No. 05-6049
IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JIMMIE RAY SLAUGHTER,	**DEATH PENALTY CASE**
Petitioner,	**EMERGENCY**
v.	**No. 05-6049**
MIKE MULLIN, Warden of the Oklahoma State Penitentiary,	
Respondent.	**EXECUTION SCHEDULED MARCH 15, 2005**

AMICUS CURIAE BRIEF IN SUPPORT OF JIMMIE RAY SLAUGHTER'S EMERGENCY APPLICATION FOR LEAVE TO FILE A SECOND HABEAS CORPUS PETITION

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IDENTITY OF AMICUS AND AUTHORITY TO FILE

The Innocence Project ("the IP" or "the Project") is a non-profit legal organization and clinical program of the Benjamin N. Cardozo School of Law located in New York, New York. Since its 1992 founding by professors Barry Scheck and Peter Neufeld, the IP has helped to pioneer the practice of post-conviction DNA testing as a means to exonerate the wrongfully convicted. The Project has been directly or indirectly involved in over half of the 157 post-conviction exonerations in the United States. The IP has also advocated for the passage of state post-conviction DNA testing statutes and been actively involved in reform efforts designed to address the root causes of wrongful conviction including mistaken eyewitness identification and the use of unfounded or "junk" forensic sciences.

The IP has the authority to file this brief under Fed. R. App. P. Rule 29(a) having been granted leave to file by this honorable Court.

ARGUMENT

Jimmie Ray Slaughter should be granted leave to file a second habeas petition because newly discovered evidence raises serious questions about Mr.

Slaughter's innocence as well as the integrity of the jury verdict rendered against him. It would constitute a fundamental miscarriage of justice to execute Mr. Slaughter without a single court meaningfully reviewing the merits of the scientific evidence supporting his actual innocence claim. See Calderon v. Thompson, 523 U.S. 538, 559 (1998) (credible claims of actual innocence overcome procedural bar); U.S. v. Cervini, 379 F.3d 987, 992 (10th Cir. 2004) (new reliable evidence of actual innocence overcomes procedural bar).

New and reliable evidence has come to light that demonstrates that Mr. Slaughter's jury was presented with "false facts" by the prosecution at trial. These "facts"appeared to strongly support an inference of guilt, but now have been objectively disproved.

First, the jury heard testimony and argument that microscopic hair comparison proved that the hair of Mr. Slaughter's co-worker Octovia Vicki Mosely was found at the crime scene and that Mr. Slaughter was the only person who could have left it there. See, e.g., Tr. 124-25 (October 3, 1994: argument of Richard Wintory, prosecutor). New DNA evidence conclusively demonstrates that the hair in question could not have come from Ms. Mosely. (See Exhibit 6 of Mr. Slaughter's proposed "Second Petition for a Writ of Habeas Corpus"). Thus, the prosecutor's damning accusation, apparently supported by forensic evidence, has

now been revealed to be false. No court has yet considered the impact that this "false fact" had upon Mr. Slaughter's jury and whether it contributed to their guilty verdict.

Second, Mr. Slaughter's jury also heard testimony and argument that Composite Lead Bullet Analysis (CBLA) proved that the bullets that killed Melody Wuertz were the from exact same source as bullets found in Mr. Slaughter's safe. See, e.g., Tr. 120 (October 3, 1994: argument of Richard Wintory, prosecutor). Since the time of Mr. Slaughter's trial, comprehensive studies have demonstrated that the entire discipline of CBLA is predicated on erroneous scientific assumptions. (See Slaughter's proposed "Second Petition for a Writ of Habeas Corpus" at 15-19; see also Slaughter's Notice of Supplemental Authority filed March 9, 2005). Thus, the inference that CBLA supports the state's theory that the bullets from Mr. Slaughter's safe came from the same source as the bullets that killed Melody Wuertz is entirely false. Once again, no court has directly contemplated what impact this ostensibly inculpatory (but actually false) forensic evidence had upon the deliberations of Slaughter's jury and whether this false fact contributed to the guilty verdict.

The impact of "science" on juries is well-known. See, e.g., Bennett L. Gershman, Misuse of Scientific Evidence By Prosecutors, 28 Okla. City U. L.

Rev. 17, 29-30 (2003) ("The expert, more than any other witness who testifies in a U.S. courtroom, possesses the greatest capacity to mislead the jury. In tandem with a prosecutor who zealously seeks a conviction, the expert often single-handedly can secure that conviction."). This introduction to the jury of false inferences of guilt supported by unreliable scientific testimony must be kept in mind when examining the core issue underlying actual innocence claims – reasonable doubt. See Cervini, 379 F.3d at 991 ("an actual innocence claim must be viewed in light of the reasonable doubt standard.").

In classic newly-discovered-evidence-of-innocence situations, the new evidence was never heard by the original jury and the reviewing court considers the new evidence in light of all of the other evidence of guilt. See, e.g., Herrera v. Collins, 506 U.S. 390, 417-19 (1993) (assuming, without deciding, that a persuasive showing of actual innocence would justify habeas relief even if otherwise procedurally barred; evaluating new exculpatory affidavits "in light of the proof of petitioner's guilt at trial"). However, in a "false fact" situation like Mr. Slaughter's, the new evidence demonstrates that the jury's actual deliberations and guilty verdict were potentially tainted by objectively discredited testimony and argument. In this situation, a reviewing court must consider whether these "false facts" actually contributed to the jury's guilty verdict.

Since "false facts" directly implicate the integrity of the jury's deliberations, the reviewing court's approach can be thought of as analogous to review of an erroneous jury instruction. In that situation, the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial, was surely unattributable to the error." Sullivan v. Louisiana, 503 U.S. 275, 279 (1993) (emphasis in original). To proceed without reference to the impact of this false evidence (or an erroneous instruction) on the jury's verdict would effectively nullify the actual jury's role in finding guilt. Given that the Sixth Amendment requires a jury to ultimately decide innocence or guilt, refusing to consider the impact of "false facts" on Slaughter's actual jury would violate the Constitution. See, e.g., id. ("to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that findings to support that verdict might be – would violate the jury-trial guarantee.").

Thus, the particular nature of Mr. Slaughter's actual innocence claim demands to be heard and fully vetted by the district court. At the very least, the death sentence should not proceed until the role these "false facts" played in Mr. Slaughter's trial and the impact they had upon his jury's deliberations has been reviewed. Fundamental principles of justice and the United States Constitution

demand no less.

Therefore, for the reasons given, the Innocence Project prays that this honorable Court grants Mr. Slaughter's application for leave to file a second habeas petition.

Respectfully Submitted,

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CERTIFICATION

I certify that a copy of this Amicus Curiae Brief in Support of Jimmie Ray Slaughter's Emergency Application for leave to file a second habeas corpus petition was this 11th day of March, 2005 mailed by first-class United States Mail, postage pre-paid, to counsel for Respondent, at the following address. In addition, an electronic PDF copy was sent to the Attorney General's last known e-mail address.

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