

STATE OF LOUISIANA
FIRST CIRCUIT COURT OF APPEAL

No. 2007-KW-1348

STATE OF LOUISIANA

v.

ARCHIE C. WILLIAMS

Brief of *Amicus Curiae* of the Innocence Network in Support of Archie Williams' Application for Supervisory Jurisdiction Urging Reversal Of the Decision of the 19th Judicial District Court Parish of East Baton Rouge

Hon. Richard 'Chip' Moore, Judge Presiding
District Court Case No. 01-83-0234, Section III

CRIMINAL CASE

**BRIEF OF *AMICUS CURIAE* OF THE INNOCENCE NETWORK IN
SUPPORT OF ARCHIE WILLIAMS' APPLICATION FOR
SUPERVISORY JURISDICTION URGING REVERSAL OF THE
DECISION OF THE 19th JUDICIAL DISTRICT COURT PARISH OF EAST
BATON ROUGE**

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INTRODUCTION

The Innocence Network, Inc. (“Innocence Network”) respectfully submits this memorandum, amicus curiae, in support of the appeal of Archie Williams from an order of the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana, denying his petition, pursuant to Article 926.1 of the Louisiana Code of Criminal Procedure, for post-conviction DNA testing.

The Innocence Network is a non-profit organization currently affiliated with, and serving the interests of, over thirty-five Innocence Projects nationwide. The Innocence Network is dedicated to providing legal services to individuals seeking to exonerate themselves and to redressing the causes and effects of wrongful convictions. These goals are often achieved by seeking and obtaining post-conviction DNA testing. To date, the vast majority of DNA exonerations in the United States have been achieved by and through organizations that are members of the Innocence Network.

When testable evidence is available, DNA analysis has extraordinary potential to uncover the truth. DNA testing has been aptly described by former Attorney General John Ashcroft as “nothing less than the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the

innocent.”¹ To date, Innocence Projects across the country have obtained over 200 post-conviction DNA exonerations.² In the vast majority of these cases the authorities involved, including prosecutors, police and judges, believed the evidence of guilt to be very strong.³ In each case, however, when available DNA evidence was tested, these parties were proven wrong.⁴

The testing sought by Mr. Williams, Short Tandem Repeat (STR) DNA testing, is routinely used by law enforcement agencies to definitively determine whether a suspect may be the donor of sperm in rape cases. STR DNA testing is a powerful technology that can exclude individuals previously included by other testing methods, such as blood typing or secretor testing.

The Federal Bureau of Investigation (FBI) has evaluated STR DNA testing technology. In its report, The CODIS STR Project: Evaluation of Fluorescent Muilplex STR Systems, presented at the 50th Annual American Academy of Forensic Sciences Meeting in February, 1998, it stated that “STR

¹ Naftali Bendavid, U.S. targets DNA backlog; Agency to spend \$30 million to aid state crime labs, Chicago Tribune, Aug. 2, 2001 at n.10.

² See Innocence Project Case Profiles at <http://www.innocenceproject.org/know> (last visited August 12, 2007).

³ See Riter, It’s the Prosecution’s Story, But They’re Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases, 74 Fordham L. Rev. 825, 834 (2005) (“In many cases where convictions appeared to be based on solid, and in some cases overwhelming, evidence, results of post-conviction DNA testing have proven actual innocence.”).

⁴ Id.

typing is robust, accurate, highly sensitive, and suitable for forensic application.”⁵

It stated further that “STR typing results can be routinely achieved from typical forensic specimens, included degraded and low-quality DNA samples. The simultaneous amplification of several STR loci . . . expedites and simplifies sample analyses, reduces DNA consumption and the chance of contamination.”⁶

STR DNA testing is routinely used and the entire testing process normally takes only a few days.⁷ Relatively speaking it is a simple procedure, and its ability to conclusively reveal the truth is indisputable. With the potential to exonerate the wrongly convicted, such a simple and routine test should not be denied in a case like that of Mr. Williams, where 1) the statutory requirements for post-conviction DNA testing are met, and 2) testing has the potential to scientifically exclude the applicant as the perpetrator of a crime when his conviction was based exclusively on less reliable, non-scientific evidence.

SUMMARY OF ARGUMENT

Not only has the DNA revolution revealed that innocent citizens have been sent to prison and death row, but it has also exposed serious shortcomings in

⁵ See DNA Testing Finds the Crook, Applied Genetics News, May 1, 1998

⁶ Id.

⁷ See e.g. DNA Testing Center of America, Information Center, available at <http://www.dnatca.com/info-center.php> (last visited Aug. 12, 2007).

various traditional methods of forensic science and the often unreliable nature of eyewitness testimony and line-up identifications, both of which have led directly to wrongful convictions.⁸ This brief aims to inform the court of the incredible capabilities of DNA testing and why in cases like that of Mr. Williams, whose conviction was based exclusively on a lone eyewitness identification, it should not be denied.

The lower courts' interpretation of Louisiana's post-conviction DNA testing statute was far too narrow. A precedent of such constricted interpretation will result in the denial of DNA testing where it is most warranted - cases where a conviction was based exclusively on the eyewitness identification of a traumatized victim and where DNA evidence is available for testing to confirm or contradict the identification evidence.

To deny testing in such circumstances is contrary to the purpose of post-conviction DNA testing statutes. Finality of convictions is an important interest of the State. This interest, however, must be overridden by the interests of truth and justice.

⁸ See Michael J. Saks and Jonathon J. Koehler, The Coming Paradigm Shift in Forensic Identification Science, 5 Science 892, 893-95 (2005) (describing how post-conviction DNA exonerations have revealed major errors in other more traditional forensic science practices, and surveying data on high error rates in such disciplines).

In light of these underlying principles, we urge the court to interpret Louisiana's post-conviction DNA testing laws in a context focused on discovering the truth, as opposed to construing it in the rigid manner imposed by the lower courts. Specifically, the two main legal standards found in Article 926.1, requiring an "articulable doubt" as to the convicted person's guilt and a "reasonable likelihood" that testing will establish the convicted person's innocence, must be interpreted liberally in light of the purposes of the statute, which are to seek truth, justice and absolute resolution of the case.

Here, there is ample "articulable doubt" about Mr. Williams' guilt. The only evidence against him was the eyewitness testimony of the traumatized victim. A second eyewitness not only failed to identify Mr. Williams, but positively identified another individual as the perpetrator. Both the victim and the second eyewitness described the attacker as significantly taller than Mr. Williams. And defense witnesses, if credited, placed Mr. Williams elsewhere at the time of the attack.

Moreover, there are two possible outcomes of DNA testing that would establish Mr. Williams' likely innocence. First, if testing yielded identifiable DNA from two person, neither of whom was Mr. Williams, this result would create all-but-conclusive doubts about the jury's verdict. Second, the testing might yield a

single DNA sample that matched a person other than Mr. Williams from one of a number of DNA databases, thereby establishing that person's guilt. These possibilities establish a "reasonable likelihood" that DNA testing will exonerate Mr. Williams.

BACKGROUND

Procedural History:

In 1983, Archie Williams was convicted by a non-unanimous jury of aggravated rape, for which he was sentenced to imprisonment for life; attempted murder, for which he was sentenced to imprisonment for 50 years; and aggravated burglary, for which he was sentenced to imprisonment for 30 years, all terms of imprisonment running concurrently. In 1996, Mr. Williams filed a "Post-Conviction Motion to Release Trial Evidence for DNA Testing," which was denied, as were Mr. Williams' subsequent motions for rehearing and supervisory writs filed with the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana, the Court of Appeal for the First Circuit, and the Supreme Court of Louisiana. In January 2003, Mr. Williams filed an application seeking DNA testing under Article 926.1 of Louisiana's Code of Criminal Procedure. The Commissioner issued a recommendation in September of 2006 that Mr. Williams' application be denied, and the 19th Judicial District Court adopted this

recommendation without discussion in May 2007. In July 2007 Mr. Williams filed an Application for Supervisory Jurisdiction from the 19th Judicial Court, as well as a Motion to Reargue the decision of the District Court.

Statement of Facts:

Anne Eaton was raped and stabbed by a single assailant at her residence shortly before noon on December 9, 1982.⁹ Stephanie Alexander, a neighbor; Ms. Alexander's child; and Ms. Eaton's child entered the Eaton residence during the assault and viewed the assailant.¹⁰

Immediately after the rape, Ms. Eaton underwent a pelvic examination.¹¹ "Viable sperm," the result of an ejaculation that likely occurred sometime after 5:00 A.M. the morning of the rape, were collected, observed, and preserved.¹²

Ms. Eaton and Ms. Alexander, both of whom testified that they made an effort to remember the assailant's appearance in order to provide a physical description to police,¹³ helped prepare separate composite drawings of the

⁹ T. 56.

¹⁰ T. 56, 59, 61

¹¹ T. 145

¹² T. 146-47.

¹³ T. 84-85, 369, 383.

assailant.¹⁴ The drawings were dissimilar.¹⁵ Both Ms. Eaton and Ms. Alexander testified that the assailant was approximately 5'10" tall;¹⁶ Ms. Eaton, who is 5'7" tall and who stood by the assailant, further testified that the assailant was a few inches taller than she.¹⁷ Mr. Williams is 5'4" tall.

Ms. Eaton identified Mr. Williams after viewing seventeen photo arrays, the last three of which repeated Mr. Williams' photograph after Ms. Eaton indicated that the first photograph of Mr. Williams resembled her attacker.¹⁸ No other photographs shown to Ms. Eaton were repeated.¹⁹ Ms. Eaton also identified Mr. Williams in a physical line-up,²⁰ and she identified him affirmatively and emphatically at trial.²¹ Ms. Alexander did not select Mr. Williams from any of the photo arrays she was shown.²² She positively identified another individual as the assailant in the same in-person line-up, including Mr. Williams, that Ms. Eaton viewed.²³ She was not asked to identify Mr. Williams at trial.

¹⁴ T. 70, 351.

¹⁵ T. 97.

¹⁶ T. 94, 375, 380.

¹⁷ T. 375.

¹⁸ T. 269-74, 354-56.

¹⁹ T. 306-07.

²⁰ T. 361.

²¹ T. 361, 364, 383-84.

²² T. 95-96.

²³ T. 98, 287-88.

No evidence other than Ms. Eaton's positive identification implicated Mr. Williams. The knife used in the assault was not recovered,²⁴ and testing of available physical evidence was inconclusive. In particular, trial testimony established that prints near bloody smears on the door in the room in which the assault occurred did not belong to Mr. Williams or any other person whose prints were tested for a match.²⁵

Mr. Williams' sister and a friend of his mother's testified that Mr. Williams was asleep at his mother's home several hours before the crime.²⁶ Mr. Williams' mother testified that Mr. Williams was asleep at her home when she left several hours before the crime and was asleep when she returned at about the time of the crime.²⁷ Mr. Williams has maintained his innocence since the time of the crime.

²⁴ T. 223-24, 228.

²⁵ T. 154.

²⁶ T. 427-28, 441.

²⁷ T. 400, 403.

ARGUMENT

I. THERE IS AN “ARTICULABLE DOUBT” AS TO PETITIONER WILLIAMS’ GUILT.

Under Article 926.1 of Louisiana’s Code of Criminal Procedure, individuals who have been convicted of a felony may file an application for post-conviction relief requesting DNA testing of an unknown sample secured in relation to the offense for which they have been convicted. In relevant part, the statute states that such an application shall be dismissed unless a court finds that:

There is an articulable doubt based on competent evidence, whether or not introduced at trial, as to the guilt of the petitioner and there is a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner. In making this finding the court shall evaluate and consider the evidentiary importance of the DNA sample to be tested.²⁸

Here, the Commissioner recommended a finding that there was no “articulable doubt” as to Petitioner’s guilt, and the district court adopted that recommendation without discussion. The Commissioner concluded that no “articulable doubt” existed because “the petitioner is unable to point to any competent evidence, in this case, that would undermine the reliability of the victim’s identification and testimony at trial.”²⁹ To the extent that the

²⁸ La. Code Crim. Proc. Ann. art. 926.1(C)(1) (2007).

²⁹ Commissioner’s Recommendation at 4, Williams v. N. Burl Cain, No. 1-82-234 (19th Jud. Dist. Ct. Sept. 1, 2006) (hereinafter, “Recommendation”).

Commissioner meant that there is no articulable cause for concern where a defendant is convicted of multiple serious crimes and sentenced to life in prison without parole based exclusively on the eyewitness identification of a traumatized victim, we respectfully disagree. To the extent that the Commissioner meant there was no evidence in the record suggesting the possibility of a misidentification—in a case where a second eyewitness not only failed to identify Petitioner as the assailant, but affirmatively identified another suspect from a lineup that included Petitioner—he was simply wrong. To the extent that the Commissioner meant that “articulable doubt” must be based on new evidence, not presented at trial, he misapprehended the relevant test. In any event, his conclusion here, that there is no “articulable doubt,” must be rejected.

A. Louisiana’s Post-Conviction DNA Testing Statute Should Be Construed To Favor Testing

In recent years, forty states and the District of Columbia have enacted statutes which permit individuals who have been convicted of crimes to seek exoneration through the testing of DNA samples.³⁰ A primary goal of DNA

³⁰ The statutes are as follows: Arizona, Ariz. Rev. Stat § 13-4240 (2002); Arkansas, Ark. Code Ann. § 16-112-202 (2006); California, Cal. Penal Code § 1405 (2002); Colorado, Col. Rev. Stat. § 18-1-413 (2003); Connecticut, Ct. Stat § 54-102J (7) (2003); Delaware, 11 Del. Code § 4504 (2006); D.C. Code Ann. § 22-4133 (2002); Florida, Fla. Stat. Ann. 925.11 (2002); Georgia, Ga. Code Ann. § 5-5-41 (2006); Hawaii, Haw. Rev. Stat. § 844D-123 (2006); Idaho, Idaho Code Ann. § 19-4902 (2006); Illinois, 725 Ill. Comp. Stat. Ann. 5/116-3 (2005); Indiana, Ind. Code Ann. § 35-38-7-7 (2002); Iowa, Iowa Code § 81.10 (2005); Kansas, Kan. Stat. Ann. § 21- 2512 (2005); Kentucky, Ky. Rev. Stat. Ann. § 422.285 (2006); Louisiana, La. Code Crim. Proc. Ann. art. 926.1 (2006); Maine, 15 Me. Rev. Stat. Ann. § 2138 (2005); Maryland, Md. Code Ann., Crim. Proc. § 8-201 (2006); Michigan, Mich. Comp. Laws Serv. § 770.16 (2006); Minnesota, Minn. Stat. § 590.01 (2005); Missouri, Mo. Rev. Stat. § 547.035 (2006); Montana, Mont. Code Ann. § 46-21-110 (2005); Nebraska, Neb. Rev. Stat. § 29-4122 (2005); New

testing statutes is to improve the accuracy of the criminal justice system by drawing on competent evidence made available by recent advances in science. In addition to the overriding goal of uncovering the truth, the fundamental purpose of these DNA testing statutes is a remedial one—to exonerate those who have been wrongly convicted based on faulty evidence.³¹ The remedial purpose of these statutes is reflected not only in the legislative history underlying them, but also in the structure of the statutes themselves. For example, in many states, Louisiana included, individuals whose convictions are the result of a guilty plea may still pursue relief under the relevant post-conviction DNA testing statute.³² The fact that Louisiana allows individuals who have pled guilty to the crimes of which they have been accused illustrates the law’s curative purpose. While it might have been

Hampshire, N.H. Rev. Stat. Ann. 651-D:2 (2006); New Mexico, N.M. Stat. Ann. § 31-1A-2 (2006); New Jersey, N.J. Stat. Ann. § 2A:84A-32a (2006); New York, N.Y. Crim. Proc. Law § 440.3 (2002); North Carolina, N.C. Gen. Stat. Ann. § 15A-269 (2006); North Dakota, N.D. Cent. Code 29-32.1-15 (2006); Ohio, Ohio Rev. Code Ann. § 2953.72-81 (2006); Oklahoma, 22 Okla. Stat. §§ 1371, 1371.1, 1372 (2002); Oregon, Ore. Rev. Stat. T. 14, Ch. 138 Prec. 138.005 (2003); Pennsylvania, 42 Pa. Cons. Stat. § 9543.1 (2005); Rhode Island, R.I. Gen. Laws § 10-9.1-12 (2006); Texas, Tex. Code Crim. Proc. Ann. art. 64.03 (2001); Utah, Utah Code Ann. § 78-35a-301 (2006); Virginia, Va. Code Ann. § 19.2-327.1 (2006); Washington, Wash. Rev. Code § 10.73.170 (2006); West Virginia, W.Va. Code § 15-2B-14 (2006); and Wisconsin, Wis. Stat. § 974.07 (2006).

³¹ **See, e.g.**, H.B. 5022 (Ct. 2003) (indicating that the purpose of Connecticut’s post-conviction DNA testing statute is “[t]o increase the State’s effectiveness in identifying criminal offenders . . . [and] exonerating innocent persons”); D.C. Comm. Rep. B. 14-153 (2001) (noting that the committee which sponsored the District of Columbia’s post-conviction DNA testing statute “[s]trongly believes that every measure should be taken to allow wrongly convicted individuals to prove their innocence By having an innocent person in jail for a crime that he or she did not commit, the public safety for all citizens is threatened because the real perpetrator is free.”). The legislative purpose underlying the federal DNA testing statute, 18 U.S.C. § 3600, is also remedial. **See** 150 Cong. Rec. H7328-02 (2004) (stating that the purpose of the law is “[t]o protect crime victims’ rights [and] . . . to provide post-conviction testing of DNA evidence to exonerate the innocent”).

³² Louisiana’s post-conviction DNA testing statute explicitly contemplates that individuals who have pled guilty and have subsequently been convicted will seek relief under the statute. **See** La. Code Crim. Proc. Ann. art. 926.1(H)(3) (2007) (“[C]rime laboratories shall preserve . . . all items of evidence in their possession which are known to contain biological material that can be subject to DNA testing, in all cases that . . . have been concluded by . . . a plea of guilty.”).

understandable to bar testing in the event of a guilty plea, given the seemingly conclusive nature of such a plea, the Louisiana legislature instead chose to permit it, no doubt with the objective of ensuring that the statute would be put to maximum use in situations where DNA testing could correct unwarranted convictions.

Given the remedial purpose of DNA testing statutes, courts have held that such statutes should be construed liberally so as to afford convicted individuals every opportunity to benefit from the relief provided under them.³³ Louisiana's courts are no different in this respect. In Louisiana v. Leroy White,³⁴ the 16th Judicial District Court ruled that DNA testing should be permitted, stating that “[t]he ‘DNA’ testing statute is remedial legislation, and in this Court’s view, must be given liberal interpretation in keeping with the goals of the legislature to allow this new science to be used on old cases where DNA material is available for testing.”³⁵

The relatively low threshold set by the “articulable doubt” standard is illustrated in numerous Louisiana cases where DNA testing has been allowed

³³ See, e.g., Anderson v. State, 831 A.2d 858, 864 (Del. 2003) (noting that “because of its remedial purpose,” Delaware’s DNA testing statute should be “liberally construed to allow post-conviction DNA testing” whenever the petitioner has complied with its requirements).

³⁴ No. 22725, slip op. (16th Jud. Dist. Ct. Jul. 8, 2005).

³⁵ Id. at 2.

under the DNA testing statute. For example, in State ex rel. Randolph v. Louisiana,³⁶ the Louisiana Supreme Court remanded the petitioner's request for DNA testing to determine the availability of evidence for DNA testing based on a "bare bones" pleading. The four-page application contained a very minimal description of the facts and a brief reference to problematic identification testimony. In relevant part, the application in Randolph stated only that "there was no direct evidence" to support the victim's statement that she had been raped by the petitioner, "nor was there any evidence identifying defendant as the perpetrator."³⁷

The court in Randolph ruled in favor of the petitioner despite the scant number of facts set forth in his pleading. In this case, Mr. Williams has easily satisfied the "articulable doubt" threshold by presenting far more substantial evidence of articulable doubt than Randolph; accordingly, DNA testing should be granted.

Strong evidence of guilt at trial does not require a finding of no "articulable doubt." For example, in State v. Bibbins,³⁸ the petitioner was apprehended in the vicinity of the crime less than an hour after it occurred and in

³⁶ 847 So. 2d 1183 (La. 2003).

³⁷ Writ of Supervisory Control at 2-3, State ex rel. Randolph v. Louisiana, No. 317-886 (Crim. Dist. Ct. Apr. 15, 2002).

³⁸ 525 So. 2d 255 (La. Ct. App. 1988).

possession of a small portable radio that the victim identified as being stolen from the scene of the crime.³⁹ The victim was also able to make an immediate positive identification of the petitioner when presented with him.⁴⁰ A forensic expert testified at trial that tests run on the victim's bed sheet, underwear, and vaginal swab indicated her assailant was a Type B secretor.⁴¹ This fact was highly probative given that petitioner was himself a Type B secretor, a distinction belonging to only 6.4% of the population.⁴²

Despite the “overwhelming” evidence of Mr. Bibbins’ guilt, as found by the Court of Appeal of Louisiana,⁴³ the 19th Judicial District Court of East Baton Rouge Parish granted his application for DNA testing, which resulted in his eventual exoneration.

Here, too, Louisiana’s post-conviction DNA testing statute should be given a liberal interpretation that favors testing and affords relief in the greatest number of circumstances where such relief may be legitimately available.

³⁹ Id. at 257.

⁴⁰ Id.

⁴¹ Id. at 259.

⁴² Id.

⁴³ See id. at 259 (stating [i]n this case, the evidence of defendant’s guilt of the offenses of aggravated rape and aggravated burglary was overwhelming.”

II. ARTICULABLE DOUBT GENERALLY EXISTS WHERE EYEWITNESS IDENTIFICATION IS THE PRIMARY EVIDENCE AGAINST THE DEFENDANT BECAUSE EYEWITNESS IDENTIFICATIONS ARE INHERENTLY UNRELIABLE.

“Articulate doubt” exists almost by definition in cases where eyewitness identification testimony is the primary evidence sustaining a defendant’s conviction. Doubt is heightened in cases involving lone witness identifications given that “the witness’ memory holds the key information, but that information is difficult to recover and easy to contaminate.”⁴⁴ DNA testing has the unique ability to objectively determine the accuracy of testimony based on subjective eyewitness identification.

A. Mistaken Eyewitness Identifications Are A Leading Cause Of Wrongful Convictions

Eyewitness misidentification is the single largest cause of wrongful convictions nationwide.⁴⁵ There have been 206 exonerations to date in the United States based on post-conviction DNA testing and 155 of those wrongful

⁴⁴ James M. Doyle, *True Witness* xiii (2005).

⁴⁵ Innocence Project website, available at: www.innocenceproject.org. Case-studies show empirically that eyewitness identification is a significant cause of wrongful convictions, including convictions in capital cases. Samuel R. Gross, et al., *Exonerations in the United States 1989 through 2003* (2004) (study of 328 exonerations based on D.N.A. evidence between 1989 and 2003, concluding: “[t]he most common cause of wrongful convictions is eyewitness misidentification”); Barry Scheck et al., *Actual Innocence* (2001) (study reconstructing 62 exonerations determined that mistaken eyewitnesses were a factor in 84% of the convictions); Rob Warden, Center on Wrongful Convictions, *The Snitch System* 14 (Winter 2004-2005) (study of 111 wrongful convictions in capital cases in the United States since 1973 revealed that 28 people were convicted and sentenced to death based on eyewitness misidentifications); Wells et al., *Eyewitness Identifications Procedures* (study of 40 exonerations based on D.N.A. evidence in the 1990’s found that 36 cases, or 90%, involved misidentification).

convictions were based on eyewitness identifications that DNA testing later proved to be erroneous.⁴⁶ The National Institute for Justice, in a report aimed at understanding the reasons for wrongful convictions, detailed 28 cases in which individuals convicted of various crimes were later exonerated by DNA testing.⁴⁷ The report states, “[i]n the majority of these cases, given the absence of DNA evidence at trial, the eyewitness testimony was the most compelling evidence Clearly, however, those eyewitness identifications were wrong.”⁴⁸

Not only is eyewitness testimony inherently unreliable, there also is no reliable way of distinguishing a credible eyewitness from an incredible one. In particular, a witness’ self-described certainty is no guarantee that her identification is in fact accurate. Time and again, one finds examples of eyewitnesses who professed to be certain and who testified about events that seemingly were conducive to accurate identification but who were subsequently shown to be wrong by other evidence. The emotional power of such testimony is strong,⁴⁹ even

⁴⁶ Innocence Project website, available at: www.innocenceproject.org

⁴⁷ Convicted by Juries. Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, 1996

⁴⁸ Id.

⁴⁹ A study recorded verdicts in a mock trial. Two separate sets of jurors heard evidence which differed only by the presence or absence of an eyewitness. Only 18% of the jurors returned with guilty verdicts where there was no eyewitness identification; the percentage of guilty verdicts leaped to 72% once there was the addition of eyewitness identification. Elizabeth Loftus and J. Doyle, Eyewitness Testimony- Civil and Criminal (1992).

though eyewitness confidence is *not* an effective indicator of accuracy in identification.

The attack of Jennifer Thompson is an illustrative example. Ronald Junior Cotton was convicted of the rape in 1984⁵⁰. During the attack, the victim claimed to have “studied every single detail on the rapist’s face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him . . . [w]hen and if I survived the attack.”⁵¹ She was determined to identify her attacker if she survived. A few days after the rape, after looking at a series of police photos, the victim identified Mr. Cotton as her attacker.⁵² She identified him again in a lineup.⁵³ Mr. Cotton was sentenced to life in prison, largely based on the victim’s steadfast identification.⁵⁴ In 1987, Mr. Cotton was re-tried after his first conviction was overturned.⁵⁵ Another man, Bobby Poole, claimed to be the rapist.⁵⁶ The victim had the opportunity to see Mr. Poole in court, and, when asked if she had ever seen him, she replied, “I have never seen him in my life. I have no idea who he is.”⁵⁷ Mr. Cotton was convicted again, and sentenced to two life

⁵⁰ Jennifer Thompson, I Was Certain but I Was Wrong, The New York Times, June 18, 2000.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

sentences.⁵⁸ In 1995, the victim agreed to provide a blood sample for DNA testing on the evidence, even though she was positive she had identified her rapist.⁵⁹ Much to the victim's shock, Mr. Cotton was excluded as the rapist. The DNA matched Bobby Poole.⁶⁰

Similarly, in the case of Steven Avery, the victim testified: "There is absolutely no question in my mind."⁶¹ The victim "emphasized that she had been aware enough during the trauma of her attack to tell herself, 'I have to stay calm and get a good look at this guy.'"⁶² Steven Avery was a 23 year old father of five at the time of his arrest; at the age of 41 he was released from prison based on DNA evidence that proved he was innocent.⁶³

Thus, the conviction that the victim expressed here,⁶⁴ a conviction that may appear warranted by the circumstances, is no guarantee that she correctly identified her attacker.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

⁶¹ A Mistake and a Miscarriage of Justice, Milwaukee Journal Sentinel, September 21, 2003.

⁶² Id.

⁶³ DNA Clears Prisoner 17 Years Into his Term Man was Convicted of 1985 Sex Assault; Now Another Man is Implicated, Milwaukee Journal Sentinel, September 11, 2003. Yet another example of where the victims certainty proved to be wrong is the case of Michael Mercer. Mr. Mercer was convicted of rape and spent 12 years in prison until DNA testing proved his innocence. His conviction had been based largely on the victim's 'adamant' identification. DNA Clears Rape Convict After 12 Years, New York Times, May 20, 2003.

⁶⁴ When responding as to why she did not make an identification when first presented with Mr. William's photo in an array, Mrs. Eaton testified: "Because when I picked out the man who attacked me, there was going to be no doubt in my mind" (T.355).

That eyewitness misidentification is one of the most common causes of wrongful convictions is not novel.⁶⁵ Several psychological studies were conducted in the 1970s in an effort to analyze the effect of the human mind on eyewitness misidentifications.⁶⁶ The findings all echoed a main point: “[r]esearch on perception and memory suggests strongly that any eyewitness report should be evaluated cautiously and skeptically.”⁶⁷ Continuing research over the following decades created a “rather large body of peer-reviewed, scientific literature that forms an increasingly coherent picture of how mistaken identifications occur.”⁶⁸ This research shows that complicating factors have a dramatic effect on a witness’ ability to identify the perpetrator and yet are not obvious to a lay cross-examiner. These complicating factors include: the stress or violence associated with an event; the passage of time before the identification; suggestions by others; police tactics in conducting identifications; differences in race between the witness and the accused; and the confidence of the witness. Several of these factors were present in Mr. Williams’ case.

⁶⁵ Gary L. Wells, Amina Memon, and Steven D. Penrod, Eyewitness Evidence: Improving Its Probative Value, 7 *Psychological Science in the Public Interest* 45 (2006) (stating that “decades before the advent of forensic DNA testing, psychologists were questioning the validity of eyewitness reports.”)

⁶⁶ See, e.g., David B. Fishman & Elizabeth F. Loftus, Expert Psychology Testimony on Eyewitness Identifications, *Law & Psychol. Rev.* 87 (1978); Felice J. Levine & June L. Tapp, The Psychology of Criminal Identification: The Gap From Wade to Kirby, 121 *Pa. L. Rev.* 1079 (1973)

⁶⁷ Robert Buckhout, Psychology & Eyewitness Identification, 2 *Law & Psychol. Rev.* 75 (1976).

⁶⁸ Gary Wells, Eyewitness Identification Evidence: Science and Reform, 29 *The Champion* 12 (2005).

First, scientific studies have demonstrated that the presence of a weapon during the crime reduces the witness' ability to recall other details and correctly identify the perpetrator.⁶⁹ In the instant case, Mrs. Eaton testified that the perpetrator threatened her with a knife and held the knife to her throat.⁷⁰ Ultimately, he stabbed her several times, inflicting serious injuries.⁷¹

Second, scientific research has shown that cross-racial identification is more likely to result in a mistaken identification.⁷² The effect of race in misidentification need not have anything to do with bias or prejudice. It can be explained simply by the fact that most people have more interactions with members of their own race, and are thus more adapt at identifying individuating features within that race.⁷³ The reduced accuracy of cross-racial identifications has been shown to take affect within only *two minutes* of witnesses seeing the

⁶⁹ Elizabeth F. Loftus et al., Some Facts About "Weapon Focus", 11 Law & Hum. Behav. 55 (1987); A. Maas & G. Kohnken, Eyewitness Identification: Simulating the "Weapon Effect." 13 Law & Hum. Behav. 397 (1989); Nancy Mehrkens Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413 (1992) (analyzing the data and results of twelve tests conducted since 1976).

⁷⁰ T. 347-49.

⁷¹ T. 26

⁷² Christian A. Meissner & John C. Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychology, Public Policy, & Law 3 (2001); Gary L. Wells & Elizabeth A. Olsen, The Other-Race Effect in Eyewitness Identification: What Do We Do About It, 7 Psychology, Public Policy & Law 230-31; Kassir, S.J., Ellsworth, P.C., & Smith, V.L., The 'General Acceptance' of Psychological Research on Eyewitness Testimony: A Survey of the Experts, 44 American Psychologist 1089-1098 (1989).

⁷³ Christian A. Meissner & John C. Brigham, Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychology, Public Policy, & Law 3,7 (2001) (noting that "recent studies have consistently failed to find a relationship between racial attitudes and memory for other-race faces"); See also F. Bedford, Cross-Racial Witness Identification, available at <http://www.u.arizona.edu/~bedford/expertwitness.htm> (noting that "the greater difficulty people have in distinguishing between members of a different race compared to [their] own race" is not a product of racism).

individual they are attempting to identify.⁷⁴ In an examination of 70 DNA exonerations involving mistaken identification, the Innocence Project found that 55 percent of these crimes involved black perpetrators and white victims.⁷⁵ Given that the majority of violent crimes occur within racial groups,⁷⁶ this is a particularly high figure. In the instant case, Mrs. Eaton is white and Mr. Williams is black, yet another factor contributing to the potential unreliability of Mrs. Eaton's identification and further reason for why DNA testing should be mandated under the statute.

Third, scientific research has shown that highly stressful events increase the likelihood that the witness will wrongly identify the perpetrator. Witnesses to very violent crimes and victims of highly emotional, traumatic events are less able to recall details of those events correctly than are those who view nonviolent and less emotional events.⁷⁷ Although conventional wisdom would suggest that stress may enhance a witness' ability to perceive and remember a

⁷⁴ O'Toole, A.J., Deffenbacher, K.A., Valentin, D., & Abdi, H, Structural Aspects of Face Recognition and the Other-Race Effect, 22(2) *Memory & Cognition* 208-224 (1994).

⁷⁵ Barry Scheck, et. Al. Actual Innocence 265 (2001)

⁷⁶ According to the Bureau of Justice Statistics, 17 percent of violent crimes perpetrated against white victims involve black offenders. This group of offenses constitutes 14 percent of violent crimes generally. U.S. Department of Justice, Bureau of Justice Statistics, Special Report: Violent Victimization and Race, 1993-98, March 2001, NCJ 176354.

⁷⁷ Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony, Civil and Criminal § 2-8 (3d ed. 1997); Kenneth A. Deffenbacher et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 *Law & Hum. Behav.* 687 (2004) (noting that studies have shown that memory of highly stressful events is less accurate than the memory of less stressful events).

perpetrator's physical characteristics, scientific studies show that the exact opposite is true: "[a]ll other factors being equal, a witness in a high stress situation is more likely to be an unreliable witness than one not under stress."⁷⁸ Highly stressful situations increase the risk of "false-positive" identifications.⁷⁹ Here, Mrs. Eaton has admitted that she was frightened and that the incident was very traumatic.⁸⁰

Fourth, scientific research has shown that line-ups are another contributing factor to mistaken eyewitness identifications. Witnesses who believe that the perpetrator is present at an identification procedure, based on suggestive statements or events leading up to the lineup, are likely to identify the person who most resembles the culprit even when the true perpetrator is not present.⁸¹

A victim's identification of a defendant in the courtroom carries a significant weight with the jury. It has been said that "[t]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the

⁷⁸ Handberg, Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013, 1024 (1995).

⁷⁹ In a study of military trainees who were subjected to either highly stressful or non-stressful interrogations, false-positive identifications occurred among the high-stress group more than twice as often as among those subjected to non-stressful interrogations. Charles Morgan III et al., Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J.L. & Psychiatry 265, 272 tbl.1 (2004).

⁸⁰ T. 365. When Mrs. Eaton was asked: "You were frightened at that point, and, I suppose maybe frightened is an understatement, but it was a very traumatic incident the entire time is that correct?" She responded; "Yes."

⁸¹ See, e.g., R.S. Malpass & P.G. Devine, Eyewitness Identification: Lineup Instructions and the Absence of the Offender. 66 Journal of Applied Psychology 482-89 (1981); Gary Wells, et. al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, 22 Law and Human Behavior 603-47 (1998).

defendant, and says 'That's the one!'”⁸² People generally overestimate eyewitness accuracy and fail to understand the factors that affect it.⁸³ Here, Mrs. Eaton identified Mr. Williams in the court room as the man who raped her.⁸⁴

B. There Are Articulate Reasons To Doubt The Identification Here

As the case studies discussed above illustrate, mistaken identification is a leading cause of wrongful convictions. Accordingly, “articulate doubt” almost invariably exists in cases where eyewitness identification testimony is the primary evidence sustaining a defendant’s conviction. Here, that general unreliability is supported by specific facts about the trial and Mr. Williams’ conviction.

First, a second eyewitness, Ms. Alexander, helped to create a composite portrait of the attacker bearing no resemblance to the portrait that Mrs. Eaton helped to create;⁸⁵ she then positively identified a different suspect from an in-person line up which included Mr. Williams.⁸⁶

⁸² 449 U.S. 341, 352 (Brennan, J., dissenting) (emphasis in original); See also Handberg, Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury, 32 Am. Crim. L. Rev. 1013, 1024 (1995) (explaining that “[t]o jurors, once an eyewitness has picked out the defendant, that evidence dictates a guilty verdict.”).

⁸³ Gary Wells & Elizabeth Olson, Eyewitness Testimony, 54 Annual Rev. of Psych. 277, 284-85 (2003).

⁸⁴ T. 361

⁸⁵ See T.97: Ms. Alexander indicating that she was curious as to how two people could see the same thing and come up with such different impressions.

⁸⁶ See T.98-99

Second, there are significant discrepancies between Mr. Williams' appearance and the descriptions Mrs. Eaton and Ms. Alexander gave to the police. Mrs. Eaton, who is 5'7" estimated the perpetrator's height to be at least 5'9" noting: "I thought he was around 5'9". I'm about 5'7", and he's a few inches taller than I am."⁸⁷ The second eyewitness, Ms. Alexander, estimated the perpetrator's height to be about 5'10".⁸⁸ Ms. Alexander, who is 5'4" was wearing three inch heels at the time she viewed the perpetrator.⁸⁹ Mr. Williams is 5'4," significantly shorter than both eyewitnesses' description of the perpetrator.

Moreover, Mr. Williams has numerous visible scars on both of his legs and on his backside, including a large burn on his lower leg (approximately seven inches by three inches), a two-inch scar on his backside, a scar on his right thigh, a scar on his arm, and a scar on his right shin.⁹⁰ Yet, Ms. Alexander, who viewed the perpetrator completely naked, failed to identify any scars on the perpetrator.⁹¹ Mrs. Eaton testified that the perpetrator had a scar on his clavical, when in fact the scar that she later identified when Mr. Williams was asked to take off his shirt in court before the victim and the jury, was on his arm.⁹² Mrs. Eaton did not identify any other scars on the perpetrator.

⁸⁷ T. 375

⁸⁸ T.94

⁸⁹ T. 104

⁹⁰ T.447-449

⁹¹ T.82

⁹² T.378.

Lastly, the second eyewitness testified that she believed the perpetrator was circumcised: “I had never seen an uncircumcised penis, and so I presumed that if it were, it would look unusual to me and I would have noticed.”⁹³ Mr. Williams is uncircumcised.⁹⁴

All of these discrepancies give further rise to articulable doubt because both Mrs. Eaton and Ms. Alexander testified to looking at the perpetrator to be able to provide an identification later.⁹⁵

Third, the conviction is correct only if defense witnesses committed perjury. Testimony from Gladys Williams, Delores Williams, and Albert Sterling placed Mr. Williams sleeping in the back bedroom of his mother’s home either several hours before, or at the time of, the attack.⁹⁶ This alibi testimony further adds to the doubt that Mr. Williams was the perpetrator.

⁹³ T. 92. Testimony by a doctor indicated that in the un-erected state there would be a marked difference between a circumcised man and an uncircumcised man. T.451. At the time Ms. Alexander witnessed the perpetrator he did not have an erection. T.92. Mrs. Eaton was unable to say one way or the other whether the perpetrator was circumcised as she “did not look there at all.” T. 373-374.

⁹⁴ T.453

⁹⁵ T. 84-85: When asked whether she had her eyes closed while on the floor, Ms. Alexander responded that she did not and that she wanted “height, weight, hairstyle, age and clothes, because I knew the police would ask me for those thing.” Ms. Alexander was able to provide very specific details as to the clothing worn by the perpetrator (T.89). Mrs. Eaton similarly stated she looked at the perpetrator because “if I lived through it I was going to know who that person was, and I was going to be able to draw a good composite.” (T. 342). Similarly when asked “[a]s I understand your testimony, during the course of this, although you were frightened and concerned about your own life, you did make mental notes about the description of the man for the purposes of making an identification at some point later?,” Mrs. Eaton answered: “Yes.” (T. 369).

⁹⁶ See, T. 424-430, 396-406, 438-443).

One can explain away all of these anomalies, but they nonetheless show articulable reasons to be uncertain.

C. There Is No Basis To Conclude That “Articulable Doubt” Requires New Evidence.

In relevant part, Article 926.1 states that an application shall be dismissed unless a court finds that “[t]here is an articulable doubt based on competent evidence, whether or not introduced at trial.”⁹⁷ Thus, the language of the statute precludes the argument that new evidence must be presented to find articulable doubt. This statute stands in contrast to the language found in other post-conviction Louisiana statutes which place a much higher burden on the applicant.⁹⁸ Here, Mr. Williams is merely seeking the testing of DNA samples, which may later prove to be new evidence. To the extent that the District Court, in adapting the Commissioner’s recommended finding of no “articulable doubt,” believed that new evidence, or evidence not presented at trial, was required to support a finding of “articulable doubt,” it simply misread the statute.

⁹⁷ La. C.Cr.P. Art. 926.1(C)(1) (2003).

⁹⁸ See State v. Bolden, 852 So.2d 1050, 1063 (La. App. 2003) (stating that a motion for a new trial based on newly discovered evidence under La. C. Cr. P. art. 851 is required to show that “(1) the evidence must have been discovered since the trial; (2) the failure to learn of the evidence at the time of trial was not due to defendant's lack of diligence; (3) the evidence must be material to the issues at trial; and, (4) the evidence must be of such a nature that it would probably produce an acquittal in the event of a retrial”).

III. THERE IS A “REASONABLE LIKELIHOOD” THAT DNA TESTING WILL ESTABLISH PETITIONER’S INNOCENCE

A. The State And The District Court Employed The Incorrect Standard Regarding The “Reasonable Likelihood” Requirement

Louisiana’s post-conviction DNA testing statute also requires a petitioner to establish that “there is . . . a reasonable likelihood that the requested DNA testing will resolve the doubt and establish the innocence of the petitioner.”⁹⁹

Both the District Court’s decision and the State’s most recent brief in Opposition to the Application for Supervisory Writs misinterpret the statute’s requirement. In particular, the District Court adopted, without discussion, the Commissioner’s Recommendation that there is no “reasonable likelihood” of establishing innocence here because “the absence of the petitioner’s DNA would not necessarily prove that he is innocent.”¹⁰⁰ To be sure, DNA testing might be inconclusive here. But it might also be dispositive, and that entirely reasonable possibility is sufficient to warrant testing.

Such reasoning is consistent with the 16th Judicial District Court’s decision in State of Louisiana v. White.¹⁰¹ In White, the State argued that DNA testing should be denied because there was “a likelihood that DNA [t]esting may

⁹⁹ La.C.Cr.P. art. 926.1(C)(1) (2003).

¹⁰⁰ Commissioner Recommendation, September 18, 2006, at 4-5 (emphasis added).

¹⁰¹ Written Reasons for Judgment on the Issue of DNA Testing, 16th Jud. Dist. Ct. (July 8, 2005).

prove inconclusive.”¹⁰² The court rejected the State’s argument and granted DNA testing noting that:

If a defendant would first have to show that DNA testing will find DNA present on the sample, and will find the DNA not degraded, and will generate the necessary DNA profiles, and that the DNA test results will be conclusive of the innocence of the defendant, then, arguably, no defendant could be granted DNA testing.¹⁰³

The Court concluded that it was “not convinced that Article 926.1 contemplates a standard impossible to meet.”¹⁰⁴

The “reasonable likelihood” requirement does not require an inquiry into all the possible results of a DNA test, and an assessment of how likely each possible outcome is, before testing is actually conducted. Instead, as delineated in White, the “reasonable likelihood” standard simply requires that “a possibility exists that DNA testing would establish the innocence of petitioner.”¹⁰⁵

New Jersey has adopted a similar standard of review for post-conviction DNA testing petitions. For example, in State v. Peterson,¹⁰⁶ the court held that:

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ State v. Peterson, 836 A.2d 821 (N.J. Super. Ct. App. Div. 2003).

because it is difficult to anticipate what results DNA testing may produce in advance of actual testing, the trial court should postulate whatever realistically possible test results would be most favorable to defendant in determining whether he has established that ‘favorable’ DNA testing ‘would raise a reasonable probability ... [that] a motion for new trial based upon newly discovered evidence would be granted.’¹⁰⁷

A DNA test, by itself, cannot establish innocence; however, the results of the tests “may establish a suspect’s innocence or guilt by providing probative information to the fact finder who is apprised of other relevant facts. The ‘reasonable likelihood’ standard describes how strong the possibility must be that DNA test results will lead to the legal conclusion of innocence.”¹⁰⁸

The White court thus proposes a two-part procedure. First, the court should determine possible outcomes of a DNA test. Second, the court should interpret those outcomes in light of the known facts of the case. So long as one of those possible outcomes establishes that it is “reasonably likely” that the petitioner is innocent, the “reasonable likelihood” standard of Article 926.1 is satisfied.

This type of analysis has the advantage of allowing courts to reject frivolous petitions, or petitions where even the most positive outcome possible

¹⁰⁷Id. at 827

¹⁰⁸ Id.

would be of very little probative value,¹⁰⁹ while allowing the court to grant petitions in which DNA testing would be “reasonably likely” to establish innocence.

Here, the “reasonable likelihood” standard of Article 926.1 is met.

First, there are various possible outcomes of the test. These possible outcomes include: (1) the testing yields no DNA profile or (2) the DNA testing yields two DNA profiles, neither of which are consistent with Mr. Williams’ profile.¹¹⁰

Second, the above outcomes must be examined in light of the facts presented at Mr. Williams’ trial, to determine whether one of the outcomes establishes that it is “reasonably likely” Mr. Williams is innocent. The first outcome would not lead to the conclusion that it is “reasonably likely” that Mr. Williams’ is innocent.

However, the second outcome would make it “reasonably likely” that Mr. Williams is innocent. Based on the facts of this case, one of the samples could be a consensual partner, but the second would almost certainly be an attacker who was

¹⁰⁹ See e.g. State v. White, 617 A.2d 272 (N.J. Super. Ct. App. Div.1992) (denying a motion for post-conviction DNA testing, because the petitioner sought to test semen marks on his own shirt and holding that such a test would be irrelevant because even a “conclusive finding that the semen on defendant's T-shirt was not his own would have no exculpatory impact... The tests defendant seeks would not prove his innocence.”); State v. Reldan, 861 A.2d 860 (N.J. Super. Ct. App. Div. 2004) (denying DNA testing of hairs found in the petitioner’s car, and holding that “DNA testing of the hairs found in [defendant’s] car would not exculpate him, rather at best it might indicate that those particular hairs were not those of either or both of the victims, something that would not change the jury’s verdict.”).

¹¹⁰ As indicated, these are merely *some* of the possible outcomes in this case. For example, DNA testing could yield one DNA profile which is not consistent with Mr. Williams.’ DNA testing could also show that Mr. Williams was the perpetrator and was properly convicted. Although the possibility of such an outcome is not the basis for granting a request for testing in the first instance, it shows yet another way in which testing in this instance might help to resolve uncertainty rather than merely creating new questions.

not Mr. Williams.¹¹¹ Thus, Mr. Williams' would meet the "reasonable likelihood" requirement of Article 926.1 because one of those outcomes, when viewed in light of the facts of the case, establishes a "reasonable likelihood" of his innocence.

The State misconstrued the "reasonable likelihood standard" when it inexplicably concluded that DNA testing would produce a "a DNA profile . . . , that . . . , could only be dispositive of petitioner's guilt, rather than his innocence."¹¹² There are clearly other possible outcomes which would be "reasonably likely" to establish Mr. Williams' innocence. Moreover, the State's flawed argument rests entirely on the victim's un-sworn statement – a statement never subjected to cross-examination – that she did not believe the attacker ejaculated.¹¹³ Such evidence is hardly conclusive, as a victim's recollection of whether or not the perpetrator ejaculated is often erroneous. For example, Bruce Godschalk was convicted of two home invasion rapes.¹¹⁴ Although the victim

¹¹¹ DNA testing technology is capable of yielding two genetic profiles if both are present in the test sample. The Commissioner's argument that "the most that DNA testing could hope to show . . . is that the seminal fluid belonged to someone other than the petitioner," which would be meaningless because the victim could have engaged in consensual sex "at some point prior to the rape," is simply wrong. Commissioner, at 5.

¹¹² Opposition to Application for Supervisory Writs Filed on Behalf of the State of Louisiana, at 13 (emphasis added).

¹¹³ See Answer and Motion to Dismiss Application for Post-Conviction Relief, dated Mar. 6, 2003 at 6.

¹¹⁴ See Maurice Possley & Steve Mills, Crimes Go Unsolved as DNA Tool Ignored, Chicago Tribune, Oct. 26, 2003.

reported that the rapist did not ejaculate, DNA testing showed that ejaculation had taken place and exonerated Mr. Godschalk.¹¹⁵

Furthermore, even if the rapist did not ejaculate, the type of testing sought can still reveal genetic profiles.¹¹⁶ By testing “the skin cells and/or pre-ejaculate left behind during intercourse,” Y STR DNA testing is fully capable of yielding DNA results regardless of whether there was full ejaculation.¹¹⁷

The Commissioner also misinterpreted the statute’s requirement.¹¹⁸ In response to petitioner’s argument that DNA testing could determine the ‘true assailant’ by matching a sample in the state or federal databases, the Commissioner stated that “[t]he DNA test results could just as easily find no match in any of the databases.”¹¹⁹ The Commissioner’s observation, while true, is irrelevant. Of course, DNA testing could be inconclusive, in this or any other case. The relevant fact is that one or more possible outcomes would establish a “reasonable likelihood” of innocence. That test is met in this case.

¹¹⁵ Id.

¹¹⁶ See Affidavit of Sudhir K. Sinha, President and Laboratory Director of ReliaGene Technologies (explaining that Y STR DNA testing is capable of yielding genetic profiles “even if the rapist did not ejaculate”).

¹¹⁷ Id.

¹¹⁸ See supra, III.A and FN 107 (**make sure FN 107 stays same otherwise adjust**).

¹¹⁹ Commissioner Recommendation, at 5.

B. Even If The Court Rejects The White Test, It Is Still “Reasonably Likely” That DNA Testing Will Establish Mr. Williams’ Innocence.

Even if this Court rejects the two-part test proposed in White, it is still “reasonably likely” that DNA testing will establish Mr. Williams’ innocence.

“Reasonable likelihood” must not be construed to require a petitioner to prove that it is more likely than not that DNA testing will prove his innocence. If “reasonable likelihood” were interpreted to mean “more likely than not,” no petitioner would be able to satisfy the test, because the jury’s verdict, based on a finding of guilt beyond a reasonable doubt, will always make actual innocence a relative rarity.

In other criminal contexts, courts have treated the “reasonable likelihood” standard as a low threshold. For example, in United States v. Anderson,¹²⁰ Anderson sought to set aside his conviction based, in part, on the government’s failure to disclose pertinent information.¹²¹ In reviewing Anderson’s claim, the court discussed whether or not the prosecutor’s action amounted to a Brady violation.¹²² To do so, the court discussed four types of Brady violations and the risk of unjust conviction needed to justify reversal with each.¹²³ The fourth type of violation included “cases in which the undisclosed information indicate[d]

¹²⁰ 574 F.2d 1347 (5th Cir. 1978).

¹²¹ Id. at 1352-53

¹²² Id. at 1353-55.

¹²³ Id. at 1353

that the conviction [was] based on false evidence or perjured testimony which the prosecution knew or should have known was false.”¹²⁴ This type of conviction would have to be set aside if “there [was] any reasonable likelihood that the false testimony could have affected the judgment of the jury.”¹²⁵ Significantly, the court held that “[o]f the four standards for measuring the materiality of the undisclosed evidence, this “reasonable likelihood” standard is the lowest threshold for reversal. That is, the defendant's burden of showing the materiality of the suppressed evidence, a showing which requires reversal, is the least onerous of the four type situations.”¹²⁶

“Reasonable likelihood” does not mean “probability.” In United States v. Rodriguez, appellant moved for a new trial based on false testimony by one of the government’s witnesses.¹²⁷ The court noted that a Brady error occurs when a prosecutor “suppresses ‘material’ evidence that is favorable to the accused.”¹²⁸ To determine the meaning of “material” the court compared two

¹²⁴ Id. at 1355 (emphasis added).

¹²⁵ Id. (emphasis added).

¹²⁶ Id. (emphasis added). See also U.S. v. Barham, 595 F.2d 231(5th Cir. 1979). The court, in reversing Barham’s convictions and remanding for a new trial, stated that “the failure of the prosecution to correct false testimony which it knows to be false violates due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” Id. at 232-233 (emphasis added). The court further elaborated that “this ‘reasonable likelihood’ standard of materiality is a ‘low threshold’ standard.” Id. at 242.

¹²⁷ 162 F.3d 135, 146 (1st Cir., 1998)

¹²⁸ Rodriguez, at 146.

standards.¹²⁹ Under the Bagley standard, evidence is material only if “there is a ‘reasonable probability’ that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”¹³⁰ Under the Agurs standard, “a conviction . . . is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”¹³¹ The court noted that the Agurs standard of materiality is more favorable to the defendant.¹³²

Similarly, in Boyde v California,¹³³ the petitioner argued, in part, that a jury instruction used in the penalty phase of his trial was inconsistent with the Eighth Amendment.¹³⁴ The United States Supreme Court stated that in such a case, the proper inquiry is whether “there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of

¹²⁹ Id.

¹³⁰ Id. at 146 quoting Kyles v Whitley, 514 U.S. 419 (1995) (emphasis added).

¹³¹ Rodriguez, at 146 quoting Kyles, 514 U.S. 419 at 433 n.7 (emphasis added).

¹³² Rodriguez, at 146. See also U.S. v. Frost, 125 F.3d 346,382 n.17 (6th Cir. 1997) (noting that “[a]ny favorable evidence . . . is ‘material’ if ‘there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A more defense-friendly standard of ‘materiality’ applies when the prosecutor has relied upon perjured testimony: the defendant only must show that ‘there is [a] reasonable likelihood that the false testimony could have affected the judgment of the jury’” (emphasis added); See also U.S. v. Arnold, 117 F.3d 1308, 1315 (11th Cir., 1997). In Arnold the appellant sought a new trial based on the government’s suppression of taped conversations. 117 F.3d at 1315. In determining whether a Brady violation occurred the court noted that a “‘reasonable probability’ is one sufficient to undermine confidence in the trial outcome. The standard of materiality is less stringent, however, when the prosecutor knowingly uses perjured testimony. . . . In that instance, the falsehood is deemed material if a ‘reasonable likelihood’ exists that the false testimony could have affected the jury’s verdict.” Id. (emphasis added).

¹³³ 494 U.S. 370,380 (1990).

¹³⁴ Boyde, at 380.

constitutionally relevant evidence. [A] defendant need not establish that jury was more likely than not to have been impermissibly inhibited by the instruction. . . .

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As these cases make clear, a “reasonable likelihood” standard, as set forth in Article 926.1, is not intended to impose a stringent threshold for petitioners seeking DNA testing.

In the civil litigation context, the standard for discoverable information – “reasonably calculated to lead to the discovery of admissible evidence”¹³⁶ – is comparable to the “reasonable likelihood” standard and has been held to set a similarly low threshold. The Supreme Court has long stressed that discovery is afforded “a broad and liberal treatment” so that parties may obtain “the fullest possible knowledge of the issues and facts before trial.”¹³⁷ Similarly, Article 1422 of the Louisiana Code of Civil Procedure provides that any relevant matter, not privileged, is discoverable.¹³⁸ Even information which will be

¹³⁵ Id. (emphasis added). See also Martinez v. Superior Court, 29 Cal.3d 574 (1981). The court had to determine whether or not to grant Martinez a change of venue for trial. Id. at 577. In setting out the standard the court noted that “[a] motion for change of venue . . . shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had.” Id. quoting Maine v. Superior Court, 68 Cal.2d 375,383. The court stressed that “[t]he phrase ‘reasonable likelihood’ denotes a lesser standard of proof than ‘more probable than not.’” Martinez, at 578.

¹³⁶ Federal Rule of Civil Procedure 26(b)(1); Louisiana Code of Civil Procedure, Article 1422.

¹³⁷ See e.g. Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947).

¹³⁸ La. C. C. P. art. 1422

inadmissible at trial is discoverable, so long as it is “reasonably calculated” to lead to the discovery of admissible evidence.¹³⁹

A court in a civil litigation would not dream of denying a party’s request for discovery solely on the grounds that the information requested would not “necessarily” lead to the discovery of admissible evidence. But that, in effect, is what the District Court did here: it denied DNA testing by adopting the Commissioner’s recommended finding that such testing would not “necessarily” establish innocence here. That is the wrong test. In order to be entitled to testing, a petitioner must show only a possibility that testing will establish his innocence, not a probability. Archie Williams meets that test.

C. Here, There Is A “Reasonable Likelihood” That DNA Will Be Conclusive

Archie Williams was convicted beyond a reasonable doubt based on the only evidence available at the time — subjective, eyewitness testimony. That was 24 years ago. Since that time, scientific capabilities have vastly evolved. By granting DNA testing, this court will not be declaring, or even implying, Mr. Williams’ innocence. All it will be doing is acknowledging the possibility, or

¹³⁹ Id.

reasonable likelihood, of his innocence, allowing the testing to bring the weight of the best available evidence to bear on this issue.

This case represents a no lose situation. In a worst case scenario the test will be inconclusive, leaving all parties in exactly the same place that they are in now. Mr. Williams would remain incarcerated, as he has previously been convicted beyond a reasonable doubt. But even that outcome has its advantages, as it will mean that the State did everything it possibly could with the evidence available.

If the DNA test results match Mr. Williams, that too has its advantages. It will once and for all put the case to rest and resolve any doubt as to Mr. Williams' guilt.

This Court has nothing to lose by granting testing, and everything to gain, if it means exonerating an innocent man, perhaps by finding a previously undetected perpetrator.

Moreover, there are two possible favorable outcomes that would provide probative information supporting Mr. Williams' innocence. First, DNA testing could yield two male DNA profiles, neither of whom was Mr. Williams.¹⁴⁰

¹⁴⁰ Affidavit of Sudhir K. Sinha (stating: "Y STR testing is capable of showing two male Y profiles.")

This result would demonstrate, to a near certainty, Mr. Williams' innocence. Second, DNA testing could yield a single DNA sample that does not match Mr. Williams, but instead matches another individual in any of the various DNA databases. This result would conclusively establish Mr. Williams' innocence. Both of these possibilities easily meet the "reasonable likelihood" requirement set forth in Article 926.1

Post-conviction DNA testing statutes were enacted out of a recognition that superior methods of evidence analysis are now available, and to enable the application of this new technology to cases pre-dating the advancement of DNA testing. In particular, these statutes exist for cases like the one before the court, where doubt as to an applicant's guilt is articulable, and reasonable possibilities of DNA evidence exonerating the applicant exist.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, the Innocence Network Inc. urges this court to grant Mr. Williams' Application for Post-Conviction Relief, and to order post-conviction DNA testing.

Dated: New York, New York
August __, 2007

Respectfully Submitted,

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VERIFICATION AND CERTIFICATION

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned notary, personally came and appeared:

KEITH A. FINDLEY

who, being duly sworn, deposed and said that he is the _____ of the Innocence Network, that the statements contained in the foregoing Brief of Amicus Curiae are true and correct to the best of his information, knowledge and belief; and that a copy of the foregoing Brief of Amicus Curiae has been served upon: Judge Richard Moore III, 19th Judicial District Court, Parish of East Baton Rouge, 222 St. Louis Street, Baton Rouge, Louisiana 70802; Assistant District Attorney Ms. Prem Burns, 222 St. Louis Street, Baton Rouge, Louisiana 70802; and Commissioner John M. Smart Jr., 222 St. Louis Street, Baton Rouge, Louisiana 70802.

KEITH A. FINDLEY

SWORN TO AND SUBSCRIBED
before me, this ___ day of August, 2007

NOTARY PUBLIC