

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

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CA No. 05-CP-18-1368  
Appellate Case No. 2014-000387

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KENNETH SIMMONS, SK5066.....*Petitioner,*

v.

STATE OF SOUTH CAROLINA.....*Respondent.*

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

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## STATEMENT OF INTEREST OF *AMICUS*

The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to convicted individuals seeking to prove their innocence. The 70 member organizations of the Innocence Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as internationally.<sup>1</sup> The Innocence Project, a member organization of the Innocence Network, has recorded exonerations based on new DNA evidence of 333 people who served a combined 4,563 years behind bars for crimes they did not commit.<sup>2</sup> Because of the Innocence Network's experience exonerating innocent individuals and examining the causes of wrongful convictions, the Innocence Network is aware of the role that unreliable or improper scientific evidence can play in wrongful convictions. In 2009, the National Academy of Sciences published a groundbreaking study

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<sup>1</sup> The member organizations include the Alaska Innocence Project, Arizona Justice Project, Arizona Innocence Project, Midwest Innocence Project, California Innocence Project, Loyola Law School Project for the Innocent, Northern California Innocence Project, Connecticut Innocence Project, New England Innocence Project, Office of the Public Defender, State of Delaware, Mid-Atlantic Innocence Project, Innocence Project of Florida, University of Miami Law Innocence Clinic, Georgia Innocence Project, Hawai'i Innocence Project, Idaho Innocence Project, Life After Innocence, Center on Wrongful Convictions, Illinois Innocence Project, Wrongful Conviction Clinic, Innocence Project of Iowa, Kentucky Innocence Project, Innocence Project New Orleans, Resurrection After Exoneration, University of Baltimore Innocence Project Clinic, Committee for Public Counsel Services Innocence Program, Thomas M. Cooley Law School Innocence Project, Michigan Innocence Clinic, Michigan State Appellate Defender Office – Wrongful Conviction Units, Innocence Project of Minnesota, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, Rocky Mountain Innocence Center, Innocence and Justice Project at the University of New Mexico School of Law, The Exoneration Initiative, Innocence Project, New York Law School Post-Conviction Innocence Clinic, Reinvestigation Project, The Duke Center for Criminal Justice and Professional Responsibility, North Carolina Center on Actual Innocence, Wake Forest University Law School Innocence and Justice Clinic, Ohio Innocence Project, Office of the Ohio Public Defender, Wrongful Conviction Project, Oklahoma Innocence Project, Pennsylvania Innocence Project, Witness to Innocence, Justicada Reinvidicada – Puerto Rico Innocence Project, Innocence Project of Texas, Texas Center for Actual Innocence, Thurgood Marshall School of Law Innocence Project, Innocence Project at UVA School of Law, Innocence Project Northwest Clinic, West Virginia Innocence Project, Wisconsin Innocence Project, Innocence Project Argentina, Griffith University Innocence Project, Sellenger Centre Criminal Justice Review Project, Association in Defense of the Wrongly Convicted, University of British Columbia Law Innocence Project, Osgoode Hall Innocence Project, Innocence Project of France, Irish Innocence Project at Griffith College, Israel Public Defender, Italy Innocence Project, Knoops' Innocence Project, Innocence Project New Zealand, Innocence Project South Africa, and Taiwan Association for Innocence.

<sup>2</sup> The Innocence Project, *DNA Exonerations Nationwide*, (October 25, 2015 12:18 PM), available at <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>.

demonstrating that many of the traditional forensic sciences are inadequately researched and validated, and in short, lack a significant scientific basis.<sup>3</sup>

Consistent with that conclusion, invalid or improper forensic science is the second greatest contributor to wrongful convictions later overturned with proper DNA testing.<sup>4</sup> Flawed or unvalidated forensic science testimony has contributed to more than 50% of wrongful convictions later overturned based on DNA evidence.<sup>5</sup> In one analysis of DNA exoneration cases, scholars examined 137 cases featuring trial testimony by forensic analysts. In 60% of these cases “forensic analysts called by the prosecution provided invalid testimony at trial—that is, testimony with conclusions misstating empirical data or wholly unsupported by empirical data.”<sup>6</sup>

As a leading national advocate for the wrongly convicted, the Innocence Network has a compelling interest in ensuring scientific expert testimony in our criminal justice system is accurate and reliable. Given the Innocence Network’s reliance on DNA evidence to establish the innocence of wrongly convicted individuals, the Innocence Network has a particularly powerful interest in making sure that DNA evidence is properly collected, analyzed, and presented at criminal trials. This interest is directly implicated by the prosecution’s impermissible reliance on unsupported and unreliable DNA evidence to convict Kenneth Simmons.

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<sup>3</sup> See Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

<sup>4</sup> See Innocence Project, *Wrongful Convictions Involving Unvalidated or Improper Forensic Science that Were Later Overturned through DNA Testing* (as of December 8, 2015), available at [http://www.innocenceproject.org/causes-wrongful-conviction/DNA\\_Exonerations\\_Forensic\\_Science.pdf](http://www.innocenceproject.org/causes-wrongful-conviction/DNA_Exonerations_Forensic_Science.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 2 (2009).

## INTRODUCTION

Sixteen years ago, Dorchester County prosecutors used false and misleading DNA evidence to convict Kenneth Simmons of murder. Mr. Simmons has been imprisoned ever since. The Innocence Network, a longtime champion of the *proper* use of DNA evidence, believes it is critical this Court overturn Mr. Simmons's conviction, because (1) the improper use of DNA evidence leads to wrongful convictions; (2) the testimony, evidence, and arguments regarding DNA evidence in this case were fatally flawed; and (3) wrongful convictions based on flawed DNA evidence are fundamentally unfair and detrimental to the broader judicial system.

This case exemplifies how the persuasive power of DNA testing—one of the justice system's greatest assets—can be misused to secure convictions untethered to the realities of the evidence or the constitutional requirements of a fair trial. The errors here were egregious, including uncontrolled tests, unfounded assumptions, false testimony that overstated the likelihood of a genetic match and cited the results of tests that had never been run. Today, DNA evidence is highly persuasive to jurors, but also little understood, so safeguards must be imposed by courts like this one to ensure the evidence is properly obtained and clearly presented. To hold otherwise would invite dangerous misuse of DNA evidence to secure easy but improper verdicts. The Court should overturn Mr. Simmons's conviction.

### **I. FLAWED DNA EVIDENCE LEADS TO WRONGFUL CONVICTIONS.**

“Modern DNA testing can provide powerful new evidence unlike anything known before.” *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62 (2009) (recognizing that DNA testing has both supported convictions and “exonerated wrongly convicted people”). Where used properly, DNA evidence advances the truth-seeking function of the trial process. Where, as here, DNA evidence is misused, it corrupts the process.

**A. DNA Testing, Used Properly, Provides Powerful Scientific Evidence.**

Results of valid, accurate, and thorough DNA tests, presented scrupulously, can demonstrate the probability of a suspect's involvement in a crime, or establish a defendant's innocence. And the correct interpretation of DNA evidence has contributed to resolving countless cold cases that might otherwise have gone unsolved. *See, e.g., Al Baker, Indicting DNA Profiles Is Vital in Old Rape Cases*, N.Y. Times (October 18, 2009).<sup>7</sup>

The Innocence Network has long championed the persuasive power of properly marshaled DNA evidence. The Innocence Project reported, over twenty-five years, 333 post-conviction exonerations based on exculpatory DNA evidence. *The Innocence Project: DNA Exonerations Nationwide* (Oct. 26, 2013).<sup>8</sup> The Innocence Network embraces the power of DNA evidence, used correctly, to generate accurate outcomes.

**B. Jurors Place Tremendous, and at Times, Excessive, Faith in DNA Evidence.**

Jurors “trust in the accuracy and reliability of DNA evidence,” but it “has the potential to be highly technical and confusing in a way that could unduly affect the outcome of a trial.” *Whack v. State*, 73 A.3d 186, 188 (Md. 2013) (ordering a new trial where arguments regarding DNA evidence potentially confused the jury); *Duncan v. Kentucky*, 322 S.W.3d 81, 93 (Ky. 2010) (recognizing the “immense weight jurors are apt to accord DNA evidence”).

The potency—and in some cases, the inscrutability—of DNA evidence, has led jurors to rely heavily, and in certain instances excessively, on this particular branch of forensic evidence. Studies consistently demonstrate that jurors are much more likely to be swayed by DNA evidence than by other types of evidence, and are much less likely to question its accuracy. For example:

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<sup>7</sup> Available at <http://www.nytimes.com/2009/10/19/nyregion/19dna.html>.

<sup>8</sup> Available at <http://www.innocenceproject.org/free-innocence/improve-the-law/fact-sheets/dna-exonerations-nationwide>.

- In a 2005 Gallup poll, 85 percent of respondents believed DNA evidence was “completely” reliable or “very reliable.” Joel D. Lieberman, et al., *Gold versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 Psychol. Pub. Pol’y & L. 27, 32 (2008).
- In a 2008 University of Nevada poll of several hundred jurors, participants viewed DNA evidence, on average, as “95% accurate” and “94% persuasive.” *Id.* at 52.
- In a 2000 criminal justice study, researchers presented mock jurors with DNA evidence, eyewitness accounts, or both. *Id.* at 32-33. Where DNA evidence was present, more guilty verdicts followed. *Id.* In yet another study, mock jurors voted to convict a defendant even when expert testimony raised problems with the DNA evidence. *Id.*<sup>9</sup>

Paradoxically, when experts fail to clearly and lucidly explain the implications of DNA results, jurors may actually place *more* faith in the evidence, because they do not have a grasp on the issues at hand, nor do they have the ability to question the results. *See id.* at 32. Presenting jurors with foreign, exceedingly complex scientific data acts as a “heuristic cue” that leads jurors to abandon attempts to understand the material presented, and to instead adopt a short-cut for decision-making. *Id.* That short-cut, all too often, leads jurors to rely not on complex facts presented by experts, but to fall back instead on the popular conception that DNA evidence is exceedingly accurate. That blind faith, however, carries tremendous risk because the underlying tests may be slipshod, the testimony provided may be inaccurate, and the presentation to the jury may be incomplete. As detailed below, Mr. Simmons’s case is a paradigmatic example where this pyramid of errors caused the jurors to have misplaced faith in the DNA evidence.

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<sup>9</sup> Reliance on DNA evidence has become so widespread that jurors in recent years have exhibited a “CSI effect” or a “science effect,” such that they hesitate to convict a defendant without DNA evidence. *See generally* Shelton, Barak, and Kim, *Studying Juror Expectations for Scientific Evidence*, 47 Ct. Rev. 8, 11 (2009) (reporting study results that three quarters of jurors “expected” to see DNA evidence in murder cases).

### C. DNA Testing, When Used Improperly, Causes Wrongful Convictions.

DNA evidence, though powerful, is not flawless. There are documented cases where *accurate* DNA evidence helped exonerate defendants who had previously been convicted on the basis of *inaccurate* DNA evidence. One study cited eleven cases in which innocent people were both convicted of serious crimes based on (improper) DNA evidence and exonerated based on (proper) DNA evidence. Brandon L. Garrett and Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 63 (2009). In many of these cases, the prosecution overstated the strength of DNA evidence, offered inaccurate statistics, relied on shoddy lab work, and placed undue emphasis on equivocal DNA evidence. *See, e.g., id.* at 64 (trial expert testified to a DNA match but presented no supporting statistics);<sup>10</sup> *id.* at 64-65 (expert testified to a complete DNA match where he never even conducted a full analysis of the lab results).<sup>11</sup>

When evidence regarding forensic science is offered at trial, courts must apply extra vigilance, because otherwise juries may “give more credence [to the evidence] than it may deserve,” and thus return a wrongful conviction. *United States v. Hebshie*, 754 F. Supp. 2d 89, 94 (D. Mass. 2010) (overturning conviction where experts offered flawed scientific testimony); *see Ragland v. Commonwealth*, 191 S.W.3d 569, 580–82 (Ky. 2006) (overturning conviction where the state’s expert presented false test results); *Clemons v. State*, 896 A.2d 1059, 1061–62 (Md. 2006) (overturning conviction where the state’s expert failed to establish his test’s reliability).

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<sup>10</sup> In reference to *Texas v. Josiah Sutton*. *See Ex parte Sutton*, No. AP-75, 181, 2005 Tex. Crim. App. Unpub. LEXIS 316, \*1 (Tex. Crim. App. May 25, 2005) (*see* Trial Transcript at 181-84, *State v. Josiah Sutton*, No. 800450 (Tex. Dist. Ct. 1999), *available at* <http://www.scientific.org/archive/Christy%20Kim%20Testimony.pdf>.)

<sup>11</sup> In reference to *State v. Gilbert Alejandro*. *See* Trial Transcript at 149, *State v. Gilbert Alejandro*, No. 90-09-8445-CR (Tex. Dist. Ct. Dec. 11, 1990), *available at* [http://www.law.virginia.edu/pdf/faculty/garrett/innocence/alejandro\\_zain\\_testimony.pdf](http://www.law.virginia.edu/pdf/faculty/garrett/innocence/alejandro_zain_testimony.pdf).

DNA evidence is no exception. Like all forensic evidence, DNA is obtained, analyzed, and interpreted by human beings—and is thus subject to human error. DNA “matches” do not simply occur without human intervention; rather, the analysis and interpretation of test results is a subjective exercise that can be affected by scientific mistakes. Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always “Harmless Error,”* 17 Tex. Wesleyan L. Rev. 404, 414 (2011).<sup>12</sup> Moreover, like other evidence, DNA can be fraudulently represented and mishandled. Lieberman, *et al.* at 30-31. Accordingly, while DNA is in many ways superior to other forms of forensic evidence, it also opens up “new territory for old problems.” Boies at 414.

These problems arise from both intentional malfeasance and innocent mistakes. DNA evidence has been intentionally misused to secure wrongful convictions. For example, in 2006, investigators uncovered 43 cases in which employees of a Houston crime lab fabricated forensic evidence and falsely presented it in court. *Id.* at 415. More recently, a 2010 review of the San Francisco crime lab revealed a pattern of neglect and malfeasance, where analysts mixed evidentiary samples and then destroyed records to cover their mistakes. Terry Collins & Brooke Donald, *San Francisco Crime Lab Scandal Strains Justice System*, Associated Press, April 3, 2010.<sup>13</sup> These tactics lead to unjust results in individual cases, and, more broadly, erode faith in the criminal justice system.

Though intentionally false reports are perhaps the most egregious misuse of DNA evidence, unintentional errors also have catastrophic consequences. Neither state crime labs nor private labs are immune from making mistakes with DNA evidence that lead to innocent people being imprisoned or executed. *See Lieberman et al.* at 31-32. DNA labs are vulnerable to

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<sup>12</sup> For example, when analyzing tests, lab technicians must decide which loci present interpretable results. Boies, at 413.

<sup>13</sup> Available at <http://www.deseretnews.com/article/700021749/San-Francisco-crime-lab-scandal-strains-justice-system.html?pg=all>.

human error at each stage of the testing process: “collection, interpretation, and application.” Boies at 407. For example, specimen cross-contamination, either with a lab worker’s DNA or with a victim’s DNA is a pervasive risk. William C. Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the “DNA War,”* 84 J. Law & Criminology 22, 42 (1993). Moreover, it is not always easy to distinguish between intentional malfeasance, advocacy masquerading as science, and innocent mistakes. For example, several DNA labs have been faulted for drawing unsupported conclusions from ambiguous data. *Id.* at 43, 46. Whatever the motive, the result is often the same: a wrongful conviction.

## **II. THE DNA EVIDENCE AT MR. SIMMONS’S TRIAL WAS FATALLY FLAWED.**

The DNA evidence presented during Mr. Simmons’s trial was flawed in three key respects that deprived him of a fair trial. *First*, the prosecution’s experts conducted a faulty analysis of the DNA test results that led to their overstating and misrepresenting the likelihood of Mr. Simmons’s involvement in the crime. *Second*, the prosecution presented false and misleading testimony at Mr. Simmons’s trial—crafting a damning picture unsupported by the testing. *Third*, the analysis and the testimony rested on a house of cards, because the DNA testing itself was improper—it was conducted without appropriate safeguards, proper documentation, or reasonable analysis. All of these issues were compounded because the prosecution withheld exculpatory material that would have enabled Mr. Simmons’s defense team to challenge both the overarching utility of the flawed testing and the specific instances of false testimony regarding the DNA evidence. As a result of these mistakes, Mr. Simmons has been imprisoned for life. But-for his mental disability, he would likely be slated for execution. Neither is a just result. Mr. Simmons should be given the opportunity for a new, properly conducted trial free of false evidence and *Brady* violations.

**A. Lifecodes Failed To Properly Analyze the Test Data.**

**1. Lifecodes Improperly Assumed that the DNA Samples had only Two Contributors.**

Even if Lifecodes’s underlying testing had been flawless—and it was far from that—Lifecodes made an improper and unjustified assumption in *analyzing* that data. From the start Lifecodes assumed, without any basis, that only two contributors to the DNA samples existed: the victim and the perpetrator. (App. 4553.) Lifecodes’s reliance on its unfounded assumption was, for all intents and purposes, dispositive. This initial assumption led Lifecodes to exclude as possible contributors all of the suspects whose DNA was tested, other than Mr. Simmons.

But this assumption has no basis in science. To the contrary, as defense experts Drs. Charlotte Word and Robin Cotton explained in their affidavit in support of Mr. Simmons’s post-conviction claims, “[i]t is not possible to determine the number of contributors to the DNA obtained from these [vaginal swab] samples – simply that there are two *or more* DNA contributors to the mixed sample.” (App. 4548 ¶ 25) (emphasis added). Because the DNA cannot tell us the number of contributors, Lifecodes should have considered the possibility that there were more than two contributors to the DNA evidence. As Drs. Word and Cotton pointed out, had Lifecodes followed proper scientific protocol and considered that possibility, “ten of the twenty-six [potential suspects] tested with complete DQ/PM profiles”—all of whom were reported as excluded in the Lifecodes report— would have been reported as “cannot be excluded (or are included) as possible contributors to the mixed DNA profile.” (App. 4548 ¶ 27; *see also* 4553 ¶ 34.)

A similar error contributed to the wrongful conviction of 16-year-old Josiah Sutton of Houston, who was convicted for a 1998 rape and sentenced to 25 years in prison. Rebecca

Leung, *DNA Testing, Foolproof?*, CBS News (May 27, 2003).<sup>14</sup> In the *Sutton* case, DNA testing of a crime scene semen sample pegged the match probability at one-in-694,000, and the prosecution expert testified that the DNA could be attributed to only the defendant or essentially an “identical twin.” Garrett and Neufeld at 65. After deliberating less than two hours, the jury convicted Sutton. Leung, *supra*. Years later, however, when experts reanalyzed the DNA evidence, they uncovered that lab scientists made a key mistake: in determining the match probability, they failed to account for the scenario where a sperm sample could have been attributed to multiple donors. Garrett and Neufeld at 65. Overcoming the same unfounded assumption that Lifecodes indulged here led to Sutton’s exoneration, and should lead to Mr. Simmons’s exoneration as well.

**2. The Prosecution Grossly Misstated the Relevant Statistics by Focusing on Mr. Simmons’s DNA, Rather Than the Crime Scene Samples.**

With DNA evidence, the critical question involves the likelihood that the defendant or other individuals could have contributed to the DNA collected at the crime scene. In Mr. Simmons’s case—even if one were to rely on the unfounded assumption that only one individual besides the victim could have contributed to the DNA—then the probability that another individual could match the sample was either 1 in 145 Caucasians, or 1 in 336 African Americans. (App. 4550. ¶ 28.) When the baseless assumption that no third individual could possibly have contributed to the sample is set aside, those numbers shift dramatically, and make clear that 1 in 8 Caucasians or 1 in 2 African Americans—that is half of the African-American population—could have contributed to the DNA at the crime scene. (App. 4549. ¶ 27.)

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<sup>14</sup> available at <http://www.cbsnews.com/news/dna-testing-foolproof/>. See Ex parte Sutton, No. AP-75, 181, 2005 Tex. Crim. App. Unpub. LEXIS 316, \*1 (Tex. Crim. App. May 25, 2005); Trial Transcript at 181-84, State v. Josiah Sutton, No. 800450 (Tex. Dist. Ct. 1999), available at <http://www.scientific.org/archive/Christy%20Kim%20Testimony.pdf>.

The prosecution's expert witness Dr. Baird, however, performed a different—and incorrect—analysis, focusing instead on the wholly separate and irrelevant question of the likelihood that someone else in the world would match Mr. Simmons's DNA profile, at nine genetic locations. Mr. Baird described *that* improbability, which has nothing to do with the likelihood that Mr. Simmons committed this crime, as falling between 1-in-several-millions to 1-in-several billions. (App. 1480, 1482.) As detailed below, this incorrect analysis and misleading testimony—and false testimony claiming matches between aspects of the DNA taken from the crime scene and DNA taken from Mr. Simmons that simply did not exist—led to Mr. Simmons's conviction.

**B. The State's False Testimony Vastly Overstated the Likelihood That Mr. Simmons Contributed to the DNA Samples.**

During testimony at Mr. Simmons's trial, the prosecution presented two key forms of misleading statistical evidence. *First*, the prosecution relied on a confusing, wholly inapposite comparison that focused not on the likelihood that Mr. Simmons contributed to the DNA samples at the crime scene, but rather on the one-in-several million odds that someone else in the world's population would have the same DNA as Mr. Simmons. *Second*, the prosecution relied on non-existent matches between the crime scene evidence and Mr. Simmons's DNA. Each error, standing alone, affected the verdict, and was a miscarriage of justice. Moreover, each error compounded the other, creating the illusion of an infallible DNA match.

**1. The Prosecution Misled the Jury with Dr. Baird's Incorrect Analysis of the Relevant Statistics.**

As explained above, Dr. Baird's analysis focused on the wrong question. Namely, Dr. Baird considered how likely it was that any particular individual in the world might match Mr. Simmons's DNA. Dr. Baird described that improbability as falling between 1-in-several-millions to 1-in-several billions. (App. 1480, 1482.) He did not, however, address the relevant

question of how likely it was that any particular individual *contributed to the crime scene evidence in this case*. Dr. Baird’s testimony likely gave the jury the incorrect impression that the probability that someone other than Mr. Simmons contributed to the crime scene sample is astronomically high, falling between 1-in-several-millions to 1-in-several billions. (App. 1480, 1482.) However, as Drs. Word and Cotton explain, “no credible forensic scientist would report the results from DNA testing in this manner.” (App. 4545 ¶ 16.)

The prosecution relied on this error to repeatedly mislead the jury. The prosecution opened by promising jurors DNA evidence—a “nine out of nine match”—and testimony regarding “the statistical significance of that DNA match.” (App. 1041.) Yet during direct examination, rather than testify regarding the purported significance of that non-existent match, Baird offered only the misleading statistic that would lead any reasonable juror to a guilty verdict:

Dr. Baird: In other words, one person in Eight Million would have that profile that we see in Mr. Simmons.

Counsel: All right. And you also see that same profile in the Male Fragment of the vaginal swab?

Dr. Baird: **Right.** In the vaginal swab is a DNA profile consistent with Mr. Simmons being a contributor as well as the victim.

Counsel: Thank you.

(App. 1482 (emphasis added)).

Again, the prosecution could have tried to cure this misleading testimony, but elected instead to double down. Time and again, both during testimony and in closing arguments, the prosecution cited this irrelevant statistic, rather than providing the jury with a statistic that would demonstrate the likelihood that a person contributed to the DNA collected at the crime scene.

**2. The Prosecution Falsely Claimed a “Nine out of Nine” Match Between Mr. Simmons’s DNA and DNA from the Crime Scene where no such Match Existed.**

At Mr. Simmons’s trial, the prosecution claimed—through testimony, a demonstrative exhibit, and in closing statements—that Mr. Simmons’s DNA matched the DNA from vaginal swabs taken from the victim in *nine out of nine* tested locations. (App. 1464-71, 1481-82, 2005-06.) This was false. Two samples from the vaginal swabs were tested. One sample was labeled F156386 (for simplicity, hereinafter identified as “Sample A”). The other sample was labeled F156384 (for simplicity, hereinafter identified as “Sample B”). Neither sample A nor B showed a nine-out-of-nine match between Mr. Simmons’s DNA and the crime-scene sample.

**a. One of the two samples was not even tested in nine genetic locations.**

Taken together, the genetic tests known as the DQA/PM test and the CTT test provide data regarding a total of nine genetic locations. The DQA/PM test provides data regarding six locations, and the CTT test provides data for three additional locations. Lifecodes tested both Sample A and Sample B with the DQA/PM kit, and thus obtained data for *six* of the nine genetic locations at issue. Pet.’s Br. for Writ of Certiorari at 5. But Lifecodes performed the CTT test for the other three locations *only* on Sample A. Lifecodes never performed the required CTT test on Sample B. (App. 4723-24, 4733-34, 4798, 4807-08.) As a result, for Sample B, Lifecodes never obtained *any* data regarding three of the nine relevant locations. (*See* App. 4555.) Nonetheless, the prosecution’s case against Mr. Simmons presented expert testimony and a demonstrative chart falsely claiming that tests on Sample B revealed a nine-for-nine match with Mr. Simmons. *See* Pet. Br. for Writ of Certiorari at 7.

**b. The sample that was tested in nine locations did not show the purported match with Mr. Simmons’s DNA.**

Lifecodes did run the CTT test on Sample A—and the results *contradict* the evidence

presented at trial. The CTT tests on Sample A only indicated that they were consistent with the victim's DNA. (App. 4805-4810, 4812-16, 4951.) Yet at Mr. Simmons's trial, the prosecution's experts testified to—and presented a chart displaying—a nine-for-nine match, genetic location for genetic location, that did not exist. *See* Pet. Br. for Writ of Certiorari at 7. The critical false evidence regarding a non-existent, nine-for-nine match surely sealed Mr. Simmons's fate in the minds of the jurors.

**c. The prosecution, and its experts, compounded this false testimony by relying on it to create a misleading demonstrative chart used during closing arguments.**

The prosecution could have corrected the misimpression for the jury by revealing that (a) one sample was never even tested for nine locations, and (b) that the sample that was tested did not show a match with Mr. Simmons. They did not. Instead, the prosecution provided Dr. Baird and Ms. Crane with the chart that explicitly set out this misinformation, and which has been described by Drs. Word and Cotton as “clearly a gross compilation of errors that can be nothing but prejudicial to the defendant.” (App. 4556 ¶ 39.) Notwithstanding, both Dr. Baird and Ms. Crane relied on this chart during their testimony, and the jury was able to consider it in their deliberations. The prosecution's closing arguments further relied on both purported nine-for-nine matches. (App. 1041, App. 2005-06.) The State's misleading argument reiterating this falsehood compounded the prejudice that led to Mr. Simmons's conviction. (*See* App. 4556 ¶ 39 (describing the prejudicial effect of this “gross compilation of errors”).)

**C. Multiple Errors Compromised the DNA Testing Process.**

Lifecodes Corporation, the for-profit biotechnology lab that conducted the DNA testing at issue, has an unfortunate history of dubious quality control. (App. 1431-33); *see, e.g., O'Dell v. Netherland*, 95 F.3d 1214, 1248 (4th Cir. 1996) (finding Lifecodes testified to a DNA “match”

when variations in the results exceeded Lifecodes's own match criterion and therefore the results should have been deemed "inconclusive"); *Harvey v. State*, No. A-7963, 2004 WL 60771, at \*10 (Alaska Ct. App. Jan. 14, 2004) ("Baird and his company, Lifecodes, were connected to controversial DNA testimony that prompted a National Research Council study of DNA evidence – a study that cautioned prosecutors and defense attorney's against "over-sell[ing] DNA evidence"); *People v. Castro*, 545 N.Y.S.2d 985, 996-97 n. 15 (N.Y. Sup. Ct. 1989)(finding that Lifecodes "failed in its responsibility to perform the accepted scientific techniques and experiments in several major respects"; and that Dr. Baird used methods to perform his statistical calculations that were "scientifically unacceptable"). Lifecodes's performance in this case cannot withstand scrutiny: the company violated testing protocols, produced inexplicable test results, and failed to properly report its findings.

**1. Analysts Ignored Standard Operating Procedures when they Failed to use a "Reagent Blank Control Process."**

In DNA testing, contamination is an ever-present concern. See Boies at 435; National Forensics Science Technology Center, *Report on DNA Analyst Training*, § 4 (2007).<sup>15</sup> Laboratory staff, other DNA samples, and DNA transferred into a given sample through careless preparation can all contaminate the tested sample. *Id.*<sup>16</sup> A "reagent blank" contains all the material in a given sample except for the component that the experiment is designed to detect, and thus provides a control, or baseline, that enables analysts to identify exogenous DNA and other biological substances that can invalidate results. *Id.* § 6.<sup>17</sup> Accordingly, DNA protocols established by the United States Department of Justice require the use of reagent blanks as part of the control processes, as did established DNA protocols in the early 1990s. U.S. Department

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<sup>15</sup> Available at [http://projects.nfstc.org/pdi/Subject04/pdi\\_s04\\_m04.htm](http://projects.nfstc.org/pdi/Subject04/pdi_s04_m04.htm).

<sup>16</sup> Available at [http://projects.nfstc.org/pdi/Subject04/pdi\\_s04\\_m04\\_01.htm](http://projects.nfstc.org/pdi/Subject04/pdi_s04_m04_01.htm).

<sup>17</sup> Available at [http://projects.nfstc.org/pdi/Subject06/pdi\\_s06\\_m03\\_02\\_d.htm](http://projects.nfstc.org/pdi/Subject06/pdi_s06_m03_02_d.htm).

Of Justice, *FBI DNA Laboratory: a Review of Protocol and Analysis Vulnerabilities*, at 36 (May 2004)<sup>18</sup> (“Without properly analyzing the negative control and the reagent blank. . . scientists cannot be sure that the only source of the test results is the DNA from the evidence under examination.”); (App. 5060-61.)

Lifecodes, however, ignored this fundamental test requirement, and did not use a reagent blank control process. (See App. 5009-10, App. 4545 ¶ 17, 4557-58 ¶¶ 43-44) As a result, the analysts, testifying experts, prosecutors, defense attorneys, and most importantly, the jurors in Mr. Simmons’s case, had no way to know whether the DNA evidence was contaminated. (See App. 4545 ¶ 17, 4557-58 ¶¶ 43-44.)

## **2. Tests Results Conflicted as to Whether *any* Male DNA was even Present.**

Where testing leads to contradictory results, findings must be called into question. In this case, two tests were run on the same sample—and one indicated that no male DNA was present. Lifecodes performed multiple tests, with divergent results on this key point. First, Lifecodes tested the relevant sample using a DQ Alpha Polymarker kit (“DQA/PM”). The DQA/PM testing kit was once widely-used but has since given way to more sophisticated testing methods. National Forensic Science Testing Center § 1<sup>19</sup>. The DQA/PM test indicated a DNA mixture from two or more individuals, which was assumed to include at least one male. (App. 4545, 4548.) The sample was then tested using the “CTT” method, which is commonly used “to exclude innocent suspects.” Amhed M. Refaat et al., *CTT Multiplex System is a Quick and Inexpensive Method to Exclude Innocent Suspects During Criminal Inquiries*, 6 *Nature and Science* 6 (2008). CTT testing indicated that only one individual contributed to the sample. (App. 4545-46 ¶ 18.) Moreover, after obtaining the surprising CTT test results, Lifecodes

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<sup>18</sup> Available at <https://oig.justice.gov/special/0405/final.pdf>.

<sup>19</sup> Available at [http://projects.nfstc.org/pdi/Subject01/pdi\\_s01\\_m02\\_02\\_a.htm](http://projects.nfstc.org/pdi/Subject01/pdi_s01_m02_02_a.htm).

conducted an “amelogenin,” or “gender-typing” test, and found *no male DNA*. (App. 4551-52.)

Put simply, testing on the same genetic material should not generate these different results. (App. 4552-53 ¶¶ 32-33.) Such a basic discrepancy typically indicates a testing error, contamination of the sample during the DQA/PM test, or both. *Id.* Yet none of this information discrediting these tests—tests that were key to Mr. Simmons’s conviction—was ever revealed to the jury.

### **3. Lifecodes failed to properly document their testing.**

Where the outcome of a case and an individual’s liberty are at issue, forensic scientists must, at a minimum, record the steps they have taken. National Forensic Science Training Center § 8.<sup>20</sup> This is not a novel concept, but a basic principle of any science: the results must be verifiable. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 590 (1993) (Scientific testimony “must be supported by appropriate validation.”).

Here, however, Lifecodes’s reports are missing critical information. As a result, neither the defense nor the Court can verify their results. Defense experts reviewing Lifecodes’s lab notes determined that documentation regarding significant portions of the testing procedures had either been removed, or never existed. (App. 4559 ¶ 47.) These yawning holes in the record suggest there may have been yet more flaws in Lifecodes’s testing that have not come to light because Lifecodes failed either to keep, or to provide, the appropriate documentation.

#### **D. The Prosecution Withheld Key Exculpatory Evidence Regarding The Invalidity of the DNA Testing.**

Prosecutorial suppression of evidence “favorable to an accused” violates due process because it creates “an unfair trial.” *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). An individual asserting a *Brady* violation must demonstrate that the State suppressed evidence

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<sup>20</sup> Available at [http://projects.nfstc.org/pdi/Subject08/pdi\\_s08\\_m02\\_01.htm](http://projects.nfstc.org/pdi/Subject08/pdi_s08_m02_01.htm).

favorable to that individual with resulting prejudice. *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999) (“[t]he prudent prosecutor will resolve doubtful questions in favor of disclosure.”) (internal citation marks omitted).

Here, the prosecution never disclosed myriad fatal flaws and holes in the DNA testing to Mr. Simmons’s defense team. This fundamentally prejudiced Mr. Simmons, leaving him without a chance to rebut, or even properly explain, what the evidence did and did not show. At a minimum, the State had a constitutional obligation to disclose the following facts:

- Lifecodes failed to use the reagent blank control test, which could have detected contamination. (App. 4515-17.)
- The only CTT test performed showed only the victim’s DNA. (App. 4551-54.)
- Lifecodes’s gender-typing amelogenin test indicated that no male DNA was identified in any of the crime scene samples. (App 4551-52.)
- Ms. Crane, the prosecutors’ own expert witness, believed the CTT tests used to convict Mr. Simmons were in fact “inconclusive.” (App. 4830-31.)

Instead, the prosecution bombarded the jury with trumped-up DNA evidence that seemed to mandate conviction. Prosecutors told the jury about two sets of perfect, nine-for-nine matches between Mr. Simmons’s DNA and the crime scene evidence—matches that did not exist.

Prosecutors also presented a chart that was used in the jury’s deliberations, and which hammered home this false point. Moreover, prosecutors misdirected jurors with repeated invocations of irrelevant but purportedly damning statistics regarding astronomical odds of another match (with Mr. Simmons’s DNA, not the crime-scene sample) being as high as one-in-several-billion.

Given all that the jurors heard—and did not hear—about the DNA evidence, Mr. Simmons’s conviction was a foregone, but incorrect, conclusion. The State’s evidence was overstated and outright false. Had Mr. Simmons’s defense been provided with the essential *Brady* material described above, they would have been able to easily rebut the State’s misleading presentation.

In circumstances like this one, where the prosecution withheld information that undermines key forensic evidence, courts have repeatedly held due process violated. *Aguilar v. Woodford*, 725 F.3d 970, 971 (9th Cir. 2013) (Prosecution could not withhold information undermining their forensic evidence); *U.S. ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (Prosecution could not withhold forensic evidence undermining trial testimony); *In re Stenson*, 276 P.3d 286, 294 (Wash. 2012) (Prosecution could not withhold test results that could have been used to impeach a forensic expert at trial); see *In re Brown*, 952 P.2d 715 (Cal. 1998) (Prosecution could not withhold test results inconsistent with test results they relied on during trial); *People v. Garcia*, 17 Cal. App. 4th 1169, 1180 (Cal. Dist. Ct. App. 1993) (Prosecution could not withhold evidence tending to undermine trial expert's credibility).

As the Supreme Court has recognized, *Brady*'s mandates protect not only defendants like Mr. Simmons, but also the judicial system. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87-88. Mr. Simmons was treated unfairly, and the system has suffered as a result. The Court should cure both ills, and order a new trial in this case.

### **III. MR. SIMMONS'S CONVICTION IS PRECISELY THE TYPE OF RESULT THAT SHOULD BE OVERTURNED BECAUSE OF FLAWED DNA EVIDENCE.**

A "prosecutor's error" in overstating the statistical import of DNA evidence "must be considered within the larger context . . . [where jurors] place[] a great deal of weight on the reliability and accuracy of DNA evidence." *Whack*, 433 Md. at 746-50 (holding that misstatements regarding DNA "seriously misled the jury" and deprived the defendant of a fair trial, because such evidence easily confounds juries, and must be described with "extra care").

Accordingly, courts “will not hesitate to award a new trial . . . if . . . DNA identification evidence was presented in a misleading or improper way.” *State v. Bloom*, 516 N.W.2d 159 (Minn. 1994).

Mr. Simmons’s case fits this mold. Prosecutors used DNA evidence that jurors were predisposed to believe and ill-equipped to understand. Prosecutors relied on tests that lacked basic controls, documentation, or consistent results, then hyped and misstated the findings. Finally, the state confused the jury with a misdirected focus and imposing statistics that had no bearing on the likelihood of whether the DNA found at the crime scene matched Mr. Simmons’s DNA.

Under these circumstances, courts will not let an improper verdict stand. For example, in a recent case where the state conflated the statistical likelihood that any African American could have left the DNA at one part of the crime scene (1 in 172) with the much longer odds that any African American *other than the defendant* could have left the DNA at another part of the crime scene (1 in 212 trillion), the Maryland Court of Appeals ordered a new trial. *Whack*, 433 Md. at 746-47. Similarly, in another case like Mr. Simmons’s, where prosecutors introduced a chart of DNA results “[w]ithout reliable accompanying evidence” to express its true statistical import, the Supreme Judicial Court of Massachusetts overturned the conviction. *Mattei*, 455 Mass. at 849. The Supreme Court of Kentucky, too, ordered a new trial where DNA evidence showed a “match” to the defendant, but the prosecutor overstated the significance of the match and suggested—as the State did here—that the evidence was more powerful than it really was. *Duncan v. Commonwealth of Kentucky*, 322 S.W.3d 81, 98 (Ky. 2010). As the *Duncan* court recognized, misstatements regarding DNA evidence are especially pernicious because of the “immensely persuasive effect DNA evidence tends to have,” and its inherent “aura of conclusiveness.” *Id.* at 91.

Prosecutors in Mr. Simmons's case misused a potent form of forensic evidence, thus depriving him of his constitutional right to a fair trial. This Court—like those in Maryland, Massachusetts, and Kentucky—should overturn this conviction, and ensure that prosecutors properly use DNA evidence to achieve just results.

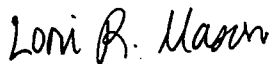
### **CONCLUSION**

The State's fatally flawed testing, analysis, and presentation of DNA evidence deprived Mr. Simmons of a fair trial. To sustain Mr. Simmons's conviction based on this improper DNA evidence would be unjust, and would also cast a needless shadow of doubt over the wider use of DNA evidence. Rather than compromise one of the justice system's powerful tools for convicting the guilty and preserving liberty for the innocent, the Court should overturn Mr. Simmons's conviction.

Dated: December 23, 2015

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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

CA No. 05-CP-18-1368  
Appellate Case No. 2014-000387

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**S.C. Supreme Court**

KENNETH SIMMONS, SK5066.....*Petitioner,*

v.

STATE OF SOUTH CAROLINA.....*Respondent.*

**CERTIFICATE OF SERVICE**

I, Joseph M. McCulloch, Jr., hereby certify that one (1) copy of the Innocence Network Motion for Leave to File Brief of the Innocence Network as *Amicus Curiae* in Support of Petitioner its provisional brief has been served upon counsel for Petitioner and Respondent by depositing the same in the United States Mail, first class postage pre-paid, addressed as follows:

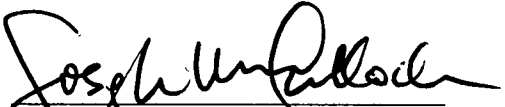
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