2014CA144 (unpublished) TIMOTHY KENNEDY, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondent.	DATE FILED: December 17, 2021 5:37 PM FILING ID: 42D90D2BC714F CASE NUMBER: 2021SC662 ▲COURT USE ONLY▲
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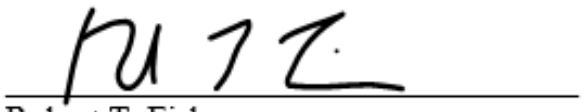
BRIEF OF *AMICUS CURIAE* THE KOREY WISE INNOCENCE PROJECT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with all requirements of C.A.R. 29 and 32, including all formatting requirements set forth in those rules. In addition, this amicus brief complies with C.A.R. 53(g) because it contains 3,108.



Robert T. Fishman

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE……...……..ii

TABLE OF CONTENTS…….….iii

TABLE OF AUTHORITIES……..….. iv

IDENTITY AND INTEREST OF AMICUS CURIAE……..1

REASONS FOR GRANTING THE PETITION……2

1. The Circumstances Surrounding the Murders…….…....4

2. The Murders & Ensuing Investigation……6

3. Given the Errors Committed at Trial, the Question of Mr. Kennedy's Guilt or Innocence Remains an Open One…….....11

CONCLUSION……...13

CERTIFICATE OF SERVICE……14

TABLE OF AUTHORITIES

Cases

Herrera v. Collins, 506 U.S. 390, 404–405 (1993))……12, 13

Jackson v. Virginia, 443 U.S. 307 (1979)……..12

McQuiggin v. Perkins, 569 U.S. 383, 392 (2013)……..12

People v. Bennett, 515 P.2d 466, 470 (Colo. 1973)…….12, 13

Other Authorities

Julie Schmidt Chauvin, "*For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 Loy. L. Rev. 217, 248–49 (2007)……....13

Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591, 602-603 (2009)……12

Brandon L. Garrett, *Judging Innocence*, 108 Columbia L. Rev. 55, 94-105 (2008)……1

http://www.law.umich.edu/special/exoneration/pages/exonerationsContribFactorsByCrime.aspx.....3

IDENTITY AND INTEREST OF AMICUS CURIAE

The Korey Wise Innocence Project ("KWIP") is a Colorado organization dedicated to providing pro bono legal and related investigative services to indigent Colorado prisoners who have been wrongfully convicted for crimes they did not commit. KWIP also is dedicated to improving the accuracy and reliability of the criminal legal system. To this end, KWIP researches the causes of wrongful convictions and pursues reforms designed to reduce future wrongful convictions and enhance the truth-seeking functions of the criminal justice system. As part of the Colorado Law and University of Colorado (CU) Boulder community, KWIP's staff also mentors law students and undergraduate students in both the legal and advocacy work of our project.

In its work, KWIP has studied and drawn lessons from cases in which the criminal legal system has convicted innocent persons, and has a unique perspective on the legal and practical issues implicated in this case. Although hundreds of individuals have been exonerated by DNA evidence since 1989, many, if not most, received no relief on direct appeal and served decades before being exonerated. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 Columbia L. Rev. 55, 94-105 (2008). To the extent direct appeals can shorten the time individuals are unjustly incarcerated for crimes they did not commit, KWIP has a direct interest in

ensuring robust appellate review, particularly in cases like this, which raise substantial issues that directly impact the reliability of any conviction.

REASONS FOR GRANTING THE PETITION

This Court should grant the *Petition for Writ of Certiorari* because, as Mr. Kennedy has explained, this case presents legal issues—and errors—of widespread applicability and systemic importance: the right to a unanimous and uncoerced jury verdict; the admission of unreliable eyewitness identification evidence (in this case the prosecutor's statement in an identification case that a witness had identified the accused as the individual leaving the scene of the crime in the absence of any such evidence); and the admission of highly irrelevant and prejudicial testimony that the accused had been previously convicted of the very same crimes by another jury.

This case also cries out for this Court's review because those errors likely contributed to the conviction of an innocent man. There was scant evidence implicating Mr. Kennedy in the crimes of conviction, and substantial evidence pointing to the guilt of others. That evidence includes the following:

On March 11, 1991, J.C. and S.S. were murdered, execution-style, in their Colorado Springs mobile home. S.S., who was 37 years old at the time, was shot once in the head. J.C., who was 15 years old and romantically involved with S.S., suffered three gunshots wounds to the head. The number and location of the shots to J.C.'s head suggested strongly that J.C. was the killer's primary target.

Mr. Kennedy became a suspect because he readily admitted to being one of the last people to have contact with the victims before their murder. He also acknowledged that he had given the victims guns for self-defense, including the apparent murder weapon. For nearly five years, the El Paso County District Attorney investigated the case but declined to bring charges against Mr. Kennedy, due to the paucity of evidence implicating him in the murders and the lack of any conceivable motive for Mr. Kennedy to have killed his best friends. After the election of a new district attorney, however, Mr. Kennedy was charged with and convicted of two counts of first degree murder.

In 2009, that conviction was overturned multiple grounds, including ineffective of counsel, the prosecution's failure to disclose letters from Stroud intended for Corkins, newly discovered (and inconclusive) DNA evidence, and the modern repudiation of comparative-bullet-lead analysis techniques.[1] Thereafter, Mr. Kennedy was released on his own recognizance and remained in the community without incident for five years while the prosecution unsuccessfully appealed the order overturning his conviction. In 2014, he was again tried and

[1]These problems are frequently identified as the source(s) of demonstrably wrongful convictions. *See* http://www.law.umich.edu/special/exoneration/pages/exonerationsContribFactorsByCrime.aspx (listing percentage of exonerations by contributing factor and type of crime based on 2,927 exonerations (last accessed December 17, 2021).

convicted of two counts of first degree murder and received the mandatory sentence of life in prison without the possibility of parole. The court of appeals affirmed Mr. Kennedy's conviction and the case is now before this Court.

1. The Circumstances Surrounding The Murders.

In November, 1990—a few months before the murders—J.C. was kidnapped and brutalized by Charles Stroud and Rebecca Corkins. Stroud and Corkins abducted J.C., plied her with drugs and alcohol, shocked her with a cattle prod, beat her with a belt, and terrorized her. They repeatedly raped J.C., and photographed her being sexually assaulted and humiliated in a variety of ways. Eventually, Stroud and Corkins allowed J.C. to go free, but they threatened to kill her if she told the police what they had done to her. Despite that threat, J.C. reluctantly told a neighbor about the abuse she had suffered at the hands of Stroud and Corkins, and the neighbor reported the incident to law enforcement.

Stroud and Corkins were arrested and charged with kidnaping and sexual assault on a child. While incarcerated and awaiting trial, authorities learned that the two were attempting to orchestrate J.C.'s murder or disappearance in order to keep her from testifying against them. More specifically, Kathy Weese—a fellow inmate and close confidant of Corkins—informed investigators that Corkins and Stroud communicated with one another while incarcerated through an intermediary, who passed notes between the two. Weese also communicated

directly with Patrick Dudley, her lover and a convicted felon who had a well-earned reputation for violence.

Authorities learned that Stroud was pursuing a plan to pay someone either to kill J.C. or to persuade her not to testify. In the meantime, Corkins had contacted Dudley and another individual—C.J. McKenna—about making sure that J.C. disappeared before the impending trial. On February 24, 1991—roughly two weeks before the murders—Corkins met with Dudley at the jail. After their meeting, Corkins boasted to Weese that the "situation would be taken care of" in two weeks, and that Dudley planned to shoot J.C. and S.S. in the head. Corkins went on to explain that the plan was to have Dudley stay with J.C. and S.S. in advance of the murders, and have another person, Ricky Glimp, drive Dudley to the trailer park to commit the crimes.[2]

The police took the threat posed by Stroud and Corkins so seriously that they placed J.C. into protective custody. Unfortunately, she escaped and returned to S.S. and the trailer park. Stroud is currently serving a 19-year

[2]Much of what Weese reported to the authorities was independently corroborated. Corkins confirmed that on February 24th, she and Dudley discussed "doing something" with J.C. to prevent her from testifying. C.J. McKenna likewise corroborated the fact that Corkins discussed with her the possibility of preventing J.C. from testifying. Dudley did in fact stay with J.C. and S.S. a few weeks before the murders, and also stayed with them the night of March 8, 1991. And by Dudley's own admission, he and Ricky Glimp were together when the murders likely occurred.

sentence after pleading guilty to soliciting J.C.'s murder. The plea was entered only after Mr. Kennedy's conviction in this case, leaving the trial jury unaware of this development.

2. The Murders & Ensuing Investigation.

S.S. and J.C. were well aware of the threat posed by Stroud and Corkins, and they started carrying guns in an effort to protect themselves. Mr. Kennedy has always admitted that he was the person who lent them those weapons. In addition, S.S. and J.C. had what some described as an extremely aggressive hybrid "wolf-dog" named "Keva," who would guard the trailer. Although the dog could be aggressive towards strangers, Keva did not act aggressively towards people with whom he was sufficiently familiar.[3] On the evening of March 10th, a number of people—including Mr. Kennedy—congregated at the victims' trailer to watch movies, drink alcohol, and smoke marijuana. Prior to leaving the trailer around midnight, Mr. Kennedy gave S.S. an AMT handgun and reclaimed a Davis handgun that he had previously lent S.S.[4]

[3]The division found it significant that because Keva was familiar with Mr. Kennedy, the dog would allow him to enter the trailer without incident. *See People v. Kennedy*, 14CA1446 at ¶¶4, 16 (Colo. App. July 1, 2021), *as modified* (Sept. 2, 2021). The court ignored the fact that the same could be said of Dudley, as well as many others in the trailer park.

[4]Mr. Kennedy explained that S.S. was dissatisfied with the performance of the Davis, which is what prompted him to lend him the AMT instead. The question of when Mr. Kennedy gave S.S. the AMT is significant because the

The evidence at trial established that it was very windy the night of the murders. Several trailer park residents reported being awoken by a sound—barking dogs, tree branches banging against trailers, a backfiring car, or perhaps gunshots—between 2:00 and 3:00 a.m. Warren Qualls testified that he awoke to what he characterized as gunshots or the sound of a car backfiring, looked out the window and saw, from roughly 100 yards away, a man leaving the victims' trailer. Qualls said the man appeared to injure himself while descending a ramp leading from the victims' trailer and that he appeared to be limping as he walked away.[5] Although his account has differed over time, Mr. Qualls testified at the second trial that Mr. Kennedy did not resemble the man he saw leaving the victims' trailer in the early morning hours of March 11th.

Dawn Reed woke up to the sound of barking dogs that same morning. She looked outside and saw a man wearing a light green military jacket stumble near

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evidence at trial showed that it was almost certainly the weapon used to murder J.C. and S.S. The evidence also showed that Mr. Kennedy owned, and at one point possessed, the AMT, but it has never been found.

[5]According to the division, Qualls' testimony was significant because "Kennedy himself admitted to having a limp at th[e] time [of the murders.]" *Kennedy,* Slip Op. at ¶16. However, the evidence at trial suggested that Mr. Kennedy had been walking with a limp for several months, whereas Qualls testified that the man he saw leaving the victims' trailer started limping only after injuring himself on the ramp.

her property line and then run away. Ms. Reed did not see the man exit the victims' trailer, and she never identified Mr. Kennedy as the person she observed.[6]

On the afternoon of March 11th, an El Paso County Sheriff's deputy went to the trailer in response to an attempted burglary complaint that S.S. had made the day before. After gaining access to the trailer with the help of two young girls, the deputy discovered two bodies on the floor near the front entrance of the trailer—J.C. lying prone and draped over S.S., who was lying face-up.

Corkins was ecstatic when she heard the news, exclaiming that "Charlie did it"—an apparent reference to Stroud's success in orchestrating J.C.'s murder. Corkins also explained to Weese that Dudley was the person who actually committed the murders. Later, Corkins told Weese that the murders had been committed with a gun that "some dumb fuck left . . . at the scene."

Most experts believed that S.S. was shot using a crude, makeshift silencer fashioned out of a sponge-like material. And as it happened, the police seized a

[6]The prosecution devoted considerable effort attempting to connect Mr. Kennedy to the type of jacket described by Reed, and the division remarked that "[a] witness also said that the man was wearing a military-style jacket, which Kennedy was known to wear." *Kennedy,* Slip Op. at ¶16. In fact, no military-style jacket was ever found in Kennedy's possession and several witnesses testified that they had never seen him wear a coat like that. There was, however, evidence that several residents of the trailer park owned, and regularly wore, green military-style jackets.

document explaining how to produce homemade silencers from Stroud's residence when he was arrested on the kidnapping and sexual assault charges pertaining to J.C. As noted, the shots that killed J.C. and S.S. were almost certainly fired from the AMT handgun originally owned by Mr. Kennedy. But the question in this case is not, and has never been, about who owned the AMT, but rather, who used that weapon to commit murder.

As to that question, suspicion first turned to Charles Stroud, Rebecca Corkins, and their associates, including Patrick Dudley. That was hardly surprising, given their obvious motive to prevent J.C. from testifying against them on extremely serious charges, not to mention their explicit threat to kill her if she reported their crimes to the police. Nonetheless, the investigating authorities turned their attention to Mr. Kennedy after Dudley provided an alibi that placed him with Ricky Glimp on March 10-11.[7]

But there is overwhelming and largely uncontroverted evidence that casts serious doubt on the notion that Mr. Kennedy murdered his friends in cold blood,

[7]At this nascent stage of the investigation, the authorities were unaware of the fact that Corkins told Weese that the plan was to have Glimp drive Dudley to the trailer park to commit the murders. There was evidence—albeit disputed—that Glimp admitted to being the driver during a night of hard drinking with co-workers. And at least one resident of the trailer park saw a truck drive away from the victims' trailer during the early morning hours of March 11th, a truck that roughly matched a vehicle that Glimp had access to at work. Finally, there were numerous inconsistencies in the statements offered by Glimp and others in support of Dudley's alibi.

and without any apparent reason. For example, there is nothing in Mr. Kennedy's background to suggest either the inclination or ability to commit such brutal and cold-blooded crimes against anyone, not to mention against his closest friends. Mr. Kennedy admitted early on in the investigation to owning the murder weapon and to bringing it to the victims' trailer the night before the murders. Similarly, he never denied being at the victims' trailer as late as midnight on March 11th.

Perhaps more significantly, and despite repeated and thorough searches, not a speck of the victims' blood was ever found on anything connected to Mr. Kennedy: No blood was found on his clothing, the outside or inside of his car, or any surface or item in his apartment. This is despite the fact that the evidence indicated that the person who shot and killed J.C. and S.S. almost certainly would have been covered in their blood. Similarly, the investigators conducted comprehensive DNA testing on several items that the killer likely would have touched or had contact with during the commission of the offenses, but Mr. Kennedy was excluded as a contributor to any of the resulting DNA profiles.[8]

All of this evidence contrasts sharply with the immense body of evidence supporting the common-sense conclusion that Stroud, Corkins, and Dudley were

[8]Mr. Kennedy's DNA was detected on a cigarette found inside a beer case and cuttings from a plastic bag, neither of which is surprising given his routine presence at the victim's trailer.

responsible for the murders of J.C. and S.S., both because they had a compelling motivation to commit these crimes and because of their demonstrated ability and inclination to commit heinous acts of violence against J.C.[9]

3. Given the Errors Committed at Trial, the Question of Mr. Kennedy's Guilt or Innocence Remains an Open One.

The legal issues presented in this case—the right to a unanimous and uncoerced verdict, the prosecutor's statement that a witness identified the accused as the individual leaving the scene of the crime in the absence of any such evidence, and the admission of testimony that the accused had been previously convicted of the very same crimes by another jury—all cast serious doubt on the reliability of Mr. Kennedy's conviction. And from an evidentiary standpoint, those doubts are well founded given the very real possibility that Mr. Kennedy is actually innocent of these murders.

However, the inescapable (albeit uncomfortable) fact is that direct appellate review is generally ill-equipped to address claims of actual innocence. Courts currently do not recognize a freestanding constitutional claim of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (citing *Herrera v. Collins*, 506 U.S. 390, 404–405 (1993)). Consequently, the only way to test a defendant's guilt

[9]Stroud and Corkins both exercised their privilege against self-incrimination at the trial below. Dudley died before the retrial underlying this appeal.

or innocence on direct appeal typically involves challenging the sufficiency of the evidence—as Mr. Kennedy did below. But such a challenge results only in an appellate court reviewing the evidence in the light most favorable to the prosecution and discounting all exculpatory evidence and inferences of innocence. *See People v. Bennett*, 515 P.2d 466, 470 (Colo. 1973). As a result, the discrepancy between successful sufficiency claims and defendants eventually determined to be actually innocent, is as striking as it is troubling. *See, e.g.,* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 Marq. L. Rev. 591, 602-603 (2009) (noting DNA exoneration cases confirm that the *Jackson v. Virginia*, 443 U.S. 307 (1979) standard (like the *Bennett* standard in Colorado) is weak protection against convicting the innocent, and establishing that of the actually innocent defendants examined in the Garrett study, *see supra* p. 1, 45% raised a sufficiency of the evidence claim, but *only one* of these innocent defendants obtained relief on that basis).

The legal framework for assessing the sufficiency of evidence on appeal—and the framework applied by the division in this case in rejecting Mr. Kennedy's sufficiency claim—asks whether the trier of fact made a *rational* decision in light of the evidence presented, when viewed in the light most favorable to the prosecution. It does not ask whether the trier of fact made the *correct* determination of guilt. *See, e.g.*, Julie Schmidt Chauvin, "*For It Must Seem Their*

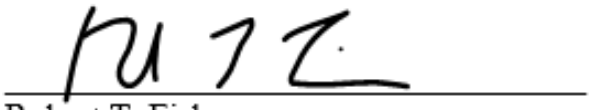
Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard, 53 Loy. L. Rev. 217, 248–49 (2007); *accord Herrera*, 506 U.S. at 401–02 (same). Nevertheless, in evaluating whether the errors presented in this case cast doubt on the reliability of Mr. Kennedy's conviction, this Court should not turn a blind eye to the fact that the question of Mr. Kennedy's guilt or innocence remains very much an open one.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: December 17, 2021
Denver, Colorado

Respectfully submitted,



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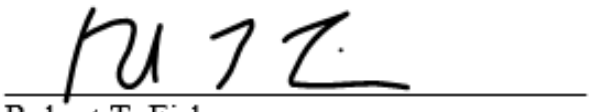
CERTIFICATE OF SERVICE

I hereby certify that a copy of this amicus brief was served, via the Colorado Courts' E-Filing System, on this 17th day of December, 2021, which will serve the pleading on all counsel of record.



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