

No. 08-6

In the
Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL
DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,
Petitioners,

v.

WILLIAM G. OSBORNE,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF *AMICI CURIAE* OF JEANETTE POPP,
JENNIFER THOMPSON-CANNINO, MELINDA
ELKINS, TRACY KANELLOPOULOS, STACY
FIERGE, MICHELE MALLIN, AND MARK
TOKARSKI IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI*¹

Amici are individual crime victims or family members of crime victims whose lives have been profoundly impacted—not only by the crimes perpetrated against them or their loved ones, but by the results of post-conviction DNA testing. Because the interests of other people impacted by crime are likely to be affected by the resolution of this case, *amici* submit this brief to offer this Court a view of the ways in which post-conviction DNA analysis serves and supports victims' rights.

SUMMARY OF ARGUMENT

The federal government and all fifty states have passed legislation recognizing the rights of crime victims. This Court has likewise recognized that the finality of convictions is part of the moral dimension of the criminal law that is shared by victims and the state. Underlying that moral dimension is the bedrock principle that innocent defendants should not be punished for crimes they did not commit.

Neither the government nor the victims of crime have any interest in punishing the innocent. DNA testing is a revolutionary truth-seeking tool with the power to determine innocence or guilt and to provide victims, defendants, and society with finality. *Amici* have all suffered in some way at the hands of

¹ The parties have consented to the filing of amicus briefs in this case and filed consent letters with the Clerk. This brief was not authored in whole or part by counsel for a party, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

criminals, but they have also experienced the power of post-conviction DNA testing to rebalance the scales of justice.

The stories of *amici* provide a tapestry of the real-life experiences of victims and defendants who have been impacted by post-conviction DNA testing. It is against this human backdrop—not in the realm of the hypothetical—that the core issues of finality, truth, and justice should be evaluated in this case.

ARGUMENT

I. DNA Testing Provides A Gold Standard For Victims to Know That The Moral Judgment Of A Criminal Conviction Has Been Meted Out On The Guilty Party.

All fifty states and the federal government have enacted some form of victims' rights legislation. See Victoria Schwartz, Comment, *The Victims' Rights Amendment*, 42 Harv. J. on Legis. 525, 526 & n.13 (2005) (listing victims' rights statutes). Thirty-two states have enshrined victims' rights in their constitutions. *Id.* at 527 n.14. While the exact contours of these provisions differ, they represent a fundamental recognition of the role of the crime victim in the criminal justice system. Although none of these laws specifically provides crime victims with the right to have post-conviction DNA testing conducted, such testing is consistent with the rights of crime victims, including their right to be protected from further harm from the persons who actually victimized them, and their right to be treated with fairness and respect for their personal dignity.

This Court has noted that the finality of criminal proceedings has a “moral dimension” that is

often shared by the state and the victims of crime. *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). “Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the ‘powerful and legitimate interest in punishing the guilty[.]’” *Id.* (internal citations omitted).

Satisfying this moral interest depends on a fundamental, yet simple condition—that the defendant who is punished is not factually innocent of the crime charged. “[N]o one, regardless of his political, philosophical, or jurisprudential disposition, should otherwise be troubled that a person who was convicted in accordance with law might thereafter be set free, either by the executive or by the courts, because of evidence that provides absolute proof that he did not in fact commit the crime for which he was convicted.” *Harvey v. Horan*, 285 F.3d 298, 306 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc). Neither the state nor the victims of crime can claim any legitimate interest in inflicting punishment on factually-innocent persons. *Cf. Herrera v. Collins*, 506 U.S. 390, 417 (1993) (recognizing “that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional”); *id.* at 420 (same) (O’Connor, J., concurring).

Twenty years ago, a New York Court recognized that “[DNA testing] constitute[s] the single greatest advance in the ‘search for truth,’ and the goal of convicting the guilty and acquitting the innocent,

since the advent of cross-examination.” *People v. Wesley*, 533 N.Y.S. 2d 643, 644 (Albany County Ct. 1988). The state of the art has made significant progress in the last two decades. It allows an effectively unique profile to be generated from even the smallest and most degraded of samples. This technology is different from all that preceded it, in that it is capable of discerning the essential facts to “a practical certainty.” *Harvey*, 285 F.3d at 305 & n.1 (Luttig, J., respecting the denial of rehearing en banc). Victims of crime should be entitled to the greatest degree of certainty that society can muster.

II. The Experiences Of *Amici* Demonstrate The Power of Post-Conviction DNA Testing To Ensure That Justice Is Served And To Provide Crime Victims With Closure And Finality.

Victims of crime have a profound interest that those being punished are actually guilty of the crimes for which they were convicted. The life experiences of *amici* demonstrate the salience of this point.

Melinda Elkins saw her husband spend seven years in prison after he was wrongfully convicted of the rape and murder of her mother and the rape of her niece.

Tracy Kanellopoulos was raped by a man with a history of rape who remained at large because an innocent man was wrongly convicted for his crimes.

Jennifer Thompson-Cannino twice testified against an innocent man she was convinced had raped her. She was victimized not only by the crime against her, but by her own guilt when she learned that she had misidentified her assailant.

Jeanette Popp thought the men who raped and murdered her daughter had been tried, convicted, and sent to prison. She suffered through the experience of the murder trial, believing justice had been done, only to have her world turned upside down when the real killer was found.

Stacy Fierge identified the man she believed had raped her. He was convicted and sent to prison. Although the defendant claimed he was the victim of mistaken identity, post-conviction DNA testing ultimately confirmed that justice had been done.

In the first four examples profiled in this brief, post-conviction DNA testing led to the exoneration of a falsely convicted individual and to the discovery of the true perpetrator. In some cases the DNA testing vindicated a long-held belief in truth that was denied by the justice system, while in others the DNA testing overturned long-held beliefs that the right person or persons were being held to account for the crimes. In Ms. Fierge's case, post-conviction DNA testing confirmed that the right person had been convicted and laid to rest any doubt about mistaken identity.

Amici Michele Mallin and Mark Tokarski are also victims or family members of victims of violent crimes that led to the conviction of innocent persons who were ultimately exonerated by DNA testing. Although the guilty have not yet been brought to justice in these cases, DNA testing affords *amici* their best hope that moral justice will be properly brought to bear.

Victims deserve to participate in the criminal justice system confident that it will correct "fundamental miscarriage[s] of justice," see *Engle v.*

Isaac, 456 U.S. 107, 135 (1982), thus “guaranteeing that the ends of justice will be served in full.” *McCleskey v. Zant*, 499 U.S. 467, 495 (1991).

Each of these interests is fostered by the recognition of a fundamental due process right to post-conviction access to biological evidence for testing. And indeed, even when that evidence does not establish the convicted defendant’s innocence—or perhaps especially in those cases—DNA testing provides a gold standard for victims to know that the moral judgment inflicted by society’s punishment will be carried out on the correct person. This moral concern takes on an added dimension of finality in capital cases.

With the foregoing in mind, we set forth the personal stories of *amici* to illustrate the shared interest of crime victims in using post-conviction DNA testing to secure justice and true finality in their cases.

A. Melinda Elkins: *Endured Her Husband's False Conviction For The Rape And Murder Of Her Mother And The Rape Of Her Niece.*

On June 7, 1998, an assailant entered Judy Johnson's home in Barberton, Ohio.² He savagely beat her, raped her and strangled her to death. He also raped and beat her six-year-old granddaughter, Brooke Sutton,³ whom Ms. Johnson was babysitting. The assailant left Brooke for dead. Brooke told her mother that she recognized her attacker as her uncle, Clarence Elkins. Mr. Elkins was arrested.

Brooke's aunt, *amicus* Melinda Elkins, is the daughter of the murder victim and the wife of the accused. Ms. Elkins was certain of her husband's innocence and determined to find her mother's real killer. At her mother's graveside, Ms. Elkins made a promise: "Mom, I will fight for the rest of my life to figure this out and to find out who did this to you."

² Ms. Elkins's story received extensive coverage in the media. See, e.g., *Dateline NBC: Killer Instinct; Melinda Elkins Works Seven Years to Prove Her Husband's Innocence in Murder of Her Mother, Judy Johnson, and Rape of Her Niece, Brooke Sutton* (NBC television broadcast June 3, 2007).

³ Brooke Sutton is now sixteen years old. She has previously consented, both personally and through her guardian, to the use of her full name and picture in various news accounts. She has also appeared, using her full name on television. For these reasons, *amici* forgo the common practice of referring to a child victim with a pseudonym.

Mr. Elkins had alibi witnesses who could account for his whereabouts throughout the night of the attack. Moreover, the state conceded that there was no physical evidence connecting Mr. Elkins to the crime. Although biological evidence was collected from the crime scene and the victims' bodies, none of it matched Mr. Elkins. For example, mitochondrial DNA testing was conducted before trial on pubic hairs found on each of the victims' bodies. The tests ruled out Mr. Elkins as the source of the hairs.

Despite the absence of physical evidence linking him to the crimes, Mr. Elkins was convicted of murder, aggravated assault, and three counts of rape—primarily on the strength of Brooke's eyewitness identification. He was sentenced to life in prison.

Ms. Elkins eventually convinced prosecutors to release the DNA evidence to her for testing. Improvements in technology since 1998 allowed testing of evidence taken directly from Ms. Johnson's body and from Brooke's underwear. This more sensitive testing revealed additional DNA present in skin cells collected at the scene. The DNA did not match Mr. Elkins. Nevertheless, the court denied a motion for a retrial.

Shortly thereafter, Ms. Elkins read about the rape conviction of Earl Eugene Mann, one of Ms. Johnson's former neighbors. In a twist of fate, Mann was imprisoned in the same cell block as Mr. Elkins. Aware of his wife's suspicions that Mann was the true killer and rapist, Mr. Elkins kept an eye on Mann and waited for an opportunity to gather a DNA sample. That opportunity came when he saw Mann drop a cigarette butt.

Tests on the cigarette butt showed that Mann's DNA matched the DNA recovered from both Ms. Johnson's body and from Brooke's underwear. Mr. Elkins was eventually exonerated and released from prison on December 12, 2005. At a television press conference given on learning of her husband's exoneration, Ms. Elkins prayed for her mother: "We got him, Mom. You can rest in peace now." She then looked to the camera and said: "And I'd like to say to Earl Mann: We got you."

Mann ultimately pled guilty to aggravated murder, attempted murder, aggravated burglary and rape in connection with his crimes. He was sentenced to fifty-five years to life in prison.

Had the technology been available in 1998, an innocent man may never have been convicted. And had the DNA evidence remained out of reach in 2005, the criminal justice system would have failed the victim of the crime not once, but twice. Not only would Mr. Elkins still be in prison, but Mann—who raped at least three children *after* committing the rapes and murder in the Elkins case—would soon be free.

B. Tracy Kanellopoulos: *Raped Because The Wrong Man Was Sent To Prison.*

On July 31, 1981, a man in a cowboy hat approached a car that sat idling in the parking lot of an Atlanta Kentucky Fried Chicken. The man brandished a pistol and said to the woman sitting in the driver's seat, "Slide over or I'll blow your brains out." The man entered the car and forced the woman to drive to a remote part of Cobb County, Georgia. He beat her severely, raped her three times, stole the car and left her for dead on the side of the road.

In her initial interview with the police, the victim described her abductor as five-feet-seven-inches tall. But in a later photo array and live lineup, she was “fairly positive” when she identified six-foot-one-inch tall Robert Clark. At Clark’s trial, the victim testified that “I will never forget the face, the skin color and his voice.” Clark was convicted of rape, abduction, and armed robbery and sentenced to two life terms plus twenty years in prison.⁴

But Clark did not commit any of those crimes. Twenty-four years later, DNA testing cleared Clark, and implicated Floyd Antonio Arnold. While Clark was serving a twenty-five year sentence for Arnold’s crimes, Arnold committed numerous other crimes. Among those crimes was the rape of *amicus* Tracy Kanellopoulos in Fulton County, Georgia in 1993. Arnold committed another rape in DeKalb County in 1996. Both rapes were “cold cases” that were ultimately solved because of Clark’s efforts to secure DNA evidence to prove his innocence.

Had the DNA evidence been available and tested in 1981, Arnold likely would have been caught and imprisoned before he committed his other crimes. An innocent man would not have gone to

⁴ This case was covered extensively in the news media. See, e.g., Don Plummer, *A Free Man; Robert Clark Spent Nearly 25 Years Behind Bars for a Rape He Didn't Commit. He Knew He Was Innocent, and Now the Rest of the World Knows It, Too*, Atlanta J. Const., Dec. 9, 2005 at 1A; Bill Tropy & Bill Rankin, *A Crime, then a Tragedy; Twists in Rape Case Snared Wrong Man*, Atlanta J. Const., Dec. 11, 2005 at 1A.

prison. And Ms. Kanellopoulos would not have been raped.

C. Jeanette Popp: *Watched Two Innocent Men Go To Prison For Her Daughter's Rape and Murder.*

On October 24, 1988, in Austin, Texas, Nancy DePriest was raped and murdered at the Pizza Hut where she worked.⁵ She was twenty years old. A couple of weeks later, Christopher Ochoa and Richard Danziger (who worked at another area Pizza Hut) visited the restaurant where DePriest had been murdered. Danziger proposed a toast to DePriest and discussed the killing with a security guard. Pizza Hut employees alerted police, who approached Ochoa at work two days later. Ochoa willingly accompanied them to the police station.

After two days of interrogation and threats, and with the assistance of detectives, Ochoa gave a false confession. He admitted entering the Pizza Hut with Danziger, binding Ms. DePriest, and repeatedly raping her. Ochoa initially claimed that Danziger killed her but, after a polygraph test, Ochoa changed his story and claimed that he was the shooter.

Ochoa pled guilty and avoided the death penalty in return for his testimony against Danziger. His confession was corroborated by DNA tests linking semen collected from the crime with a Hispanic perpetrator. Ochoa testified and described the killing

⁵ This case has been the subject of numerous news articles. See, e.g., Jason Shepard, *Finding Justice*, Isthmus, May 12, 2006, at 13; Mark McDonald, *Lethal Rejection*, Dallas Observer, Dec. 12, 2002.

in grisly detail. The jury convicted Danziger and sentenced him to life in prison.

DePriest's mother, *amicus* Jeanette Popp, attended each day of Danziger's trial. After the conviction, she met with the jury and, as she put it: "I couldn't have thanked them any more for the justice they had given my child." Diane Jennings, *Mother of '88 Murder Victim Says Her Faith in Justice System Shattered after Exoneration*, Dallas Morning News, Feb. 24, 2008. She was certain that justice had been done, and "wouldn't have questioned the police or the prosecution . . . the evidence was so overwhelming, so overwhelming." *Id.*

As later events would demonstrate, however, the proceedings in the courtroom did not lead to justice for Ms. Popp, her daughter, or the defendants. Notwithstanding Ochoa's testimony, both Ochoa and Danziger were innocent of any involvement in the rape and murder of Ms. DePriest. In a further tragedy, not long after his conviction, Danziger was brutally attacked in prison. He survived, but lost part of his brain and is permanently disabled.

The real rapist and murderer was Achim Josef Marino, who had selected his victim at random as part of a satanic ritual. Marino—who was later sentenced to two life terms in prison for robbery—learned of Ochoa's and Danziger's story from a fellow inmate. In 1996, Marino wrote a letter to the police and to a newspaper confessing to the killing and informing them of the location of the handcuffs he had used. Two years later, Marino wrote to the district attorney's office and again confessed to Ms. DePriest's murder. Despite Marino's confession, Ochoa did not recant his prior testimony.

In 1999, however, Ochoa reached out to the Wisconsin Innocence Project, which located the DNA evidence from the 1988 crime scene. The district attorney's office tested the DNA and, in September 2000, notified Ochoa that the test results pointed to Marino as the culprit. In early 2001, both Ochoa and Danziger were released from prison.

Twelve years after her daughter's death, Ms. Popp was faced with the fact that the two men she thought had killed her daughter were innocent. She was understandably anguished that they had spent years in prison for a crime they did not commit—yet relieved that DNA testing had finally revealed the truth. Ms. Popp met with Ochoa's mother and accompanied her to his release. Ms. Popp said that her "heart was just filled with joy" when he was freed from prison. She also met with Marino, who apologized to her, but refused her request that he plead guilty so that she would not have to go through another trial over her daughter's rape and murder. Marino was subsequently tried, convicted and sentenced to life in prison.

Speaking about Ochoa and Danziger, Ms. Popp explained that "I knew we had done a horrible thing. I say 'we' even though I was not involved in sending them to prison. I somehow feel responsible." Henry Weinstein, *Freed Man Gives Lessons on False Confessions*, L.A. Times, June 21, 2006. Those feelings of tremendous guilt would have been even further compounded had Ochoa or Danziger been executed.

While post-conviction DNA testing could not prevent the brutal crimes perpetrated on Ms. DePriest, it provided Ms. Popp with the finality of

knowing that her daughter's true murderer would never kill again, and that justice had been done.

D. Jennifer Thompson-Cannino: Spent Eleven Years Believing That An Innocent Man Raped Her.

In July 1984, *amicus* Jennifer Thompson-Cannino was raped in her Burlington, North Carolina home.⁶ She was awakened around 3:00 A.M. by an intruder who held her captive. She was able to catch brief glimpses of the man and, throughout her ordeal, she made an effort to remember the details of his appearance so that she could later identify him. Ms. Thompson-Cannino eventually escaped from her captor and fled to a neighbor's house. Another woman in a nearby home was raped under similar circumstances that same night.

Ms. Thompson-Cannino was taken to the hospital, where biological evidence from the attack was collected. She was then taken to the police station to give a statement and to help police make a composite sketch of her assailant. She was confident that she could identify the man. Police set out a dragnet for a black male, with a light complexion, around six feet tall, 170 to 175 pounds with short hair and a thin moustache.

The police received a tip identifying a man named Ronald Cotton, who matched the physical description of the assailant. Cotton had been

⁶ This case is the subject of an in-depth PBS *Frontline* program and web site. See *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997).

convicted as a teen for attempted rape and was on parole for breaking and entering. Police had Ms. Thompson-Cannino review a set of mug shots and she identified Cotton as her assailant.

When Cotton learned that he was being sought, he voluntarily went to the police station. He was put in a police line-up with six other men. Ms. Thompson-Cannino again selected him as her assailant. She was certain Cotton was the man.

The case against Cotton went to trial in January 1985, with little physical evidence. Blood typing of the semen sample collected that night was inconclusive. In addition, the trial judge excluded evidence that the other rape victim (who had been raped the same night as Ms. Thompson-Cannino) did not identify Cotton as her assailant. On the weight of Ms. Thompson-Cannino's testimony, Cotton was convicted and sent to prison.

On September 30, 1986, Cotton wrote his lawyer from prison because he was certain he had met the man who actually committed the rapes. That man was Bobby Poole. Poole worked with Cotton in the prison kitchen and shared a dorm with him. Soon thereafter, Cotton was granted a new trial on the basis of the excluded evidence about the second rape.

At the preliminary hearing, Poole testified and denied involvement in the crimes. Despite seeing Poole at the hearing, Ms. Thompson-Cannino remained steadfast in her belief that Cotton was her assailant. Moreover, the second rape victim changed her mind and also identified Cotton as her assailant. No evidence about Poole was presented at the second trial. Cotton was convicted of both rapes.

Ms. Thompson-Cannino celebrated Cotton's conviction. She said at the time: "I hated him worse than I hated anything in my whole life." She prayed that Cotton would be raped and killed in prison. Ruben Rosario, *'Sequential Lineups' Help Police Find the Right Suspect*, Saint Paul Pioneer Press (Minnesota), Feb. 11, 2005, at B1.

In 1995, prompted by inquiries from law professor Rich Rosen, the police and prosecutor raised the issue of DNA testing with Ms. Thompson-Cannino, who "agreed [to the tests] because [she] knew that Ronald Cotton had raped [her] and DNA was only going to confirm that. The test would allow [her] to move on once and for all." Jennifer Thompson, Editorial, *"I Was Certain, but I Was Wrong,"* N.Y. Times, June 18, 2000. Despite policies that allow for the destruction of old DNA samples—spurred by an intuition that there may be some issues in the future involving DNA—the police had kept evidence from the case.

The DNA tests exonerated Cotton and proved that Poole was the rapist in both of the 1984 rapes. This was a stunning turn of events for Ms. Thompson-Cannino, who "will never forget the day [she] learned . . . [that] the man [she] had identified so emphatically on so many occasions was absolutely innocent." *"I Was Certain, but I Was Wrong,"* N.Y. Times, June 18, 2000. This revelation, together with her role in the false conviction, led Ms. Thompson-Cannino to work as a speaker and advocate on the inherent unreliability of eyewitness identifications.

If the police had not opted to save the DNA, and if Cotton had never obtained access to post-conviction DNA testing, Ms. Thompson-Cannino

might have spent the rest of her life consumed with the hatred of a man who never hurt her, while the man who raped her would have gone unpunished for his crime. Her mistaken identification would have been the cause—however inadvertent—of a profound miscarriage of justice. Fortunately, she now has peace of mind knowing that, in the end, justice was done.

E. Stacy Fierge: *Verified That Justice Had Been Done.*

On the evening of October 12, 1997, *amicus* Stacy Fierge returned home to her apartment in rural Missouri. She was met there by a man with a pillowcase over his head, holding a knife. He taped a pillowcase over Ms. Fierge's head and raped her twice. Police were able to gather blood from her clothes and semen from a rape kit taken at the hospital. Ms. Fierge told police that her attacker was black and around 5'8" tall.

Police suspected that the ex-husband of one of Ms. Fierge's neighbors could be the assailant. The man matched the physical description and had visited his ex-wife on the night of the attack. Police recorded his voice and Ms. Fierge identified the voice as that of her assailant. The relatively rudimentary blood and semen testing performed at the time suggested that the semen and some blood had come from her neighbor's ex-husband.

Circumstantial evidence also pointed to the ex-husband as the attacker. He had left his wife's apartment with a putty knife and screwdriver, ostensibly to help a neighbor with some handy work, but more likely to pry open Ms. Fierge's window. He also seemed to have knowledge of the crime before

police approached him. The defendant was tried and convicted. His defense at trial was based on mistaken identity.

The defendant eventually sought access to his DNA to prove his claim of innocence. The prosecutor consented to the testing. When Ms. Fierge learned of the attempts to perform post-conviction DNA tests on the evidence from her rape, she contacted the defendant's attorney and informed counsel that she was certain that she had identified the correct assailant. Ms. Fierge agreed that the DNA testing should go forward, however, because the results could prove the defendant's guilt or innocence to a scientific certainty, which was in everyone's best interest.

The DNA testing proved conclusively that the man Ms. Fierge had identified was indeed the rapist. Ms. Fierge, like Ms. Thompson-Cannino, had been certain of the identity of her rapist. Here, that belief was ultimately vindicated by post-conviction DNA testing, which further laid to rest the defendant's false claims of mistaken identity.

* * *

The tragic experiences profiled above illustrate the tremendous truth-finding power of post-conviction DNA testing. While in each of the examples above, the actual perpetrator was found, that is not always the case. Indeed, the victimizers of the other *amici* named in this brief have not yet been brought to justice. Nevertheless, post-conviction DNA analysis is still of great importance to victims even when exoneration results in an unsolved crime.

Amicus Michele Mallin misidentified Timothy Cole as her attacker. Cole died of an asthma attack

in prison in 1999, after serving thirteen years of a twenty-five-year sentence. DNA testing posthumously proved his actual innocence. Ms. Mallin now speaks out publicly on his behalf.

Amicus Mark Tokarski is the father of an eight-year-old girl who was raped by an intruder in 1987. Based on the young girl's identification and forensic hair science later proven to be erroneous, Jimmy Ray Bromgard was convicted and sentenced to forty years in prison. Post-conviction DNA testing proved Bromgard's innocence, and he was released in 2002, having served more than fourteen years in prison. Mr. Tokarski now speaks out publicly on behalf of the wrongly convicted.

CONCLUSION

Proof to a "moral certainty," *cf. Victor v. Nebraska*, 511 U.S. 1, 15–17 (1994), is imperfect; it admits a possibility of doubt. It "is not an indictment of our system of justice [that it] does not . . . require proof beyond *all* doubt, and therefore *is* capable of producing erroneous determinations of both guilt and innocence." *Harvey*, 285 F.3d at 306 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc) (emphasis in original).

But these errors have consequences. Just as there is a cost on society from wrongful acquittals, *see Patterson v. New York*, 432 U.S. 197, 208 (1977), there is likewise a cost from wrongful convictions. That cost is not paid only by the convicted; erroneous convictions also come at the cost of the victims of crime. Indeed, false convictions provide victims and society at large with false assurance that justice has been done. And when the innocent go to jail, the

guilty remain free. Indeed, the guilty often go on to create more victims by committing more crimes.

Early in the last century, Judge Learned Hand observed that “[o]ur procedure has been always haunted by the ghost of the innocent man convicted.” *United States v. Garsson*, 291 F. 646, 649 (D.C.N.Y. 1923). Today, the availability of DNA testing provides a unique truth-finding tool in the service of both justice and finality. Recognition of a due process right to post-conviction access to DNA serves crime victims’ interests both in obtaining protection from those who would harm them, and in seeing justice served on those who have. For these reasons, *amici* respectfully request that this Court affirm the ruling of the court below.

Respectfully submitted,

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