No. 04-1327

In the Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE INNOCENCE PROJECT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Supreme Court Rules

Other Authorities

Page

Page

Page

INTEREST OF *AMICUS CURIAE*[1]

The Innocence Project, Inc. (the "Project") is a nonprofit legal clinic and criminal justice resource center. Founded by Professors Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law/Yeshiva University in 1992, the Project provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence. The Project pioneered the litigation model that has exonerated, to date, at least 145 innocent persons through post-conviction DNA testing.

In addition to seeking relief for its clients under state DNA testing statutes, the Project has also served as chief counsel in the leading cases heard in the federal courts to date concerning the federal constitutional right of access to potentially exculpatory DNA evidence.[2] The Project also regularly consults with legislators and law enforcement officials on the state, local, and federal level, conducts research and training, produces scholarship, and proposes a wide range of remedies to prevent wrongful convictions, while continuing its primary work to exonerate individual clients through post-conviction DNA testing.

SUMMARY OF ARGUMENT

DNA testing has exposed deeply rooted, systemic problems with the criminal justice system, demonstrating with unprecedented certainty that more innocent people

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[1] Pursuant to Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part. This brief was written by undersigned counsel. No person or entity other than *Amicus* and its counsel made any monetary contribution to the preparation or submission of this brief.

[2] *See, e.g.*, *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002); *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366 (E.D. Pa. 2001).

suffer in prison or await execution than most lay citizens and legal scholars imagine.[3] Nonetheless, efforts to exonerate wrongly convicted inmates have often been met with strong resistance from the executive and judicial branches. Many courts, citing procedural defects, have denied these prisoners access to the judicial system, and as a result, potentially thousands of wrongly convicted prisoners will never be able to vindicate their claims of innocence and regain their freedom.

There are many reasons why innocent people are wrongfully convicted. They include false eyewitness identification; false confessions; careless or fraudulent forensic evidence; jailhouse informant testimony; junk science; prosecutorial misconduct; careless and inadequate defense counsel; and racial bias.[4] In a substantial percentage of wrongful conviction cases, the forensic evidence implicating the wrongfully convicted person appears to be strong, but the reliability of the evidence is either substantially weakened or completely undermined by (i) improper evidence collection techniques; (ii) the use of fallible, unscientific forensic analyses; and (iii) police misconduct/evidence planting. In this *amicus* brief, the Project will show that the risk factors present in this case are similar to those found in other wrongful conviction cases.

The Project files this *amicus* brief in support of Bobby Lee Holmes' petition for a writ of certiorari because due process requires that every defendant should have a fair opportunity to present evidence of his or her innocence. Holmes, however, was not given that opportunity. Instead,

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[3] DNA exonerations have "laid bare" the "fabric of false guilt." Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* xv (2000).

[4] *See generally* Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* 163-202 (2003) (hereinafter "*Actual Innocence*").

during both the guilt and the sentencing phases of his trial,[5] Holmes was precluded from presenting evidence of third party guilt, i.e., that another individual – Jimmy White – committed the murder, rape, and burglary of eighty-six-year-old Mary Stewart. Holmes proffered the testimony of fourteen witnesses in support of his third party guilt case: four witnesses testified that White was on the victim's street (where each witness also lived) around the time of the crime;[6] three witnesses testified that White confessed to them that he committed the crime and that Holmes was innocent;[7] three witnesses testified that they heard White admit that Holmes was innocent;[8] three witnesses testified

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[5] This was Holmes' second capital trial. Holmes' direct appeal from the first trial was affirmed, *State v. Holmes*, 464 S.E.2d 334 (S.C. 1995), and he was subsequently granted a new trial on post-conviction relief.

[6] Three of these witnesses, Renetta Jamison, Henrietta Gilmore, and Deloris Brown, testified that they saw White walking in the area of the victim's apartment on their street. Third Party Guilt Hr'g (hereinafter "TPG Hr'g"), Aug. 14 Tr. at 87-92, 103-08; TPG Hr'g, Aug. 15 Tr. at 4-9. One witness, Annie Boyd, heard someone knock at her door who identified himself as "Jimmy," although she did not open her door. TPG Hr'g, Aug. 14 Tr. at 163-67.

[7] Stephen Westbrook testified that while he was housed with White at Broad River Correctional Institution, White admitted that he broke into the victim's home and raped her and that Holmes did not commit the crime. TPG Hr'g, Aug. 14 Tr. at 183-89. Mattie Scott testified that White talked about how he had killed and raped the "old lady in York" and that Holmes would fry for it. TPG Hr'g, Aug. 21 Tr. at 49-51. Ken Rhodes, a friend of White's, testified that in 1992 he asked White about the rumor that he was connected to Stewart's death, to which White responded that he broke into the victim's home and raped her and that someone else would be locked up for it. TPG Hr'g, Aug. 21 Tr. at 63-70, 89-90.

[8] Nancy Bennett was employed as a secretary at the Public Defender's Office in 1992, when White was a client and told her "he didn't think [Holmes] was guilty and that he knew maybe who did it." TPG Hr'g, Aug. 14 Tr. at 175–78. Thomas Murray heard White admit that he knew Holmes was innocent and that he was "in jail for nothing." TPG Hr'g, Aug. 21 Tr. at 22–26, 35, 38. John Dixon heard Murray ask White why he did not confess to the crimes, to which White responded "what's done is done" and that it was over. TPG Hr'g, Aug. 15 Tr. at 29-32.

that the jailhouse snitches used by the state were not credible;[9] and one witness impeached White's alibi testimony.[10]

One of the confession witnesses, Stephen Westbrook, also provided testimony regarding the intentional fabrication of forensic evidence against Holmes. Westbrook testified that the Solicitor's Office employees acknowledged to him that they had manufactured underwear evidence (the source of the DNA evidence) incriminating Holmes and that they had lifted one of Holmes' palm prints from the county jail door to use against him in trial. *State v. Holmes*, 605 S.E.2d 19, 23 (S.C. 2004). Westbrook also testified that White told him that Officer Boot Smith cautioned White to keep quiet about his guilt, that Officer Smith was out to "'frame'" Holmes, and that even Holmes' former attorney had urged White to testify against Holmes.[11] *Id.* In addition to this testimonial evidence of third party guilt, the defense proffered the following evidence: (i) a psychological evaluation of White that revealed that he had assaulted women and had sexual fantasies with themes of dominance and control;[12] (ii) evidence that White better fit the description of the attacker given by Stewart;[13] and (iii) White's own testimony, which cast serious doubt on his credibility.[14]

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[9] TPG Hr'g, Aug. 15 Tr. at 43-49, 57-73.

[10] Joshua Lytle testified that he never drove with White around the time of the crime. TPG Hr'g, Aug. 14 Tr. at 125.

[11] Westbrook also testified that two police officers offered to get him out of jail if he would testify (in the first trial) that Holmes had confessed to him. 605 S.E.2d at 23.

[12] TPG Hr'g, Aug. 14 Tr. at 314-16.

[13] Stewart described her attacker as having relatively long hair, but at the time of the attack, Holmes' hair was so short that he was nearly bald, as evidenced by the mug shot taken by the police. Tr. at 2146-54.

[14] For example, White admitted to his violent history with respect to older women and alluded to his recognition of his own guilt: "I asked him [Chief Mobley] would I have to be in court. He say they probably would

The defense also attacked the credibility of the forensic examinations and the forensic examiners, as well as the integrity of the forensic evidence allegedly linking Holmes to the crime by pointing to the following: (i) the striation pattern of the palm print allegedly lifted from the victim's door did not match the type of pattern that would have come from a smooth surface, but more closely resembled a rough origination surface;[15] (ii) the officers who gathered evidence from the victim's home testified that they placed the evidence in paper bags from the victim's home and did not wear gloves while doing so;[16] (iii) a detective testified that he sifted through all of the evidence from the case simultaneously, including the victim's and defendant's items, without wearing gloves or washing his hands between individual items of evidence;[17] (iv) the state's fiber analyst used the scraping method to obtain fiber samples from both the victim and the defendant in the same room on the same day, despite the fact that the scraping method often leaves fibers in the air that may land on other evidence items;[18] (v) two sets of allegedly "consistent" fibers came from a third source, but the state made no effort to determine the source of the fibers;[19] (vi) the state failed to perform either an Optical Properties Refractive Index test or a chemical analysis of the fibers' dye;[20] (vii) the state lost the victim's blood samples from the rape kit and never tested the DNA found on Holmes' clothing for the preservative

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bring me to court. **And I told him, did he really think I did it**. He say no. I say do they got evidence on him [Holmes]. And he say yeah. Then he told me what all they had. **And I say, do y'all got evidence on me.** He say ain't none of mine match." TPG Hr'g, Aug. 14 Tr. at 322 (emphasis added).

[15] Tr. at 2898, 3965, 3990-91.

[16] Tr. at 2201-03, 2238.

[17] Tr. at 2559, 2561.

[18] Tr. at 3018, 3020, 3888-89.

[19] Tr. at 3028, 3036, 3038.

[20] Tr. at 3893-96.

known to be in the blood samples;[21] (viii) the evidence log does not describe Holmes' jeans, underwear, or shirt as containing blood stains, while it does describe other items as containing blood stains;[22] (ix) Holmes' own blood sample was sent under the victim's name for testing;[23] and (x) the police never tested the money used to tie Holmes to the crime for fingerprints.[24]

Despite the extensive third party guilt evidence and the flawed forensic evidence, the South Carolina Supreme Court found that, "due to the strong evidence of his guilt," Holmes failed to meet the standard in *State v. Gregory*, 16 S.E.2d 532, 534-35 (S.C. 1941), and *State v. Gay*, 541 S.E.2d 541, 550 (S.C. 2001), for the admission of third party guilt evidence. *Holmes*, 605 S.E.2d at 24. The court found that Holmes could not overcome the "overwhelming" evidence against him to raise a reasonable inference of his own innocence. *Id.* Missing from the court's analysis, however, was the fact that the reliability of some of this "overwhelming" evidence was directly undermined by much of the third party guilt evidence.[25] In light of this crucial omission and its ramifications for Petitioner's claim of innocence, *Amicus* files this brief in support of Petitioner's request for certiorari on the issue of the correct standard for admission of third party guilt evidence.

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[21] Tr. at 2282-85, 3172, 3361, 3372, 3763, 3770.

[22] Tr. at 2619-21.

[23] Tr. at 3370.

[24] Tr. at 3994.

[25] This *amicus* brief does not address the legal arguments that the court below erred in its application of the *Gregory* and *Gay* standards and that such a legal bar to the admission of third party guilt evidence violates a defendant's due process rights. *See Holmes*, 605 S.E.2d at 26 (Pleicones, J., dissenting) (finding that Holmes' proffer met the *Gregory* standard and that *Gay* was distinguishable).

ARGUMENT

I. ABSENT THIS COURT'S INTERVENTION TO PROTECT PETITIONER'S CONSTITUTIONAL DUE PROCESS RIGHT TO PRESENT A DEFENSE, THERE IS A SIGNIFICANT RISK THAT AN INNOCENT MAN WILL BE EXECUTED

A. DNA Testing Has Exonerated Innocent Individuals In Many Cases Where Evidence Of Guilt Appeared "Overwhelming" But Where A Third Party In Fact Committed The Crime

Had Holmes been given the opportunity to present his evidence of third party guilt, the evidence on which he was convicted may have appeared far less "overwhelming" to the trier of fact. Indeed, DNA testing has exonerated many individuals who were convicted on the basis of an apparent wealth of forensic evidence, later found to be false. If these defendants had not been given the opportunity to prove their innocence, they could have spent their lives in prison or been executed, and the perpetrators, who were conclusively matched by these same DNA tests, would have remained free.

1. Ronald Williamson and Dennis Fritz[26]

Six years after a Pontotoc County, Oklahoma girl was raped and murdered, county officials finally "solved" the

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[26] *See* Charles T. Jones, *DNA Tests Clear Two Men in Prison*, Daily Oklahoman, Apr. 16, 1999, LEXIS, News Library; *Actual Innocence*, *supra* note 4; Complaint filed in § 1983 action, *Fritz v. City of Ada* (E.D. Okla. Apr. 14, 2000) (No. 2000-CV-194); Plaintiffs' Brief in Support of Summary Judgment Motion, *Fritz v. City of Ada* (E.D. Okla. Jan. 8, 2002) (No. 2000-CV-194) (hereinafter "Fritz Brief").

case and secured the 1987 convictions of Ronald Williamson, who was sentenced to death, and Dennis Fritz, who received a life sentence. The trial evidence against Williamson and Fritz appeared to be compelling, including detailed testimony from multiple witnesses. These included the account by Glen Gore, one of the state's chief witnesses, who testified that he saw Williamson at the victim's place of employment shortly before her murder; the claim of a female prison inmate that Fritz had confessed in detail to the murder and that she had heard Williamson threaten to harm his mother as he had the victim; testimony that the victim had previously complained to a friend that these two men "made her nervous"; and statements Williamson had made while in police custody about a vivid "dream" he had about the crime. Furthermore, the state's forensic experts testified that *seventeen* hairs from the crime scene "matched" either Williamson or Fritz, and that upon serological analysis, both men were possible contributors of sperm that was recovered from the victim.

After Williamson received a last-minute stay of execution, and Fritz's long-standing efforts to obtain post-conviction DNA testing were successful, DNA results conclusively excluded both men as the source of the semen found in the victim's body. The profile from the semen instead matched Gore's. Further DNA testing also proved that not one of the seventeen hairs deemed to be "matches" with Williamson and/or Fritz at the time of trial (under the microscopic analysis then available) belonged to either. As a result, both defendants were exonerated and released from prison in 1999.

The full scope of the police misconduct and concealed exculpatory and fabricated evidence that tainted the case was broad and deep; the most compelling examples involved Gore, who made a statement confessing to the homicide to an inmate just before he testified at the preliminary hearing as a key prosecution witness, which

was suppressed and never investigated. Gore also made a statement the day after the homicide showing that his accusation four years later about Williamson being at the victim's place of employment bothering the victim was invented. Gore even admitted that he did not offer truthful testimony against Williamson and Fritz and that the suggestion that Williamson was at the victim's place of employment on the night of the incident came from the police. A variety of additional exculpatory evidence later discovered demonstrates the sheer scale of the corruption.[27] The wrongful convictions of Williamson and Fritz demonstrate how easily a complicated web of fabrications and deceit could hide the actual innocence of two men and the overwhelming guilt of another.

2. Christopher Ochoa and Richard Danziger[28]

In 1988, Nancy DePriest was raped and murdered in a Pizza Hut restaurant. Christopher Ochoa, an employee of the Pizza Hut restaurant chain in Austin, Texas, was brought to the police station for questioning a few weeks later. After a long interrogation, Ochoa gave a detailed confession, telling the police that he committed the crime

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[27] For example, statements from seven of fifteen witnesses interviewed who were at the victim's place of employment on the night of the incident were suppressed as it became clear that none of the witnesses would support Gore's story; an inmate stated that he overheard a jailhouse informant swear to make something up as "pure as gold" to incriminate Fritz, just before the informant testified at a preliminary hearing claiming that Fritz confessed; an OSBI report was doctored to eliminate a page that listed witnesses who could undermine claims by a jailhouse informant that Williamson made incriminating statements; and exculpatory hair result tests from one OSBI analyst were suppressed by the testifying analyst. *See* Fritz Brief, *supra* note 26.

[28] *See* Mark Donald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002, LEXIS, News Library; Mark Wrolstad, *Hair-Matching Flawed as a Forensic Science: DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide*, Dallas Morning News, Mar. 31, 2002, at 1A, 2002 WLNR 10578400.

with his friend, roommate, and fellow employee Richard Danziger. Ochoa pled guilty to the crime and later testified at Danziger's trial. Danziger was convicted on the basis of this testimony, in addition to the expert testimony of a state hair examiner who concluded that a single pubic hair found near the victim's body was microscopically similar to Danziger's. Both men remained in prison for nearly a decade. In February 1998, Achim Marino wrote to then-Governor George W. Bush, confessing to the DePriest murder. Years later, post-conviction DNA testing conclusively exonerated both Ochoa and Danziger by excluding both men as the source of the semen found in the victim's body, while the single DNA profile obtained a perfect match to Marino's.

As revealed later by the civil rights case brought on Ochoa's behalf against the City of Austin and various officers of the Austin Police Department ("APD"), police misconduct was prevalent in all aspects of the DePriest murder investigation, from coercion of Ochoa's confession to concealment of exculpatory evidence.[29] The APD later formed a Joint Task Force to investigate the police misconduct that led to Ochoa's unlawful arrest and conviction, finding that a variety of police customs and policies caused Ochoa to falsely implicate himself and Danziger for a crime they did not commit.[30]

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[29] *See* Complaint filed in § 1983 action, *Ochoa v. City of Austin* (W.D. Tex. Nov. 7, 2002) (No. A02CA710). For example, when Ochoa was taken into police custody for interrogation, he was told he had no right to an attorney and his request for a lawyer was denied. The police then used coercive tactics, such as threatening Ochoa with imminent physical harm, rape by inmates, and the death penalty by needle, to obtain a false confession. Although he stated his innocence to the police, these threats led Ochoa to confess falsely that he was involved in the crimes with Danziger. *Id.*

[30] *See id*. Specifically, the Joint Task Force found that between 1986 and 1992, the APD had a custom and policy of feeding nonpublic information to suspects, using abusive and coercive interrogation methods, and then concealing evidence favorable to the accused; the policymakers and

3. Kirk Bloodsworth[31]

Another DNA exoneration in the face of seemingly overwhelming evidence of guilt is that of Kirk Bloodsworth of Maryland, who was convicted and sentenced to death in 1985 for the rape and murder of a young girl. At trial, five eyewitnesses testified that they were certain that Bloodsworth was the man they saw with the victim just prior to her murder; the prosecution presented evidence that the police had received an anonymous call informing them that Bloodsworth was seen with the victim earlier that day; the police testified that during Bloodsworth's first police interrogation, he mentioned a "bloody rock," a weapon used in the crime that was not known to the public at the time; Bloodsworth's acquaintances testified that he said he had done something "terrible" that day; and evidence was presented that a shoe impression found near the victim's body was the same size as Bloodsworth's own.

In 1992, however, Bloodsworth became the first death row inmate in the nation to be exonerated and released based on post-conviction DNA testing, when those tests excluded him as the source of the semen that was found on the young victim's underwear, an autopsy slide, and a stick found near her body. A decade later, after the Project convinced the prosecutors to retest the remaining evidence with DNA technology that would permit the assailant's profile to be entered into state and federal DNA data banks, the sample yielded a data bank "hit" to the DNA profile of

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supervisors of the APD and the City of Austin knew about these practices; and the APD failed adequately to train or supervise the homicide detectives. *Id.*

[31] *See Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Nat'l Inst. Just., Off. Just. Programs, U.S. Dep't Just., NC J161258, at 35-7, *at* http://www.ncjrs.org/pdffiles/dnaevid.pdf (June 1996).

the true assailant, who was another Maryland inmate serving time for a subsequent attempted rape and murder.[32]

These examples demonstrate the risk of serious error in our criminal justice system, even when the quantity or type of evidence of conviction appears unassailable. The need for caution is particularly acute in heinous capital cases, where emotions run high and where community pressure on police and prosecutors to secure convictions can be acute.[33] Most of all, these cases make clear that no defendant should be unreasonably deprived of his right to prove his innocence through DNA testing or evidence of third party guilt.

B. Post-Conviction DNA Testing Has Shown That The Types Of "Overwhelming Evidence" Cited As Proof Of Petitioner's Guilt – Fingerprint And Fiber Evidence – Can Be Unreliable

Certain types of evidence used by prosecutors in criminal trials are less reliable than others. Jailhouse informants (or "snitches"), for example, have such weighty incentives to offer damning testimony against fellow detainees that diverse coalitions of criminal justice experts have proposed sharply limiting the circumstances under which they may be allowed to testify.[34]

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[32] *See* James Dao, *In Same Case, DNA Clears Convict and Finds Suspect*, N.Y. Times, Sept. 6, 2003, at A7, 2003 WLNR 5651894.

[33] *See* Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology (forthcoming 2005) (manuscript at 10 & n.22, on file with author) (hereinafter "Gross Study") (citing Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Probs. 123, 129-33 (Autumn 1998); James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000)).

[34] *See, e.g.*, *Report of the [Illinois] Governor's Commission on Capital Punishment*, Recommendations 50-52 (urging, *inter alia*, mandatory pretrial admissibility hearings on all informant testimony proffered by

The South Carolina Supreme Court's ruling was explicitly premised on other types of evidence used against Holmes at trial which, despite their apparent persuasive force, have recently been proven by contrary DNA evidence to be unreliable. By resting its decision in part on the "overwhelming" palm print evidence and the fabric fiber evidence that allegedly linked Holmes to the victim and the crime scene, the South Carolina Supreme Court again demonstrated why this Court must be the final arbiter of the Constitution's fundamental guarantees.

1. Emerging Challenges to Fingerprint Analysis

Recent events suggest that fingerprints "are not scientific determinations but opinions based on experience one has developed by looking at fingerprints – opinions, whose overall reliability has never been measured."[35] Just last year, in the case of Stephan Cowans[36] of Massachusetts, post-conviction DNA technology conclusively trumped, for the first time, a reported fingerprint "match" in a criminal case, calling into question not only the case against this individual, but also the continued legitimacy of fingerprint analysis, which has long been relied on to convict thousands of defendants.

Cowans was convicted in 1998 for shooting a Boston police officer while fleeing the scene of a robbery. The evidence against him included not only eyewitness identification by the surviving victim, but also the testimony of two separate fingerprint analysts with the Boston Police Department, each of whom independently

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the state), *at* www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf (Apr. 2002).

[35] Simon A. Cole, *Fingerprints Not Infallible*, 26 Nat'l L.J. 22 (2004).

[36] *See* Jonathan Saltzman & Mac Daniel, *Man Freed in 1997 Shooting of Officer*, Boston Globe, Jan. 24, 2004, 2004 WLNR 3621085.

concluded that a single print recovered from the crime scene was a match to Cowans'. In 2004, however, STR-DNA testing yielded a DNA profile wholly inconsistent with Cowans' DNA. The fingerprint was then reanalyzed, and after police concluded that the prior match had been "a mistake" by both analysts, Cowans was exonerated and released.

In the post-9/11 world, with its concomitant pressure to quickly catch and detain terrorists, faulty fingerprint analysis may become more common. Oregon attorney Brandon Mayfield[37] was arrested in May 2004, jailed for two weeks, and labeled a terrorist after *three* top FBI experts mistakenly matched his fingerprints to a print found on bomb-making materials from the Madrid train bombing that killed 191 people in March 2004. Mayfield had never been to Madrid. Spanish experts later determined that the fingerprints matched those of a foreign terrorist. The FBI report[38] analyzing the erroneous fingerprint matches concluded that "[t]he power of the [fingerprint] match, coupled with the inherent pressure of working an extremely high-profile case, was thought to have influenced the initial examiner's judgment and subsequent examination" and "[o]nce the mind-set occurred with the initial examiner, the subsequent examinations were tainted."[39]

As these successful new attacks on fingerprint evidence demonstrate, apparently "strong" forensic

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[37] *See* Edward Humes, *Crime Scenes Put Under New Microscope*, Orange County Reg., Oct. 17, 2004, LEXIS, News Library.

[38] Robert B. Stacey, *Report on the Erroneous Fingerprint Individualization in the Madrid Train Bombing Case*, 54 J. of Forensic Identification 706 (2005).

[39] *Id.* The pressure to solve high-profile cases can also lead to the planting of evidence, as the defense in the Holmes case introduced evidence of the planting of the palm print and the tampering and planting of the blood evidence. *See, e.g.*, John O'Brien, *Shirley Kinge Lawsuit Rejected; Her Wrongful-Arrest Suit Was Filed Too Late, Judge Rules*, Post-Standard, Sept. 18, 2003, at B1, LEXIS, News Library.

evidence that was once considered infallible has resulted in the conviction of innocent defendants. That wrongful convictions resulted in each of these cases despite *multiple* tests of the evidence by forensic analysts lends further credence to Holmes' argument that he should have the opportunity to present evidence of third party guilt and evidence regarding the reliability of the forensic evidence against him.

2. Fiber Analysis

Recently, fiber analysis has been criticized by some forensic experts as a fallible, unreliable form of forensic testing, equivalent to some of the more well-known discredited forensic sciences such as hair analysis,[40] forensic dentistry (where invisible teeth marks in a suspect's skin are matched to a victim's dentistry plates), and bloodhound testimony. In many cases involving these forms of "forensic" science, innocent people have been wrongly convicted.

The South Carolina Supreme Court relied heavily on the fiber evidence against Holmes. According to the court, this allegedly "overwhelming" evidence included: (i) fibers "consistent with" a black sweatshirt owned by Holmes that were found on the victim's bed sheets; (ii) a single blue acrylic fiber that was found on the victim's nightgown and another on Holmes' blue jeans that "'could have come from the same common source or it could have come from different sources, but indeed they do . . . match each other'"; and (iii) "microscopically consistent fibers" that were found on the victim's nightgown and on Holmes' underwear. *Holmes*, 605 S.E.2d at 21-22 (alteration in original). The state's admission that one of the fibers that was allegedly found on the victim's and Holmes' clothes *could have come*

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[40] *See* Barry Scheck & Peter Neufeld, *Junk Science, Junk Evidence*, N.Y. Times, May 11, 2001, at A35, 2001 WLNR 3405176.

from a different source appeared to be irrelevant to the court because the fibers "matched" each other.

"Matching" fibers to prove a defendant's presence at the crime scene has recently been discredited. FBI Supervisory Physical Scientist Max M. Houck, a defender of microscopic hair comparison, has explained why fiber analysis is scientifically imprecise: "The number of different fiber types found on any one textile, such as clothing, therefore, is potentially very large, making it impossible to track each type to its source or sources."[41] Houck explains that because there are so many different types of fiber classes, shapes, dyes, pigments, and fiber manufacturers, the "web of production makes it difficult, if not occasionally impractical, to trace any one product and identify its components to their sources."[42] Although Houck concludes that trace evidence such as fibers often can answer "how" a crime was committed, "trace evidence can rarely tell us who definitively" committed the crime.[43] The South Carolina Supreme Court considered this unreliable fiber evidence as part of the "overwhelming" case against Holmes, even despite the cross-contamination evidence.

II. ADMITTING THIRD PARTY GUILT EVIDENCE IS PARTICULARLY NECESSARY WHEN THERE ARE ALLEGATIONS THAT FORENSIC EVIDENCE HAS BEEN PLANTED OR FABRICATED

The increasing lack of proper scientific methodology in forensic crime labs has played a significant role in

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[41] Max M. Houck, *Statistics and Trace Evidence: The Tyranny of Numbers*, 1 Forensic Sci. Comms. (1999).

[42] *Id.*

[43] *Id.*

wrongful convictions.[44] Most troubling are wrongful convictions based on intentional police misconduct, such as evidence fabrication or witness perjury, which have given credence to claims of framing made by defendants.

A. Mass Exonerations Based On Fabricated Evidence

The recent Gross Study of 340 exonerations in the United States from 1989 (the first time DNA exonerated a defendant) through 2003 finds that in 43% of all exonerations, at least one type of perjury (perjury by the police, forensic scientists, or other witnesses for the state) is reported.[45] For murder exonerations, this percentage is 56%, making perjury the leading cause of false convictions for murder.[46] The Gross Study also reports that, out of 340 exonerations, 24 involved perjury by forensic scientists testifying for the government and an additional 5 exonerations involved perjury by police officers.[47] These numbers do not even account for the mass exonerations that have taken place due to large-scale police perjury and corruption.[48] Police and state forensic scientist perjury and fabrication unfortunately are not rare and demonstrate why defendants such as Holmes should be permitted to present such evidence. Some of the most notorious crime lab scandals involved analysts Fred Zain in West Virginia and Joyce Gilchrist in Oklahoma, whose shoddy work and perjury, once discovered, eventually resulted in the exonerations of at least ten defendants and the expenditure

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[44] A Chicago Tribune investigation of 200 death row exonerations since 1986 revealed that more than one quarter involved faulty crime lab work or testimony. Maurice Possley et al., *Scandal Touches Even Elite Labs*, Chi. Trib., Oct. 21, 2004, at 1, LEXIS, News Library (hereinafter "Possley").

[45] *See* Gross Study, *supra* note 33, at 20-21.

[46] *Id.* at 20-21, 28.

[47] *Id.* at 20.

[48] *Id.* at 11-12.

of millions of dollars in settlements.[49] Indeed, Gilbert Alejandro was wrongly convicted in part due to Zain's testimony that tied him to the crime when the tests actually absolved him.[50] Alejandro was released in 1994, after new DNA tests established his innocence.

The recent mass exoneration scandals described in the Gross Study (but not included in the data for the study) are even more devastating to the integrity of the criminal justice system. For example, the Rampart CRASH ("Community Resources Against Street Hoodlums") scandal[51] involved widespread police fabrication of arrest reports; the shooting, killing, and wounding of unarmed suspects and innocent bystanders; the planting and fabrication of evidence; and the framing of innocent defendants. The scandal was revealed by Officer Rafael Perez, who provided information on the activities of his fellow CRASH officers in return for a reduced sentence (based on a drug charge). As a result of his testimony, nearly 100 convictions have been overturned.

B. Individual Planting/Fabrication Cases

Cases of individual exonerations due to evidence fabrication are equally compelling. Anthony Peek was convicted and sentenced to death for the murder and rape of an elderly woman in her home. The state offered evidence that two of Peek's fingerprints were lifted from the victim's abandoned car, found near the halfway house where Peek was staying. Blood and semen stains on the victim's sheets were consistent with Peek's identity as a

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[49] *See* Possley, *supra* note 44.

[50] Martha Bryson Hodel, *Zain Case 'Blueprint' for Convicting the Innocent, Defender Says*, Associated Press, Sept. 3, 2001, LEXIS, News Library.

[51] *See* Gross Study, *supra* note 33, at 11; Rick Young, *The Outcome of the Rampart Scandal Investigations*, P.B.S. Frontline, *at* http://www.pbs.org/wgbh/pages/frontline/shows/lapd/later/outcome.html (last visited Apr. 7, 2005).

type-O secretor and a hair similar to Peek's was found in a cut-stocking in the victim's garage. Peek was acquitted at his third retrial, when expert testimony concerning hair identification evidence was proven false.[52]

In *State v. Munson*, 886 P.2d 999 (Okla. Crim. App. 1994), the conviction of Adolph Munson was overturned based on such evidence as the prosecution's deliberate suppression of photographs and reports suggesting Munson was innocent. A criminalist testified that a strand of hair found in Munson's car matched hair samples taken from the victim. Some of the forensic evidence at the trial was provided by Dr. Ralph Erdmann, who later pled guilty to seven felony counts involving autopsies he allegedly performed or failed to perform in other cases.

These cases demonstrate that there are many possible explanations for forensic evidence to match an innocent person: faulty test-taking methods, intentional evidence fabrication, perjury, and contamination of evidence. Holmes should have had the opportunity to present evidence showing the existence of these factors in his case, as well as evidence that another individual committed the crime for which he was charged and convicted. Not only does Holmes have a due process right to such an opportunity, but there is also a significant public safety interest in preventing wrongful convictions.[53]

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[52] *See Peek v. State*, 488 So. 2d 52 (Fla. 1986); Associated Press, *Inmates Freed from Death Row at a Glance*, July 6, 2003, LEXIS, News Library.

[53] For example, in California, DNA from a series of unsolved rapes and murders committed by the unknown "Bedroom Basher" in the late 1970s was finally entered into the state's data bank in 1996. An immediate "hit" led police to the real perpetrator, Gerald Parker, who confessed not only to these crimes, but also to the 1979 beating and rape of a woman named Diana Green, whose husband, Kevin, had been convicted and imprisoned. After DNA from the case was tested and found consistent with Parker's, Kevin Green (whose earlier pleas for DNA testing before Parker's confession had fallen on deaf ears) was finally exonerated and freed in 1996. *See* Charlie Goodyear & Erin Hallissy, *The Other Side of*

CONCLUSION

In an epilogue to his decision vacating Ronald Williamson's conviction, Chief Judge Frank Seay wrote:

> While considering my decision in this case I told a friend, a layman, I believed the facts and law dictated that I must grant a new trial to a defendant who had been convicted and sentenced to death.
>
> My friend asked, "Is he a murderer?"
>
> I replied simply, "We won't know until he receives a fair trial."
>
> God help us, if ever in this great country we turn our heads while people who have not had fair trials are executed. That almost happened in this case.
>
> ACCORDINGLY, the Writ of Habeas Corpus shall issue . . . .

Williamson v. Reynolds, 904 F. Supp. 1529, 1576-77 (E.D. Okla. 1995). For the foregoing reasons, the Project urges the Court to grant the writ of certiorari.

DNA Evidence: An Innocent Man Is Freed, San Francisco Chron., Oct. 19, 1999, at A10, 1999 WLNR 4049356.

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