

STATE OF NORTH CAROLINA
CRAVEN COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
95 CRS 10229-30, 95 CRS 1352

STATE OF NORTH CAROLINA)
)
 v.)
)
 MELVIN LEE WHITE,)
)
 Defendant)

**BRIEF OF ADVOCATES FOR THE WRONGLY CONVICTED
AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT MELVIN LEE WHITE**

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TABLE OF CONTENTS

Table of Authorities 3

Statement of Interest 6

Introduction 10

Argument 11

 I. NONWHITE DEFENDANTS, ESPECIALLY THOSE ACCUSED OF CRIMES
 AGAINST WHITE VICTIMS, FACE A UNIQUELY HIGH RISK OF
 WRONGFUL CAPITAL CONVICTION 11

 A. North Carolina’s Rate of Wrongful Conviction is Racially
 Disproportionate Relative to Both Race of Defendants and Race of
 Victims 12

 B. North Carolina’s Racially Disproportionate Wrongful Conviction Rate is
 Reflected Throughout the South 13

 C. There is Strong Nationwide Evidence of the Link Between Race of
 Defendant, Race of Victim, and Likelihood of Wrongful Conviction 15

 II. RACIALLY DISPROPORTIONATE WRONGFUL CONVICTION RATES
 ARE CAUSED BY THE CONSCIOUS AND SUBCONSCIOUS BIASES THAT
 PLAGUE EVERY STAGE OF CRIMINAL PROCEEDINGS 17

 A. Racially Disproportionate Wrongful Conviction Rates are the Product of
 Racially Biased Cultural Beliefs and Stereotyping 18

 B. Racially Disproportionate Wrongful Conviction Rates are the Product of
 Cross-Racial Misidentification 21

 C. Racially Disproportionate Wrongful Conviction Rates are the Product of
 Nonwhites Being “Easy Targets” for Police and Prosecutors 23

Conclusion 25

Appendix 27

TABLE OF AUTHORITIES

Susan Bandes, *Loyalty to One's Own Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006)23

Hugo Bedau, *Racism, Wrongful Convictions, & the Death Penalty*, 76 TENN. L. REV. 615 (2009)..... 12

William Bowers, Benjamin Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001)..... 19

Bureau of Justice Statistics Crime and Justice Data Online,
<http://bjsdata.ojp.usdoj.gov/dataonline/Search/Homicide/State/OneYearofData.cfm>..13

Mike Charbonneau, *Former Death-row Inmate Set Free*, WRAL.com, May 2, 2008,
 available at <http://www.wral.com/news/state/story/2824402/>11

Expanded Homicide Data Table 5 – Crime in the United States 2006,
http://www.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_05.html..... 13

Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008)25

Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008) 16, 21, 24

Samuel Gross, *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005)21, 24

Samuel Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125 (1998).....24

Samuel Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996)..... 17

Talia Roitberg Harmon, *Race For Your Life: An Analysis of the Role of Race in Erroneous Capital Convictions*, 29 CRIM. JUST. REV. 76 (2004).....11, 14, 20

Roger Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013 (1995)23

Erin Hartness, *Death Row Inmate Freed After 15 Years*, WRAL.com, Apr. 2, 2008,
 available at <http://www.wral.com/news/local/story/2669008/> 10

Adam Hime, <i>Life or Death Mistakes: Cultural Stereotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Conviction</i> , 82 U. DET. MERCY L. REV. 181 (2005)	14, 18, 19, 20
Innocence Cases: 2004 – Present Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence-cases-2004-present	10
Innocence and the Death Penalty Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st	12
Innocence: List of Those Freed From Death Row Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row	12, 16
The Innocent and the Death Penalty, http://www.innocenceproject.org/Content/1857.php	16
Sheri Lynn Johnson, <i>Black Innocence and the White Jury</i> , 83 MICH. L. REV. 1611 (1985).....	18, 19
Sheri Lynn Johnson, <i>The Color of Truth: Race and the Assessment of Credibility</i> , 1 Mich. J. Race & L. 261 (1996)	19, 22
Sheri Lynn Johnson, <i>Cross-Racial Identification Errors in Criminal Cases</i> , 69 CORNELL L. REV. 934 (1984).....	20, 22
Mandy Locke, <i>Fantastic tales told in blood; a jury stunned by SBI's acts</i> , NEWS & OBSERVER, August 16, 2010, available at http://www.newsobserver.com/2010/08/10/621810/fantastic-tales-told-in-blood.html#storylink=misearch	26
Mandy Locke, <i>For executed men, audit's too late</i> , THE NEWS & OBSERVER, August 19, 2010, available at http://www.newsobserver.com/2010/08/19/635619/for-executed-men-audits-too-late.html#storylink=misearch	23
Mandy Locke, <i>Scathing SBI audit says 230 cases tainted by shoddy investigations</i> , THE NEWS & OBSERVER, August 19, 2010, available at http://www.newsobserver.com/2010/08/19/635632/scathing-sbi-audit-says-230-cases.html#storylink=misearch	23
Alexandra Natapoff, <i>Beyond Unreliable: How Snitches Contribute to Wrongful Convictions</i> , 37 GOLDEN GATE U. L. REV. 107 (2006).....	24
Alexandra Natapoff, <i>Snitching: The Institutional and Communal Consequences</i> , 73 U. CIN. L. REV. 645 (2004)	25

Radha Natarajan, <i>Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications</i> , 78 N.Y.U. L. REV. 1821 (2003)	22
2008 North Carolina Crime Statistics, http://sbi2.jus.state.nc.us/crp/public/Default.htm .	12
North Carolina Department of Correction, www.doc.state.nc.us/DOP/deathpenalty/deathrow.htm	13
Karen Parker et al., <i>Racial Bias and the Conviction of the Innocent</i> , in <i>WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 114</i> (Saundra Westervelt & John Humphrey eds., 2001)	15, 16, 18, 20, 24
Karen Parker et al., <i>Race, the Death Penalty, and Wrongful Convictions</i> , 18 CRIM. JUST. 49 (2003).....	14, 15
Edward Stein, <i>The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification</i> , 2 LAW, PROBABILITY & RISK 295 (2003).....	23
Andrew Taslitz, <i>Wrongly Accused: Is Race a Factor in Convicting the Innocent?</i> 4 OHIO ST. J. CRIM. L. 121 (2006)	22
Andrew Taslitz, <i>Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example</i> , 37 SW. U. L. REV. 1091 (2008). 17, 18, 19, 20	
2008 United States Census Bureau North Carolina QuickFacts, http://quickfacts.census.gov/qfd/states/37000.html	12
2007-2008 Annual Statistical Report, at 22, <i>available at</i> http://randp.doc.state.nc.us/pubdocs/0007058.pdf	12

STATEMENT OF INTEREST

Amici are attorneys who represent wrongly convicted individuals, men who spent collective decades in prison before evidence revealed they were wrongly convicted, and a person who became an advocate for criminal justice reform after she learned the man she accused of rape was exonerated by DNA evidence. All of these individuals have first-hand experience with the ways race influences criminal justice outcomes and leads to wrongful convictions of persons of color.

Darryl Hunt is a black man from Winston-Salem, North Carolina who was exonerated by DNA evidence and released from prison in 2004 after being incarcerated for over 19 years for the rape and murder of a white woman named Deborah Sykes. Following his release from prison, Mr. Hunt founded *The Darryl Hunt Project for Freedom and Justice*, which provides assistance to individuals who have been wrongfully incarcerated, helps ex-offenders return to life outside the prison system, and advocates for changes in the justice system to protect the innocent. Mr. Hunt regularly speaks to community groups and has been repeatedly honored for his work. He has received the 2008 Winston-Salem Chronicle Man of the Year Award, the 2006 Henry Frye Trailblazer Award, the 2007 Winston-Salem Urban League/Non-Profit Agency of the Year Award, the 2006 North Carolina Academy of Trial Lawyers Crabtree Award, and the 2007 National Black Theatre Festival Community Action Award. Mr. Hunt has also testified before the United States Senate Judiciary Committee on the death penalty appeals process.

Mark Rabil is a North Carolina Assistant Capital Defender and Co-Director of the Wake Forest University School of Law Innocence & Justice Clinic. Mr. Rabil represented Darryl Hunt throughout the nearly twenty-year life of the case, until the day Mr. Hunt was exonerated. Mr. Rabil has received the 2004 North Carolina Academy of Trial Lawyers

Thurgood Marshall Award for his work representing Mr. Hunt. He also served on the North Carolina Chief Justice's Criminal Justice Study Commission, formerly called the North Carolina Chief Justice's Commission on Actual Innocence.

Ronald Cotton is a black man from North Carolina who spent over ten years in prison for the rape of a white woman named Jennifer Thompson-Cannino before being exonerated by DNA evidence in 1995. Mr. Cotton has spoken about his experience at a number of schools and conferences, including Washinton and Lee University, University of Nevada Las Vegas, and Georgetown Law School. Along with his former accuser, Ms. Thompson-Cannino, Mr. Cotton recently co-authored a book called *Picking Cotton*.

Jennifer Thompson was one of the people involved in the wrongful conviction case of Ronald Cotton. Ms. Thompson, a white woman, studied her rapist's face during the crime so he would be brought to justice. However, at trial, Ms. Thompson identified the wrong man. Today, she has become an advocate for criminal justice reform, particularly in the area of cross-racial misidentifications. Ms. Thompson is a member of the North Carolina Actual Innocence Commission, the advisory committee for Active Voices, the Constitution Project, and Mothers for Justice. Her op-eds have appeared in the *New York Times*, the *Durham-Herald Sun*, and the *Tallahassee Democrat*. She recently penned a book called *Picking Cotton* with Ronald Cotton, the man she formerly, and wrongly, accused of rape.

Theresa A. Newman is Clinical Professor of Law and the Co-Director of the Wrongful Convictions Clinic at Duke University School of Law. She is a board member and past president of the Innocence Network, an affiliation of more than sixty organizations dedicated to providing pro bono legal services to the wrongly convicted. She was also a founding board member and past president of the North Carolina Center on Actual Innocence, and served on the North

Carolina Chief Justice's Criminal Justice Study Commission, formerly called the North Carolina Chief Justice's Commission on Actual Innocence.

Peter J. Neufeld is the Co-Founder and Co-Director of the Innocence Project at the Benjamin N. Cardozo School of Law in New York City. The Innocence Project is a national litigation and public policy organization whose mission it is to assist prisoners who could be proven innocent through DNA testing. As of 2009, the Innocence Project assisted in the exoneration of 238 factually innocent Americans, including 17 who were on death row awaiting execution.

The Innocence Network ("the Network") is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The sixty-one current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.¹ The Innocence Network and its members are also dedicated to improving the accuracy

¹ The member organizations include the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Justice Brandeis Innocence Project (Schuster Institute for Investigative Journalism at Brandeis University), Justice Project, Inc., Kentucky Innocence Project, Life After Innocence, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project

and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

Its affiliate, the Innocence Project, is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. It has a specific focus on exonerating long-incarcerated individuals through use of DNA evidence, including newly-developed DNA testing methods. It also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system— including identifying those who actually committed crimes for which others were wrongfully convicted. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's objectives both serve as an important check on the awesome power of the state over criminal defendants and help ensure a safer and more just society. As perhaps the Nation's leading authority on wrongful convictions, the Innocence Project and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science, charged with regulating state and local crime laboratories) are regularly consulted by officials at the state, local and federal levels.

(Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Center for Actual Innocence, Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project and Wrongful Conviction Clinic

In this case, the Innocence Network and the Innocence Project seek to present a broad perspective on the issues presented in the hope that the risk of future wrongful convictions will be minimized.

INTRODUCTION

The passage of North Carolina's racial justice act came on the heels of the exonerations of three black death row inmates: Jonathon Hoffman, Glen Edward Chapman, and Levon "Bo" Jones. Hoffman was sentenced to death in Union County in 1995 for the murder of a white jewelry store owner. Despite a complete lack of physical evidence linking Hoffman to the crime, an all-white jury found him guilty. Only in 2004, after the State's star witness admitted to fabricating testimony in exchange for substantial undisclosed rewards – including thousands of dollars and numerous sentencing deals – was Hoffman awarded a new trial. In December 2007, after three more years spent awaiting retrial, the State dismissed all charges and Hoffman was exonerated.²

Glen Edward Chapman was sentenced to death in Catawba County in 1994. Chapman was convicted of killing two women: one black, one white. His jury included only one African-American. In 2007, a judge awarded Chapman a new trial, citing withheld evidence; lost, misplaced, or destroyed documents; perjured testimony by the State's lead detective; and ineffective assistance of defense counsel. Post-trial investigation revealed that one of the killings had likely not been a homicide at all. In April 2008, the State dismissed all charges and Chapman was exonerated.³

² See Innocence Cases: 2004 – Present | Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-cases-2004-present>.

³ See Erin Hartness, *Death Row Inmate Freed After 15 Years*, WRAL.com, Apr. 2, 2008, available at <http://www.wral.com/news/local/story/2669008/>.

Levon “Bo” Jones was sentenced to death in Duplin County in 1993. Jones was convicted of the 1987 robbery and murder of a white bootlegger. Like Chapman’s jury, Jones’ included only one African-American. In 2006, Jones was awarded a new trial. Shortly thereafter the State’s main witness recanted her testimony, saying she was “certain that Bo Jones did not have anything to do with” the murder and that “much of what [she] testified to was simply not true.” The witness admitted to lying, being coached on what to say, and collecting thousands of dollars in exchange for her testimony. In May 2008, the State dismissed all charges and Jones was exonerated.⁴

These exonerations – the three most recent in North Carolina – are cause for celebration, but can hardly be heralded as triumphs of the justice system. Hoffman, Chapman, and Jones should never have been arrested, charged, or convicted in the first place, and they should certainly not have spent a cumulative forty-one years on Death Row. Unfortunately, their cases are not the only ones. This brief describes the link between race and wrongful convictions in North Carolina and nationwide.

ARGUMENT

I. NONWHITE DEFENDANTS FACE A UNIQUELY HIGH RISK OF WRONGFUL CAPITAL CONVICTION.

Hoffman, Chapman, and Jones provide stark examples of the fact that across the board, race bears on one’s likelihood of wrongful conviction. Racial minorities, and blacks in particular, bear the burden at every stage of proceeding, with the disturbing result that black defendants are more likely than their white counterparts to be erroneously convicted of capital offenses. Talia Roitberg Harmon, *Race For Your Life: An analysis of the role of race in*

⁴ See Mike Charbonneau, *Former Death-row Inmate Set Free*, WRAL.com, May 2, 2008, available at <http://www.wral.com/news/state/story/2824402/>.

erroneous capital convictions, 29 Crim. Just. Rev. 76, 78 (2004). Indeed, “[i]t is not really an oversimplification to insist that racial bias and convicting the innocent are the twin evils paramount in our current death penalty system, as they have been for generations.” Hugo Bedau, *Racism, Wrongful Convictions, & the Death Penalty*, 76 Tenn. L. Rev. 615, 623 (2009).

A. North Carolina’s Rate of Wrongful Conviction is Racially Disproportionate Relative to Both Race of Defendants and Race of Victims.

Since 1973, there have been seven death row exonerations in North Carolina – the seventh-highest of any state.⁵ Of the seven exonerees, five (71%) are black; six (86%) are nonwhite.⁶ By no reasonable measure are these numbers racially proportionate. In contrast to the rate of wrongful conviction, the population of North Carolina is approximately 21% black and 28% nonwhite.⁷ The state’s prison population is 57% black and 61% nonwhite.⁸ Among homicide offenders whose race is known, approximately 59% are black and 61% are nonwhite.⁹

⁵ Innocence and the Death Penalty | Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st>. The seven exonerees are Samuel Poole (1974), Christopher Spicer (1975), Alfred Rivera (1999), Alan Gell (2004), Jonathon Hoffman (2007), Glen Chapman (2008), and Levon “Bo” Jones (2008).

⁶ Innocence: List of Those Freed From Death Row | Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>. Except for Alan Gell (white) and Alfred Rivera (Latino), all are African-American.

⁷ This data was retrieved from the 2008 US Census North Carolina QuickFacts, <http://quickfacts.census.gov/qfd/states/37000.html>.

⁸ This data was retrieved from the 2007-2008 Annual Statistical Report, at 22, *available at* <http://randp.doc.state.nc.us/pubdocs/0007058.pdf>.

⁹ This data was retrieved from the 2008 North Carolina Crime Statistics, <http://sbi2.jus.state.nc.us/crp/public/Default.htm> (select 2008; Murder; Murder Offenders by Race, Ten Year Trend). The year 2008 is the most recent year for which these statistics are available.

Even on the state's death row, 55% of prisoners are black and 62% are nonwhite.¹⁰ While nonwhites are consistently overrepresented in the state's criminal justice system, no other numbers come close to their overrepresentation among wrongful capital convictions.¹¹

Perhaps even more striking than the overrepresentation of nonwhites among wrongly convicted defendants is the overrepresentation of whites among their alleged victims. One-hundred percent of North Carolina's death row exonerees were originally convicted of crimes against white victims.¹² Overall, however, whites make up only about 40% of the state's homicide victims in any given year.¹³ Murders committed by nonwhites against white victims are particularly uncommon – they account for less than 10% of the nation's total homicides, and yet make up six of North Carolina's seven (86%) death row exonerations.¹⁴

B. North Carolina's Racially Disproportionate Wrongful Conviction Rate is Reflected Throughout the South.

Racial disparities in wrongful conviction are not unique to North Carolina; rather, they persist throughout all death penalty states, and are particularly manifest in the South. In general, the greater the proportion of blacks in a state's population, the higher the rate of capital error in

¹⁰ This data was retrieved from the North Carolina Department of Correction website, www.doc.state.nc.us/DOP/deathpenalty/deathrow.htm.

¹¹ Refer to the Appendix of this Brief for a summation of statistics related to exonerations in North Carolina by race of the defendant and race of the victim.

¹² Alfred Rivera and Glen Chapman were each accused of killing two victims: one white, one black.

¹³ This data was retrieved from the Bureau of Justice Statistics Crime and Justice Data Online, <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Homicide/State/OneYearofData.cfm>; North Carolina Crime Statistics, <http://sbi2.jus.state.nc.us/crp/public/Default.htm> (select 2008; Murder; Murder Victims by Race, Ten Year Trend).

¹⁴ Expanded Homicide Data Table 5 – Crime in the United States 2006, http://www.fbi.gov/ucr/cius2006/offenses/expanded_information/data/shrtable_05.html.

that state. Harmon, *Race for Your Life, supra*, at 80 (citing JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002)).¹⁵ Southern states, which tend to have larger black populations than other regions, are the most likely to wrongfully convict and sentence innocent people to death. Adam Hime, *Life or Death Mistakes: Cultural Stereotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Conviction*, 82 U. DET. MERCY L. REV. 181, 196 (2005).

More death row prisoners are exonerated from the South than from all other regions of the country combined. Of all death row exonerees, 57% have been freed from Southern states and 43% from other regions. Karen Parker et al., *Race, the Death Penalty, and Wrongful Convictions*, 18 CRIM. JUST. 49, 52 (2003); *see also* Hime, *Life or Death Mistakes, supra*, at 189-90 (despite the fact that Alabama, Georgia, Florida, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Texas, and Virginia account for only thirty-one percent of the nation's total population, they house more than half the nation's death row inmates and account for nearly sixty percent of death row exonerations). Ultimately, relatively high conviction, wrongful conviction, and execution rates make innocent Southerners more likely than those from other regions to suffer wrongful death sentences and possibly wrongful executions. Hime, *Life or Death Mistakes, supra*, at 190.

Of all regional and racial disparities in wrongful capital convictions, the greatest burden is borne by blacks in the South. The rate of wrongful conviction among southern blacks is higher than for any other population subgroup in any other geographic region of the country. *Id.* at 196. In other regions, whites are the most likely to be exonerated following wrongful

¹⁵ Available at <http://www2.law.columbia.edu/brokensystem2>.

conviction, followed by “other” race/ethnic groups, followed by blacks. Parker, *Race, supra*, at 52. In Southern death penalty states, however, the trend is completely reversed. *Id.* Of all black death row exonerees, nearly two-thirds have been freed in the South. *Id.*

In recent years, people’s discomfort with these facts has become increasingly evident. To a greater degree than ever before, participants express concern that the death penalty is unfair because of regional and racial disparities, as well as the possibility of wrongful conviction. Parker, *Race, supra*, at 52. Nearly two-thirds of respondents in a 2001 ABC News/*The Washington Post* poll agreed that capital punishment is unfair because it is applied inconsistently from county to county and state to state. *Id.* Over one-third of respondents believed it is unfair because it is applied differently to blacks than whites. *Id.* Additionally, a majority of respondents supported halting executions to examine these problems more closely. *Id.* In the same poll, 68% of respondents agreed that capital punishment is unfair because innocent people are sometimes executed. *Id.* A Harris poll taken the same year found that 93% of respondents believed innocent people are sometimes convicted of murder, and a 2000 Gallup poll found that 80% of respondents believed an innocent person had been executed within the previous five years. *Id.*

C. There is Strong Nationwide Evidence of the Link Between Race of Defendant, Race of Victim, and Likelihood of Wrongful Conviction.

Nationally, the proportion of minorities, especially blacks, facing wrongful execution is growing. Karen Parker et al., *Racial Bias and the Conviction of the Innocent*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 114, 118 (Saundra Westervelt & John Humphrey eds., 2001). Overall, blacks make up at least 40-57% of all death row exonerations. *Id.* at 127. Among Innocence Project death row exonerees – a select group whose exonerations all involved

DNA evidence – 47% are black and 65% are nonwhite.¹⁶ Because these estimates derive from cases which actually result in exoneration, they represent only a fraction of the problem: “[I]t is likely that the proportion of blacks and minorities among the wrongly convicted is even higher, especially since whites and those with relatively more money, knowledge, power, and connections are more likely than others to be able to marshal the resources necessary for eventual vindication.” Parker, *Bias and Conviction*, *supra*, at 127-28. The hurdles faced by wrongfully convicted blacks are reflected in the fact that they spend, on average, far longer on death row than their white counterparts. Over the past ten years, the average length of time between conviction and exoneration of white exonerees was 11.9 years; for black exonerees, the average was 15.8 years.¹⁷

Minorities are exonerated at rates disproportionately high relative even to their overrepresentation among prisoners and murder convicts. Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 66 (2008). While approximately 55% of murder convicts are nonwhite, the percentage rises to 65% of murder exonerees. *Id.* at 66-67 n.41 (citing Matthew Durose & Patrick Langan, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts*, 2002, at 6 tbl.5 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fss02.pdf>). Thus, disproportionate conviction rates do not on their own explain the overrepresentation of nonwhites among known miscarriages of justice.

Ultimately, race puts a nonwhite capital defendant at an immediate disadvantage, and on its own heightens the risk of wrongful conviction. If the defendant’s alleged victim was white, the hurdles to justice and the risk of error are dramatically compounded. Other factors

¹⁶ See *The Innocent and the Death Penalty*, <http://www.innocenceproject.org/Content/1857.php>.

¹⁷ See *Innocence: List of Those Freed From Death Row* | Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

statistically related to race, such as the likelihood that a nonwhite defendant will be tried and convicted on weaker evidence than a white defendant, further thwart a reliable conviction. On appeal and post-conviction, it may be less likely for an innocent nonwhite defendant to obtain the resources necessary for eventual vindication. And, in the end, even if the defendant is finally granted relief, it will likely come after he has spent many more years on Death Row – and after the State has spent many more years expending resources on wrongful prosecution and incarceration – than if the defendant had been white.

II. RACIALLY DISPROPORTIONATE WRONGFUL CONVICTION RATES ARE CAUSED BY THE CONSCIOUS AND SUBCONSCIOUS BIASES THAT PLAGUE EVERY STAGE OF CRIMINAL PROCEEDINGS.

All capital cases carry a particularly great risk of wrongful conviction. Samuel Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469, 472-73 (1996). For reasons including exposure to prejudicial pre-trial publicity, death qualification, and heinousness of the crimes, capital juries in general are more likely to convict than juries in other cases. *Id.* at 493-95. However, when a defendant is nonwhite, the risks are even further heightened. Racial biases infect every step of a criminal proceeding, and their harmful effects are compounded along the way. The biases that result in disproportionate numbers of nonwhites entering the criminal justice system in the first place also result in their being perceived more suspiciously, treated more aggressively, and tried less fairly once therein. Racially biased police investigation and arrest practices thus lead to racially biased prosecutorial charging decisions, which lead to racially biased sentencing decisions, even though the discrimination at each step may be entirely subconscious.¹⁸

¹⁸ See Andrew Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. U. L. REV. 1091, 1091-92 (2008) (internal quotes

The main explanations behind racial disparity in wrongful convictions include overt racism (intentional or otherwise); stereotyping; the frequency of cross-racial misidentification; and the fact that blacks, relative to whites, tend to be “easy targets” for the law enforcement and criminal justice systems. Parker, *Bias and Conviction*, *supra*, at 121-22.

A. Racially Disproportionate Wrongful Conviction Rates are the Product of Racially Biased Cultural Beliefs and Stereotyping.

“Despite the fact that African-Americans arrested for violent crimes in any given year comprise less than one percent of the overall African-American population, the cultural stereotype of African-Americans as ‘prone to violence’ persists,” and is one of the main explanations behind blacks’ disproportionate wrongful conviction rate. Hime, *Life or Death Mistakes*, *supra*, at 209; see also Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1645-47 (1985) (describing nature and evolution of prejudicial white beliefs regarding black criminality) (1985). Capital jurors who have been exposed to this stereotype are at serious risk of interpreting the facts of a case in such a way as to reinforce it. Hime, *Life or Death Mistakes*, *supra*, at 209. For example, studies show that even in areas where crime is not a serious problem, it is seen by whites as being more serious, and they are more fearful of being victimized, in areas with larger black populations. Taslitz, *Wrongly Accused Redux*, *supra* note

omitted): “[S]ubconscious racial biases lead decisionmakers at various key points in the processing of a criminal case to view racial minorities, especially African-Americans, as more dangerous and less credible than whites. Police therefore use more intense – and riskier – investigative techniques when having contact with black suspects. But those suspects are more likely than white ones to react to such pressure defensively. That reaction leads the officers to be still more suspicious of their subject, leading them in turn to still more aggressive policing tactics. This escalating cycle of aggression continues until a mistaken eyewitness identification, false confession, or similar source of error results. Fact-finders, in turn, are more likely to conclude that such flawed evidence is in fact credible. In short . . . racial features trigger an unconscious process of stereotyping and selective inattention, a process rooted in racial stigma and a corresponding presumption of black criminality.”

17, at 1094 n.23. In turn, people who associate blacks with crime tend to support harsher punishment for criminals. *Id.* When a defendant is black, the effect is even further magnified: “Indeed, the offender’s race leads to an increased likelihood of interpreting a crime as especially reprehensible, meriting greater punishment.” *Id.* at 1103.

The converse to this phenomenon is “own-race bias”; that is, the tendency of jurors to be more lenient toward members of their own race. Hime, *Life or Death Mistakes*, *supra*, at 209. The possible manifestations of own-race bias are many and varied. *See, e.g.*, Johnson, *Black Innocence*, *supra*, at 1634-35 (jurors likely to view defendants as more culpable when victim and juror are of the same race); Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 316 (1996) (white jurors likely to view white witnesses as more intelligent and more honest than black witnesses). However, the effect is clear: even if no deliberate racism is exhibited, a nonwhite defendant whose fate is left to a predominantly white jury may nonetheless be at a “significant disadvantage.” *Id.*; *see also* William Bowers, Benjamin Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 193 (2001) (describing the “black male presence effect” – in black defendant, white victim cases, the presence of a single black male juror decreases the likelihood of a death sentence from 71.9% to 42.9%).

Observations consistent with racial stereotypes are more salient to the observer – they attract more attention and are both more believable and more memorable. People are more likely to notice, seek, evaluate, and trust evidence consistent with their beliefs and ignore or downplay any inconsistencies. Taslitz, *Wrongly Accused Redux*, *supra*, at 1111. This “confirmation bias,” together with invidious stereotypes regarding black criminality, means that black defendants face

a unique risk of being accused, tried, convicted, and sentenced to death without the levels of scrutiny and presumed innocence they are due. Parker, *Bias and Conviction*, *supra*, at 121. Simply put, “white witnesses expect to see black criminals,” and, because this misperception accords with prejudicial beliefs of black criminality, resulting errors may go largely unquestioned. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 950 (1984).

The same discriminatory expectations that affect witnesses and law enforcement officers are also carried into court by prosecutors and jurors, at which point the racial “selection bias” affecting who enters the system in the first place turns into a “conviction bias.” Taslitz, *Wrongly Accused Redux*, *supra*, at 1112. Because many whites intentionally or subconsciously expect nonwhites – especially blacks – to conform to criminal stereotypes, the latter risk being tried and convicted in spite of relatively weak evidence against them. Parker, *Bias and Conviction*, *supra*, at 121. Increased pressure on police to solve crimes with black suspects and white victims often leads to rushed investigations based on little evidence. Harmon, *Race for Your Life*, *supra*, at 77. In spite of weak evidence, prosecutors may be more likely to pursue the death penalty against nonwhite defendants, predicting less jury sympathy and less-qualified opposing counsel. Hime, *Life or Death Mistakes*, *supra*, at 207. As a result, nonwhite capital defendants charged with killing white victims tend to be convicted on less and weaker evidence than their white counterparts. Harmon, *Race for Your Life*, *supra*, at 90. Capital cases involving a nonwhite defendant and a white victim are likely to be based on only one or two types of evidence, while cases involving a white defendant and white victim are more likely to be based on three or four types. *Id.* Unsurprisingly, such prosecutions are particularly likely to result in wrongful

conviction. *See* Garrett, *Judging Innocence*, *supra*, at 92 (“many capital convictions of the innocent were predicated on surprisingly weak evidence . . .”).

Over time, the more disproportionately that blacks are policed, the more disproportionately they end up in the criminal justice system, and the more disproportionately whites associate their race with criminality and dangerousness, further fueling a cycle that results in racially-biased trials and a heightened risk of wrongful convictions. Taslitz, *Wrongly Accused Redux*, *supra*, at 1113. Rather than leading to an overall decrease in crime, high rates of arrest and conviction error together with harsh police treatment undermine black communities’ trust in and willingness to cooperate with law enforcement. *Id.* at 1093. Ultimately, reduced community aid in combating crime leads not to its demise, but to its expansion. *Id.* In addition, pervasive distrust of law enforcement may make innocent suspects more likely to take pleas in order to protect themselves, and increased interrogation raises the risk of false confession. Thus, as racially-biased policing leads to the expansion of crime, it also raises the risk of wrongful conviction, especially within lower-income black communities already “devastated” by overrepresentation in the criminal justice system. *Id.* at 1119.

B. Racially Disproportionate Wrongful Conviction Rates are the Product of Cross-Racial Misidentification.

Eyewitness misidentification is a leading cause of wrongful conviction. Samuel Gross, *Exonerations in the United States: 1989 through 2003*, 95 *J. Crim. L. & Criminology* 523, 542 (2005). North Carolina resident Darryl Hunt spent almost twenty years in prison in part because of mistaken identification. Hunt, an innocent African-American man, was convicted of murder in a capital trial based in part on the erroneous testimony of two white men who identified him as the perpetrator; one of the witnesses was a former member of the Ku Klux Klan. Hunt was ultimately exonerated by DNA evidence.

Eyewitness misidentification is the most scientifically studied and supported way in which race affects miscarriages of justice. See Andrew Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?* 4 OHIO ST. J. CRIM. L. 121, 124 (2006). It is well-documented that misidentification is more likely to occur in cross-racial than intra-racial contexts, and the effect is especially exaggerated when the witness is white. *Id.* at 124, 125; Johnson, *Cross-Racial Identification*, *supra*, at 948. As a result, white witnesses who testify in criminal cases are most likely to make erroneous identifications when the subject is nonwhite.

Cross-racial misidentification can occur in spite of conscious rejection of racial stereotypes. Taslitz, *Is Race a Factor*, *supra*, at 125; Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1836 (2003) (“[J]uries may assume that a cross-racial identification might only be problematic if the witness is shown to be a racist. Rather, the own-race bias is material in any case with a cross-racial identification, regardless of the specific character or racial biases of the witness.”); Johnson, *Color of Truth*, *supra* (“Many people believe that cross-racial identifications are less likely to be reliable if the person making the identification is racially biased, but racial bias does not seem to affect the rate of cross-racial identification errors.”). The process of cross-racial misidentification is an unconscious and automatic one; however, it has an “extraordinarily powerful grip on the human mind.” *Id.* Though unconscious, a white observer “may have little regret about the risk of error because of a working assumption about minority, especially black, guilt.” *Id.*

As with other racially biased elements of the investigation and prosecution, the effects of cross-racial misidentification may be compounded over the course of a case. At the outset of investigation and prosecution, many police and prosecutors experience “tunnel vision,” tending

to commit prematurely and over-confidently to early theories of a case and blinding themselves to flawed or inconsistent evidence. Taslitz, *Wrongly Accused Redux*, *supra*, at 1110-11; *see also* Susan Bandes, *Loyalty to One's Own Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006). Tunnel vision leads to failure to pursue alternative theories of the crime, and the risks are especially great when a suspect is black and thus already has racial stereotypes of criminality working against his presumed innocence. At trial, jurors tend to be overly-influenced by eyewitness identifications, viewing them as infallible. *See, e.g.*, Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 LAW, PROBABILITY & RISK 295, 295 n.3 (2003) (citing various Supreme Court cases and law review articles in support). Most jurors lack the knowledge to adequately evaluate the reliability of eyewitness accounts; however, even when given accurate information about the problems of eyewitness identifications, jurors tend to overestimate their accuracy. Roger Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1022-23 (1995). Ultimately, “[o]ne raced procedural error compounds another.” Taslitz, *Wrongly Accused Redux*, *supra*, at 1114.

C. Racially Disproportionate Wrongful Conviction Rates are the Product of Nonwhites Being “Easy Targets” for Police and Prosecutors.

The third explanation behind the overrepresentation of black exonerees is fairly straightforward: they are relatively easy targets for law enforcement and the criminal justice system. The roots of this problem extend far beyond the courtroom, for racial disparities in wrongful conviction are but one result of earlier pervasive forms of discrimination: “residential segregation, concentrated poverty, joblessness, and other forms of concentrated disadvantage . . . reinforce racial disparities in the treatment of minorities in the criminal justice system, including

racial bias in convictions of the innocent.” Parker, *Bias and Conviction*, *supra*, at 126. One way in which systemic disadvantage directly heightens nonwhites’ risk of wrongful conviction is by making them uniquely susceptible to the State’s use of informants, or “snitches.”

Perjury – especially in the form of deliberate false accusation – is a leading cause of wrongful homicide convictions. Gross, *Exonerations*, *supra*, at 543-44; *see also* Garrett, *Judging Innocence*, *supra*, at 93 (describing informant testimony as a category of evidence commonly supporting wrongful convictions, though often “particularly flimsy” in capital cases); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 109 (2006) (estimating that snitch testimony influences 21-50% of wrongful capital and homicide convictions). In spite of this, snitches are more commonly relied upon in solving and prosecuting murders and capital cases than in less serious crimes. Samuel Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 139 (1998).

Reliance on snitches is not only undependable – it is also racially discriminatory. Nonwhites are, on the whole, more likely than whites to be transient or otherwise without strong roots in the community, and less likely to have established or affluent contacts to help fight wrongful prosecution and conviction. Parker, *Bias and Conviction*, *supra*, at 122. In poor inner-city neighborhoods, high rates of unemployment combined with substandard housing conditions mean that residents spend more time on the streets, where they can more easily be hassled or arrested by police and where their social networks can more easily be penetrated. Taslitz, *Wrongly Accused Redux*, *supra*, at 1139. Ultimately, “[s]nitches snitch on those they know, and since the police disproportionately focus on racial minorities as the pool from which to recruit snitches, snitches tend to snitch on other persons who belong to similar racial minorities.” *Id.* at

1145. In this way, the use of snitches becomes a racial focusing mechanism. See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 673 (2004). Ultimately, this results in blacks bearing a disproportionate share of the burden of snitches' unreliability.

North Carolina capital exonerations reflect these patterns. For example, Bo Jones and Jonathan Hoffman, both black, were both wrongly convicted based on false snitch testimony. North Carolina cases also illustrate that black defendants have been the targets of law enforcement. At the trial of Darryl Hunt, a black man, the State falsely told Hunt's defense lawyers that the DNA evidence was "too degraded to be tested," when in fact the analyst had recommended a more sophisticated test. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1663 (2008). In the case of George Goode, an African-American man who always maintained his innocence, the federal court reduced his sentence of death to a life sentence because of false forensic testimony by an analyst from the State Bureau of Investigations (SBI) Crime Lab. See Mandy Locke, *Fantastic tales told in blood; a jury stunned by SBI's acts*, News & Observer, (August 16, 2010).¹⁹

CONCLUSION

For the reasons stated in this brief, *amici curiae* request that this Court give Defendant's evidence of racial disparities in capital decision-making fair consideration—in the context of the

¹⁹ A recent audit commissioned by North Carolina Attorney General Roy Cooper uncovered over 200 cases in which the SBI withheld or distorted blood evidence. See Mandy Locke, *Scathing SBI audit says 230 cases tainted by shoddy investigations*, THE NEWS & OBSERVER, August 19, 2010, available at <http://www.newsobserver.com/2010/08/19/635632/scathing-sbi-audit-says-230-cases.html#storylink=misearch>. These cases include four current death row inmates and three executed defendants'. See *For executed men, audit's too late*, THE NEWS & OBSERVER, August 19, 2010, available at <http://www.newsobserver.com/2010/08/19/635619/for-executed-men-audits-too-late.html#storylink=misearch>.

influence of race on the likelihood of a wrongful conviction occurring—at a full evidentiary hearing.

Respectfully Submitted
this 27th day of August 2010

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APPENDIX

A. North Carolina Statistics by Race of the Defendant

Number of Death Row Exonerees	Percentage of Population that is Nonwhite	Percentage of Death Row that is Nonwhite	Percentage of Exonerees who are Nonwhite
7	28%	62%	86% ¹

¹In the Southern States, 67% of exonerees are black. Among the group of exonerees tracked by the Innocence Project, 65% of the exonerees are nonwhite.

B. North Carolina Statistics by Race of the Victim

Number of Death Row Exonerees	Percentage of Homicide Victims who are nonwhite	Percentage of Black Death Exonerees Convicted of Crimes against White Victims	Percentage of Exonerees Convicted of Crimes Against White Victims
7	28%	86%	100% ¹

¹Among the group of exonerees tracked by the Innocence Project, 76% were originally convicted of crimes against white victims.

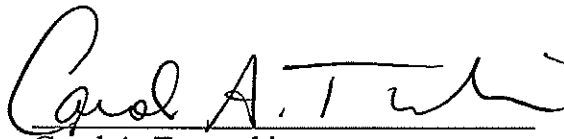
CERTIFICATE OF SERVICE

I hereby certify that a copy of the enclosed Brief of Advocates for the Wrongly Convicted as *Amici Curiae* in Support of Defendant Melvin Lee White has been served upon:

L. Michael Dodd
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by first class mail this 27th day of August 2010.

A handwritten signature in cursive script, reading "Carol A. Turowski". The signature is written in black ink and is positioned above a horizontal line.

Carol A. Turowski
Counsel for *Amici Curiae*