STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2011AP001803-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

GENERAL GRANT WILSON,

Defendant-Appellant

ON REVIEW OF A JUDGMENT OF THE COURT OF APPEALS REVERSING A JUDGMENT AND ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE VICTOR MANIAN AND THE HONORABLE JEFFREY A. CONEN PRESIDING

AMICUS BRIEF OF THE FRANK J. REMINGTON CENTER

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STATEMENT OF INTEREST

This brief is submitted by the Frank J. Remington Center at the University of Wisconsin Law School, a program made up of several clinical projects focused on criminal justice and dedicated to teaching, service, and research.

This case presents an important question concerning the circumstances in which a defendant has a right to present evidence of a third-party perpetrator. The Remington Center believes it is especially well suited to help frame this question for the Court. As an institution that helps educate future judges, prosecutors, defense attorneys, and law enforcement personnel, the Remington Center provides instruction the admissibility of evidence in criminal trials. In particular, the Remington Center has filed briefs and argued cases involving the standard for admitting third-party perpetrator evidence in Wisconsin courts. In short, the Remington Center has both an interest and expertise in the resolution of the question before this Court.

ARGUMENT

This case involves a defendant who has always maintained that he did not murder the victim; he contends that it would have been impossible because he was not there. At trial, he exposed flaws in the prosecution's case, and then he attempted to present evidence supporting his claim of innocence—evidence that another man who was at the scene when the victim was murdered had a motive to kill the victim and a propensity for violence against her. The circuit court excluded the evidence, saying it failed Wisconsin's test for the admissibility of alternative-perpetrator evidence. This Court should reject the State's argument that strong forensic evidence supporting the State's theory of the case governs the

application of the *Denny* test. *See State v. Denny*, 120 Wis. 2d 614, 624, 357 N.W.2d 12 (Ct. App. 1984). Such a strained application of *Denny* would violate Wilson's constitutional right to present a complete defense.

This brief presents two issues that neither party has directly addressed: 1) narrowly applying the *Denny* test, as the State advocates, would jeopardize innocent defendants and raise the probability that guilty parties escape justice; and 2) the State's argument in favor of excluding Wilson's alternative-perpetrator evidence so closely mirrors the state's argument in *Holmes v. South Carolina*, 547 U.S. 319, 323-24 (2006), that *Holmes* should control the outcome in this case.

I. Convicting the wrong person does not serve the interests of the State or the defendant.

Just a few decades ago, lay people and legal scholars thought the criminal justice system rarely convicted the wrong person. Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 56 (2008). At that time, evidence that an alternative perpetrator may have committed the crime seemed implausible, especially when the state presents apparently strong evidence of the defendant's guilt. *See id*. at 61 (stating that in many of the innocence cases studied, appellate "courts denied [innocent defendant's] claims after finding that evidence of guilt offset error, sometimes even referring to 'overwhelming evidence' of guilt").

Today, the number of DNA exonerations in the United States has grown to 318. Total exonerations, DNA and non-DNA, now totals over 1400, and most of those convictions were for serious crimes such as rape and murder. In most of those cases, a jury found the defendant guilty beyond a reasonable doubt. *Detailed View of Exonerations*, The

National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited July 31, 2014). However, DNA exonerations have exposed deep flaws in the evidence once believed to be reliable, e.g., eyewitness identification, confessions, and, as in this case, forensic science. In fact, in 2009, the National Academy of Sciences released a groundbreaking report exposing the unreliability of most forensic science evidence, proclaiming, "With the exception of nuclear DNA analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence of a specific individual or source." National Research Council, National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* 5 (2009). The report supported what had been discovered through DNA exonerations—forensic analysts called by the prosecution provided invalid forensic science testimony in 60% of the first 157 cases studied. Brandon Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 2 (2009).

With this growing number of acknowledged wrongful convictions, courts should be wary of limiting a defendant's ability to present an alternative-perpetrator defense because there is a risk that the strong evidence of guilt can be flawed. Therefore, by looking only to the strength of the evidence against a defendant and denying a defendant the opportunity to present evidence of an alternative theory, we may convict the wrong person while the true perpetrator escapes justice.

Without reviewing every transcript in the exoneration cases, it is hard to quantify how many wrongly convicted defendants were denied the opportunity to present evidence of an alternative perpetrator—the actual perpetrator—in their

trials. So far, no one has published the data. One man's case, however, stands out as a precautionary tale.

Ronald Cotton was arrested for rape and burglary in North Carolina in 1984. The evidence against him was strong. The victim spent thirty minutes memorizing her attacker's facial features. She identified him in a photo line-up and then in a live line-up. In the appellate decision upholding Cotton's conviction, the court states that her "identification of [Cotton] was certain and largely unimpeachable under extensive cross examination." *North Carolina v. Cotton*, 394 S.E.2d 456, 459 (N.C. Ct. App. 1990). Furthermore, Cotton's alibi witnesses gave inconsistent stories, his initial statements to the police were inconsistent with his trial testimony, and just four years earlier, he pled guilty to assault with intent to rape. *Id.*

Cotton claimed that he did not commit the 1984 burglary and rape. To support his theory that someone else did it, Cotton attempted to introduce evidence of a second rape that occurred in the same area, around the same time, with many of the same features. In that second rape, the victim did not identify Cotton as her attacker. The trial court denied Cotton's request and excluded the evidence. With such strong evidence of guilt and no alternative theory, Cotton was convicted. *Know the Cases*, Innocence Project, http://www.innocenceproject.org/Content/Ronald_Cotton.php (last visited July 31, 2014).

Two years later, Cotton was granted a new trial based on the fact that the trial court erred in excluding evidence of the second rape. *Id.* At the new trial, though, the victim of the second rape claimed that she could now identify Cotton as the man who raped her. Now facing two victims who were unwavering in their identifications, Cotton offered evidence that another man, Bobby Poole, serving time for another rape, had confessed to also committing these rapes. Again, the trial

court excluded Cotton's alternative-perpetrator evidence. *Id.* The jury convicted Cotton of both crimes. He was sentenced to life plus 54 years. *Id*.

In 1994, Cotton requested DNA testing. The DNA excluded Cotton, and it identified Bobby Poole as the actual perpetrator. *Id.* Of course, there is no way to know whether the alternative-perpetrator evidence would have changed either verdict, but Cotton's case illustrates the dangers of being lulled into believing that a defendant's theory is pure speculation based on the strength of the prosecution's case. DNA exonerations, like Ronald Cotton's, have taught us that even some of the evidence historically viewed as strong, whether it be a confession, a witness identification, or forensic science, can lead us to the wrong perpetrator. Certainly, with all we know about the causes of wrongful convictions, courts should be wary of denying a defendant's alternative perpetrator evidence based solely on the perceived strengths of the prosecution's case, especially when the prosecution offers no reason for the exclusion.

II. In *Holmes v. South Carolina,* the United States Supreme Court squarely rejected the State's reasoning for exclusion of alternative perpetrator evidence.

In *Holmes v. South Carolina*, the South Carolina Supreme Court upheld the preclusion of Holmes's alternative-perpetrator evidence because the petitioner could not "overcome the forensic evidence against him to raise a reasonable inference of his own innocence." 547 U.S. 319, 324 (2006). Justice Alito, writing for a unanimous Court, authored a short and simple opinion invalidating South Carolina's evidentiary rule. The Court declared South Carolina's rule unconstitutional—a violation of the

defendant's right to meaningfully present a complete defense. *Id*. at 331.

In reaching its holding, the Court recognized the long line of cases establishing a defendant's constitutional right to present a complete defense. *Id*. at 324-26. This right includes the right to present evidence that a third perpetrator committed the crime. *Id*. at 325 (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)).

Instead of crafting a bright-line rule for third-party perpetrator evidence, the Court left states free to craft their own rules of admissibility. However, the Court noted that those rules are subject to constitutional scrutiny. *Id*. at 326-27. When a state's rule precluding defendant's third-party evidence is arbitrary or a state court applies the rule in an arbitrary fashion, it violates the Constitution. *Id*. at 326. An arbitrary *application* is one that looks only to the strength of the prosecution's evidence when deciding on admissibility and provides no legitimate end that the rule's application serves. *Id*. at 331. It was South Carolina's arbitrary application of its third-party perpetrator rule that the Supreme Court corrected in *Holmes*.

The facts in *Holmes* are straightforward. Holmes was convicted of burglary, murder, and sexual assault of an 86-year-old woman he did not know. Strong forensic evidence tied him to the victim—his palm print at the scene, fibers from his clothes on the victim's sheets, fibers from her nightgown on Holmes's underwear, and, most importantly, incriminating DNA evidence. DNA from a mixture on the victim's panties could exclude 99.9% of the population but could not exclude Holmes, and DNA identified the blood on Holmes's tank top as a mixture of the victim's and Holmes's blood. *Id*. at 321-23.

At trial, Holmes claimed that he did not commit the crime; he was not there. His argued that corrupt police planted the evidence linking him to the crime. He tried to present evidence that an alternative suspect, who was in the neighborhood on the morning of the assault, admitted or insinuated to different people that he, not Holmes, committed the murder. *Id*. at 323. The trial court excluded the third-party perpetrator evidence, and the South Carolina Supreme Court upheld the preclusion because "petitioner could not 'overcome the forensic evidence against him to raise a reasonable inference of his own innocence.'" *Id*. at 324.

In striking down South Carolina's rule, Justice Alito's opinion looked to its practical application, exploring the state court's logic for precluding Holmes's third-party evidence:

> The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the *Gregory* rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "a meaningful opportunity to present a complete defense."

Id. at 331 (citations omitted).

Three principles from *Holmes* apply here. First, while a state may apply its own evidentiary test to defendants' evidence of alternative perpetrators, its *application* of the test must not violate defendant's constitutional right to meaningfully present a complete defense. Second, an application of the third-party perpetrator rule that looks only

to the strength of the State's evidence, even when strong forensic evidence supports a guilty verdict, is unconstitutional. Third, when the state fails to offer any explanation as to how the exclusion of the evidence would further the purpose of the test, the exclusion is arbitrary and unconstitutional.

Here, the State has asked this Court to do what *Holmes* forbids—to look at the strength of the prosecution's evidence in applying the opportunity portion of *Denny*. For instance, the State argues:

- "The physical evidence shows that Friend could not have directly committed the murder by firing the first weapon." Brief of Plaintiff-Respondent at 18.

- "Based on the ballistics evidence, it was impossible for Willie to have fired two .44 bullets into Eva Maric and then had someone else discharge the same gun towards him while he ran from the scene." *Id.* at 20.

- "Other physical evidence also supported Friend's eyewitness account of the shooting involving the .44 magnum revolver and shows that Friend did not have the opportunity to fire the first weapon." *Id*.

- "This assumption [that Friend set up Eva so others could kill her] overlooks the ballistics evidence showing that the shooter fired at Friend while he was hunkering down." *Id*. at 24.

In this case, the State urges an application of *Denny* that *Holmes* forbids—one that relies on the strength of the State's physical evidence seen only from the State's perspective. After spending eight pages of its brief arguing the strengths of its case against Wilson, the State does not

explain how applying *Denny*'s opportunity prong in such a way as to preclude the third-party perpetrator evidence in this case would rationally serve the purpose that the *Denny* test, especially the opportunity prong, was designed to further. *See* Brief of Plaintiff-Respondent at 3-16.

The Court of Appeals appropriately assessed the State's evidence and found that it could support the State's contention that Wilson fired at the victim and at Friend as he hid behind the door and then ran away. But crucially, the court, without referring to *Holmes*, nonetheless applied the same analysis. In doing so, it did not simply assume the reliability of the State's evidence or the credibility of its witnesses. The Court of Appeals found that the physical evidence could also support Wilson's contention that Friend had the victim killed and made the scene look as if Friend was also in harm's way. (Slip. Op. at 7.) Because the evidence was contradictory, the Court of Appeals correctly held that to exclude it would violate Wilson's constitutional right to present a complete defense. (*Id.* at 10.)

By asking the Court to define opportunity by looking only to the strength of the forensic evidence supporting its theory and by not offering any reason that exclusion furthers the purposes of the *Denny* test, the State is inviting this Court to replicate the very error the United States Supreme Court identified and corrected in *Holmes*.

CONCLUSION

For the reasons state, the decision of the Court of Appeals should be affirmed.

Respectfully submitted this 4th day of August, 2014.

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b) and (d) for a brief and appendix produced with a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum of 2 points and maximum of 60 lines. The length of the petition is 2,457 words.

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John A. Pray

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

A copy of this brief has also been served with the court and served on all parties.

Dated this 4th day of August 2014.

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John A. Pray