No. 06-5247

IN THE

Supreme Court of the United States

JOHN F. FRY,

Petitioner,

v.

CHERYL K. PLILER, WARDEN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Network ("Network") is an association of thirty-six member organizations dedicated to providing *pro bono* legal and investigative services to indigent prisoners whose actual innocence may be established by post-conviction evidence.[2] The Network currently represents hundreds of prisoners with innocence claims in all fifty States and the District of Columbia. The Network also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system.

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[1] Pursuant to Rule 37, a letter of consent from each party accompanies this filing. Pursuant to Rule 36, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] The Network's members include: Arizona Justice Project; Association in Defense of the Wrongly Convicted; Barbara C. Salken Criminal Justice Clinic; California & Hawaii Innocence Project; Center on Wrongful Convictions; Cooley Innocence Project; Downstate Illinois Innocence Project; Florida Innocence Initiative; Georgia Innocence Project; Griffith University Innocence Project; I.U. School of Law Clinic, Wrongful Conviction Component; Idaho Innocence Project; Innocence Institute at Point Park University; Innocence Project New Orleans; Innocence Project Northwest Clinic; Innocence Project of Minnesota; Iowa/Nebraska Innocence Project; Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project; Maryland Office of the Public Defender Innocence Project; Medill Innocence Project; Mid-Atlantic Innocence Project; Midwestern Innocence Project; New England Innocence Project; North Carolina Center on Actual Innocence; Northern Arizona Justice Project; Northern California Innocence Project; Office of the Public Defender, State of Delaware; Rocky Mountain Innocence Project; Second Look Program; Texas Center for Actual Innocence; Texas Innocence Network; The Innocence Project, Inc.; The University of Leeds Innocence Project; University of Melbourne Innocence Project; Wesleyan Innocence Project; and Wisconsin Innocence Project.

The Network thus has a compelling interest in ensuring that a robust harmless error standard is applied on habeas review, especially when the case involves a federal constitutional violation resulting from the exclusion of reliable evidence of third-party guilt.

SUMMARY OF ARGUMENT

A federal constitutional error in a state court criminal proceeding should be reviewed at least once, whether by the state court or a federal habeas court, to determine whether that error was "harmless beyond a reasonable doubt" under *Chapman v. California*, 386 U.S. 18, 24 (1967). Both *Chapman* and *Brecht v. Abrahamson*, 507 U.S. 619 (1993), support the conclusion that a federal habeas court must review a federal constitutional error to determine if it was harmless beyond a reasonable doubt when the state court has failed to conduct such a review. This conclusion also best furthers the goals of habeas corpus, including the protection of innocent persons, because more rigorous harmless error review enhances the reliability of convictions. The interests of comity and finality that led the Court in *Brecht* to apply a more lenient harmless error review do not apply when the state courts have not conducted a *Chapman* review in the first instance.

Even under the *Brecht* standard, however, the error in this case cannot be said to have been harmless. Defendant was convicted in his third trial, after two previous juries hung and after the jury that convicted him deliberated for five weeks (once reporting themselves deadlocked). The evidence excluded was critical in that it was the only testimony from an unbiased witness that a third party confessed to committing the two murders for which Fry was tried and convicted.

A rigorous and meaningful review for harmless error is a crucial aspect of protecting the rights of innocent persons. The examples from other cases discussed below demonstrate that a defendant may be innocent notwithstanding that the evidence against the defendant adduced at trial appears to be overwhelming. Moreover, meaningful harmless error review is especially critical in a case like this one in which the federal constitutional error consisted of exclusion of vital evidence of third-party guilt from an unbiased witness. Evidence of third-party guilt is often a crucial factor in demonstrating a defendant's innocence, providing the jury with a different lens through which to view all of the evidence in the case. Many cases in which a defendant was wrongfully convicted and later exonerated involve critical third-party evidence that was not before the jury when it rendered its verdict. To the extent that any harmless error analysis is appropriate, the exclusion of such evidence should be reviewed to determine whether it was harmless "beyond a reasonable doubt" rather than whether it had a "substantial and injurious effect" on the verdict.

ARGUMENT

I. The *Chapman* Harmless Error Standard Rather Than the *Brecht* Standard Should Be Applied by a Federal Habeas Court When the State Court Did Not Conduct a *Chapman* Review.

The *Chapman* harmless error standard should be applied by a federal habeas court when the state court has not conducted a *Chapman* harmless error analysis in the first instance. If the state court identifies a federal constitutional error, this Court's precedent in *Chapman* requires that the state court "be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at

24. The Court in *Brecht v. Abrahamson* reaffirmed that state courts must apply the *Chapman* reasonable doubt standard when determining whether a federal constitutional error is harmless.[3] 507 U.S. 619, 636, 654 (1993). It would be contrary to the underpinnings of both *Chapman* and *Brecht* to deny review under the *Chapman* standard when the state court fails even to identify a federal constitutional error and that error is identified for the first time in federal court.

As this Court has recognized in evaluating the contours of harmless error on habeas review, one of the core purposes of the writ of habeas corpus is to protect innocent persons:

> [O]ur conclusion is consistent with the basic purposes underlying the writ of habeas corpus. As we have said, we are dealing here with an error of constitutional dimension—the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person.

O'Neal v. McAninch, 513 U.S. 432, 442 (1995); *see also id.* (discussing one purpose of habeas review as "protect[ing] individuals from unconstitutional convictions and help[ing] to guarantee the integrity of the criminal process by assuring that trials are fundamentally fair" (citing Roger J. Traynor, *The Riddle of Harmless Error* 23 (1970)). The scope and

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[3] A review for harmless error under *Chapman* requires the reviewing court to determine whether the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. Under *Brecht*, by contrast, "the standard for determining whether habeas relief must be granted is whether . . . [the] error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Under the *Kotteakos* harmless error standard, an error may be deemed harmless if the reviewing court finds that "the error did not influence the jury, or had but very slight effect," 328 U.S. at 764, and that "the judgment was not substantially swayed by the error," *id.* at 765.

rigor of harmless error review has direct implications for the reliability of convictions and in turn the paramount goal of protecting the innocent:

> If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side—the possibility that an error may have caused the conviction of an actually innocent person—is sufficient by itself to permit plenary review of the prisoner's claim. . . . [T]he harmless-error standard often will be inextricably intertwined with the interest of reliability.

Brecht, 507 U.S. at 652 (O'Connor, J., dissenting).

This critical interest in reliable verdicts and avoiding the punishment of innocent persons militates strongly in favor of continued adherence to the constitutional requirements announced in *Chapman.* Every federal constitutional error should be reviewed at least once to determine whether the error can be said to be harmless beyond a reasonable doubt under the *Chapman* standard.

The type of constitutional error that occurred here—exclusion of testimony of third-party guilt—strikes at the heart of a defendant's right to present a meaningful defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). As this Court has recognized, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding that exclusion of evidence of third-party confession that bore persuasive assurances of trustworthiness and was "critical to [defendant's] defense" violated "traditional and fundamental standards of due process"); *see*

also Washington v. Texas, 388 U.S. 14, 16 (1967) (holding that exclusion of "testimony [of third-party guilt that] would have been relevant and material, and . . . vital to the defense" violated Compulsory Process Clause). The state courts' erroneous failure to recognize this grave constitutional error should not deprive the defendant of a *Chapman* review to determine whether the error was harmless beyond a reasonable doubt.

Applying *Brecht* on habeas review when the state court has not first applied *Chapman* fundamentally and unfairly disadvantages the defendant and creates an undue risk that innocent persons will remain wrongfully incarcerated. Applying *Brecht* allows the state court's erroneous ruling on the merits of a federal constitutional challenge to additionally and forever deprive a defendant of a harmless error review under the *Chapman* standard. The upshot of a holding that *Brecht* applies even when no *Chapman* review has been conducted previously is that habeas relief will be denied to defendants who have suffered a federal constitutional harm through the exclusion of reliable third-party evidence, even if it cannot be said that the error was not harmless beyond a reasonable doubt.

Neither comity nor finality, the chief policy concerns cited by the *Brecht* plurality, suggests that *Brecht* should be applied when the state court has never applied *Chapman*. *Brecht*'s holding rested heavily on principles of comity and federalism. In *Brecht*, six lower courts (including three state courts) had already conducted harmless error review. 507 U.S. at 636. The *Brecht* plurality reasoned: "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*," and the state courts "often occupy a superior vantage point" for evaluating harmless error. *Id.* Accordingly, the plurality

concluded, "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." *Id.* By contrast, a *Chapman* harmless error review by a federal habeas court when the state court has failed to do so demonstrates no lack of respect for the state court. There is no call for any deference to the state court when the state court has never conducted the *Chapman* analysis in the first place.

The *Brecht* plurality also cited concerns regarding the finality of state criminal convictions and the difficulty of retrying a defendant years after the crime occurred. These concerns are at best tenuously linked to the harmless error question and in any event have been largely alleviated by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which was enacted after *Brecht* was decided. AEDPA sets strict time limitations on habeas petitions and limits second or successive petitions as well. 28 U.S.C. § 2244 (b), (d). In any event, the states' interest in finality must yield to remedying federal constitutional error. *Cf. House v. Bell*, 126 S. Ct. 2064, 2076 (2006) (discussing the procedural bar rule for defaulted claims asserted in a habeas petition, and stating that in appropriate cases "the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration") (internal quotation marks and citations omitted). This is particularly so when the constitutional error consists of the exclusion of evidence demonstrating third-party guilt.

II. The Manner in Which the Ninth Circuit Majority Applied *Brecht* in this Case Deprived the Petitioner of a Meaningful Harmless Error Analysis.

Regardless of which standard applies, the manner in which the Ninth Circuit applied *Brecht* in this case deprived Fry of a meaningful harmless error analysis. The Ninth Circuit majority concluded that "[t]he exclusion of Pamela Maples's testimony involved an unreasonable applicable of clearly established federal law, because her testimony was material and would have substantially bolstered [Fry's] claims of innocence," yet held that the exclusion of reliable testimony of third-party guilt from the only unbiased witness did not have a "substantial and injurious effect or influence in determining the jury's verdict" under *Brecht*. JA 212 (internal quotation marks and citations omitted). The majority reached this conclusion notwithstanding that Fry was convicted in the third trial after two previous juries hung and after five weeks of deliberation by the jury that ultimately convicted him, who also reported themselves deadlocked before reaching a decision. JA 211. Although other witnesses testified that Tony Hurtz confessed to committing the murders for which Fry was being tried, Hurtz's cousin Paula Maples's testimony, had it been admitted, would have been the only such testimony by an unbiased witness. JA 214 (Rawlinson, Circuit Judge, dissenting).

Against this backdrop, holding the exclusion of Maples's testimony to be harmless is untenable. *Compare Wilson v. Firkus*, 457 F. Supp. 2d 865 (N.D. Ill. 2006) (granting habeas relief based on erroneous exclusion of evidence of third-party guilt after conducting a detailed and searching harmless error review). Evidence of third-party guilt is especially potent, and a defendant's right to present

such evidence to a jury is among our most fundamental constitutional protections. *See Chambers*, 410 U.S. at 302; *Washington*, 388 U.S. at 16. Moreover, as set forth in further detail below, evidence of third-party guilt is often a crucially important factor in establishing a defendant's innocence. *See infra* Part III.A. The impact of reliable third-party-guilt testimony, especially confessions, cannot be overestimated. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. . . . Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." (internal quotation marks and citation omitted)).

Assuming without conceding that exclusion of reliable testimony of third-party guilt can ever be harmless,[4] it was not harmless in this case, regardless of whether *Chapman* or *Brecht* is applied.

III. Robust and Meaningful Harmless Error Analysis Is Necessary To Ensure That Innocent Persons Are Not Put To Death or Left To Languish in Prison for Crimes They Did Not Commit.

Real and devastating consequences result when error in the criminal justice process goes unrecognized. Innocent persons are convicted and then languish in prison for decades while the real perpetrators remain free to commit additional heinous crimes. As set forth above, one of the purposes of

[4] Although not presented by the question as to which this Court granted certiorari in this case, there is a serious question as to whether the exclusion of evidence of third-party guilt in violation of a defendant's constitutional rights constitutes "structural error" or is otherwise not subject to harmlessness review. *See generally, e.g.*, *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2563-65 (2006).

habeas corpus review in general, and harmless error review in particular, is to identify and remedy such error, but this purpose can be achieved only if review is robust and meaningful.

A. Harmless Error Analysis Is Particularly Important in Regard to the Treatment of Evidence Relating to Third-Party Guilt.

The importance of meaningful harmless error review is heightened as to errors regarding the presentation of evidence of third-party guilt. It is crucial that defendants be allowed to present evidence of third-party guilt to a jury because such third-party evidence is often a crucial factor in proving innocence. Reliable evidence that someone other than the defendant committed the crime, especially evidence that another person confessed, is highly persuasive to jurors and can have wide-ranging effects on the dynamic of a trial and the jury's deliberations. As this Court has recognized, the defendant's alternative explanation provides the jury with a different lens through which to view all of the evidence in the case, and tends to undermine the probative value of the State's evidence as well as the State's trial themes and narratives.[5]

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[5] *See generally House*, 126 S. Ct. at 2076-86 (analyzing evidence that was not presented to the jury at trial, and making a holistic judgment about the effect of that evidence along with all other evidence on reasonable jurors who were to apply the reasonable-doubt standard); *see also id.* at 2085 (reasoning that certain third-party-guilt evidence, including testimony concerning a confession, was not conclusive in isolation but, in combination with other challenges to prosecution evidence, "the evidence pointing to [the third party] likely would reinforce other doubts [in the jurors' minds] as to [the defendant's] guilt"); *Holmes v. South Carolina*, 126 S. Ct. 1727, 1734-35 (2006) ("Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party

Indeed, there are too many examples of cases where key evidence of third-party guilt was not presented to the jury for one reason or another—for example, it was undeveloped by the government, improperly withheld from the defense, or excluded at trial—and an innocent person was wrongly convicted. Ronald Cotton, for example, was tried and convicted for rape and burglary. His conviction was overturned because the trial court had excluded evidence showing that two similar crimes occurred on the same night nearby and that one of the other victims identified a different man out of a lineup, which also included the defendant. *State v. Cotton*, 351 S.E.2d 277, 278-79 (1987). Before Cotton was retried, another person confessed, but the trial judge excluded this information during the retrial, and Cotton was convicted again. Connors, Lundregan, Miller & McEwen, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 43-44 (U.S. Department of Justice/NIJ Research Report, June 1996). His appeals were unsuccessful, and he served over ten years of his sentence before DNA testing established a match with the person who had confessed earlier. *Id.* at 44. Cotton was subsequently cleared of all charges and released. *Id.*

Just as improper exclusion of third-party guilt can and does result in the conviction of innocent persons, exonerations often turn on the identification of a third-party perpetrator as well. Prosecutors, juries, and courts alike quickly grasp the powerful impact of evidence that persuasively identifies another individual as the true

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guilt has only a weak logical connection to the central issues in the case. [¶][¶] [B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.").

perpetrator. The exoneration of Jeffrey Deskovic is another compelling example. Deskovic was charged at the age of sixteen with raping, beating, and strangling a fifteen-year-old female classmate. *People v. Deskovic*, 607 N.Y.S.2d 957, 957 (N.Y. App. Div. 1994). He spent approximately nine hours alone in police custody without food. After hours of questioning, Deskovic confessed.[6]

DNA testing was conducted before trial and eliminated Deskovic as the source of the semen in the rape kit.[7] But the State argued that the semen had come from a consensual sex partner and that Deskovic was still the killer.[8] Deskovic was convicted, and his conviction was affirmed on appeal. *Deskovic*, 607 N.Y.S.2d at 957. The semen was retested in 2006 with advanced technology and was matched to a convicted murderer, who subsequently confessed.[9]

Deskovic was recently released after spending sixteen years in prison.[10] The earlier exculpatory DNA evidence was not sufficient to convince the jury or the courts of Deskovic's innocence. He was exonerated only after the presentation of affirmative evidence that another person committed the crime. After that new third-party-guilt evidence was in hand,

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[6] Innocence Project, DNA Proves Jeffrey Deskovic's Innocence 16 Years After He Was Wrongly Convicted as a Teenager (Sept. 20, 2006), http://www.innocenceproject.org/press/archive.php (last visited Jan. 20, 2007).

[7] *Id.*

[8] *Id.*

[9] Innocence Project, DNA Proves Jeffrey Deskovic's Innocence 16 Years After He Was Wrongly Convicted as a Teenager (Sept. 20, 2006), http://www.innocenceproject.org/press/archive.php (last visited Jan. 20, 2007).

[10] *Id*.

the District Attorney whose office had prosecuted Deskovic described the case as "a very dramatic reminder to all of us that the system is not infallible." Jonathan Bandler, *Freed After 16 Years*, The Journal News, Sept. 21, 2006, at 1A.

Evidence of third-party culpability has been the key factor in many other exonerations as well. For example:

- After new DNA evidence implicated another inmate, who subsequently confessed, Douglas Warney was released from prison having served nine years.[11]
- Darryl Hunt was released from prison after serving eighteen years for rape and murder because new DNA evidence implicated a third party, who subsequently confessed.[12] Notably, Hunt had earlier been denied federal habeas relief by the Fourth Circuit, despite the presentation of new DNA evidence establishing that he was not the source of semen in the victim's body. *See Hunt v. McDade*, 205 F.3d 1333 (4th Cir. 2000) (unpublished). It was only after the DNA from the semen was affirmatively linked to a known individual who confessed that prosecutors agreed that Hunt was innocent and consented to his release.[13]

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[11] Innocence Project, Case Profile of Douglas Warney, http://www.innocenceproject.org/case/display_profile.php?id=180 (last visited Jan. 20, 2007).

[12] Innocence Project, Case Profile of Darryl Hunt, http://www.innocenceproject.org/case/display_profile.php?id=142 (last visited Jan. 20, 2007); *Murder, Race, Justice, The State vs. Darryl Hunt*, http://darrylhunt.journalnow.com (last visited Jan. 20, 2007).

[13] Innocence Project, Case Profile of Darryl Hunt, http://www.innocenceproject.org/case/display_profile.php?id=142 (last visited Jan. 20, 2007); *Murder, Race, Justice, The State vs. Darryl Hunt*, http://darrylhunt.journalnow.com (last visited Jan. 20, 2007).

- Robert Clark was released from prison in 2005 after serving twenty-four years; DNA evidence implicated an individual who had been identified by Clark to police during the investigation many years before but whom police had not investigated.[14]

Because evidence of third-party guilt is so important to establishing innocence, constitutional errors that relate to the presentation of such evidence deserve particularly probing scrutiny on federal habeas review.

B. Many Individuals Have Been Exonerated Even After Courts Determined That There Was Overwhelming Evidence of Their Guilt.

In the absence of Maples's testimony regarding Hurtz's confession, Fry's case was a very close one. But even where the evidence of guilt adduced at trial appears to be overwhelming, innocent persons may be wrongfully convicted. Time and again individuals have been exonerated after the courts held that there was not only significant but overwhelming evidence of guilt. Accordingly, in an attempt to prevent wrongful convictions from standing, federal constitutional errors should be reviewed at least once under a searching *Chapman* analysis to determine whether the error is harmless beyond a reasonable doubt.

Leonard McSherry was convicted of rape and kidnapping after a six-year-old female victim positively identified him as her assailant. *People v. McSherry*, 14 Cal. Rptr. 2d 630, 632 (Cal. Ct. App. 1992) (unpublished). The girl's brother and a neighbor also positively identified McSherry. *Id.* The girl identified McSherry's car as the one

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[14] Innocence Project, Case Profile of Robert Clark, http://www.innocenceproject.org/case/display_profile.php?id=167 (last visited Jan. 20, 2007).

in which she was kidnapped and McSherry's grandparents' house as the house where the sexual assault occurred. *Id.* She provided seemingly accurate details about the interior of the home. *Id.* at 633. After the verdict but before sentencing, McSherry sought a new trial based on newly discovered evidence consisting of DNA testing, which eliminated him as the perpetrator. *Id.*

The California courts denied McSherry's appeal and petition for state habeas relief even in light of the new DNA evidence, concluding that the evidence "overwhelmingly identif[ied] appellant as the perpetrator." *Id.* at 636. Yet he was innocent, as new evidence of third-party guilt later demonstrated. McSherry was exonerated in 2001 after further DNA testing identified another inmate already serving a life-term sentence as the true attacker.[15]

The *McSherry* case is only one example of many. It is unfortunately not at all rare for the evidence in a case to appear to courts (and juries) to be "overwhelming" when the defendant is in fact innocent. For example:

- Dennis Brown was exonerated in 2001 after nineteen years in prison.[16] The courts had previously found that "[t]he evidence overwhelmingly support[ed] appellant's guilt." *State v. Brown*, C.A. No. L-82-297, 1983 WL 6945, at *10 (Ohio Ct. App. Sep. 16, 1983) (unpublished).

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[15] Innocence Project, Case Profile of Leonard McSherry, http://www.innocenceproject.org/case/display_profile.php?id=104 (last visited Jan. 20, 2007).

[16] Innocence Project, Case Profile of Dennis Brown, http://www.innocenceproject.org/case/display_profile.php?id=157 (last visited Jan. 20, 2007).

- Frederick Daye was exonerated in 1994 after ten years in prison.[17] The courts had previously found that "[t]he People's case against Daye was strong. There was overwhelming direct evidence of his guilt." *People v. Daye*, 223 Cal. Rptr. 569, 580 (1986) (unpublished).
- Larry Holdren was exonerated in 2000 after fourteen years in prison.[18] The courts previously found that "the evidence overwhelmingly [was] sufficient to support the jury's verdict." *Holdren v. Legursky*, 16 F.3d 57, 63 (4th Cir. 1994).

These examples demonstrate that even when the evidence supporting a conviction appears overwhelming, the accused may in fact be innocent and the real perpetrator at large. The potential for wrongful conviction is even greater when the evidence is more mixed, such as in the case currently before this Court, where there had already been two hung juries, and the third jury, at one point deadlocked, deliberated for five weeks before reaching a verdict. Meaningful habeas review and, in particular, meaningful harmless error review, are intended to function as a backstop, catching and correcting such errors, and are thus crucial for protecting both the freedom of the innocent and the integrity of our criminal justice system.

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[17] Innocence Project, Case Profile of Frederick Daye, http://www.innocenceproject.org/case/display_profile.php?id=24 (last visited Jan. 20, 2007).

[18] Innocence Project, Case Profile of Larry Holdren, http://www.innocenceproject.org/case/display_profile.php?id=64 (last visited Jan. 20, 2007).

CONCLUSION

For these reasons, *amicus curiae* the Innocence Network respectfully requests that this Court reverse the judgment of the Court of Appeals and hold that when a state court has failed to conduct a *Chapman* harmless error review in the first instance, the federal habeas court must do so.

Respectfully submitted,

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January 2007