IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

Thomas Siller,

Appellant,

v.

State of Ohio,

Appellee.

Case No. 08-90865

Appeal from Case No. CR 391411(A)

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF APPELLANT THOMAS SILLER

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INTERESTS OF AMICUS CURIAE

The Innocence Network ("Network") is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The thirty-eight current members of the Network represent prisoners with innocence claims in all 50 states and the District of Columbia.[1] The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system. Drawing on the lessons from cases in which the system convicted innocent persons, the Network promotes study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

The founding member organization of the Network — the Innocence Project[2] — pioneered the post-conviction DNA litigation model that has exonerated over 200 innocent persons, serving as counsel in the majority of these cases. The Innocence Project and other Network organizations have analyzed these cases extensively, as well as much of the literature surrounding the issue of wrongful convictions, and have developed a substantial understanding of the types of facts and circumstances that often lead to wrongful convictions. The Network,

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[1] The member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defense of the Wrongly Convicted (Canada), California & Hawai'i Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Griffith University Innocence Project (Australia), Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Ohio Innocence Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University-Justice Brandeis Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, Wesleyan Innocence Project (Texas), and Wisconsin Innocence Project.

[2] The Innocence Project was established in 1992 at the Benjamin N. Cardozo School of Law by civil rights attorneys Barry Scheck and Peter Neufeld and is dedicated to exonerating the innocent through post-conviction DNA testing.

and many of its individual member organizations, are now considered the nation's leading authorities on wrongful convictions.

The advent of forensic DNA testing and the use of such testing to review criminal convictions conclusively demonstrates that our system convicts innocent people and that wrongful convictions are not isolated or even rare events. DNA testing has opened a window into wrongful convictions so that we may study the causes of this injustice and recommend practices to minimize the chance of its occurrence. If used incorrectly, however, testimony about DNA evidence can be used to perpetrate grave injustice. *Amicus* have a particularly strong interest in cases where, as here, trial courts have admitted perjured forensic testimony and false conclusions — especially when they have resulted in a wrongful conviction.

SUMMARY OF ARGUMENT

Due process is violated whenever a representative of the State supplies false testimony on a topic that materially prejudices the rights of the accused. Further, due process may be violated by not only the prosecution, but also the independent acts of the State's witnesses, such as forensic examiners or police officers offering false testimony that weighs on the guilt or innocence of the accused.

In cases where the accused was convicted but later exonerated because he was innocent, false testimony "is a surprisingly common feature" of the underlying trials that led to the conviction. Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 543 (2005) (discussing false testimony using the term "perjury"). Already a generation ago, a study of 350 erroneous convictions in "potentially capital cases" revealed that there was "perjury by prosecution witnesses" in approximately one-third of the cases. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stanford L. Rev. 21, 60 (1987). Indeed, false testimony by

prosecution witnesses was "twice as frequent a cause of error as are the next most important factors." *Id.* at 61 n.184. Contemporary study of exonerations illustrates that through and including the present, this continues to be the case. *See*, *e.g.*, Gross et al., 95 J. Crim. L. & Criminology at 544 (noting that in 43% of the 340 exonerations studied, "at least one sort of perjury" is reported).

Perjured testimony offered by prosecutor-retained experts—such as that by the State's expert serologist, Joseph Serowik—is a particularly pernicious problem and necessarily rises to the level of a due process violation. It is well-established that scientific testimony can powerfully affect, and often determine, the outcome of criminal cases. Study after study demonstrates that lay jurors give extraordinary deference to the testimony of scientific experts. This deference frequently conceals significant holes in the prosecution's case and lulls jurors into believing that the "science" to which the "expert" has testified provides the requisite link of evidence to support a conviction. Obviously, false expert testimony can have a catastrophic impact on the truth-seeking function of trial courts and this compels careful oversight and intervention by the reviewing courts in instances where, as here, it is demonstrated that a conviction has been obtained based upon false forensic expert testimony.

Concerns about the integrity of the judicial process and prejudice to the accused are exacerbated when false scientific testimony works to bolster the testimony of witnesses who—as Jason Smith did here—testify against the accused in exchange for leniency in their own role in the underlying criminal activity.[3] Not only do witnesses of this type, collectively referred to with other cooperating witnesses as "snitches," have the incentive to exaggerate their testimony or even lie, studies show they often do. When such testimony is corroborated only by the false testimony of a prosecutor-retained forensic expert, the right of the accused to due

[3] Smith's agreement with the prosecutor in this case extended far beyond leniency for his own role in the Zolkowski assault: the prosecutor granted Smith immunity if the victim died and agreed to dismiss two unrelated drug charges then-pending against Smith. (*Id.* at 343-44.)

process is violated. For the reasons discussed herein, the Court should reverse the trial court and remand the case for a new trial.

STATEMENT OF FACTS

In March of 1998, Thomas Siller was indicted in connection with an attack on Lucy Zolkowski, who had been assaulted in her Cleveland home in June of 1997. Zolkowski never recovered from the attack and died in April of 1999. Siller was charged with felonious assault, attempted aggravated murder, kidnapping, aggravated burglary, and aggravated robbery. In July of 1998, a jury found Siller guilty of all charges, and the court sentenced him to a term of twenty years incarceration. When Zolkowski died in 1999, Siller was charged with aggravated murder. After a trial in 2001, a jury found him guilty of this crime as well, and the court sentenced him to a thirty year term without parole, to run concurrently with the earlier sentence. Siller unsuccessfully appealed both convictions.

In each of Siller's trials, false forensic evidence and the self-serving testimony of a witness led directly to his convictions. At both trials, prosecution witness Joseph Serowik, then employed as a serologist by the Cleveland Police Department, misrepresented the work he did in connection with the Zolkowski investigation. At both trials, prosecution witness Jason Smith, who prolonged his lengthy criminal career through a series of agreements to offer testimony in exchange for leniency, gave testimony that changed and evolved as the errors in Serowik's work came to light.[4] The true damage of Serowik's testimony only came to light after the trial, when the Innocence project provided DNA testing that conclusively shows that Serowik falsely testified at both trials. The caustic combination of Serowik's false testimony and Smith's changing story materially affected Siller's fundamental right to a fair trial, resulted in his wrongful conviction and entitle him to a new trial.

[4] See, Motion for New Trial, .

Beginning with the 1998 trial, Serowik's shortcomings as a forensic examiner started to surface. He had no adequate system of record keeping. In both trials, blood (or the lack thereof) on a pair of pants belonging to Smith was key to the prosecution's entire case. When first asked if certain stains on the pants had been tested for blood, Serowik said they had not. (T1 at 455).[5] However, minutes later, in the same line of questioning, when asked again about testing the pants for blood, Serowik said, "I may have. I may have, sir, but I may not have looked at those stains ... I do not recall." (T1 at 458-59). Serowik could not remember the tests he had conducted, nor did he have any sort of records to verify what testing was done to the stains on the pants.

During the second trial, when asked about the same stains on the same pants, Serowik changed his testimony. In that proceeding, Serowik made the assumption that a circled stain on the pants was indeed tested and that the test was negative for human blood. (T2 at 2098, 2115). Again, due to the lack of a sufficient record-keeping system or apparently any established procedures or protocol, all Serowik could do was assume the stain had been tested, based on the fact it was circled. The nature of Serowik's testimony prompted questions from the jury (T2 at 2117-18), leading to a mid-trial re-submission of the Smith pants for testing by Serowik.

When called back to the stand in the murder trial, after having examined the pants a second time, Serowik admitted the circled stain he had assumed had been tested and therefore was negative for blood was indeed a bloodstain. (T2 at 2713). Confronted with the scientific proof of his own test, Serowik changed his testimony again, saying that the original test in 1997 on the stain was in fact positive for blood. (T2 at 2718). This directly contradicted his previous testimony, which was that the test was done, but the result was negative for blood. (T1 at 2098.)

[5] Numbers in parentheses refer to pages in the trial transcript, which are preceded by T1 for the first trial and T2 for the second trial.

Despite the magnitude of his error and the significance of his changing testimony, Serowik said that it did not get recorded as positive for blood because of an "oversight." (T2 at 2727).

At this point, Serowik's testimony shifted beyond what could be charitably characterized as absent-mindedness and incompetence. After admitting to the fact there was an additional bloodstain on the pants, Serowik testified that he tested *every* stain on the back of the pants, but that there were ***no other bloodstains***. (T2 at 2714-15). When the jury deliberated, that was its impression as well — that other than the two bloodstains identified by Serowik, there were no other bloodstains on the pants. We now know that Serowik's testimony was patently false. There were many other blood stains on the pants, at least ***twenty*** others. Of the twenty bloodstains, at least eight, and possibly all twenty originated from the victim.[6]

Serowik's false and misleading testimony lent "scientific" credibility to the testimony of Smith, the State's star witness. As detailed in the principal brief, Smith testified that he never went into the room where the victim was tied up. (T1 at 554). Yet the second bloodstain that Serowik belatedly identified on Smith's pants belonged to the victim, Lucy Zolkowski. (T2 at 2735). This revelation severely undercut the State's account of the events surrounding the attack on Zolkowski, which were built around Smith's self-proclaimed non-involvement in the attack (which was the basis for his plea). The victim's blood on Smith's clothing evidenced his up-close-and-personal involvement and countered his testimony.

In an inventive effort to get around this difficult development, Smith added new "facts" to his testimony in the murder trial, which helped to explain how the victim's blood may have come to land on his pants. (T2 at 2810-11). Unsurprisingly, Smith's revised testimony served to further his own interests to the detriment of Siller's.

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[6] Supplemental Affidavit of Edward Blake, filed with trial court March 14, 2007. "Thus there are 20 stains on the pants that were not found by Serowik. As many as eighteen of those stains (the 7 that were matched to the victim and the 11 that were not tested) could have originated from the victim." Id.

Siller has not been the only victim of erroneous testimony given by Serowik. In 1988, Michael Green was convicted of rape and robbery. At Green's trial, Serowik offered expert testimony. As in Siller's case, Serowik's testimony was false. Post-conviction DNA testing exonerated Green in 2001, thirteen years after his conviction, and showed that Serowik had lied. In a subsequent federal civil rights lawsuit, Serowik's lies were shown to be knowing and intentional — they were not honest mistakes. As a result of Green's civil lawsuit and the facts it unearthed, the City of Cleveland fired Serowik and agreed to audit his files, including Siller's. Robert Spalding of Spalding Forensics, LLC conducted the audit, confirming Serowik's errors in Siller's case. (Spalding Letter, June 9, 2007 at 5-8, 16-17). At best, Spalding concluded Serowik had very poor record keeping; at worst, Serowik never did the test he claimed to have done in 1997 on the circled stain that he testified about in the second trial. (*Id.* at 17). In other words, there was evidence that Serowik committed perjury.

Post-conviction DNA testing of the pants was ordered, and the results of this testing conclusively proved what was already known — Serowik, a key prosecution witness in Siller's two trials, testified falsely. DNA testing identified ***twenty*** additional blood stains on Smith's pants. (*See* Blake Aff. ¶ 5). These are the same pants Serowik initially testified had only one blood stain. These are the same pants Serowik, after reexamining them, testified had only two bloodstains. These twenty bloodstains were found on the same pants on which Serowik claimed to have tested every stain, but testified that only two were bloodstains.

As it turned out, the victim's blood was on seven of the newly tested stains. (Post Conviction DNA Testing Report 1, FSA File number 06-139 dated July 25, 2006, at 49). Siller was convicted initially by a jury who believed there was none of Zolkowski's blood on Smith's pants, and later by a jury who believed there was a single, isolated stain of her blood behind the knee of Smith's pants. No jury has ever considered the critical fact that there were ***twenty***

bloodstains on Smith's pants, with no less than ***eight*** of them (located front and back) from the victim. No jury has ever considered the validity of Smith's self-serving and changing testimony in light of the fact his own pants were sprayed and dotted with the victim's blood.

LAW AND ARGUMENT

I. MISLEADING AND FALSE TESTIMONY PRESENTED ON BEHALF OF THE STATE CAUSES GREAT PREJUDICE TO THE ACCUSED AND CORRUPTS THE TRUTH SEEKING FUNCTION OF THE TRIAL PROCESS

In *Brady v. Maryland*, the United States Supreme Court held that due process is violated where a prosecutor suppresses exculpatory evidence that "is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). While *Brady* most often applies in cases where the prosecutor has suppressed exculpatory material, it remains equally applicable to cases where the state has relied, whether intentionally or inadvertently, upon perjured testimony. *See United States v. Agurs*, 427 U.S. 97, 103 (1976). When dealing with a *Brady* violation, courts focus on prejudice to the accused, rather than intentional prosecutorial misconduct. *Brady*, 373 U.S. at 87. And it has long been determined that a prosecutor deprives the accused of due process where the prosecutor knowingly presents perjured testimony. *Mooney v. Holohan*, 294 U.S. 103, 110-13 (1935).

When dealing with careless, misleading and patently false testimony offered by the State against the accused, the court must protect another interest in addition to the rights of the accused—the integrity of the criminal justice system. Thus, the due process protection is even broader, with a violation occurring even where the false testimony of state witness does not involve the facts of the case and is only relevant to the credibility of the wtiness, and even if the prosecutor trying the case does not know that the witness is perjuring himself. *Napue v. Illinois*,

360 U.S. 264, 269 (1959) ("The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness."); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (finding due process violation where prosecutor trying case did not know state witness was lying and perjury undermined the witness' credibility). And the bar for proving prejudice to the accused, or "materiality," is set relatively low: "A new trial is required if the 'false testimony could . . . in any reasonable likelihood have affected the judgment of the jury," and the accused meets this standard "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Giglio*, 405 U.S. at 154 (1972) (citing *Napue*, 360 U.S. at 271); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). These standards have been established because, in addition to the fact that perjured testimony causes great harm to the defendant, "[p]erjury or the possibility of perjury strikes at the heart of the judicial system in its role as finder of truth." 74 Yale L.J. at 138.

Brady is applicable to state actors other than prosecutors, such as police officers and state forensic scientists. *See, e.g., Newsome v. McCabe*, 256 F.3d 747, 752-53 (7th Cir. 2001) (it was clearly established as of 1979 that police could not withhold from prosecutors exculpatory information such as fact that defendant's fingerprints did not match those found at crime scene); *Charles v. City of Boston*, 365 F. Supp. 2d 82, 89 (D. Mass. 2005) ("Bogdan, an experienced crime lab technician, must have known of his legal obligation to disclose exculpatory evidence to the prosecutors, their obligation to pass it along to the defense, and his obligation not to cover up a *Brady* violation by perjuring himself."). A state forensic scientist (such as Serowik) should, at a minimum, be aware of his "obligation not to cover up a *Brady* violation by perjuring himself." *Charles*, 365 F. Supp. 2d at 89; *see also* Paul C. Giannelli &

Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, Fordham L.R. 1493, 1517 (2007).

Ohio law addresses core concepts of fairness by focusing on prejudice to the accused as well as the integrity of the criminal justice system and including state actors other than prosecutors in the due process analysis. In at least one case, the Ohio Court of Common Pleas held that a state forensic expert's false testimony about his credentials violated the defendant's due process rights and "infringed the integrity of both the court and the criminal justice system." *State v. DeFronzo*, 59 Ohio Misc. 113, 121-22 (1978). Ohio courts have also recognized that "the taint on a trial is not less if the police, rather than state's attorney, are guilty of misrepresentations," and that perjured testimony can prejudice the accused even if it only affects the way the accused prepares his case. *DeFronzo*, 59 Ohio Misc. at 120-21; *see also State v. Tomblin*, 443 N.E.2d 529, 531 (Ohio Ct. App. 1981) ("The police are a part of the state and its prosecutorial machinery."). Similarly, Ohio's perjury statute permits a conviction for perjury even if the perjurious statement is withdrawn or stricken, because such a statement "can affect the outcome of the proceeding." Ohio Rev. Code Ann. § 2921.11 (2008); *State v. Bell*, 647 N.E.2d 193, 194-95 (Ohio Ct. App. 1994); *U.S. v. Lee*, 359 F.3d 412, 417-18 (2004). In other words, a perjurious statement is "material" under the perjury statute, whether or not the court attempts to correct the statement, because damage to the defendant's rights and to the system more generally can occur from the moment the perjury occurs. *Id.*

Collectively, these cases reflect a judicial acknowledgment that false testimony offered by the state has the potential to cause great prejudice to the accused and corrupts the "truth seeking function of the trial process." *Agurs*, 427 U.S. at 104 (1976). As discussed below, the potential for prejudice to the accused and corruption of the courts truth-seeking function is heightened where the state's perjury stems from a forensic expert, who is perceived to speak as a

matter of objective scientific truth. The potential for prejudice peaks when that forensic expert's perjury gives credibility to a non-credible witness, such as a snitch, or a potential co-conspirator, or someone who has received immunity or other consideration for their testimony.

II. FALSE FORENSIC TESTIMONY MATERIALLY IMPAIRS A DEFENDANT'S RIGHT TO A FAIR TRIAL

Unfortunately, reports abound of wrongful convictions procured in part or in full using false testimony by state forensic experts. In a recent study of exonerations, forensic scientists testifying as experts for the government committed perjury in a shocking twenty-four (24) cases. Gross et al., 95 J. Crim. L. & Criminology at 544. Perjury by scientific experts is particularly troubling, because, as courts have realized since the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceutical*, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." 209 U.S. 579, 595 (1993); *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("[E]xpert testimony may be assigned talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to weigh the value of such evidence against its potential to mislead or confuse."); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975) ("an opinion that claims a scientific basis is apt to carry undue weight with the trier of fact"); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) ("scientific proof may . . . assume a posture of mystic infallibility in the eyes of the jury or laymen"); Michael Mann, *The CSI Effect: Better Jurors Through Television and Science?*, 24 Buff. Pub. Int. L. J. 211, 235 (2006) (discussing today's unfortunate legal atmosphere where "the use of science, DNA in particular, is required to fix an injustice"); Scott Bales, *Turning the Microscope Back on Forensic Scientists*, 26 Litig. 51, 51 (2000)

("[P]rosecutors, defense attorneys, and judges agree that scientific evidence can powerfully affect—and often determine—the outcome in criminal cases.").

Reports in the popular media have detailed the malfeasance caused by shoddy forensic work, and have reported the exonerations of those wrongfully convicted based on false or misleading expert testimony.[7] One such case concerns Joyce Gilchrist, formerly a scientist at the Oklahoma City Police Laboratory. Gilchrist started working at the lab in 1980 and during her tenure at the Oklahoma City Police Laboratory, Gilchrist testified in more than one thousand criminal cases.[8] Already early in her career, there were warning signs that her forensic work was substandard. For example, "publicly rebuked in several judicial opinions and attacked by other forensic scientists." Paul C. Gianelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 Fordham L. Rev. 1493, 1500 (2007). For example, "In 1987, the Southwestern Association of Forensic Scientists disciplined Ms. Gilchrist for violations of its ethical code." *Pierce v. Gilchrist*, 359 F.3d 1279, 1283 (10th Cir. 2004). "Yet, despite this notoriety, she worked for another decade, even receiving commendations and promotions." Gianelli, 76 Fordham L. Rev. at 1500. In a 2002 report by cbsnews.com, her testimony helped to send 23 people to death row, 11 of which were executed.[9] Among the exonerated freed after Gilchrist's malfeasance was exposed was Jeffrey Pierce.[10] Pierce was convicted of raping and sodomizing a women in her own apartment based in part on Gilchrist's testimony that the hairs found in the apartment matched Pierce's hair.[11] In 2001, the FBI analyzed the hairs and confirmed that

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[7] Convicted Murderer Is Freed in Wake of Tainted Evidence, N.Y. Times, May 22, 1007, available at http://www.nytimes.com/2007/05/22/us/exonerate.html?scp=2&sq=joyce+gilcrist&st=nyt (detailing the release of a prisoner who was convicted based on false and misleading testimony from Joyce Gilcrist, the discredited police chemist in Oklahoma City, OK.)

[8] http://www.innocenceproject.org/Content/235.php (visited May 12, 2008).

[9] *Under The Microscope: Forensic Scientist Accused Of Mishandling Cases, available at* http://www.cbsnews.com/stories/2001/05/08/60II/main290046.shtml (visited May 12, 2008).

[10] http://www.innocenceproject.org/Content/235.php (visited May 12, 2008).

[11] *Id.*

Gilchrist's testimony was inaccurate and that the hairs "preliminarily matched a felon in Oklahoma."[12] Pierce was freed after spending 15 years in prison for his wrongful conviction.

Gilchrist is not the only example of a state forensic expert who went to great lengths to secure convictions of the wrongfully-accused. In West Virginia, Trooper Fred Zain, the former head serologist of the state police crime laboratory, "falsified test results in as many as 133 cases from 1979 to 1989." Gianelli, 76 Fordham L. Rev. at 1497. In 1993, a West Virginia prosecuting attorney initiated a judicial investigation into Zain's work and as a result of the investigation and a report that arose from the investigation, which the West Virginia Supreme Court of Appeals found correctly concluded that "Trooper Zain's pattern and practice of misconduct completely undermined the validity and reliability of any forensic work he performed or reported." *In re Investigation of the W.Va. State Police Crime Lab., Serology Div.*, 190 W.Va. 321, 324 (1993).

Among the wrongfully convicted Zain helped imprison is James Richardson.[13] Richardson was convicted of raping and murdering a woman and then setting her house on fire in large part based because Zain's testimony linked Richardson to the crime with semen evidence and excluded three other suspects.[14] After finding Richardson guilty, the jury "handed down a sentence of life imprisonment without parole based."[15] Seven years later, DNA testing proved that Zain's testimony was wrong, which led to the vacating of Richardson's conviction and the state did not retry him.[16]

Courts, such as the 10th Circuit Court of Appeals, have also permitted claims for damages under 28 U.S.C. § 1983 to proceed against state forensic scientists. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1285-1297 (10th Cir. 2004). In *Pierce*, for example, the 10th Circuit

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[12] *Id.*
[13] http://www.innocenceproject.org/Content/244.php (visited May 12, 2008).
[14] *Id.*
[15] *Id.*
[16] *Id.*

implied that a state forensic chemist was a state actor, or acted under color of state law, when she made false reports to support an arrest warrant. *Id.* at 1298. The Court also denied her qualified immunity defense, in part because "no one could doubt that the prohibition on falsification or omission of evidence, knowingly or with reckless disregard for the truth, was firmly established as of 1986." *Id.* at 1298. Although the forensic chemist in *Pierce* supplied false information to support an arrest warrant and not a conviction, the Court emphasized that there is no "reason to distinguish between falsifying evidence to facilitate a wrongful arrest and engaging in the same conduct several days later to induce prosecutors to initiate an unwarranted prosecution." *Id.* at 1296.

While judges have a greater chance at effectively regulating inaccurate and improper expert testimony by strictly fulfilling their "gatekeeper" function, they cannot easily identify forensic expert perjury before it happens or fix the damage it does after the fact. Studies of juror behavior further confirm that misleading—or even just dense testimony—by a forensic expert can have a deep impact on jurors in criminal trials. For example, some studies have suggested that, where the subject matter of a witness' testimony is complex or difficult to understand, jurors focus on a witness' credentials rather than on the quality of their argument. Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 Psychol. Pub. Pol. & L. 267, 273 (2001) (summarizing heuristic models of persuasion studies). That is, jurors considering scientific testimony may focus "on the perceived expertise and trustworthiness of the communicator rather than the quality of the message." *Id.* Demonstrating the extraordinary power of scientific evidence, another study found that, in their survey of jurors, "approximately one-quarter of previous jurors would have changed their verdict to not guilty had scientific evidence not been submitted." Tara Marie La Morte, *Sleeping Gatekeepers: United States v. Llera Plaza and the*

Unreliability of Forensic Fingerprinting Evidence Under Daubert, 14 Alb. L.J. Sci. & Tech. 171, 208-09 (2003) (summarizing Joseph L. Peterson et al., *The Uses and Effects of Forensic Science in the Adjudication of Felony Cases*, 32 J. Forensic Sci. 1730, 1748 (1987)). As a result, "the authors predicted that '[t]he presence of forensic science evidence, regardless of the certainty with which it connects the defendant with the crime, is predicted to result in higher rates of conviction.'" *Id.* And a 1998 public opinion poll found that, while only 19 percent of Americans had a great deal of confidence in courts and the legal system, 40 percent expressed a great deal of confidence in the scientific community. Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 Yale L.J. 1050, 1072 (2006) (summarizing poll conducted by National Opinion Research Center).

All of these studies merely confirm what we should already know: perjury — or even careless testimony — by a forensic scientist undermines the integrity of the criminal justice system and prejudices the accused not only because of the lie, but also because the lie is shrouded in the appearance of scientific truth and communicated by one perceived to be objective and trustworthy. This explains why the U.S. Supreme Court has charged trial court judges with carefully judging the admissibility of scientific evidence and why all actors in the criminal justice system acknowledge the pivotal role played by scientific experts. It may also explain why a substantial number of wrongful convictions show perjury by the state to be a contributing factor. As discussed below, courts should be particularly solicitous where perjured scientific testimony corroborates characteristically unreliable testimony, such as that given by snitches.

III. THE UNRELIABILITY OF ACCOMPLICE WITNESS TESTIMONY IS EXACERBATED BY FORENSIC EVIDENCE THAT FALSELY CORROBORATES OTHERWISE UNSUPPORTABLE TESTIMONY

It is "widely accepted" that where, as here, the prosecution has "condition[ed] leniency" on cooperation in criminal cases, the situation "is rife with the potential for abuse." R. Michael Cassidy, *"Soft Words of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 N.W.U. L. Rev. 1129, 1130 (2004). Not only is there a potential for abuse, statistics have shown that abuse is prevalent. For example, the work of the Innocence Project has revealed that "[i]n more than 15% of cases of wrongful conviction overturned by DNA testing, an informant or jailhouse snitch testified against the defendant."[17] Similarly, Gross, et al.'s study of exonerations exposed that in at least seventeen (17) exoneration cases "the real criminal lied under oath to get the defendant convicted." Gross, et al., 95 J. of Criminal L. & Criminology at 543; *see also* Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 87 & n.121 (2007) (identifying cases where the informant "had ulterior motives beyond seeking special treatment from law enforcement," *i.e.*, "DNA testing later revealed that they were the actual perpetrators").

Promises of leniency affect different types of witnesses in different ways. For example, one type of witness, exemplified by Jason Smith, is the "accomplice witness," *i.e.*, a "joint venturer" in the crime who, following detection and/or apprehension "agree[s] to testify against his confederates in exchange for leniency." Cassidy, 98 N.W.U. L. Rev. at 1133. As noted by Bedau & Radelet, "[t]he arrest of accomplices creates a greater incentive for perjury in [potential capital cases] than does the arrest of accomplices in other felony cases, for in the latter the accomplice is not at risk for a death or life sentence." Bedau & Radelet, 40 Stanford L. Rev.

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[17] http://www.innocenceproject.org/understand/Snitches-Informants.php (visited May 7, 2008).

at 61 n.184. "For a criminal defendant or target facing a lengthy prison sentence, or even death, lenient treatment will likely be the more valued form of compensation." George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepperdine L. Rev. 1, 16 (2000) (discussing lenient treatment in the context of departures under the U.S. Sentencing Guidelines).

Another type of witness that exchanges testimony for leniency is the "jailhouse informant." Cassidy, 98 N.W.U. L. Rev. at 1133-34. Jailhouse informants are incarcerated prisoners who have overheard another person make admission about criminal activity and who agree to testify about the overheard confession at that person's upcoming trial. *See id.* at 1134. Their incentives to pursue leniency largely are the same as those facing accomplice witnesses.

Collectively, accomplice witnesses and jailhouse informants are referred to as "snitches." *See* Rob Warden, *Illinois Death Penalty Reform: How it Happened, What it Promises*, 95 J. Crim. L. & Criminology 381, 382 (2005) (defining the term "snitch testimony" broadly to include jailhouse informants, accomplice witnesses, as well as "other witnesses who might be motivated to lie in order to protect friends or relatives").[18]

Snitch testimony is "the leading cause of wrongful convictions in U.S. capital cases."[19] Between the time capital punishment was resumed during the 1970s and a study of snitch testimony conducted in Winter 2004-05, there had been 111 exonerations and of those, 45.9% of the wrongful convictions were based on false snitch testimony.[20] The work of the

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[18] *Cf.* Daniel C. Richman, *Cooperating Clients*, 56 Ohio State L.J. 69, 79 n.43 (1995) (recognizing that one author defines "informant" as "the type of 'informer' who has participated in the offense he reports," but concluding: "It seems fair to say that a criminal defendant who agrees to give the government information about his associates in exchange for leniency can safely be called a "snitch" or "informer" without fear of terminological inexactitude."); Daniel B. Yaeger, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 Wash. U.L.Q. 1, (1993) (reading the reference to "snitch" as used Justice Marshall's *Roberts v. United States*, 445 U.S. 552 (1980) dissent as "most apt when applied to . . . someone who betrays a comrade").

[19] http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf (visited May 7, 2008).

[20] *Id.*

Network's members also has helped expose the problem of snitch testimony as a major source of wrongful convictions in both capital and non-capital cases. At least one study of DNA exonerations has "shown that snitches lie on the stand."[21] In fact, "[i]n more than 15% of cases of wrongful conviction overturned by DNA testing, an informant or jailhouse snitch testified against the defendant."[22]

The use of snitch testimony such as this presents an "obvious dilemma." Lillquist, 41 U. Richmond L. Rev. at 917. With respect to accomplice witnesses specifically, they "have first-hand knowledge of the crime." *Id.* On the other, when offered leniency, "they have an obvious incentive to either exaggerate the conduct or statements of the defendant or, if they are sufficiently sophisticated, to wholly fabricate their testimony against the accused." *Id.* at 918. Moreover, cross-examination can be insufficient to determine whether cooperators are telling the truth because "unlike uncharged lay witnesses, the cooperators have compelling incentives to pin responsibility on [the accused]. Their future literally hangs in the balance, based on their ability to maintain a consistent story." Alexandra Natapoff, Comment: *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 124 (2006).

Any discussion of how to balance the competing merits of this "obvious dilemma" is more than just an intellectual exercise — it frequently means the difference between life and death. One of the many examples of this uncovered through the efforts of Innocence Network members is the case of Ron Williamson and Dennis Fritz. In 1988, Williamson and Fritz were convicted of the murder of Debra Sue Carter, who had been raped and killed in her apartment.[23] A snitch who testified that she heard incriminatory remarks by Williamson was one of the key prosecution witnesses in the case against Williamson. *See* Paul C. Giannelli, *The*

[21] http://www.innocenceproject.org/understand/Snitches-Informants.php (visited May 7, 2008).
[22] *Id.*
[23] http://www.innocenceproject.org/Content/295.php (visited May 9, 2008).

Innocent Man, 22-WTR Crim. Justice 46, 46 (2008) (recounting Williamson's story). Based in large part on this testimony, Williamson was convicted of Carter's rape and murder and sent to death row.[24] Through DNA evidence, Williamson and Fritz — whose alleged confession to the crimes were reported by a snitch "one day before the prosecution would have been forced to drop the charges against Fritz" — were exonerated and they were released in April 1999.[25] At one point during Williamson's incarceration, he had come within five days of execution.[26] Eventually, it was proved that another witness who had testified against Williamson was the actual killer. *See* Paul C. Giannelli, *The Innocent Man*, 22-WTR Crim. Justice 46, 46 (2008) (recounting Williamson's story); *see also* Garrett, 108 Columb. L.R. at 93 ("In Ron Williamson's case, the actual perpetrator was a witness testifying for the State at trial.").

Verneal Jimerson also was sent to death row based on false snitch testimony.[27] Jimerson was convicted and sentenced to death in 1985 for the 1978 abduction and murder of a young couple.[28] The young woman had been raped.[29] A woman, who was a purported accomplice to the crime, implicated four men including Jimerson.[30] The purported accomplice recanted and the charges against Jimerson were dropped—but she later claimed the original version of her story was accurate. Charges were filed against Jimerson again, and he was tried, convicted, and sentenced to death.[31] In exchange for her testimony, the eyewitness was released from prison, "where she was serving 50 years for her supposed role in the case."[32] Eventually, the biological evidence from the trial was subjected to DNA testing, which excluded Jimerson

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] http://www.innocenceproject.org/Content/184.php (visited May 9, 2008).
[28] *Id.*
[29] *Id.*
[30] http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf (visited May 9, 2008).
[31] http://www.innocenceproject.org/Content/184.php (visited May 9, 2008).
[32] http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf (visited May 9, 2008).

and the other three men implicated by the purported accomplice.[33] Jimerson was released in 1996.[34]

Notwithstanding that "[h]orror stories abound of . . . paid informants who frame innocent people in pursuit of cash or lenience for their own crimes," Alexandra Natapoff, Comment: *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 107-08 (2006), at Siller's first trial, the jury had no reason to doubt Smith's testimony because it was corroborated by Serowik. Serowik testified that he tested Smith's pants and none of the victim's blood was found on the pants. The prosecutor emphasized this testimony several times during the trial, including at closing where he stressed that Smith could not have been involved in the assault because "whoever did this vicious beating probably got ***some*** blood spattered on the clothes." (T1 at 728) (emphasis added).

At Siller's second trial, Serowik again initially testified that he tested Smith's pants and none of the victim's blood was found on the pants—a point highlighted in the prosecutor's opening statement. Serowik, however, was forced to change his testimony after he was asked to test and analyze one particular stain on the back of Smith's pants. That spot turned out to be blood—and the blood matched that of the victim.[35] The prosecutor admitted that Serowik's error was "an embarrassing situation for the Cleveland Police Department" as well as for the prosecutor's office, that the new test results raised questions about Smith's credibility, and that "that one spot of evidence puts a date, unlike the fingerprint, concerning him in the house." But he ultimately asked the jury to ignore all of this because Smith could not have

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[33] http://www.innocenceproject.org/Content/184.php (visited May 9, 2008).
[34] *Id.*
[35] T2 at 2330:6-9.

assaulted the victim. He argued that had Smith assaulted her, "I would submit to you that there would be more blood and it would be on the front of his pants." (T2 at 3535).[36]

But now we know the victim's blood was indeed on the front of Smith's pants. In addition to the single drop of the victim's blood about which Serowik testified and that Smith had to try and explain away at Siller's second trial, there are at least 20 additional blood stains on Smith's pants.[37] Only a fraction of these have been submitted to DNA analysis,[38] but the test results so far are shocking. The victim's blood is on the front of Smith's pants.[39]

According to the Opinion & Order denying Siller's Motion for New Trial, Serowik's perjured testimony did not matter and that the newly-discovered spots of the victim's blood on the front of Smith's pants—which the prosecutor suggested would be present "had" Smith participated in the assault—could be dismissed as nothing more than "cumulative" evidence. Opinion & Order at 4. To support its finding, the Trial Court highlighted that additional testing occurred during Siller's trial and that the jury knew that this additional testing "reveal[ed] even more of the victim's blood than was previously stated or known in the record," but Siller was still convicted. *Id.*

While the Trial Court's recitation of the facts technically is true, its conclusion that the evidence is cumulative is wrong. Evidence is not cumulative when it "brings to light some new and independent truth of a different character." *Gandolfo v. State*, 11 Ohio St. 114, 119 (Ohio 1860). As illustrated below, the newly-discovered evidence relating to the existence

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[36] At the same time, second trial, prosecutor Bombik also philosophized that "I can't help but wonder if three years ago, I had evidence against Jason Smith having one spot of the victim's blood on his pants, whether he would have got three years." (Id. at 3658). The prosecutor then admitted that "that one spot of evidence puts a date, unlike the fingerprint, concerning him in the house" and suggested that Smith would have received a larger sentence than three years. (Id.).

[37] *See* Blake Aff. ¶ 5.

[38] Spalding Letter, June 9, 2007, p. 3; Blake Aff. ¶ 5 .

[39] FSA Report 33-34; Supplemental Aff. of Edward Blake at ¶ 3.

of the victim's blood on Smith's pants brings to light new and independent truth of a different character than what was presented to either the first jury or the second jury.

This is patently clear with respect to Siller's first trial. At Siller's first trial, Serowik testified that he found none of the victim's blood on Smith's clothes and the prosecutor emphasized that because the victim's blood was not on Smith's clothes, Smith could not have taken part in the assault. We now know this testimony was incorrect—the victim's blood was on Smith's clothes.

As illustrated by the evidence that was presented at the second trial, the DNA evidence that before was not available is both new and of an "independent character" than the evidence presented at Siller's second trial. At Siller's second trial, Serowik initially presented the same testimony he did at the first trial—none of the victim's blood was on Smith's pants. And initially, the prosecutor highlighted the purported absence of blood on Smith's pants. What was presented to the jury was as follows: Serowik's testimony that "re-tested" every stain on the back of the pants and that other than one that was a blood spot of the victim's blood, there were no other bloodstains. (T2 at 2714-15). This testimony gave credibility to the prosecutor's attempt to explain-away that a spot of the victim's blood was found on Smith's pants—that had Smith participated in the assault, he would have had blood on the ***front*** of his pants.

While one spot of the victim's blood on the back of Smith's pants indeed was "even more of the victim's blood than was previously stated or known in the record," we now know that this was incorrect—Smith did have the victim's blood on the front of his pants—something that neither jury ever heard. Similarly, neither jury heard that there are at least 20 blood spots on Smith's pants. While eleven of these spots remain to be tested for a determination as to whether one or more are the victim's blood, the testing that has been done demonstrates that at a minimum there are five spots of the victim's blood on the front of Smith's

pants. This is "of a different character" because what the jury heard is that Smith only had blood on the back of his pants and the prosecutor's argument that Smith could not have participated in the assault because he had none of the victim's blood on the front of his pants.[40] Thus, Siller was denied due process based on the newly discovered evidence.

Siller also was denied due process because the Trial Court adopted an unduly high standard for obtaining relief when there is newly discovered forensic evidence that could have altered the outcome of the trial—that the forensic testimony "eliminate" the accused as the victim's killer. Opinion & Order at 6. The ultimate inquiry under the Fourteenth Amendment is whether the accused received a fair trial. Here, the answer to that question is "no."

As illustrated in Siller's second trial, the jury was particularly interested in the blood evidence, specifically whether the victim's blood was on Smith's pants. What was presented to the jury at that trial is as follows: (1) all of the spots on the back of Smith's pants were tested and only one was a spot of the victim's blood; and (2) had Smith participated in the assault, he would have blood on the front his pants. That evidence is fundamentally different from what we now know: (a) there are at least three spots of the victim's blood on the back of Smith's pants; (b) there are at least five spots of the victim's blood on the front of Smith's pants; and (c) there remain other blood spots on the pants that need to be DNA-tested.

While there may be room for argument as to whether the difference between no blood and one drop on the back of an alleged assailant's pants is *de minimis*, the same cannot be said of multiple spatters of blood on the front of an alleged assailant's pants ***as well as*** multiple spatters of blood on the back of an alleged assailant's pants. As illustrated at Siller's second trial, the jury was particularly interested in the evidence about whether the victim's blood was on Smith's pants. Had the jury known that there was more than one spot of the victim's blood on

[40] We also now know that there was more than just the one spot of blood on the back of Smith's pant that the jury heard about in Siller's second trial, which in and of itself is new evidence of a different character.

Smith's pants, they may well have justifiably associated the multiple stains with Smith's active participation in the assault that led to Zolkowski's death. Given the inherent risks in using snitch testimony, the importance of the newly-discovered evidence of a different character, and the second-trial jury's demonstrated interest in the blood evidence, due process requires that Siller be given the opportunity to re-present his case to a jury so that he is assured of a fundamentally fair trial.

Moreover, in denying Siller relief, the trial court relied on the "overwhelming amount of evidence [that] points to Siller as the principal perpetrator." The trial court's analysis does not account for the fact that the "overwhelming evidence" against Siller derived from Smith. The question is whether given the combination of snitch testimony *and* forensic malfeasance, Siller received a fair trial. The eliminate-the-accused-as-a-suspect is such a high bar, it is unknown whether anyone could ever meet it. As discussed above, snitches lie. Under this new standard, any time a lying snitch implicates an accused in a crime, that accused could never get a new trial, *i.e.*, because there would be "some" evidence that the accused should still be considered a suspect. Simply, this new standard impermissibly conflicts will well-established Fourteenth Amendment jurisprudence regarding the right of the accused to a fair trial and, therefore, it should be expressly rejected by this Court; this Court should reverse the Trial Court and grant Siller a new trial.

CONCLUSION

When there is false testimony by a prosecution-retained forensic expert, the accused is prejudiced. This prejudice is compounded when the false testimony corroborates otherwise- unreliable snitch testimony, not only because snitches have an incentive to exaggerate their testimony, but because research illustrates that snitches do lie — and case law proves it. For these reasons, Amicus Curiae respectfully asks this Court to reverse the judgment of the Trial Court and grant Mr. Siller's motion for a new trial — or at the very least, reverse the judgment of the Trial Court and remand the case with instructions to conduct an evidentiary hearing to explore the newly-discovered DNA evidence and its impact on the credibility of both Joseph Serowik's and Jason Smith's testimony.

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