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No. 08-6

IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ET AL.,

Petitioner,

v.

WILLIAM G. OSBORNE,

Respondent.

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

BRIEF OF CURRENT AND FORMER PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

"[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1995). The obligations and constraints that animate this principle are uniquely those of the prosecutor, who "by virtue of his office, must seek truth even as he seeks victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986) (Marshall, J., dissenting from the denial of certiorari). He or she "may prosecute with earnestness and vigor," but always with the "twofold aim . . . that guilt shall not escape nor innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). This Court has "several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'" *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999) and citing cases). *See generally Brady v. Maryland*, 373 U.S. 83 (1963).

Amici listed here are current and former prosecutors representing nearly a century of prosecutorial experience at the local, state and federal level. They have prosecuted murder cases, rape cases, and other crimes where deoxyribonucleic acid ("DNA") evidence is often relevant. All of them have proceeded with prosecutions based on direct and

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

circumstantial evidence that was highly indicative of guilt, but where such guilt could not be known with total certainty. Some of them have had the experience of obtaining the conviction of an individual who was later proven innocent by postconviction DNA testing, or have participated in the release of evidence to a convicted person who would later establish proof of their innocence and vacatur of their sentence. To be sure, such an experience is humbling. Many of these convicted individuals faced overwhelming evidence against them. Often times they were positively identified by multiple eyewitnesses, and a number even confessed to the crime. But with advances in science now allowing an individual to be absolutely exonerated or identified as the true perpetrator with an extremely high rate of accuracy, circumstantial and testimonial evidence are, in some cases, no longer the best indicia of guilt we have.

"[T]radition and experience justify [the] belief that the great majority of prosecutors [are] faithful to their duty" to seek the truth. *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987). However, experience also demonstrates that "institutional and political barriers" may "deter district attorneys' offices from recognizing potentially valid innocence claims." Daniel Medwed, *The Zeal Deal: Prosecutorial Resistance to Postconviction Claims of Innocence*, 84 B. U. L. REV. 125, 130 (2004). And state laws, while commonly available, often exclude large classes of cases from postconviction DNA testing based on arbitrary factors that bear no

relation to the likely result of the test. *Amici* believe that postconviction DNA testing should be available, as a matter of federal law, when an exclusionary result would demonstrate that it is more likely than not that the convicted person did not commit the crime, and state law fails to provide the adequate recourse.

Amicus Janet Reno was the Attorney General of the United States from 1993 to 2001. As Attorney General during a time when the technology of DNA testing was rapidly advancing, she directed the National Institute of Justice (NIJ) to identify the prevalence of convictions that were later overturned by modern science. After extensive study, the NIJ published a report entitled *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996). Upon reviewing this report, the Attorney General established and convened the National Commission on the Future of DNA Evidence in 1998. The Commission consisted of representatives from prosecution, the defense bar, law enforcement, the scientific community, the medical examiner community, academia, and victims' rights organizations, and served the important role of providing the Attorney General with recommendations on the use of current and future DNA methods, applications and technologies, from the crime scene to the courtroom. Her leadership at the national level led to the preparation of a number of Commission reports, including *Postconviction DNA Testing: Recommendations for Handling Requests*

(2000), which proved extremely influential in giving guidelines for individual prosecutors and transforming the state statutory landscape over this past decade. (*See infra*. pp. 13-14.) Prior to serving as Attorney General of the United States, she was the State Attorney of Dade County in Florida from 1978-1993. She is also a member of the Board of Directors for the Innocence Project, Inc., counsel for respondent.

Amicus Thomas M. Breen was an Assistant State's Attorney in Cook County, Illinois, from 1972 to 1978, during which time he led the prosecution and secured the convictions of Chicago teenagers Michael Evans and Paul Terry for the 1976 rape and murder of a nine-year-old Chicago girl. Nearly a quarter of a century later—in what a Chicago Tribune editorial called "an act of profound self-reflection and courage"—Breen confided to an attorney at the Center on Wrongful Convictions that he had begun to harbor serious doubts about the youths' guilt. Center lawyers obtained DNA testing, which exonerated Evans and Terry in 2003. Breen's misgivings about the case surfaced as a result of his experience in private practice (which he entered in 1981) representing wrongfully convicted defendants such as Gary Dotson, the victim of a fabricated rape allegation who in 1989 became one of the first persons in the world to be exonerated by DNA, and Rolando Cruz, who was exonerated in 1995 by DNA testing of the 1983 abduction, rape, and murder of a little girl.

Amicus Kenneth L. Gillis served in high-level supervisory positions in the Cook County, Illinois, State's Attorney's Office for 12 years, serving as Chief of Special Prosecutions during the 1970s and as First Assistant State's Attorney from early 1991 through late 1992. He was instrumental in the State's Attorney's decision to consent to DNA testing (not yet required by statute) in the case of Steven Paul Linscott, who had been convicted of murder based on his description to police of a dream that prosecutors had construed as a confession. In July of 1992, Linscott became the second wrongfully convicted person (after Gary Dotson) to be exonerated by DNA in Illinois.

Amicus Peggy A. Lautenschlager served as Attorney General for the State of Wisconsin from 2002 to 2006. During her time as Wisconsin Attorney General, Ms. Lautenschlager made efforts to improve the efficiency of the state crime laboratory with an eye toward facilitating requests by prosecutors and defense attorneys alike to seek DNA testing of biological evidence. Prior to her service as state Attorney General, Ms. Lautenschlager was the District Attorney for Winnebago County, Wisconsin, from 1985 to 1988 and United States Attorney for the Western District of Wisconsin from 1993 to 2001.

Amicus Carl J. Marlinga was the elected prosecuting attorney of Macomb County, Michigan (in suburban Detroit), from 1984 to 2004. In that position, Mr. Marlinga directed hundreds of prosecutions which identified perpetrators through

DNA evidence. Mr. Marlinga also became personally involved with the exoneration of Kenneth Wyniemko, who had been convicted in the Macomb County Circuit Court in 1994 of criminal sexual conduct. The circumstantial evidence against Mr. Wyniemko at trial was overwhelming, but when technology advanced to the point where trace biological evidence could be tested, Mr. Marlinga consented to the release of that evidence for testing. After serving nine years of a 40-60 year sentence, the new tests excluded Mr. Wyniemko as a source of the DNA. As is often the case (*see infra*. pp. 17-18), the DNA testing helped identify the true perpetrator of the crime. However, by that time, he could not be prosecuted because of the statute of limitations.

Amicus Scott D. McNamara was elected to serve as District Attorney of Oneida County, New York in November of 2007, after having been appointed to that position in March of that same year. In August of 2007, he consented to DNA testing requested by the Innocence Project in the case of Steven Barnes, who was convicted in 1989 of the rape and murder of sixteen-year-old Kimberly Simon. Those tests excluded Mr. Barnes as the source of foreign DNA found on the rape kit and the clothing worn by the victim at the time of the crime. In November of 2008, pursuant to a joint motion made by Mr. McNamara's office and the Innocence Project, Mr. Barnes was released after serving over 20 years of a life sentence.

Amicus Jim Petro was elected Attorney General of Ohio in 2002, retiring from that position in January

2007. During his service as Attorney General, Mr. Petro was actively involved in the development and adoption of Ohio's first post-conviction DNA statute, effective October 29, 2003; and the subsequent current post-conviction DNA statute, effective July 11, 2006. He also sought and received legislative authority mandating the taking of DNA samples from all convicted felons and serious misdemeanants, resulting in the development of nearly one-quarter million criminal DNA profiles in the state's data files, and the solving of hundreds of criminal cases through DNA matching technology. For his efforts in advancing the use of DNA technology, the Ohio Association of Chiefs of Police presented Petro with its "Visionary Leadership" and "Legacy" awards in 2005 and 2006. Petro was the first attorney general in the nation to intervene on behalf of a defendant seeking exoneration, in the case of Clarence Elkins. Post-conviction DNA testing ultimately proved Mr. Elkins' innocence, identified the actual perpetrator and brought about his conviction.

Amicus Craig Watkins was elected District Attorney for Dallas County, Texas in 2006, five years after the Texas legislature codified a limited right to postconviction DNA testing. In the intervening time, seven men in Dallas County were exonerated of rape or sexual assault, despite the consistent opposition of Watkins' predecessor to postconviction DNA testing. Shortly after assuming office, Watkins established the Conviction Integrity Unit, a comprehensive voluntary review of Dallas County cases dating as far back as 1970. In instances where DNA analysis

could prove exculpatory, Dallas County now makes the evidence available. In the two years since Watkins took office, postconviction testing has exonerated nine more individuals (including Patrick Waller, whose case is detailed below (*infra* pp. 17-18)). These nine individuals collectively served almost two centuries in prison for crimes they did not commit. In June 2008, Dallas County granted Watkins an additional $450,000 to continue his voluntary review program.

Amicus Andrea L. Zopp was an assistant United States Attorney for the Northern District of Illinois from 1983 through 1990, Chief of the Narcotics Bureau of the Cook County State's Attorney's Office from 1991 until late 1992, and First Assistant State's Attorney of Cook County from 1992 until late 1996. As First Assistant, she authorized felony prosecutors to voluntarily agree to DNA testing in a 1978 rape and double murder case that the news media called the Ford Heights Four case (a misnomer, because there were five defendants in the case, four men and a young woman whose confession had been instrumental in all of the convictions). The DNA testing exonerated all five defendants, two of whom had been sentenced to death. The testing corroborated confessions of other three men, who subsequently were convicted of the crime.

Because the Court's decision in this case will have a profound effect on how other prosecutors approach the retention, release and testing of DNA evidence, *amici* have a special interest in participating in this

debate. They are the people who have fulfilled the mandate of their respective state postconviction laws; who have witnessed first-hand their promise and their limitations; and who would likewise see the practical effect of the limited federal right that the respondent is urging here. And due to *amici*'s personal experiences with postconviction DNA testing, they are uniquely situated to assure this Court that a limited federal right is both absolutely necessary and absolutely proper to advance both the fairness and the finality of state criminal convictions through the promise of modern science.

SUMMARY OF ARGUMENT

I. The search for truth is a foundational core of our criminal justice system, and modern DNA analysis now allows us, in some cases, to find the truth to an extremely high degree of accuracy. Its promise has encouraged many local district attorneys' offices to voluntarily review cases where DNA results could change the verdict, a development which has garnered the federal government's full support. The majority of individual prosecutors in other jurisdictions have followed this lead. However, relying solely on the unfettered discretion of prosecutors to unlock the promise of DNA analysis can sanction injustice. *Amici* have personally seen meritorious cases evade postconviction testing for too long due to rigid opposition from state and local authorities. According to a recent study, one-fifth of the 232 postconviction DNA exonerations nationwide occurred not *because of* the good conscience of

prosecutors, but *despite* their best efforts to oppose the test. Justice delayed is justice denied.

And justice for the wrongly-convicted is not the only goal of a liberal policy toward postconviction DNA testing. Due to increased collaboration with federal, state and local authorities in maintaining DNA databanks, a high percentage of those exonerations also lead to a positive identification of the actual perpetrator, imparting a sense of *real* justice for the victim and increasing the integrity and public trust in our criminal justice system. Indeed, with present costs of DNA analysis around one-thousand dollars, it is a wasteful use of precious resources to litigate opposition to DNA testing rather than simply to allow it. *Both* an exculpatory result or an inculpatory result will shut-off future claims of actual innocence.

II. Over the past decade, forty-four states and the District of Columbia have enacted postconviction DNA testing laws. These laws serve the salutary purpose of authorizing DNA analysis when an exculpatory result would likely impugn the verdict of conviction. But this aim is not uniformly fulfilled. Some states—like Alaska—have no mechanism at all to allow for DNA testing, even in the most meritorious cases. Others exclude broad classes of cases from relief based on arbitrary, legislative judgments that experience shows bear no relation to the likely result of the testing. Indeed, Petitioner's *amici* argue that the respondent here, who the State of Alaska now concedes would be absolutely

exonerated with an exculpatory test, would be statutorily ineligible for postconviction DNA testing in several states. This simple fact—and the sheer volume of other, meritorious cases that these laws would exclude from their scope—demonstrates that the present state response to these technological developments does not adequately fulfill the promise of forensic DNA testing.

This is precisely why a limited federal right is needed. In cases where the state procedures fail to provide a "means of redress [that] satisf[ies] the requirement of procedural due process," a federal cause of action under 42 U.S.C. § 1983 will lie. *Parratt v. Taylor*, 451 U.S. 527, 537 (1981). However, where there is an "adequate state remedy" for postconviction DNA testing, *id.* at 542, there is simply no constitutional deprivation for federal law to redress. A federal constitutional right that requires a higher showing than most state statutes—something akin to "no reasonable juror would have found the defendant guilty" if favorable DNA test had been introduced at trial, *see Schlup*, 513 U.S. at 329—would leave the state laws in place as the likely avenue of first resort for postconviction DNA testing. Such a scheme is a necessary, yet still subsidiary, extension of federal due process.

This limited federal right will not significantly affect state or federal resources. Most postconviction claims for DNA testing accompany other claims, like ineffective assistance of counsel, which will not dissipate in the absence of a federal right to DNA

testing. And recent experience suggests that litigious claims for DNA testing are actually decreasing. Due to advances in DNA technology and the subsequent decrease in the cost of such testing, most criminal cases where DNA evidence is at issue will include pre-trial DNA testing, obviating any need for postconviction action. And, even where testing is not conducted pre-trial, many prosecutors—like *amici*—are consenting to postconviction DNA testing without litigation. Experience illustrates these trends. The first federal court to allow a § 1983 action for postconviction DNA testing was in 2001, and since then, there have been only *two more* cases in that circuit seeking the same relief. Minimal burdens of this sort deserve little or no weight in resolving the question before the Court.

ARGUMENT

I. Postconviction DNA Testing To Confirm Or Disprove Identity Advances The Government's Interest

In the last 15 years, DNA evidence has greatly enhanced the efficacy of truth-finding in criminal adjudications. It is, indeed, "the foremost forensic technique for identifying perpetrators." U.S. Dep't of Justice, Nat'l Inst. Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 1 (2000). DNA testing can be "at least five times as likely to result in a suspect identification compared with fingerprints." Urban Inst. Justice Policy Ctr., *The DNA Field Experiment: Cost-Effectiveness*

Analysis of the Use of DNA in the Investigation of High-Volume Crimes 3 (2008). The results neither "become weaker over time in the manner of testimonial proof," *id.* at 9, nor are they vulnerable to the subjectivities of recantation. *See Davis v. Georgia*, 660 S.E.2d 354 (Ga.), cert. denied, 129 S. Ct. 397 (2008).

These realizations inevitably led to an early embrace of the technology and its truth-seeking possibilities. For instance, even before the state of California enacted a statute permitting postconviction access to DNA evidence, district attorneys there began voluntary reviews "for cases where DNA tests had not been performed originally and where it could change a verdict." *See* James Sterngold, "San Diego District Attorney Offering Free DNA Testing," N. Y. TIMES, July 28, 2000, at A12. The sense of justice associated with his office also compelled *amicus* Craig Watkins to institute a similar program in Dallas, Texas, years *after* the state legislature enacted a statutory right to postconviction testing. *See* Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas*, WASH. POST, March 5, 2007.

The Department of Justice endorses such postconviction, discretionary relief mechanisms. This endorsement began under the leadership of Attorney General Janet Reno, who is also an *amicus* here. (*See supra.* pp. 3-4.) In 1998, she created the National Commission on the Future of DNA Evidence to make recommendations for addressing requests for

postconviction DNA analysis. Her leadership led to the preparation of a number of Commission reports, including *Postconviction DNA Testing: Recommendations for Handling Requests* (2000), which proved extremely influential in giving guidelines for individual prosecutors facing postconviction DNA testing requests and state legislatures contemplating postconviction statutes. The Commission assessed how prosecutors should respond to such requests in five different types of scenarios. In the first category, where the state concedes that DNA evidence is available for testing and could prove exculpatory, the Commission concluded that prosecutors "should be willing to stipulate to the testing and to agree that testing will be paid for by the State if the inmate is exonerated." *Id.* at 35.

In further recognition of the unique power of modern DNA analysis, former President George W. Bush committed over a billion dollars to promote the use of DNA technology to "identify criminals . . . clear suspects and exonerate persons mistakenly accused or convicted of crimes." *The President's Initiative to Advance Justice Through DNA Technology*, *available at* http://www.usdoj.gov/ag/dnaoverviewinitiative21.htm. The Prosecutor's Practice Notebook, issued as part of the President's DNA initiative, encourages those in the position of *amici* to "proactively examine potentially problematic cases" to either "confirm[] the original conviction or . . . exonerate[e] the earlier conviction." Such policies "enhance public trust in the integrity of the legal system." THE PROSECUTOR'S

PRACTICE NOTEBOOK. With these guidelines and accompanying financial support, and in acknowledgment of the fundamental values at stake, local district attorneys are more frequently undertaking voluntary programs of review and testing. *See* Fred. C. Zacharias, *The Role of Prosecutors in Serving Justice After Conviction*, 58 VAND. L. REV. 171, 198-200 (2005) (describing programs in Brooklyn, N.Y., Oklahoma County, Okla., Suffolk County, N.Y., Ramsey County, Minn., and Orange County, Cal.).

While discretionary reviews have proven invaluable, *amici* believe that placing access to DNA evidence in the unchecked hands of prosecutors will not infrequently sanction injustice. Had it been left to the sole discretion of prosecutors, Robert Clark would still be serving his life sentence for the 1981 abduction and rape of a woman in Atlanta, Georgia. Clark spent twenty-three years behind bars, petitioning for almost a decade to test the biological evidence of the crime. Each attempt met with opposition from prosecutors, and after a court ordered testing under Georgia's new postconviction DNA testing statute, the state successfully opposed the choice of laboratory. When the test was finally performed in 2005, the testing not only exonerated Clark, but identified the actual perpetrator, who had committed still more violent crimes during Clark's imprisonment. *See* "DNA That Freed One Links Another To Cobb Rape," ATLANTA-JOURNAL CONSTITUTION, Feb. 16, 2007. This is not a unique story; according to a recent study, one-fifth of the

232 [2] postconviction DNA exonerations to date occurred not *because of* the good conscience of prosecutors, but *despite* their best efforts to oppose the test. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 119 (2008) & Brandon L. Garrett, *Judging Innocence: An Update*, *available at* tinyurl.com/garrett2009. Petitioner here, the State of Alaska, provides a case on point: research has not identified a *single instance* where state prosecutors have consented to postconviction DNA analysis.

To be sure, the principle of finality is no doubt "essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Rigid opposition to postconviction remedies, however, is not the only route to achieve finality. In no less than 94 cases—over a third of all exonerations—DNA testing not only released an innocent man from prison, but also identified the actual offender. *See* Innocence Project Website, http://www.innocenceproject.org/know/Search-Profiles.php. Such promising results are made possible by the Combined DNA Index System ("CODIS"), which aggregates local, state and federal databanks that house millions of DNA profiles, and allows investigators to compare crime-scene evidence with possible matches. But delays in permitting

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[2] Respondent's brief in this case states that there have been 227 exonerations to date, but since that brief was filed last week, five more individuals have been exonerated in Nebraska because of DNA evidence. *See* "Five Pardoned After Wrongful Conviction in Neb. Crime," ASSOCIATED PRESS, Jan. 26, 2009.

these comparisons obstruct the *accurate* finality that *amici* and other prosecutors seek to provide. Patrick Waller, for instance, spent more than fifteen years in prison for a 1992 kidnapping and robbery that included sexual assaults. Repeated requests for postconviction DNA testing of the crime-scene evidence were denied by the district attorney. Waller spent almost seven years litigating that request under Texas' DNA statute, which was ultimately denied because eyewitnesses had "unequivocally identified" him. *Waller v. Texas,* Nos. 05-02-00118-R, 2003 WL 22456324 (Tex. Ct. App., Oct. 30, 2003). Only after *amicus* Craig Watkins was elected to that office were the tests finally performed. DNA testing exonerated Waller in 2008, and state authorities ran the test results through CODIS and identified two individuals who subsequently confessed to the crimes. But because the statute of limitations on the crimes had run during Waller's prison term, the true assailants could not be prosecuted. *See* Jennifer Emily, "Patrick Waller, exonerated by DNA, grants first interview," DALLAS MORNING, June 30, 2008.[3] As this case illustrates, opposition to postconviction

[3] Not only did the statute of limitations run during Waller's imprisonment, but the delay caused by the years during which the prior District Attorney opposed testing allowed the real perpetrators to be released on parole for other offenses. If the State of Texas had the DNA results earlier, though, it could have used those results to deny parole and keep those individuals off the streets.

DNA testing can needlessly prolong the search for truth and finality. [4]

Such opposition also diverts valuable resources. As the National Institute for Justice has noted, "litigating postconviction DNA applications often will be unnecessarily complex, expensive, and time consuming" in the absence of prosecutorial cooperation. Nat'l Inst. Justice, *Postconviction DNA Testing*, *supra* at 10. Brandon Moon was convicted in 1988 on three counts of aggravated sexual assault and began serving a seventy-five year sentence. For the next fifteen years, Moon filed numerous post-trial motions, petitions, and requests for analysis of DNA evidence taken from the crime scene. The state dedicated unknown quantities of time and money opposing Moon's efforts to exonerate himself. After Texas enacted a postconviction testing statute, the court granted one of Moon's motions, and he was fully

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[4] Waller's case is not an isolated one. *Amicus* Carl Marlinga helped exonerate Kenneth Wyniemko through DNA testing, which also identified the true perpetrator of the crime. However, due to early opposition to such testing, further prosecution was barred by the statute of limitations. (*See supra* pp. 5-6.) The statute of limitations for a 1993 sexual assault also expired during the fourteen years that Ronald Gene Taylor of Houston, Texas spent in prison after being convicted of aggravated sexual assault. After DNA testing exonerated Taylor in 2007, the true perpetrator was identified through a DNA database, but could not be brought to justice for the crime. *See also* Jennifer Emily and Scott McGonigle, "Delay of DNA Evidence Helped Guilty Go Free," DALLAS NEWS, June 27, 2008 (noting at least three instances were a person inculpated by DNA testing died before the testing).

exonerated of the crimes in 2005. *See generally* Maurice Possley, "Texas Man Exonerated in Rape Case," CHICAGO TRIBUNE, Dec. 21, 2004. While the effort spent defending Moon's conviction was ultimately misguided, it was also severely inefficient. The average cost of forensic DNA analysis in an accredited lab is now about one-thousand dollars, and both inculpatory and exculpatory test results can significantly curtail an inmate's legal claims of actual innocence. [5] Given the burden of protracted postconviction lawsuits, timely DNA analysis is a more prudent allocation of prosecutorial resources.

"'[T]he Government wins its point when justice is done in its courts.'" *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (quoting Hon. Simon E. Sobeloff). Since 1989, DNA analysis has exonerated 232 individuals—seventeen of whom spent time on death row—and has proven a crucial safeguard for the constitutional values of our criminal justice system. In the same time, DNA has given new meaning to the "beyond a reasonable doubt standard," and has established the culpability of countless other defendants more certainly than any other legal mechanism. *Amici* believe that the government's interest in the consistent availability of this unique evidence is beyond question.

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[5] *See* Nicholas Lovrich, Ph.D., *et al.*, *National Forensic DNA Study Report*, *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/203970.pdf (surveying state and local laboratories to arrive at an approximate cost of $1,100 for a basic rape case).

II. A Limited Federal Right for Postconviction Access to DNA Evidence Would Pose A Minimal Burden On State Laws And Procedures

A. Such A Right Would Not Affect the State Statutory Mechanisms Currently In Place

Over the course of the past decade, nearly every state has enacted a postconviction DNA testing statute. These laws uniformly acknowledge that postconviction DNA testing provides a unique "opportunity to generate accurate and objective identification evidence and enhance the integrity of the criminal justice system." Br. of Thirty-One States as *Amicus Curiae* Supporting Pet'r, at 4. Drawing on the leadership of Attorney General Janet Reno and the work of the National Institute of Justice, these laws generally agree that DNA evidence in the State's possession should be tested where "exclusionary results would exonerate the Petitioner." Nat'l Inst. Justice, *Postconviction DNA Testing*, *supra,* at 4.

This is such a case. Respondent was convicted on one count of rape. He was accused of having vaginal intercourse with the victim and leaving behind a used condom. He pressed a defense of mistaken identity at his trial. DNA testing of the crime-scene evidence could establish with *absolute certainty* whether respondent did in fact leave behind the evidence, and was truly the perpetrator of the rape. An exclusionary result, for sure, would absolutely exonerate the respondent, and could identify the true

perpetrator of the crime. The State of Alaska concedes so much. Petr's Reply to Br. in Opp'n, at 8-9 (conceding that the DNA test that Osborne seeks could "conclusively establish Osborne's innocence.")

But Alaska is one of six states that have *not* enacted statutory postconviction DNA testing procedures. And many of the states that *have* enacted such laws have peppered them with so-called "statutory filters" that purport to "ensure that testing will occur in truly meritorious cases but not in the many others where DNA testing would be a pointless and wasteful exercise." Br. of Thirty-One States as *Amicus Curiae* Supporting Pet'r, at 5. For sure, not every case should qualify for postconviction DNA testing. However, the United States acknowledges that respondent here would be denied DNA testing in some states because he is "not under a sentence of death"; because he "forewent . . . DNA testing at trial"; and because he "later confessed to the crime." Br. of the United States as *Amicus Curiae* Supporting Pet'r, at 23. The experience of *amici*, however, is that such arbitrary line-drawing tends to exclude "truly meritorious cases" from DNA testing. This is precisely why a limited federal right to postconviction DNA testing is necessary.

For instance, Kentucky and Nevada exclude non-capital cases from any entitlement to postconviction DNA testing. *See* KY. REV. STAT. ANN. § 422.285; NEV. REV. STAT. ANN. § 176.0918. Not only would these statutes exclude the respondent, but they likewise would have excluded at least *220 of the 232*

individuals who have been exonerated nationwide by DNA testing. Those individuals would still be behind-bars in the states who view DNA testing for non-capital convictions a "pointless and wasteful exercise."

At least four other states restrict postconviction DNA testing to situations where testing was not technologically feasible at the time of trial. *See* MINN. STAT. § 590.01(1a); MO. REV. STAT. § 547.035; 42 PA. CONS. STAT. ANN. § 9543.1; VA. CODE ANN. § 19.2-327.1. These statutes thus exclude persons from any entitlement to DNA testing if their trial counsel simply failed to request it. However, at least 55 out of over 200 exonerees had some form of DNA testing available to them at trial, and 25% of those cases involved situations where trial counsel simply failed to request the testing. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1657, 1663 (2008). Brian Piszczek, for example, was convicted of rape in Ohio, based largely on the victim's testimony "that there was no doubt in her mind that [he] was the person who raped her." *See Ohio v. Piszczek*, No. 62203, 1993 WL 106966, at *3 (Ct. App. Apr. 8, 1993). His trial counsel never requested DNA testing, even though it was available at the time of his conviction. *Id.* In postconviction proceedings, the physical evidence from the rape was released to Piszczek and tested, and excluded him as the source. He was released after four-years of wrongful incarceration, but had Brian Piszczek been convicted in either Minnesota, Missouri,

Pennsylvania or Virginia, he would likely still be in prison today.

At least one state conditions postconviction DNA testing on the petitioner's ability to demonstrate—*before the test is carried out*—that it will likely lead to an exculpatory result. *See* N.Y. CRIM. PROC. L. § 440.30(1-a). The United States asserts that respondent here should be forced to meet this same onerous burden. *See* Br. of United States as *Amicus Curiae* Supporting Pet'r, at 23-24. But if experience has taught us anything, it has taught us that neither the intuition of prosecutors, the deliberation of juries nor the wisdom of judges can usurp the accuracy and reliability of a DNA test. In *Arizona v. Youngblood*, 488 U.S. 51 (1988)—the first DNA case to come before this Court—the evidence against the accused appeared "so overwhelming that it was highly improbable that the lost [DNA] evidence was exculpatory." *Id.* at 59-60 (Stevens, J., concurring) (noting that "it is unlikely that the defendant was prejudiced by" the failure of the State to preserve and test the DNA evidence.) But nearly a decade later, when technology advanced to point where the miniscule samples retained by police could be reliably tested, Larry Youngblood was exonerated.

Even when state laws do not contain arbitrary preconditions for postconviction DNA testing, state courts have still implied them. While many state statutes require identity to have been in issue at an individual's trial in order to justify postconviction DNA testing, some state courts have read this

requirement to disqualify a person if their conviction was based on a guilty plea. *See* Garrett, *Claiming Innocence*, *supra*, 92 MINN. L. REV. at 1680-81 & n.238. At least one state court has interpreted its law to exclude individuals from postconviction DNA testing if their conviction was based on a confession.

Bruce Godschalk—presently the *only* individual exonerated via § 1983—is one of 31 DNA exoneration cases that involved a prior confession by the accused. *See* Garrett, *Judging Innocence*, *supra*, 108 COLUM. L. REV. 55, 88-89 & n.124 (2008). He was originally charged and convicted of two rapes in the courts of Pennsylvania. His conviction was based on what the court deemed to be "overwhelming evidence," largely due to a detailed confession that it found to be both voluntary and uncoerced. *See Godschalk v. Montgomery County Dist. Atty's Office*, 177 F. Supp. 2d 366, 367, 369 (E.D. Pa. 2001). Fifteen years later, after a federal court upheld his § 1983 suit to access and test the DNA evidence taken from the victims, *see id.* at 370, Bruce Godschalk was exonerated of the crimes. The Pennsylvania legislature passed its postconviction DNA testing statute four months later—no doubt with Godschalk's case in mind—but it is doubtful whether that statute would have granted him any relief. Pennsylvania courts have to date interpreted its provisions to bar postconviction access to DNA evidence if the petitioner had previously confessed to the crime of conviction. *See Pennsylvania v. Young*, 873 A.2d 720, 727 (Pa. Super. Ct. 2005) (holding that, under the 2002 Pennsylvania law for postconviction DNA access, a "confession . . .

bars [an inmate] from asserting a claim of actual innocence for the offense for which he was convicted," which thereby bars his statutory entitlement to access to evidence for DNA testing under Pennsylvania law). Without a *federal* remedy, Bruce Godschalk would likely have served his full sentence.[6]

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[6] The infamous Central Park Jogger cases provides a second dramatic example of how false confessions lead to wrongful convictions. After a white female jogger was brutally attacked in Manhattan's Central Park in 1989, prosecutors brought charges against five African- and Hispanic-American youths who all confessed to police. *See* Saul M. Kassin & Gisli H. Gudjonsson, *True Crimes, False Confessions*, SCIENTIFIC AM. MIND, June 2005, at 24. Four of these confessions were videotaped and later presented at trial. *Id.* The confessions were admitted and defendants were all convicted. The propriety of the confessions was duly litigated and ultimately upheld by the New York courts. *See, e.g.*, *People v. Salaam*, 83 N.Y.2d 51, 607 N.Y.S.2d 899 (1993); *People v. McCray*, 198 A.D.2d 200, 604 N.Y.S.2d 93 (1993). Thirteen years after the crime, an individual named Matias Reyes, who was incarcerated for three other rapes and a murder, came forward and admitted that he had committed the heinous crime alone. *See People v. Wise*, 752 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002). The Manhattan DA's office questioned Reyes and discovered that he had accurate, privileged, and independently corroborated knowledge or the crime and crime scene. *Id.* When the DNA evidence of the crime was finally tested, it showed that Reyes, and not to any of the convicted youths, had committed the crime. *Id.* In December 2002—after a full decade of wrongful imprisonment—the convictions were vacated and the youths released. *Id.* Although New York had the first postconviction DNA testing statute, only the conscience of the real assailant combined with the proof of DNA testing cured the injustice.

The "statutory filters" enacted by the states plainly do not ensure that all meritorious cases are submitted for testing. Instead, they contain arbitrary, legislative judgments on the likely outcome of DNA testing—which experience has demonstrated to be routinely flawed. While "legislative innovation" should indeed be encouraged in the field, *see* Br. of Thirty-One States as *Amicus Curiae* supporting Pet'r at 20-21, such innovation cannot take the form of prejudging the outcome of scientific testing before it is carried out. There is no principled basis to definitively conclude that those convicted of non-capital crimes, those represented by ineffective counsel, or those who falsely confess are absolutely guilty in the face of so much empirical and anecdotal evidence to the contrary. Allowing DNA testing in these cases is not, as the Petitioner's *amici* claim, a "pointless and wasteful exercise." Br. of Thirty-One States as *Amicus Curiae* Supporting Pet'r, at 5.

A limited federal right to postconviction DNA testing would not direct the states on how to manage their postconviction processes. The purpose of § 1983 is to "provide[] a remedy where state law [i]s inadequate . . . [or] not available in practice." *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961). The vast majority of state laws on postconviction DNA testing (40 out of 44) require a petitioner to show only a "reasonable probability" that a favorable result would have led to a different result at trial. *See* Garrett, *Claiming Innocence*, *supra,* 92 MINN. L. REV. at 1719; *see also* 18 U.S.C. § 3600(a)(1), (6)-(8). A federal constitutional right that requires a higher showing—

something akin to "no reasonable juror would have found the defendant guilty" if favorable DNA test had been introduced at trial, *see Schlup*, 513 U.S. at 329—would leave these statutes in place as the likely avenue of first resort for postconviction relief.[7] The States, in their brief to this Court as *amici curiae*, seem to endorse this rule as well. *See* Br. of Thirty-One States as *Amici Curiae* Supporting Pet'r, at 18-19 (advocating that "the Constitution should require access to potential evidence of actual innocence only to the same degree that it requires states to provide an avenue to process claims of actual innocence.")

This places the constitutional right in its proper, subsidiary role. "The Fourteenth Amendment protects only against deprivations 'without due process of law.'" *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (quoting *Baker v. McCollan*, 443 U.S. 137, 145 (1979)). Thus, the inquiry in every federal action for postconviction DNA testing would naturally focus on whether the individual has suffered an injury *without due process of law*—that is, whether the State has failed to provide "a means of redress [that] satisf[ies] the requirements of procedural due process." *Id.* In all cases, "the existence of an

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[7] Of the four states to impose a higher standard to justify postconviction DNA testing, two of those states match the "no reasonable juror" standard, *see* TEX. CODE CRIM. PROC. ANN. arts. 17.48, 64.01-.05 and COLO. REV. STAT. §§ 18-1-411 to 416, and only two states impose a more onerous "clear and convincing" standard. *See* N.H. REV. STAT. ANN. § 651-D:2 and VA. ANN. CODE §§ 19.2-327.1 to .6.

adequate state remedy . . . avoids the conclusion that there has been any constitutional deprivation . . . within the meaning of the Fourteenth Amendment." *Id.* at 542 (internal quotations marks omitted). A federal cause of action under § 1983 will lie *only* in those cases where the State provides no remedy at all, or where it excludes the application of its statutory remedy to otherwise worthy petitioners based on arbitrary classifications.[8]

It is a prosecutor's duty "to use every legitimate means to bring about a just [result]." *Berger v. United States*, 295 U.S. 78, 88 (1935). Our criminal

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[8] This is hardly a novel proposition, even in the field of criminal law and procedure. Prior to 1963, for instance, the mechanism for indigent defendants to receive appointed counsel lay solely with state law. While "most of the states ha[d] by legislation authorized or even required the courts to assign counsel for the defense of indigent and unrepresented prisoners," such laws were "neither universal nor uniform." *Bute v. Illinois*, 333 U.S. 640, 663-64 (1948) (internal quotations marks omitted). Efforts to impose a minimum federal standard for the right to counsel in state courts routinely met the same refrain: "in the face of these widely varying state procedures," this Court refused to impose the dictates of "due process" onto the states and "hold invalid all procedure not reaching that standard." *Id.* at 668; *see also Betts v. Brady*, 316 U.S. 455, 470-72 (1942). But this Court unanimously shifted course in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and held that the due process clause guarantees a minimum degree of "procedural and substantive safeguards" in state criminal courts. States were thereafter constitutionally required to provide indigent defendants with appointed counsel in certain cases, and left free to legislate above that minimum threshold. With appointed counsel and a new trial, Mr. Gideon was acquitted.

justice system requires a certain degree of flexibility and humility to correct errors, especially when those errors are readily ascertainable by modern science. *Amici* submit that the wrongful convictions that local prosecutors and state laws would have overlooked—and perhaps have overlooked—provides a weighty justification for the recognition of a limited federal right for postconviction DNA testing.

B. A Limited Federal Right Would Not Overwhelm State and Federal Resources.

Amici are current and former law enforcement officers in jurisdictions that rely on locally-funded budgets to prosecute hundreds or thousands of criminal cases each year. The defense of convictions from collateral attack is a familiar demand on scarce resources. In the experience of *amici*, however, no significant increase in that demand is uniquely attributable to the availability of postconviction DNA testing, and the limited federal right proposed above (*see supra.* § II.A.), will not significantly affect state or federal dockets. Most commonly, civil actions and collateral attacks to invalidate a conviction seek forensic DNA analysis as one of several bases for relief, along with, for instance, ineffectiveness of counsel or prosecutorial misconduct. Thus, cases that seek postconviction DNA testing would likely arise even *without* a due process right to such testing.

Recent experience also suggests that the necessity for judicial resolution of claims for

postconviction DNA testing is actually decreasing. There are two reasons behind this trend. *First*, improvements in the reliability of forensic methodologies encourage more frequent *pre-trial* DNA analysis. Of the 232 DNA exonerations to date, half of these individuals were convicted between 1982 and 1987, when the science of DNA testing was more expensive and less conclusive. Following the advent of more precise methodologies in the mid-1990s, DNA evidence has exonerated only twelve individuals who were convicted in the last ten years. The initial wave of DNA exonerations has focused principally on older convictions; most new convictions are *supported* by DNA evidence.

Second, in cases where DNA evidence was not analyzed before trial, prosecutors are becoming more willing to make the evidence available after conviction. Each DNA exoneration represents a cautionary tale for prosecutors everywhere, and the publicity associated with these cases helps legitimize other claims for postconviction access. *Amici* here offer firsthand testimony regarding the wisdom of programs such as the Conviction Integrity Unit in Dallas County, Texas, which voluntarily reviews cases where DNA evidence could conclusively establish guilt or innocence. Following the recommendations that the Department of Justice promulgated in 2000, this and similar programs forego the adversarial process in favor of a collaborative effort to fully utilize the benefits of scientific testing. In this vein, the existence of a

constitutional right may actually help *decrease* litigation for postconviction access to DNA evidence.

Experience illustrates these trends. A federal court in Pennsylvania first permitted the use of 42 U.S.C. § 1983 to enforce a due process right for postconviction DNA testing in 2001. *See Godschalk*, 177 F. Supp. 2d 366. Four months later, Pennsylvania enacted a statute that also permitted postconviction DNA analysis in certain circumstances. (*See supra* pp. 24-25.) Since that time, only *two* courts in the Third Circuit have addressed § 1983 claims for postconviction DNA analysis. *See Ross v. Lehigh County Dist. Atty's Office*, No. 07-2329, 2008 WL 5234411 (E.D. Pa. Dec. 15, 2008); *Grier v. Klem*, No. 05-05, 2006 WL 1835805 (W.D. Pa. June 29, 2006). Two cases in over seven years hardly represents an alarming diversion of judicial resources.[9]

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[9] Petitioner's *Amici* refer to the number of cases reviewed by the California Innocence Project as indicative of the "onerous litigation" that would follow a federal due process right to post conviction DNA testing. Br. of Thirty-One States as Amicus Curiae Supporting Pet'r, at 5. This is hardly the case. The statistic cited by *Amici* refer only to the letters received by the Project from prospective clients seeking representation during a one-year period. But the overwhelming majority of those seeking assistance were convicted of crimes that involved no potential DNA evidence of any kind; and in many others, potential DNA evidence had been lost or destroyed. For that reason, in that same one-year period, the California Innocence Project filed *only one* petition for DNA testing in court. Email from Jan Stiglitz, Co-Director, California Innocence Project to

A constitutional right to postconviction DNA testing will likely encourage these trends to continue. Under the limited right proposed by *amici*, a federal claim will arise only if the state has affirmatively denied a request for access to the evidence. Until that point, process has not been initiated and no due process claim has attached. Thus, individuals seeking postconviction DNA analysis will be compelled to first approach prosecutors, who then have the option of avoiding litigation altogether. Only if the prosecutor opposes testing would a due process claim arise. The State can, in effect, control its own exposure to postconviction litigation.

Even in cases where prosecutors refuse, on proper grounds, to allow testing, any resulting litigation is likely to be fairly straightforward and not overly burdensome. If DNA analysis could not conclusively determine culpability—for example, where the evidence to be tested is clearly unrelated to the perpetrator's identity—the constitutional claim is likely susceptible to being rejected on its merits in a simple and non-burdensome way. *See Hudson v. Palmer*, 468 U.S. 517, 553 n.30 (1984) (Stevens, J., concurring in part and dissenting in part) ("Our legal system has developed procedures for speedily

(continued…)

Charles T. Kotuby Jr., Associate, Jones Day (January 30, 2009, 15:48:00 EST) (on file with author).

disposing of unfounded claims." (internal quotation marks omitted)).

For all of these reasons, *amici* submit that the additional litigation that would result from this Court's recognition of an appropriately defined due process right to DNA testing would be quite modest both in quantity and in the burdens it would pose. It would also be transitional in nature, and would substantially subside after an interval of time in which prosecutors adjust to the new regime in which testing in proper cases—either pre-trial or post-trial—is treated as a matter of right.

Burdens of that sort deserve little or no weight in resolving the question before the Court. The "limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J. concurring). As Justice Harlan observed, the preservation of judicial resources represents "a value judgment on the comparative importance of classes of legally protected interests." *Id.* *Amici* submit that interests of efficiency cannot outweigh the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

CONCLUSION

For all of the foregoing reasons, *amici* urge the Court to affirm the decision below.

Respectfully submitted,

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