No. 04-8990

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL GREGORY HOUSE,
Petitioner,
v.

RICKY BELL, Warder,
Respondent,

On Writ Of Certiorari To
The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR THE INNOCENCE PROJECT, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONER

DAVID GOLDBERG
Counsel of Record
PETER J. NEUFELD
BARRY C. SCHECK
NINA R. MORRISON
Innocence Project, Inc.
100 Fifth Ave., 3rd Floor
New York, NY 10011
(212) 364-5350

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[*]

The Innocence Project, Inc. ("the Project"), is a nonprofit legal clinic and criminal justice resource center. Founded at the Benjamin N. Cardozo School of Law 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 post-conviction DNA litigation model that has to date exonerated over 160 innocent persons, and served as counsel or provided critical assistance in the majority of these cases. Currently, the Project represents over 140 individuals seeking post-conviction DNA testing, or relief from their convictions based on DNA test results, in dozens of states. The Project has also served as counsel in the leading cases heard in the federal courts to date concerning the federal constitutional right of access to exculpatory DNA evidence. These include, *inter alia*, *Harvey v. Horan,* 285 F.3d 298 (4th Cir. 2002), and *Godschalk v. Montgomery County Dist. Atty.'s Ofc.*, 177 F.Supp.2d 366 (E.D. Pa. 2001).

As perhaps the nation's leading authority on DNA evidence and wrongful convictions, the Project and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science, charged with regulating all state and local crime laboratories) are regularly consulted by officials at the state, local, and federal level. This work has given *amicus* a particularly strong interest in ensuring that jury verdicts are premised upon valid and accurate forensic science – an interest that is directly implicated by this Petitioner's constitutional claims in a number of respects.

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[*] A*micus* certifies that this brief was written by undersigned counsel, and that no counsel for a party authored any portion of this brief or made any monetary contribution to its preparation or submission. Petitioner and Respondent have both consented in writing to the filing of this brief.

SUMMARY OF ARGUMENT

A decade ago, when this Court last considered the constitutional safeguards available to *habeas* petitioners with persuasive claims of actual innocence, it noted that such claims were "extremely rare." *Schlup v. Delo,* 513 U.S. 298, 321 (1995). Without question, the criminal justice landscape has changed dramatically in the intervening decade. DNA technology – aptly described by former Attorney General John Ashcroft as "nothing less than the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent"[1] – has since freed dozens of citizens from our nation's prisons and death rows, scientifically proving their innocence beyond any doubt. And while it remains true in the years since *Schlup* (thanks largely to state officials' acceptance of the probative value of DNA evidence) that federal habeas proceedings are not the primary forum in which such exonerations occur, these cases have nonetheless provided irrefutable proof that wrongful convictions are far less "rare" than anyone – including advocates for the innocent – ever imagined.

Yet the DNA "revolution" has done more than reveal that our nation has, with troubling frequency, sent innocent citizens to prison and death row. It has also exposed grievous flaws and shortcomings of various "old" methods of forensic science, ones that directly caused many of these wrongful convictions.[2] This fact – and the lower courts'

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[1] Naftali Bendavid, *U.S.targets DNA backlog; Agency to spend $30 million to aid state crime labs*, CHICAGO TRIBUNE, Aug. 2, 2001, at N10.

[2] *See* Michael J. Saks and Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science,* 5 SCIENCE 892, 893-95 (2005) (describing how post-conviction DNA exonerations have exposed widespread error in other, more rudimentary forensic sciences, and surveying "worrisome data" on high error rates in those other disciplines). For example, 21 of the first 130 post-conviction DNA exonerations (16.15%) involved convictions obtained in reliance on

need for direction as to how such new scientific evidence should be weighed in the *Schlup* analysis -- makes it critical that this Court reverse the dangerous precedent set by the Sixth Circuit majority in the instant case.

Specifically, DNA has revealed a finite but troubling class of convictions tainted by what is best described as "false facts": forensic evidence that likely carried great weight with the original jury, but which is now known, to a scientific certainty, to have been erroneous. Most commonly – as in Petitioner's case – such "false facts" are revealed by DNA tests proving that the defendant was not, in fact, the source of critical biological evidence recovered from the crime scene, despite trial evidence to the contrary. In the instant case, the jury was told by an expert witness for the prosecution that the defendant was "definitely" a potential donor of semen on the victim's clothing, because he shared the perpetrator's distinct blood type and "secretor status"– yet DNA has now definitively excluded him as the source. Because these "false fact" discoveries involve unassailable science that would be, with good reason, enormously persuasive to a jury on retrial, they cast the *Schlup* inquiry (into whether "reasonable jurors" would likely find a reasonable doubt about guilt) in an entirely new light. Indeed, because of the public's widespread acceptance of DNA evidence, and its inherent objectivity and precision, the very considerations that usually counsel against permitting

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microscopic hair "matches." *See* Barry Scheck, Peter Neufeld, and Jim Dwyer., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 365 (New American Library ed., Dec. 2003). Nor is the problem limited to shoddy work by ill-trained criminalists. Indeed, studies comparing the findings of the world's leading microscopic hair examiners to DNA test results have had equally disturbing results. *See, e.g.,* Max Houck & Bruce Budowle, *Correlation of Microscopic and Mitochondrial DNA Hair Comparisons*, 47 J. FORENSIC SCI. 5, at 964-967 (Sept. 2002) (in 11% of cases studied, mitochondrial DNA testing proved that hairs which FBI examiners had found to be microscopically consistent with one another did not, in fact, come from the same source).

habeas petitioners to raise post-conviction challenges to their convictions – such as accuracy over time, and the need for public confidence in the outcomes of criminal cases – strongly work in favor of relief in this context.

The *en banc* majority in *House* failed to perceive this critical distinction and its legal significance under this Court's precedents. In denying relief, it crafted a new rule which – if allowed to stand – could jeopardize the legitimate claims of a significant number of innocent persons in prison and on death row. That error requires this Court's sure and swift correction -- particularly because, in this case, some of the scientific "facts" presented to the jury were not just false, but fraudulent (*see* Point III, *infra*).

Fortunately, most State officials have come to grasp the probative value of DNA evidence and other advances in forensic science, and will simply consent to grant relief when presented with a compelling case such as this one. As such, they take seriously the maxim that "the law must serve the cause of justice," and their own "duty to vindicate [the] interest" of a citizen whom they have reason to believe was wrongfully convicted. *Dretke v. Haley*, 541 U.S. 386, 399-400 (2004) (Kennedy, J., dissenting). But in the tiny fraction of such cases in which a federal court must vindicate that interest, the continued viability of *Schlup* is absolutely critical. So, too, is an unequivocal holding by this court that a "truly persuasive showing" of actual innocence would, on its own, constitute a viable constitutional claim. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993).

ARGUMENT

I. Post-Conviction Cases in Which Objective Scientific Evidence Proves the Falsity of Critical "Facts" Relied Upon By the Jury at Trial Should be Accorded Great Weight in the *Schlup* Analysis, a Principle the *En Banc* Majority Failed to Grasp

In denying relief to Mr. House, the Sixth Circuit concluded that a convicted person cannot pass through the *Schlup* "gateway" unless he effectively negates each and every item of evidence offered against him at the original trial -- no matter how persuasive his new evidence of actual innocence. As persuasively demonstrated in Petitioner's brief to this Court, that holding runs counter to the plain language (and any logical reading) of *Schlup*. Furthermore, when courts impose such an unduly high burden, they create a substantial risk that an innocent person may be executed or remain imprisoned. That error – combined with the truly impressive evidentiary showing of actual innocence by this Petitioner – is reason enough to reverse the decision below.

But this case crystallizes another recurring issue that has divided courts facing *Schlup* claims: Is there something about the nature of new scientific evidence of innocence – evidence that definitively disproves material facts offered by the State at trial – that is of distinct importance in the *Schlup* inquiry? Put another way, should objective, scientific proof that a conviction was obtained by reliance on "false facts" be entitled to heightened significance in deciding whether "it is more likely than not that no reasonable juror would have convicted" had the truth been known?

The answer is a resounding "yes." The reasons go to the heart of *Schlup*'s equitable doctrine, as well as the administration-of-justice concerns shared by both the majority and dissenters in that landmark case. And since DNA testing and other advances in forensic science are increasingly becoming the basis for meritorious claims of actual innocence -- to an extent scarcely imagined when *Schlup* itself was decided -- the time has come for this Court to squarely address its significance.

A. Public Confidence in the Outcome

Schlup's "gateway" is rooted in the equitable nature of the habeas writ. *See id.* at 319. In providing a limited forum for a habeas petitioner with strong evidence of actual

innocence to adjudicate otherwise-untimely claims of constitutional error, the *Schlup* Court balanced the constitutional imperative against execution of the innocent (the "fundamental miscarriage of justice exception" to procedural default) against considerations of finality, comity, and the orderly administration of justice. *See id.* at 324-25. This Court and the Circuits have since applied *Schlup*'s "gateway" in non-capital cases as well. *See, e.g., Bousley v. United States,* 523 U.S. 614, 624 (1998).

Two years earlier, those same concerns led to the denial of relief in *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993), in which the Court rejected the merits of the petitioner's "freestanding" actual innocence claim, while assuming that "a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional" and warrant habeas relief. *Id.* at 417. Six Justices in *Herrera* went further, asserting the position that truly persuasive "freestanding" innocence claims would clearly be cognizable. *See id.*, 506 U.S. at 419-20 (O'Connor and Kennedy, J.J., concurring); *id.* at 430 (White, J., concurring in the judgment); *id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

What tipped the equitable scales in *Schlup* – and renders it consistent with *Herrera* – was the principle that constitutional error at trial, coupled with a strong showing of innocence, so undermined "confidence in the outcome" as to merit less deference on habeas review. *Id.* at 315, 317. That principle also guided the Court in its selection of the standard to govern "gateway" claims. *Id.* at 325 ("a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks [it] should have" in the verdict) (internal citation omitted). To that end, the *Schlup* test imposes "less of a burden" on petitioners than would be required for a *Herrera* claim of innocence arising from an "error-free" trial. *Id.* at 315-16.

Scientifically proven "false facts" should be governed by

the same principles. For while the error here is factual, rather than "legal," the potentially devastating impact on public confidence in the system if the error goes uncorrected is arguably greater -- particularly when the same new evidence that exposes the falsity supports a viable claim of innocence. Jurors are known to give less weight than lawyers to perceived legal "technicalities," but are highly troubled when false scientific evidence may have tainted a conviction.[3] It is thus hard to imagine that a hypothetical reasonable juror would not find scientific "false fact" cases to fall within that "narrow class . . . implicating a fundamental miscarriage of justice." *Schlup*, 513 U.S. at 315 (internal citation omitted).

The high value conferred on truth and accuracy in the outcome of a criminal trial is by no means confined to laypersons, of course; it has long been one of the central tenets of this Court's criminal procedure jurisprudence. *See, e.g., Tehan v. United States ex rel. Shott,* 382 U.S. 406, 417 (1966) ("The basic purpose of a trial is the determination of truth"); *Williams v. United States*, 401 U.S. 646,653 (1971)

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[3] *See, e.g.,* Phoebe Zerwick, *Mixed Results: Forensics, Right or Wrong, Often Impresses Jurors*, WINSTON-SALEM JOURNAL, Aug. 29, 2005, at A1 (reviewing series of North Carolina cases in post-DNA era in which new forensics disproved trial evidence, and discussing strong impact of forensic evidence on jurors generally); Tammy Fonce-Olivas, *Juror says scientist influenced Moon case rape verdict*, EL PASO TIMES, Dec. 23, 2004, at 1A (quoting juror in 1987 rape trial of Brandon Moon, after his exoneration by DNA evidence, that subsequently-discredited serology evidence was "the majority" of what led jury to convict, as it was "what placed [Moon] at the scene more than anything else."); Roma Khanna, *Jurors Say Lab Data Was Crucial; flawed evidence a large role in their decision in Rodriguez case,* HOUSTON CHRONICLE, Oct. 21, 2004, at B1 (quoting jury foreman from 1998 rape trial of George Rodriguez, later exonerated by DNA evidence and proof that serology testimony at trial was erroneous; foreman opined that original serology testimony had been "necessary" to jury's decision to convict Rodriguez, and that "we probably would have acquitted him" without it).

(impairment of the trial's "truth-finding function" is of primary concern, warranting retroactive imposition of new constitutional rules, where defects in procedure raise "serious questions about the accuracy of guilty verdicts").

Further support for the proposition that such claims deserve special recognition under *Schlup* can be found in this Court's precedents concerning the use of fabricated evidence in criminal trials. This Court has long held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois,* 360 U.S. 264, 269 (1959) (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)). Proof of deliberate fabrication requires that the conviction be set aside unless the impact of the false evidence was truly harmless, *i.e.,* if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. 97, 103 (1976) (citing authorities). That is an even more exacting burden for the State to meet than when its officials deliberately withhold material, exculpatory evidence from the defense. *See, e.g., United States v. Bagley*, 473 U.S. 677, 682 (1985) (reversal warranted where there exists a "reasonable probability" that the jury's verdict "would have been different" had the material evidence been disclosed).

Notably, a successful showing under both lines of cases requires proof of some sort of intentional misconduct on the part of state actors, whether withholding material exculpatory evidence or manufacturing false testimony. But the difference in the two standards makes clear that there is something particularly offensive about allowing convictions predicated on patently false evidence to stand -- because the public cannot (and would not) tolerate it. This is not to say that proof that a trial was tainted by "false facts" under *Schlup* would automatically entitle a petitioner to the generous standard of review in this Court's fabrication-of-

evidence cases.[4] But the doctrinal foundation of those cases provides compelling grounds to give objective, scientifically proven "false facts" great weight in the *Schlup* analysis.

The impact of new scientific evidence on public confidence in the outcome of a criminal trial was not before the Court in *Schlup* or *Herrera*, nor has the Court addressed it in the intervening decade. But given the extent to which remarkable advances in DNA technology have transformed the adjudication and outcome of criminal cases – and the fact that new scientific evidence comprises such a notable portion of this Petitioner's claim of innocence – this case is an appropriate one in which to recognize its high probative value, and reverse the decision below accordingly.

B. Impact on Other "Inculpatory" Evidence

Objective, scientifically proven "false facts" invariably do more than invalidate "old" forensic testimony relied upon by the jury. They also transform how jurors view the entirety of the prosecution's case, including both forensic and non-forensic evidence. This is most clearly demonstrated in what is viewed as the "simplest" of DNA cases: a sexual assault by a single perpetrator, in which the victim was not otherwise sexually active (*i.e,* all parties agree that semen from the victim's body came from the rapist). In-court identification testimony by the victim at trial ("I'm positive he's the one who raped me") is well known to have an enormous impact on juries – and, in the

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[4] Among other distinctions, *Napue* and *Mooney* were cases on direct appeal, whereas *Schlup* claims arise, by definition, in the context of federal habeas. In that context, this Court has required a Petitioner to show prejudice from the constitutional violations, rather than placing the burden on the state to prove the error harmless. *See, e.g., Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993). Nor is *amicus* asking this Court to alter the substantive test of *Schlup* itself. But the fabrication line of cases, and the vast impact on the justice system caused by DNA and other forms of new scientific evidence, certainly suggest that great weight should be given to such evidence when determining whether a Petitioner satisfies *Schlup's* "no reasonable juror" test.

pre-DNA era, it was often "confirmed" by serological analysis of the rapist's blood type. Yet over 75% of DNA exonerations to date have involved rape convictions that were overturned upon conclusive, DNA evidence of innocence, despite the victim's eyewitness testimony at the original trial. In such cases, DNA tests revealing that the defendant was not the source of the semen immediately cast the once-"certain" identification in a wholly new light. It does not "erase" the victim's original testimony, of course, but eviscerates its persuasive force, by providing scientific proof that she was honestly, but tragically, mistaken.

For a prime example, one need look no further than a case which had earlier reached this Court's own docket: *Arizona v. Youngblood*, 481 U.S. 51 (1989). In *Youngblood,* this Court held that, absent proof of bad faith, the Due Process Clause was not violated by a State's failure to preserve potentially exculpatory evidence in its custody – in that case, semen-stained clothing from the sexual assault of a child. In denying relief, one member of this Court took pains to note that Mr. Youngblood was unlikely to have been prejudiced by the evidence destruction, given what appeared to be "overwhelming" evidence of his guilt at trial. *Id.* at 60 (Stevens, J., concurring in the judgment). That evidence included the fact that the child victim who identified Youngblood in lineup had spent a full one-and-a-half hours in the perpetrator's presence, in broad daylight. He had also initially described the rapist as a black man with a defective right eye – a seemingly telling link to a "bad eye" of Youngblood's own. *See State v. Youngblood*, 790 P.2d 759, 761 (Ariz.App.1989). The fact that Youngblood's defect was in his left eye, not his right, was seen as but a minor discrepancy in an otherwise solid identification. But when a cotton swab containing the rapist's semen was located and DNA tested a decade later, the results squarely proved Youngblood's innocence – and ultimately identified the real perpetrator, Walter Cruise, a pedophile who did, in fact, have

a defective left eye.[5] Viewed in light of the DNA evidence, then, the in-court identification that had seemed so powerful at the time of trial was shown to be utterly mistaken.

The power of "false facts" to alter the evidentiary landscape holds equally true in more complex cases. *Amicus* has represented dozens of clients against whom evidence in the trial record appeared massive – until DNA test results proved otherwise, generating what scientists have aptly described (in other contexts) as a "paradigm shift."[6] In these cases, a single new key fact can radically change the lens through which all of the "overwhelming" trial evidence – and the culpability of the defendant – is viewed.

Kirk Bloodsworth, for example, was convicted and sent to Maryland's death row for the rape-murder of an eight-year-old girl in 1985. Five separate eyewitnesses testified that Bloodsworth was the man seen with the victim just prior to her death. Were that not enough, the jury also heard that (a) a shoeprint near the body was the same size as Bloodworth's own; and (b) while being interrogated, he had revealed knowledge of a "bloody rock" at the crime scene – a detail then known only to police. Indeed, prosecutors were so convinced of Bloodsworth's guilt that even after DNA tests excluded him as the source of semen on the girl's underwear in 1992, they only conceded they were bound to reverse his conviction, but did not concede his innocence. It was not until ten years later, when DNA yielded a databank "hit" on the real killer – a convicted pedophile – that they did so, and belatedly apologized to Bloodsworth. By then, the evidentiary house of cards had truly fallen apart –

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[5] *See* David L. Teibel, *Man Gets 24 years in '83 Child-Sex* Case, TUSCON CITIZEN, Aug. 20, 2002; Scheck et. al., Actual Innocence 334-35.

[6] See Thomas S. Kuhn, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 150 (Univ. of Chicago Press 3d ed. 1996); *see also id.* at 10-11 (defining "paradigm" concept in scientific theory) and 92-93 (same); Saks & Kohler, *The Coming Paradigm Shift in Forensic Identification Science*, at 893.

revealing that the eyewitnesses (including heavily-coached children) were all mistaken; the same-sized shoeprint near the body a mere coincidence; and Bloodworth's "knowledge" of the bloody rock a fabrication by the police.[7]

A similarly "overwhelming" evidentiary record appeared to mark the 1988 trials of ***Ron Williamson and Dennis Fritz*** in Oklahoma, before DNA testing conducted on semen and hair evidence from the rape/murder victim exonerated them in 1999. Jurors had convicted both men, sentencing Williamson to death, after hearing the account of a man named Glenn Gore that he saw Williamson at the victim's workplace just before her murder; the testimony of three fellow inmates that the men had made admissions to the murder; that the victim had told a friend that the men "made her nervous"; and statements Williamson made in custody about a vivid "dream" of the crime. The state's experts also claimed that a total of 17 hairs from the crime scene "matched" Fritz or Williamson, and that both men were possible contributors of sperm inside the victim. Yet the same DNA tests that later excluded the men as the source of this evidence also provided a DNA link to the true perpetrator — the state's informant, Glenn Gore – thus exposing him and the other "snitches" as liars, and the statements the defendants allegedly made about the crime to be innocuous or invented.[8] (Given the interrelated concerns of due process and actual innocence at the heart of both *Schlup* and *House*, it is also of note that while these men ultimately secured the new DNA test results that proved their innocence in state court, Williamson – who, while on death row, once came within five days of execution – lived to see

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[7] Convicted by Juries, Exonerated by Science, NAT'L INSTIT. JUST., U.S. Dept. Just., NCJ161258 (June 1996) at 36; James Dao, *In Same Case, DNA Clears Convict and Finds Suspect*, N.Y. Times, Sept. 6, 2003, at A7.

[8] *See* Charles T. Jones, DNA Tests Clear Two Men in Prison Escapee Sought in Slaying of Waitress, DAILY OKLAHOMAN, April 16, 1999, at 1; Scheck et. al., ACTUAL INNOCENCE 163-202

his ultimate exoneration only because a federal *habeas* court had earlier reversed his conviction and sentence on constitutional grounds.)[9]

Other DNA cases have revealed that the original trials were tainted by flawed forensics – whether an entire analytic discipline that can only be deemed "science" if preceded by the word "junk," or by grievous casework errors within established fields of forensic analysis. ***Ray Krone of Arizona*** was the victim of a junk science dubbed "forensic odonotology," in which a defendant's dental impressions are allegedly "matched" to the bite marks left on a crime victim. Dubbed "the snaggletooth killer" and sent to death row for the murder of a waitress whose killer bit her breast, he was exonerated by DNA testing a decade later that excluded him from the bite mark's saliva stains (and which, as in the Bloodsworth case, was matched to the DNA of a convicted sex offender about to be paroled). Krone's exoneration has been followed by broader scientific studies and journalistic exposes revealing the entire "discipline" of forensic odontology to be rife with error.[10]

In a different but no less troubling vein, ***Stephan Cowans***

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[9] *See Williamson v. Reynolds*, 904 F.Supp. 1529 (E.D. Okla. 1995) (reversing conviction and sentence on various constitutional grounds, including, *inter alia*, that trial counsel was ineffective for failure to investigate evidence that state's witness Glen Gore was true perpetrator of the rape/murder), *aff'd*, *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997).

[10] *See* Flynn McRoberts & Steve Mills, *Forensics Under the Microscope: Testimony on Bite Marks Prone to Error*, CHICAGO TRIBUNE., Oct. 19, 2004, at C1 (surveying wrongful convictions predicated on erroneous bitemark analysis); C. Michael Bowers, *The Scientific Status of Bitemark Comparisons*, in Modern Scientific Evidence and the Law, 541 (ed. David Faigman, et al., 2005) (reporting, *inter alia*, "false positive" errors in bitemark analysis by 63.5% of most highly-credentialed "diplomate" examiners in blind study); K.L. Arheart & I.A. Pretty, *Results of the 4th ABFO Bitemark Workshop—1999*, 124 FORENSIC SCI. INT'L 104, 111 (2001) (reporting further on unacceptably high error rates in cases studied).

of Massachusetts was convicted of shooting a police officer, largely because two separate crime lab analysts "matched" his fingerprint to one from the crime. But when post-conviction DNA evidence proved Cowans' innocence, it also exposed serious errors by both print analysts -- leading the Boston Police Department to shut down its entire print division last year. Similarly, the 2001 exoneration of ***Michael Green of Ohio*** revealed that the serology testimony offered by a police crime lab official at his rape trial as damning evidence of guilt was in fact tainted by fraud.[11]

With good reason, then, the "ripple effect" of new evidence of innocence was not lost on the *Schlup* court. *See id.* at 330 (noting that "under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial.") Yet the *en banc* majority in *House* failed to grasp this principle. By holding that Petitioner must "do more" than merely "raise questions about the reliability of portions of the trial testimony or the manner in which physical evidence was handled or analyzed," *House v. Bell*, 386 F.3d 668, 685 (6th Cir. 2004)(emphasis supplied), the court improperly viewed the new evidence in isolation – and denied the Petitioner the powerful inferences to which he was entitled.

For this case is one in which DNA and other advanced forensic evidence does more than just "raise questions" about "portions" of the trial evidence. It directly proves the falsity of key "facts" presented to the convicting jury, and its impact reverberates throughout the trial record. Most critically, by definitively proving that Petitioner was not the source of the semen stains on the underwear and nightgown worn by the victim, the DNA test results eviscerate the entire

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[11] *See* Mark Gillespie, *Experts fault job done by police tech lab, boss,* CLEVELAND PLAIN DEALER, June 16, 2004, at A1 (reporting City of Cleveland's agreement to have panel review over 100 serology cases handled by police lab analyst who gave false testimony in rape case of Michael Green).

motive for the crime and theory of guilt upon which the prosecution asked the jury to convict (*i.e.,* that he lured Mrs. Muncey to a secluded area for purposes of sexually assaulting her, then killed her when she "resisted" him).[12] Similarly, the State Medical Examiner's new analysis of the enzyme degradation on Petitioner's blood-stained blue jeans, coupled with the undeniable evidence of substantial blood spillage from the autopsy test tubes, does far more than just show that this blood could not have come from the victim's veins at the time of her murder. For if Mrs. Muncey's blood was not on Petitioner's jeans the night she was killed, and Petitioner's semen was not on her clothing, the value of the stains as "corroboration" for the eyewitness who claimed to have seen him at the crime scene is also eliminated. And with both of these forensic "facts" no longer part of the trial record, a reasonable jury would be far more likely to credit Petitioner's innocent explanation for how he incurred his minor injuries that night – not to mention the overwhelming new evidence inculpating the victim's husband (including Mr. Muncey's motive, attempts to fabricate an alibi, and credible confessions to two members of the community).

Simply put, it is impossible for a reviewing court to correctly make "a probabilistic determination about what reasonable, properly instructed jurors would do" (*Schlup,* 513 U.S. at 329), if it considers each item of evidence in isolation, and does not consider the potentially far-reaching impact of the new evidence on the old. It is absolutely critical that this Court so instruct the lower federal courts, and avoid future error in this small but critical class of cases. *See id.* at 324-25 ("The quintessential miscarriage of justice is the execution of a person who is entirely

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[12] Indeed, the State told the court at sentencing that "the fact that there was semen on the outer garment, that is, the nightgown" was its basis for seeking the death penalty, as it would support a finding that House murdered the victim "in the process of either rape or attempted rape." *House*, 386 F.3d at 693.

innocent")(internal citations omitted).

C. On "Finality": Memories May Fade, but DNA Does Not

This Court has long wrestled with the often-competing interests of finality, accuracy, and actual innocence when considering whether reversal of a conviction is warranted. *See, e.g., United States v. Mechanik et. al.,* 475 U.S. 66 (1986) (While "[t]he passage of time, erosion of memory, and dispersal of witnesses may make retrial difficult, even impossible . . . . [t]hese societal costs of reversal and retrial are an acceptable and necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of guilt or innocence") (internal citations omitted). Indeed, the *Schlup* court noted a "threat to finality" inherent in any rule that facilitates habeas relief. *Id.* at 326. And among the chief obstacles before the petitioner in *Herrera* was the Court's view that post-conviction factfinding was, by its very nature, less accurate than the original trial. *See* 506 U.S. at 403 ("[T]he passage of time only diminishes the reliability of criminal adjudications").

However true this maxim may have been in 1993, it is clearly no longer so in the DNA era. Indeed, it is precisely because DNA test results are more objective, discriminating, and accurate than lay evidence – even decades after a crime – that access to post-conviction DNA testing has expressly overridden the ordinary rules of "finality" at both the state and federal level. As noted by the Justice Department's National Commission on the Future of DNA Evidence:

> The results of DNA testing do not become weaker over time in the manner of testimonial proof. To the contrary, the probative value of DNA testing has been steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects. . . . The strong presumption that verdicts are correct, one of the underpinnings of restrictions on post-conviction relief, has been weakened

> by the growing number of convictions that have been vacated by exclusionary DNA test results.

POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, Nat'l Instit. Just., U.S. Dept. Just., NCJ 177626 (Sept. 1999).

Scientific proof exposing "false facts" in a trial record is thus analytically distinct from virtually all other forms of post-conviction claims. In such cases, a court need not choose between fact-finding accuracy and due process, as both interests may be served by passage through *Schlup*'s gateway. The erasure of that dichotomy in this distinct class of cases should, in turn, send a clear message to lower courts that such evidence is entitled to substantial weight in determining what the verdict of "reasonable jurors," fully armed with this irrefutable science, would be.

This is not to say that scientific-evidence cases are the only ones in which a Petitioner can make a compelling claim of actual innocence needed satisfy *Schlup* or *Herrera*. Since only 5-10% of all felonies in the U.S. involve biological material that can be subjected to DNA testing,[13] it bears emphasizing that reliance on DNA and other forensic evidence is but one – and by no means the only – way to pass through *Schlup's* gateway. The lower courts have, with good reason, required that lay evidence be accompanied by truly powerful indicia of reliability when offered years after trial. But a limited number of innocent petitioners have succeeded in meeting that burden. *See, e.g., Bragg v. Norris*,

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[13] *See, e.g.,* Testimony of Michael M. Baden, M.D., director of the Medicolegal Investigations Unit of the New York State Police, before the United States Senate Committee on the Judiciary, July 31, 2003,available at http://judicary.senate.gov ("In less than 10% of murders the criminal leaves DNA evidence behind. About 5% of a crime lab's workload involves DNA analysis"); Kelly M. Pyrek, *Consortium Lobbies Capitol Hill on Behalf of Forensic Science Community*, FORENSIC NURSE, Sept. 2005 (quoting chair of consortium of four major crime laboratory associations that pool of requests for DNA analysis is "only five percent of what comes in the door").

128 F.Supp.2d 587 (E.D. Ark. 2000) (new evidence included sworn testimony from law enforcement officials, and corroborating photographs and law enforcement records, which directly contradicted statements of undercover officer who gave critical but false testimony at petitioner's narcotics trial); *Reasonover v. Washington*, 60 F.Supp.2d 939 (E.D. Mo. 1999) (in murder conviction obtained principally through testimony by jailhouse informants regarding petitioner's alleged admissions, new evidence included taped conversations surreptitiously recorded by state officials which contradicted jailhouse informants' claims and corroborated petitioner's denials, as well as documents indicating undisclosed benefits to lead informant given in exchange for testimony).

The instant case, however, is one in which such scientific evidence is available. And its impact on the verdict cannot be overstated. Indeed, that a retrial would now provide Petitioner's jury with more objective and reliable forensic evidence than was available in 1986 cannot seriously be disputed. The principal reason, of course, is the newly proven "false fact" regarding the semen stains that would no longer taint the jury's deliberations. The original jury was told by an FBI analyst that Petitioner (but not the victim's husband) was "definitely" among the small minority of men who shared both the blood type and secretor status of the semen donor, and thus could well have been its source. But as the *House* majority conceded, DNA has now proven — to an absolute scientific certainty — that neither stain came from Petitioner, and that both stains in fact came from the victim's husband, whom Petitioner has long contended was the real killer. *See House*, 386 F.3d at 687. Similarly, the majority's concession that Petitioner "succeeded in showing . . . that, at some point, the blood evidence appears to have been mishandled, resulting in spillage," *id.*, vastly understates the power of the new evidence, as well as the impact the original (false) blood evidence surely had on the jury's deliberations.

The uniquely probative and "timeless" nature of such proof makes it imperative that this Court correct the *House* majority's failure to give it due significance under *Schlup*. For in future cases, no matter how powerful the DNA or other forensic proof, there will invariably be some "old evidence" left standing from the trial (whether the specious claim of a jailhouse snitch, or the honest but mistaken recollection of an eyewitness). Yet the *House* approach could well erect an insurmountable bar to relief in future meritorious cases, whenever a prosecutor unreasonably contests a defendant's claim of innocence – no matter how weak the evidentiary straws within the State's grasp may be.

II. This Court Must Ensure a Meaningful Federal Safeguard Against Wrongful Imprisonment and Execution for the Small but Critical Minority of Innocent Persons With Exculpatory DNA or Equally Compelling Post-Conviction Evidence, but to Whom Prosecutors and State Courts Unreasonably Deny Relief

Despite the revolutionary impact of DNA technology on the justice system in recent years, the pages of the Federal Reporter are not replete with DNA exoneration case law. The reason is that this technology has so quickly gained acceptance among State officials – who recognize its power both to identify the guilty and exonerate the innocent – that most claims for post-conviction relief based on DNA evidence never reach the federal *habeas* courts, because relief is granted at the state level. Indeed, in the overwhelming majority of such cases handled by *amicus* and our colleagues to date, the defendants' exonerations have transpired on the full consent of the prosecution. There are also a small minority of cases in which the underlying conviction is vacated on consent, but the prosecution reserves the right to conduct a retrial – as, of course, the State would be free to do here.[14] But *amicus* knows of no

[14] *See, e.g., Brewer v. State*, 819 So.2d 1169 (Miss. 2002) (remanding for

case to date with a result like *House*, in which both prosecutors and courts have failed to grant so much as a new trial despite the presence of (a) DNA and other new forensic evidence that proves the falsity of key "facts" heard by the jury at trial, and (b) a broad array of testimonial proof regarding an alternate suspect's motive, fabricated alibi, and contemporaneous confessions.

It becomes even clearer that the *House* majority stands as an "outlier" among its peers when the case is compared to analogous rulings in both state and federal courts. State courts, for example, have properly granted new trials based on other newly discovered forensic evidence – even where the science at issue is far less advanced and persuasive to juries than DNA. *See, e.g.*, *State v. Behn*, 868 A.2d 329 (N.J. Super. Ct. App. Div. 2005) (reversing convictions for murder and armed robbery, based upon new scientific studies demonstrating unreliability of method of chemical analysis of lead bullets, used at trial to link partial box of bullets in defendant's possession to bullets in victim's corpse); *Alabama v. Banks,* 845 So.2d 9 (Ala.2002) (reversing conviction for murder of wife's newborn baby, based on new evidence that a prior tubal ligation likely precluded the alleged pregnancy, contradicting medical evidence at trial); *State v. Caldwell*, 322 N.W.2d 574 (Minn. 1982) (vacating murder conviction based on re-analysis of enhanced crime scene fingerprint, alleged at trial to have been defendant's, which upon closer review excludes him); *People v. Jackson*, 283 N.W.2d 648 (Mich. App. 1979) (new evidence that semen on victim's underwear is from non-secretor, while

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evidentiary hearing on new trial for death row inmate Kennedy Brewer, convicted of strangulation of 3-year-old child, after DNA excluded him from semen in girl's body) ***and*** Sherri Williams, *DNA Wins Inmate New Trial*, THE CLARION-LEDGER, Sept. 6, 2002, at B1 (reporting prosecutor's subsequent consent to vacate Brewer's conviction, remarking, "If you follow the law on newly discovered evidence, [the DNA] would be possibly something that would change the jury's verdict," but that State may retry Brewer pending further review.)

defendant is a secretor, would "render a different result probable on retrial"); *see also State v. Pope,* 80 P.2d 1232 (Mont. 2003) (in two-perpetrator, two-victim rape case, DNA excluding Pope warranted vacatur); *People v. Waters*, 328 Ill.App.3d 117 (2002) (same, in three-perpetrator rape case, where defendant was alleged to have urinated on victim, yet DNA excluded him as source of urine).

Similarly, in those rare cases when convicted persons with new, exculpatory DNA test results have been required to pass through *Schlup*'s gateway to obtain relief, the district courts have largely concurred. In *Watkins v. Miller*, 92 F.Supp.2d 824 (D.Ind. 2000), for example, the District Court of Indiana granted relief to a defendant convicted of rape and murder, after post-conviction DNA tests conclusively excluded him as the donor of the semen in victim's body. The state contended that a reasonable jury could still convict based on the defendant's "confession" to a jailhouse informant, which the informant had not recanted, under the new theory that he committed the murder with another man – even though the prosecution had argued at trial that "[t]here is no evidence whatsoever that anybody else ever molested" the victim. The court granted relief under *Schlup* (and the underlying *Brady* claim in his habeas petition), noting, with respect to the Schlup claim, that the new DNA evidence "changes the picture completely" and "conclusively disproves the only theory the state presented at trial." *Id.* at (Mr. Watkins was ultimately exonerated and freed from prison after the state did not re-prosecute him). *See also Nickerson v. Roe*, 260 F.Supp.2d 875 (D.Cal. 2003) (DNA on blood-stained glove from robbery-murder excluded defendant as source; although two eyewitnesses had identified defendant as one of three perpetrators fleeing scene, the co-defendant implicated by DNA and the two other charged defendants each affirmed that they acted alone and that Nickerson was not a participant in crime).

This is not to say that federal *habeas* courts always get it

right where DNA and innocence is concerned. In *Hunt v. McDade*, 205 F.3d 1333 (4th Cir. 2000), for example, the Fourth Circuit affirmed the denial of relief under *Herrera* to Darryl Hunt of North Carolina, who had been convicted of rape and murder in 1984 based on the highly questionable testimony of purported "eyewitnesses," with his alibi corroborated by multiple others – even though post-conviction DNA testing conclusively proved he was not the source of semen from the rapist-murderer found in the victim's corpse, and the case had been tried on a single-perpetrator theory. It was only after Mr. Hunt's habeas petition was dismissed, but retesting of the DNA allowed the unknown male profile to be entered into the national DNA databank, generating a "hit" on the real perpetrator – who confirmed that he had in fact acted alone, and that Hunt was entirely innocent – that the unfortunate error in the 4th Circuit's grudging application of *Herrera* was established.

By and large, however, the decision now under review is – fortunately – a notable exception among its peers. But the fact that the State's refusal to grant Mr. House a new trial is patently unreasonable, and the *en banc* court's reasoning outside the norm, does not mean that the opinion will not have far-reaching implications if allowed to stand. Indeed, a number of *amicus*' clients wrongfully convicted of capital murder would not be alive, let alone free men today had the Sixth Circuit's tortured reading of *Schlup* governed their cases. Moreover, as has recently been noted by legal and lay commentators, "pockets of resistance" are emerging among a small minority of prosecutors' offices, as they begin to steadfastly resist requests for DNA testing (even where it can unquestionably establish innocence or confirm guilt), or try to erect new procedural barriers to hearings on the significance of exculpatory DNA results.[15] While such

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[15] *See* Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. TIMES, Aug. 29, 2003, at A1; Carl Hiaasen, Editorial, *Still Behind Bars, Despite DNA Evidence*, THE MIAMI HERALD, May 9, 2004, at 1L

efforts have been widely deplored by commentators and many other law enforcement officials,[16] the *Schlup* gateway remains a crucial safeguard for that small – but undeniably critical – minority of innocent persons for whom state court processes fail to provide relief. This may be particularly so given that *Schlup*-eligible cases involve claims of constitutional error at trial, thus providing an incentive for some state actors to block the "gateway," *i.e.,* to prevent claims of egregious misconduct from being adjudicated on their merits (and subsequent civil actions if serious constitutional violations are established).

The legal issues posed by this finite class of "false fact" cases were barely on the horizon when *Schlup* was originally decided. Now, however, this Court can squarely address them, and in so doing reaffirm our Constitution's venerable tradition of protecting the innocent -- without fear of opening the floodgates to large numbers of such claims.

III. Evidence of Fraud and Fabrication by the State's Serology Expert at Trial, Recently Discovered by *Amicus,* Gives Still Further Weight to Petitioner's Constitutional Claims

Many "false fact" cases in the DNA context are the result of advancements in forensic science, not a revelation of bad faith on the part of the original crime lab analyst. That is, the original "fact" presented to the jury was supported by laboratory work which, even if rudimentary, was valid at the

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(quoting State's assertion, to appellate court at oral argument, that even if State knew that defendant was "absolutely innocent," he would be entitled to no relief).

[16] *See, e.g.,* William Sessions, *DNA Tests Can Free the Innocent. How Can We Ignore That?*, WASHINGTON POST, Sept. 21, 2003, at B02; *State Fought to Keep Innocent Man in Prison*, MIAMI HERALD, Aug. 15, 2004, at 1L; Editorial, *Innocence Lost Series*, ST. PETERSBURG TIMES, Aug. 22, 2004, at 2P ("When prosecutors are uninterested in evidence of a defendant's innocence, they have lost their professional way. They should not only lose their jobs but their license to practice law").

time of trial – *i.e.,* serology testing which showed that the defendant's blood type was the same as the one detected in the crime scene evidence, and thus the jury was (accurately and appropriately) informed that he was a potential donor, albeit one among many potential donors. The "falsity" is established when new, and infinitely more discriminating, DNA technology proves that he could not, in fact, have been the source. Often these DNA test results will radically transform the evidentiary landscape, and thus require a new trial, but will not impugn the lab work of the original analyst, who "did the best she could" with the technological limitations of the day.

This case, however, appears to be of a different sort. For when *amicus* reviewed the trial record to assess the full significance of the new scientific evidence, we discovered that the FBI serologist who analyzed the stains on the victim's underwear and nightgown, and compared them to the defendant's own blood type, appears to have wholly misrepresented the results of the original tests to the jury .

The State's expert testified, quite properly, that under the ABO blood group system, the 80% of the population who are "secretors" (that is, whose blood antigens are detectible in their other bodily fluids) secrete "H" antigens. Persons who are Types "A," "B," or "AB" secretors will, in addition, secrete the A and/or B antigens. The defendant, he found, was an "A secretor," and the victim herself was also blood type "A" (although, curiously, her secretor status was "not determined"). Hence, semen stains left by Petitioner should have revealed both "A" and "H" antigens. However, the state's expert found that the victim's semen-stained underwear yielded only "H" antigens, but no "A" antigens.

The combined test results, then, clearly posed a problem for the State, if it wished the jury to find that Mr. House was a potential donor of the semen. Since there were no "A" antigens detected in that stain, the results – if accurate – would have excluded him as the source. Here is how the

State fixed that problem when its serologist testified at trial:

Q: Can you tell us whether or not the A substance could have been there [in the semen stain], prior to you doing the testing?

A: It could have, yes.

Q: Does the age of the stain make a difference as to whether you find both of these substances?

A: The age of the stain does to some extent make a difference. The environment in which the stain remained after it was deposited could also make a difference. The H blood group substance is the precursor to the B and A blood group substances, chemically, and it can also be degraded from the A or the B to the H.

Q: Which means that the H lasts longer, so to speak?

A: In certain cases, yes.

Q: So, A could deteriorate into H?

A: Yes.

(Trial transcript ("TT") at 901) (emphasis supplied).

This is sheer nonsense. For while it is true that age and environment can cause bodily fluids to degrade to the point where no blood group antigens in a given sample can be detected at all, the selective degradation of only certain antigens described above -- a/k/a the conveniently "Vanishing A"-- is simply unheard of in the field of serology.[17] And it is certainly a rule that any remotely

[17] Indeed, if antigens could selectively "vanish," then serology would never have been a reliable method for drawing inculpatory or exculpatory inferences from the antigens' presence or absence in a piece of evidence (that is, the presence or absence of Type H, A or B antigens in a sample would tell us nothing about the potential donors, because one could never rule out the possibility that other antigens had been present but vanished. Fortunately, because the vanishing-antigen notion is unheard of in the field of serology, properly conducted blood type analysis was a useful vehicle to draw certain conclusions about perpetrators of crime for many

competent serologist employed by the FBI in 1986 would have known – as would a qualified serologist for the defense, had Mr. House's trial lawyer retained and instructed such an expert to conduct a thorough review of the FBI's results.

If the FBI's typing of the stain was accurate, the jury should have been told 20 years ago that Paul House, as an "A" secretor, was excluded as the source of the stain. The only logical explanation for this convenient "Vanishing A" theory offered by the State's expert witness is that it was fabricated to conform with the State's case against Paul House, *i.e.,* to fraudulently misrepresent the results to make him a potential donor of that semen stain, when the test results showed otherwise.[18]

And there is more. The FBI reportedly detected both "A" and "H" antigens on the semen-stained nightgown. From this, the analyst unhesitatingly opined that "the person who deposited that semen was blood type A." (T.899). This, too, is wrong. Since the deceased was type A, but the lab did not test her secretor status, she is presumptively a secretor (just like 80% of the population). Thus the FBI's analysis was incorrect, because all of the "H" and "A" blood group substance could have simply originated from the deceased victim herself, and thus the testing did not reveal any useful information about the donor of the semen. (For instance,

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years before it was supplanted by more discriminating DNA technology.

[18] It may be worth noting that this unheard-of "vanishing A" assertion by the State's expert at trial is quite different from the recognized phenomenon of post-mortem changes in blood enzymatic activity, which formed the basis for the Assistant Chief State Medical Examiner's assertion on habeas that the blood stains on Petitioner's blue jeans were tellingly consistent with the tubes of blood collected at the victim's autopsy. Indeed, in proceedings in the District Court, the State's expert agreed that the post-mortem process of hemolysis and environmental exposure can result in detectible changes to the enzymatic activity in a blood sample, and that the patterns of such degradation in the autopsy tubes was the same as that found in the blood on the jeans. *See* Transcript of Evid. Hearing, Feb. 3, 1998, at 140, 165-70.

"B" blood group substance from the semen could also have been present but not detectible if the semen was diluted by the victim's vaginal secretions, which contain only the "A" and "H" blood group substances.) For this reason, it is a core principle of forensic serology that when antigens in a mixed stain are wholly consistent with the victim's own, an analyst should never opine as to the blood type of the minor (male) contributor.[19] This means that, although the jury was told that the male donor was assuredly an "A secretor" like Paul House, it should instead have been told that it could have been any man on the planet.

We raise these troubling facts not to ask the Court to directly review the *Brady* and *Strickland* claims pled by Petitioner in the District Court. But they do provide powerful evidence that the *Schlup* gateway is essential here, to ensure these claims get a full and fair hearing in that forum before Petitioner is executed. Indeed, the fact that the serologist who gave this grossly inaccurate scientific testimony at trial is the very same expert the State relied upon at the habeas hearings to challenge Petitioner's scientific evidence regarding the suspicious enzymatic condition of the blood on Petitioner's jeans gives still further weight to his overall showing under *Schlup*. Clearly, this fraudulent serology, coupled with Petitioner's powerful claim of actual innocence – so strong that six Circuit Judges would have freed him from custody without delay, and a seventh would have granted granted the writ and ordered retrial – means that one cannot have the remotest

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[19] *See, e.g.,* U.S. Dep't of Justice, *Proceedings of Forensic Science Symposium on the Analysis of Sexual Assault Evidence*, Lib. Cong. Cat. No. 84-601146 (July 8, 1983) (reporting standards promulgated at FBI-sponsored symposium, on parameters for analysis of sexual assault evidence; panelists stated that in mixed samples, when all markers can be attributed to victim, an analyst may not opine as to source of semen); *see also* FS Baechtel, *Secreted blood group substances: Distributions in semen and stabilizing in dried semen stains,* 30 J. FORENSIC SCI. 1119 (1985) (same).

"confidence in the outcome" of this deeply flawed trial.

IV. This Court Should Correct the Misapprehension in the Lower Courts Regarding the Constitution's Ban on Execution and Imprisonment of the Innocent That Has Arisen Since *Herrera v. Collins*

This Court has never squarely addressed the issue of whether the 8th and 14th Amendments to the Constitution forbid the execution or continued incarceration of an individual who is actually innocent, separate and apart from any claim of constitutional error at trial. Yet this is a principle whose importance has become manifest in the last ten years, and in which *amicus'* clients have an undisputed interest. Former client Ron Williamson, for example, came within five days of execution and was measured for a coffin before a last-minute stay of execution was issued, and his innocence was proved through DNA testing.[20] And while this Court appeared poised to resolve that question in *Herrera v. Collins,* it ultimately determined that was not the appropriate case in which to issue such a ruling, given that a 6-3 majority found that Mr. Herrera would have fallen far short of the "extraordinarily high" factual showing required to sustain such a claim. *See Herrera*, 506 U.S. at 417.

But this Court has certainly never held otherwise – that is, that the federal courts would be powerless to intervene to prevent the execution of one who has, in fact, made a truly compelling post-conviction showing of actual innocence, if no state court relief were available. Indeed, in *Herrera,* the majority assumed without deciding that the federal Constitution does provide such core protection for the innocent on death row. *See id.* at 417 ("We may assume. . . . that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant

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[20] *See* Scheck et. al, ACTUAL INNOCENCE at 189.

federal habeas relief if there were no state avenue open to process such a claim.") And six Justices were even then prepared to go further and expressly so hold. *See id.*, 506 U.S. at 419-20 (O'Connor and Kennedy, J.J., concurring); *id.* at 430 (White, J., concurring in the judgment); *id.* at 430-31 (Blackmun, Stevens, and Souter, J.J., dissenting).

Unfortunately, despite clear assertions in *Herrera* itself that this issue was, at the very least, an open question – if not one the Court was all but ready to decide in the affirmative in the appropriate case – a number of lower courts have badly misread that decision. Based on the denial of relief to Herrera himself, and the attendant discussion in the majority opinion as to why post-conviction claims of innocence are generally disfavored (but hardly barred altogether) absent an "extraordinarily high" factual showing, some have read *Herrera* to foreclose such claims altogether, no matter how compelling the new evidence of innocence. *See, e.g., Sibley v. Culliver*, 377 F.3d 1196, 1207 (11th Cir. 2004); *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (8th Cir. 2001). Other courts have appropriately held otherwise, either leaving the question open, or reading *Herrera* to recognize the viability of such a claim in a meritorious case. *See, e.g., Boyde v. Brown*, 404 F.3d 1159, 1168 (9th Cir. 2005); *Noel v. Norris*, 322 F.3d 500, 504 (8th Cir. 2003); *Conley v. United States*, 323 F.3d 7, 14 n.6 (1st Cir. 2003); *State ex rel Amrine*, 102 S.W.3d 541, (Mo. 2003); *Ex Parte Elizondo,* 947 S.W.2d 202, 205 (Tex. Cr. App. 1996). And even some courts which do recognize the possibility of a "freestanding" actual innocence claim have read *Herrera* to limit its availability to capital cases. *See, e.g., Milone v. Camp*, 22 F.3d 693, 699-700 (7th Cir. 1994); *Ponder v. Lampert*, 2004 U.S. Dist. LEXIS 7646 (D. Or. 2004).

Given the remarkable increase in post-conviction DNA and other exonerations since *Herrera*, this issue is no longer – and should no longer be – theoretical. Dozens of recent exonerations of the innocent in both capital and non-

capital cases has revealed that even trials thought to be "error-free" have, on hindsight, at times led to the wrongful conviction of the innocent. And turning a blind eye to such legitimate cases is something that our Constitution – like the public at large -- cannot tolerate. *See Herrera,* 506 U.S. at 398 ("the central purpose of any system of criminal justice is to convict the guilty and free the innocent") (*citing United States v. Nobles,* 422 U.S. 225 (1975).

Given the high stakes and the decade that has passed since *Herrera*, this is not the sort of issue that should "percolate" any longer. While a number of state and federal courts have appropriately read *Herrera* to permit relief to be granted under truly extraordinary showings of actual innocence, it is constitutionally and morally unacceptable that whether an innocent person is executed may depend on the Circuit in which he is confined. It is thus critical that this Court make clear that such claims – while rare – are cognizable under the 8th and 14th Amendments. And while execution of an innocent person is our justice system's ultimate (and irreversible) nightmare, as *amicus'* clients can attest, the unimaginable ordeal of lengthy imprisonment for a crime one did not commit is no less a violation of the Constitution, and should be explicitly recognized as such by this Court. Finally, given the truly impressive array of <u>both</u> scientific and lay witness evidence of innocence that federal habeas counsel for Mr. House has presented, his case – unlike *Herrera* -- is a highly appropriate one in which to articulate the standard that governs such claims.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioner's brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

DAVID GOLDBERG
Counsel of Record
PETER J. NEUFELD
BARRY C. SCHECK
NINA R. MORRISON
Innocence Project, Inc.
100 Fifth Ave., 3rd Floor
New York, NY 10011
(212) 364-5340

Counsel for amicus curiae