

IN THE
INDIANA SUPREME COURT

Case No. _____
Appellate Cause No. 45A05-0808-PC-462

ROOSEVELT GLENN,)	Lake County Superior Court
)	Criminal Division I
Appellant,)	
)	Trial Cause No. 49G01-0311-PC-0016
)	
v.)	
)	
STATE OF INDIANA,)	The Honorable T. Edward Page,
)	Temporary Judge
Appellee.)	The Honorable Salvador Vasquez, Judge
)	

BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE* IN SUPPORT OF THE
PETITION FOR TRANSFER

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pending as of July 24, 2009.

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INTEREST OF THE *AMICUS CURIAE*

The Innocence Network (the “Network”) is an association of organizations dedicated to providing *pro bono* legal and investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The fifty-two current members of the Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.¹ The Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which innocent persons were convicted, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

The Network pioneered the post-conviction DNA model that has to date exonerated 240 innocent persons and has served as counsel in the majority of these cases. As perhaps the Nation’s leading authority on wrongful convictions, the Network and two of its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State’s Commission on Forensic Science, charged with regulating state and local crime laboratories) are regularly consulted by officials at the state, local and federal levels. In over half of the 240 exonerations by the Innocence Network, the misapplication of forensic disciplines—such as blood type testing, hair analysis, fingerprint analysis, bite mark analysis, and more—has played a role in convicting the innocent. In these cases, forensic criminalists presented erroneous evidence to the judge or jury which led to the wrongful conviction. See, e.g., Innocence Project, Facts on Post-Conviction DNA Exonerations, at <http://innocenceproject.org/Content/351.php> (last visited July

¹ For a complete list of member organizations, see Innocence Network’s Motion for Leave to Appear and File a Brief as an *Amicus Curiae* Substantively Aligned with Appellant, filed July 24, 2009, at n.1.

22, 2009); Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009). This work has given *Amicus* a particularly strong interest in ensuring that criminal convictions are premised upon accurate forensic work. In this case, the Innocence Network seeks to present a broad perspective on the issues in the hope that the risk of future wrongful convictions will be minimized.

SUMMARY OF ARGUMENT

This case presents the question as to the appropriate standard to apply in evaluating new exculpatory DNA evidence in post-conviction review under the Indiana DNA statute, Ind. Code §§35-38-7-1 to -19 (2009).

Indiana was at the forefront in recognizing the seismic impact that advances in DNA testing and evidence have had on criminal convictions based on now outdated and inaccurate science, and, in 2001, Indiana enacted the DNA statute as a special remedial statute. Where, as here, DNA testing now exculpates an accused from an inference the State sought to establish by scientific evidence, a court must begin the remedial process by candidly acknowledging the “stark reality,” as recently stated by the Kentucky Supreme Court, that a person was convicted with evidence now known to be “fundamentally false.” Bedingfield v. Kentucky, 260 S.W.3d 805, 813 (Ky. 2008). That conclusion does not involve “bad intent” or “bad conduct.” Rather, it only involves the validity of the science.² To prove a crucial issue at Roosevelt Glenn’s (“Glenn’s”) 1993 trial—that he was present at the vicious attack—the State presented serology evidence that Glenn could not be excluded from a semen sample and that his hair matched a hair sample found on the victim’s sweater on all twenty-six characteristics that were tested. Improved DNA testing later provided exculpatory evidence that the semen and hair were

² See infra note 6.

conclusively *not* from Glenn. The State conceded that its serology and hair evidence would not be admissible against Glenn in a trial today.³

In analyzing whether Glenn was entitled to a new trial pursuant to section 35-38-7-19 of the Indiana Code, the post-conviction relief (“PCR”) court both applied the wrong standard of review and failed to properly consider the impact of the newly exculpatory DNA evidence. Ignoring the remedial purpose of the statute and the “stark reality” of this case that “fundamentally false” evidence was used against Glenn, the PCR court denied relief because the DNA evidence did not “exonerate” him; then, the PCR court looked at the remaining non-scientific evidence against him without considering the totality of the evidence that a jury would hear today—devoid of the scientific serology and hair evidence that the State had presented at trial. The Court of Appeals failed to correct these errors.

Instead, a PCR court should apply the standard set forth in Indiana’s remedial DNA statute that grants a new trial where new DNA evidence is “favorable” to a petitioner, I.C. §35-38-7-19, and where there is a “reasonable probability” that a petitioner would not have been convicted with the benefit of the new DNA evidence. See Greenwell v. State, 884 N.E.2d 319, 326 (Ind. Ct. App. 2008); see also I.C. §35-38-7-8(4). Furthermore, in considering the newly exculpatory evidence, a PCR court should consider the impact that scientific evidence, or the lack thereof, would have had on the jury’s consideration of any other evidence. See, e.g., House v. Bell, 547 U.S. 518, 539-41, 554 (2006); Bedingfield, 260 S.W.3d at 814-15.

This case is the ideal vehicle to correct this erroneous determination and to set forth the appropriate test for granting a new trial under Indiana’s remedial DNA statute. No preliminary issue is presented. The post-conviction testing has occurred. The results are not disputed: the

³ *Amicus* need not take any position on whether the evidence was properly admitted at the time of Glenn’s trial.

State conceded that serology evidence and hair comparison evidence is no longer used, having been trumped by more accurate forms of DNA testing. Thus, this Court should utilize this case as a means to set forth the proper standard for Indiana courts to apply when considering newly exculpatory DNA evidence and, because Glenn meets that standard, grant him a new trial.

ARGUMENT

POINT I.

The State's Inculpatory Scientific Evidence at Trial Would Be Inadmissible Today

As a result of technological advances in DNA testing, many forms of scientific evidence that were once routinely used to convict criminal defendants would be inadmissible today. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2312 (2009) ("DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices."); see also Harrison v. State, 707 N.E.2d 767, 792 (Ind. 1999) ("[I]n the case of DNA evidence in the 1990s[,] . . . the time span between technological advances seems to the layperson to be measured in nanoseconds.").

A crucial piece of the State's case at trial was proving Glenn's presence at the attack. The State presented two types of scientific evidence showing that Glenn could have been present at the crime scene, as a basis for the jury to infer that he was, in fact, present: (1) serology analysis potentially implicating him as a contributor to a semen stain found on clothing from the scene of the rape (Trial Tr. ("Tr.") at 855:13-18),⁴ and (2) microscopic hair analysis finding that the "unique characteristics" of a hair found on the victim's sweater made it "very unlikely that

⁴ At the time of Glenn's trial, restriction fragment length polymorphism ("RFLP") analysis produced inconclusive results for one particular semen stain because such analysis required more DNA than was available. (See Appendix of the Appellant in the Indiana Court of Appeals, Vol. I ("App.") at 208).

the hair could come from someone else” other than Glenn (id. at 949:1-950:2). Eight years later, and in direct opposition to the evidence presented at trial, Glenn was excluded as a possible contributor to the semen stain by a new form of DNA testing, polymerase chain reaction DNA analysis. (Staub, Post Conviction Relief Hr. Tr. (“PCR Tr.”) at 269:18-270:7).⁵ Similarly, the results of other newly available forms of DNA testing—short tandem repeat DNA testing, which was performed in 2005, and mitochondrial DNA testing, which was performed in 2007—excluded Glenn as the contributor of the hair that the State’s science from 1990 attributed to him at trial. (See App. at 61, 65; Staub, PCR Tr. at 235:10-236:1, 249:24-250:11, 269:2-15).

Thus, at the time of Glenn’s 2008 PCR hearing, both the serology and microscopic hair comparison evidence that had been presented at trial as directly linking him to the crime scene were no longer admissible. Indeed, so outdated was the “scientific” evidence the State used in 1993 that Lisa Black, a supervisor in the Indiana State Police DNA unit, testified in 2008: “I don’t know of any forensic lab that does serology testing anymore.” (PCR Tr. at 203:8-11). The PCR court found that “both the trial counsel and the State of Indiana proceeded on the basis of scientific knowledge that was not at the time fully developed, but as we . . . see now, has been developed to the point where certain conclusions may be drawn today from the evidence that could not be drawn then.” (PCR Tr. at 538:18-25). This guarded, begrudging, prolix formulation belittled the impact of the DNA evidence: the jury had been given, as the Kentucky Supreme Court wrote, “fundamentally false” evidence on a crucial issue for the State. See Bedingfield, 260 S.W.3d at 813.

⁵ Polymerase chain reaction analysis requires a smaller volume of DNA than RFLP testing, and was not in common use at the time the evidence in Glenn’s trial was analyzed. (See Staub, PCR Tr. at 204:21-206:24, 211:3-13).

Therefore, in direct contrast to what was testified to at trial based on then-valid and powerful scientific evidence, DNA evidence now conclusively proves that Glenn did not contribute to the semen samples or hair samples found at the crime scene. The central core of the State's evidence on the crucial issue at trial would not be admissible today. Moreover, at a new trial, Glenn could affirmatively use the new DNA evidence as exculpatory evidence, buttressing other evidence presented by the defense that he was not present at the scene.

POINT II.

The PCR Court Misapplied the Indiana Code Standard

Acknowledging the importance of newly exculpatory DNA evidence, Indiana enacted remedial statutes in 2001 to allow individuals convicted of crimes to obtain new DNA testing of physical evidence and to provide courts with a standard for considering the results of that new testing. See I.C. §§35-38-7-1 to -19. The accuracy of DNA testing has only continued to improve. Almost every state has joined Indiana in creating a DNA post-conviction review statute. See Osborne, 129 S. Ct. at 2326 n.2 (Alito, J., concurring). Most of the debate over these statutes, however, has centered around when an individual should be entitled to test or re-test physical evidence using new DNA testing options. See, e.g., Osborne, 129 S. Ct. 2308; Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002). This case presents no such inquiry—the DNA re-testing has already been done and found to contradict evidence admitted against Glenn at trial. The PCR court simply needed to review the evidence in light of the newly exculpatory DNA testing. Instead, the PCR court applied the wrong standard and improperly weighed the newly exculpatory evidence.

Section 35-38-7-8(4) of the Indiana Code provides that a petitioner may have his DNA tested if, *inter alia*, “[a] reasonable probability exists that the petitioner would not have (A) been: (i) prosecuted for; or (ii) convicted of; the offense; or (B) received as severe a sentence . . . if

exculpatory results had been obtained through the requested DNA testing and analysis.” Under section 35-38-7-19, “if the results of postconviction DNA testing and analysis [ordered pursuant to section 8] are favorable to the person who was convicted of the offense, the court shall” order appropriate relief. The term “favorable” has been interpreted by the Indiana Court of Appeals to incorporate the same materiality or gatekeeper inquiry as the one found in section 8: DNA testing and appropriate relief are both granted where a “reasonable probability” exists that the petitioner would not have been convicted with the benefit of the new DNA evidence. See Greenwell, 884 N.E.2d at 326 (“In light of what we believe to be the obvious legislative intent and spirit of Indiana Code chapter 35-38-7 . . . we conclude that the ‘favorable’ threshold should be based on the standard for obtaining testing in the first place, *i.e.*, whether the results are such that there is a reasonable probability that the verdict or sentence would have been different had they been available at trial.”); see also Matheney v. State, 834 N.E.2d 658, 663 (Ind. 2005). Indeed, it would make no sense to enact a remedial statute enabling a convicted person to obtain testing under a liberal “reasonable probability” standard, only to then evaluate any resulting exculpatory evidence under the harsh, stringent standard favorable to the State used by the courts here below. The Legislature intended no such cruel hoax.

The PCR court recited the proper standard, noting that the outcome “turns on whether or not it [new DNA evidence] will probably make a difference in the outcome of the trial” (PCR Tr. at 543:14-16), but then went on to deny Glenn a new trial because “after considering everything that’s been presented,” the court “conclude[d] that the petitioner ha[d] failed to establish that the

newly discovered evidence [was] sufficient to *exonerate* Mr. Glenn” (*id.* at 547:21-25) (emphasis added).⁶

“Exoneration” is not the standard under the statute. Indiana’s DNA statute clearly provides a new trial for a person who shows a reasonable probability that the outcome of his trial would have been different had the DNA evidence at issue been available. See Greenwell, 884 N.E.2d at 326; Mathoney, 834 N.E.2d at 663. By demanding that Glenn provide evidence that affirmatively exonerates him, the PCR court misapplied sections 35-38-7-8 and -19 of the Indiana Code, and raised such a high bar that the court wrote that even the powerful new DNA evidence Glenn presented could not surmount it.

POINT III.

The PCR Court Failed to Properly Weigh Newly Exculpatory Evidence

The PCR court improperly discounted the impact of the new DNA evidence, compounding the serious harm Glenn suffered by that court’s application of the wrong standard of review. A reviewing court acting under the DNA statute must consider the entire case file as modified by the DNA evidence, taking into account the far different light that less reliable kinds of evidence, such as prison informant testimony, stand in when they lack the corroborating comfort of scientific evidence.

The Supreme Court—writing in the context of a federal habeas corpus case with an “actual innocence” claim that involved the weighing of new DNA evidence not available at trial—laid down guiding principles for the post-conviction reevaluation of a modified case file

⁶ Rather than apply the “reasonable probability” standard set forth in the Indiana DNA statute, the PCR court may have applied an “exoneration” test because of Glenn’s additional Brady claim. *Amicus* submits that, in light of the DNA evidence and the State’s acknowledgement at the PCR hearing that serology is now a discredited and unused science (Black, PCR Tr. at 203:8-11 (“I don’t know of any forensic lab that does serology testing anymore.”)), petitioner is entitled to a new trial regardless of the merits of the Brady claim.

like the one at issue here. See House, 547 U.S. at 538-40. Those principles carry both the force of logic and the wisdom of their distillation from a body of law that has developed over a far longer span of time than has DNA science.

In House, the petitioner had been convicted based on various evidence, including serological testimony that semen consistent with the petitioner's was found on the victim's clothing and that bloodstains consistent with the victim, but not the petitioner, were found on the petitioner's jeans. Id. at 528-29. After House was convicted, DNA testing established that the semen on the victim's clothing came from her husband, not from House. Id. at 540. Though this new evidence was "not a case of conclusive exoneration," id. at 554, the Court "consider[ed] the new disclosure of central importance," noting that "a jury would have given this evidence great weight," because the discredited evidence was "the only forensic evidence at the scene that would link House to the murder." Id. at 540-41.

In considering the Indiana DNA statute, *Amicus* submits that the Court should consider what House described as the proper reconsideration of a case file modified by new scientific evidence,

requir[ing] a holistic judgment about all the evidence, and its likely effect on reasonable jurors applying the reasonable-doubt standard. As a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact, and it is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses.

House, 547 U.S. at 539-540 (internal citations omitted). The Court then applied its own evaluation: Although it listed other "still potentially incriminating" evidence against House, such as his "odd evening walk and his false statement to authorities," the Court wrote that, nonetheless, a jury disabused of the idea that the semen on the victim's clothing came from House could find the other evidence "less suspicious." Id. at 541. The Court thus found that

House had made a showing that “it [was] more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.” *Id.* at 554.

Similarly, the Supreme Court of Kentucky independently embraced the same perspective when old evidence was trumped by new DNA results. See *Bedingfield*, 260 S.W.3d at 814-15. That court, reviewing a post-conviction motion for a new trial based on DNA evidence, ~~disagreed~~ with both lower court determinations that the new DNA evidence would not have changed the outcome at trial and ordered that *Bedingfield* be retried to prevent a “substantial miscarriage of justice.” *Id.* at 814. The court held that “we simply cannot ignore the permeating and saturating effect that the evidence, which was construed to identify Appellant as the source of the semen, played in enhancing the viability and credibility of *all* of the Commonwealth’s arguments.” *Id.* at 813 (emphasis in original).⁷ Elaborating, the court wrote:

For clarity’s sake we emphasize: the presence of sperm which DNA testing proves did not belong to Appellant *does not exonerate him; however*, the presence of this new evidence does cast a long shadow and assuredly merits consideration in the form a new trial. It cannot be overlooked that in Appellant’s initial trial, *all other arguments were enhanced and corroborated by the supposition that the sperm found belonged to Appellant*. Indeed, this theme was central to the Commonwealth’s prosecution. Because the technology was not available for Appellant to refute

⁷ Research on juror behavior confirms what the Kentucky Supreme Court recognized: jurors place particularly great weight on scientific evidence. Hon. Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the “CSI Effect” Exist?*, 9 Vand. J. Ent. & Tech. L. 331, 357, 360 (2006); see also *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (“[S]cientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury of laymen.”); *People v. Kelly*, 549 P.2d 1240, 1245 (Cal. 1976) (“Lay jurors tend to give considerable weight to ‘scientific’ evidence when presented by ‘experts’ with impressive credentials.”). The State argued at length in its closing at Glenn’s 1993 trial about the import of the scientific evidence. (See generally Tr. 2520:15-2528:8; see also Tr. at 2523:12-2526:19 (in closing, the prosecutor stated that he thought that “one of the most powerful and important witnesses in this case is Dana Peterson;” described at length Peterson’s hair analysis which indicated the uniqueness of the characteristics present in both the found hair and Glenn’s hair; and concluded, “I submit to you that that hair originated from that man (indicating [Glenn])”).

that claim, Appellant was left to rely on his word against that of the Commonwealth. *This new evidence is substantial, if not pivotal, and we are inclined to believe that it is precisely the type of evidence that is envisioned by the rule and that may change the result if a new trial were granted.*

Id. at 815 (emphasis added). In so holding, the Kentucky Supreme Court surveyed a number of other states' case law on the determination of whether exculpatory DNA evidence would have changed the result at trial had it been available.⁸ Id. at 811-13.

The plain language of Indiana's DNA statute similarly demands, *Amicus* submits, such analysis. A section 35-38-7-8 inquiry into whether a "reasonable probability" exists that a petitioner would not have been convicted is, logically, identical to the Supreme Court's inquiry as to whether "any reasonable juror would have reasonable doubt." House, 547 U.S. at 538.

Yet, instead of undertaking the holistic analysis of House or the realistic review of Bedingfield, the PCR court and the Court of Appeals immersed themselves in the "discrete findings regarding disputed points of fact" that House and Bedingfield caution against. Instead of viewing the case file in its entirety, the reviewing courts both attempted to parse the now-discredited serology and hair-matching evidence to judge the degree of confusion the jurors may have suffered from it. (See PCR Tr. at 539:23-540:1 ("Based on the totality of the record, it is the finding of this court that the jury was not misled on the issue of DNA analysis or serological

⁸ The cases from other jurisdictions cited by the Supreme Court of Kentucky include, *inter alia*, In re Bradford, 165 P.3d 31, 32-35 (Wash. Ct. App. 2007) (acknowledging that new DNA evidence did not positively exclude appellant as having committed the crime, yet proposing that this new evidence would "minimize the possibility" that he was the perpetrator); Pennsylvania v. Reese, 663 A.2d 206, 210 (Pa. Super. Ct. 1995) (granting convicted rapist a new trial based on test that showed DNA from the victim's vaginal smear did not match him; even though non-match did not contradict the Commonwealth's theory of the case, the court wrote that it could be enough to create reasonable doubt and cause an acquittal). See also Watkins v. Miller, 92 F. Supp. 2d 824, 839 (S.D. Ind. 2000) (granting writ of habeas corpus to defendant convicted of rape and murder because new DNA excluded him from semen in victim's body; although State contended that reasonable jury could still convict based on defendant's confession to jail-house informant, new DNA "change[d] the picture completely").

evidence.”)); see also Glenn v. State, No. 45A05-0808-PC-462, 2009 WL 1099255, at *12 (Ind. Ct. App. Apr. 22, 2009) (quoting same). Those courts failed to account for the degree to which, as in House, ambiguously incriminating circumstantial evidence presented at the trial would look less incriminating when presented without context and corroboration by deeply incriminating scientific evidence that no doubt loomed large in the jurors’ minds.

~~Instead~~ Had those courts instead viewed the case as it would be presented—one without any scientific evidence placing Glenn at the scene of the rape and without any “science” corroborating the flimsy evidence offered against him—they would have seen the thin remains of the State’s case in proper focus. What circumstantial evidence remained was far less persuasive without the buttress of hard “scientific” evidence that “corroborated” it at trial. The testimony of jailhouse informants given in exchange for reduced sentences is deeply unreliable, and that defect would have been plainly visible once those informants’ testimony had to carry the State’s burden instead of merely complementing seemingly damning serology and hair evidence.

So, too, and just as in Bedingfield, inconsistent details that fail to establish guilt beyond a reasonable doubt would have seemed far less suspicious without the pervasive taint of the physical “scientific” evidence: A missing record for the purchased can of oil was much more likely to have resulted from erroneous record keeping than any false statement, and a mistaken log entry from Glenn’s receipt for his new work clothes was much more likely to have been an innocent mistake of transcription than a premeditated deception.

CONCLUSION

Sections 8 and 19 of the Indiana DNA statute affirm a petitioner’s statutory right to a new trial once he demonstrates a “reasonable probability”—not a certainty—that a jury considering the evidence as it stands today would fail to convict him. Glenn has amply surmounted that

barrier. Glenn seeks the opportunity for a new, fair trial where the remaining evidence against him must stand alone, without false corroboration by discredited science. The PCR court misapplied the standard and improperly weighed the evidence. Thus, this court should set forth the proper standard and grant Glenn a new trial.

Dated: July 21st 2009

Respectfully Submitted,



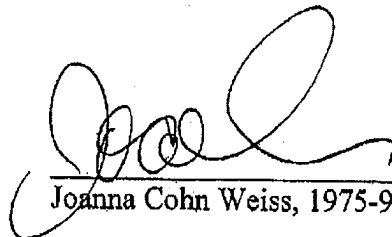
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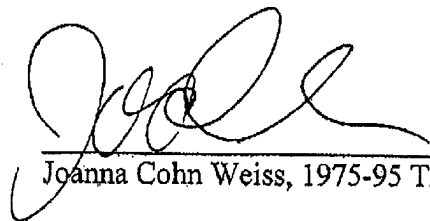

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2009, I caused a copy of the foregoing document to be served by first class mail, postage prepaid, on the following counsel of record:

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