No. 11-69

In The Supreme Court of the United States

THOMAS DOUGLAS ARTHUR,

Petitioner,

v.

ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The Alabama Court Of Criminal Appeals

BRIEF OF *AMICUS CURIAE* THE INNOCENCE PROJECT SUPPORTING PETITIONER

PETER J. NEUFELD
DAVID LOFTIS
JASON KREAG
THE INNOCENCE PROJECT
40 Worth Street,
Suite 701
New York, New York 10013
212.364.5340

J. GORDON COONEY, JR.
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania
19103
215.963.4806
jgcooney@morganlewis.com

D'ANDRA MILLSAP SHU
CLAIRE SWIFT KUGLER
SHANNON A. LANG
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street,
Suite 4000
Houston, Texas 77002
713.890.5000

KATHERINE C. MILGRAM
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
212.309.6000

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INTEREST OF *AMICUS CURIAE*[1]

The Innocence Project is a nonprofit legal clinic and criminal justice resource center. Founded at the Benjamin N. Cardozo School of Law in 1992, the Innocence Project provides pro bono legal services to indigent prisoners, with a special emphasis on using DNA testing to exonerate the wrongfully convicted. The Innocence Project pioneered the post-conviction DNA litigation model used to exonerate 273 innocent persons to date and served as counsel or provided critical assistance in most of those cases.

The advent of forensic DNA testing and the use of that testing to review criminal convictions have provided scientific proof that our system is susceptible to convicting the innocent and that wrongful convictions are not isolated events. None of the more than 270 DNA exonerations, however, would have been possible had the biological evidence not been available to test. Thus, the importance of preserving biological and other physical evidence for DNA testing is exceedingly high. Not only does protecting such evidence ensure that past injustices can be remedied, it also allows the review of cold cases. As DNA testing often may be the best evidence of innocence, the Innocence Project has a strong interest in ensuring that states enact and

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[1] All counsel of record consented to the filing of this *amicus* brief. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

follow appropriate evidence preservation policies and rules.

INTRODUCTION AND SUMMARY OF ARGUMENT

Luck should have nothing to do with being able to prove one's innocence and overturn a wrongful conviction. For many of the 273 innocent people exonerated based on DNA test results, however, luck played an all-too-important role. Luck that biological evidence had been found. Luck that it had not been destroyed. And for those, like petitioner and death-row inmate Thomas Arthur, a small measure of luck that some biological evidence may remain and may help to exonerate him. But not everyone is so lucky. In the past seven years, the Innocence Project has closed 22% of its cases because of lost or destroyed biological evidence.[2]

DNA testing sets the gold standard for forensic evidence. Unlike many other types of evidence, biological evidence is objective and precise, and when properly preserved and tested, it can provide absolute proof of guilt or innocence. Since the first DNA exoneration in 1989, technology continues to advance,

[2] See INNOCENCE PROJECT, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Aug. 8, 2011).

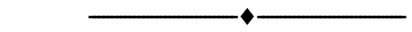
allowing testing of ever smaller and more degraded DNA samples. See Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1647-48, 1658-59 (2007-08) (hereinafter "Garrett, *Claiming Innocence*"). But this technology is useless if the evidence is not available to test. Such evidence must be protected—stored properly so that it does not deteriorate and so that it can be found when needed.

In response to ever-increasing numbers of DNA exonerations, many states have enacted laws related to protecting and providing access to test biological evidence. But this patchwork of state laws is inadequate, and many states have no protection laws at all. See *infra* Part II.

Mr. Arthur has been on death row for nearly 30 years, even though no physical evidence links him to the crime and another man has confessed. Two sources of biological evidence—a rape kit and a wig worn by the perpetrator—may corroborate the confession and thus hold the key to his freedom, but Alabama and its laws have prevented Mr. Arthur from exhausting those sources of evidence. Because any biological evidence would be in the State's possession, Mr. Arthur has no way to access or protect it on his own.

This Court should grant Mr. Arthur's petition for certiorari because protecting biological evidence is of

vital importance to the pursuit of justice.[3] Guidance from this Court is urgently needed to prevent injustices of the worst type imaginable. As this Court has recognized, "[t]he quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Schlup* v. *Delo*, 513 U.S. 298, 324-25 (1995). Prisoners like Mr. Arthur deserve the opportunity to vindicate themselves by testing biological evidence and not to have their fate sealed by the destruction or loss of evidence.



[3] An analysis of the relevant legal framework is beyond the scope of this brief, but *amicus* notes that the failure to preserve and maintain biological evidence not only raises the due process concerns detailed in Mr. Arthur's Petition, but it also interferes with the ability of federal courts to grant habeas corpus relief. The failure to preserve and maintain biological evidence while a prisoner's case makes its way through years of state court proceedings deprives the federal courts of the ability to consider or grant habeas relief on actual innocence once state court proceedings have been exhausted. Accordingly, this critical issue both implicates due process and triggers this Court's powers under the All Writs Act, 28 U.S.C. § 1651(a), because the preservation and maintenance of this evidence is "necessary or appropriate in aid of" this Court's habeas jurisdiction. See Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 590 (2002) ("The Court has not resolved the question of whether a post-trial demonstration of factual innocence beyond the trial record can be the basis for a habeas petition, but it has held that such a claim of actual innocence cannot impeach a criminal verdict in the absence of a 'truly persuasive' demonstration of factual error. It is precisely such a demonstration that the denial of DNA evidence makes impossible." (footnote omitted) (quoting *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993))).

REASONS FOR GRANTING THE WRIT

I. Preserving Biological Evidence Is A Matter Of National Importance.

A. Biological Evidence Has The Unique Power To Identify Both The Innocent And The Guilty.

"DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *Dist. Att'y's Office for the Third Jud. Dist.* v. *Osborne*, 129 S. Ct. 2308, 2312 (2009). DNA test results are objective and precise and not subject to the kinds of human frailties that can plague other types of evidence often relied on in criminal convictions:

> DNA evidence is different from traditional evidence of identity, such as eyewitness testimony, confession testimony, and physical evidence left at the scene of a crime. While other evidence can lose reliability—the meaning of physical objects left at a crime scene may be contested, memories of witnesses may be uncertain and subject to deterioration over time, and confessions may be coerced or false—DNA evidence is uniquely probative and timeless if preserved and tested properly.

Garrett, *Claiming Innocence*, at 1647 (quotation marks omitted).

Moreover, DNA evidence, if properly preserved, becomes even more valuable as time passes. The past

two decades have seen remarkable advances in DNA-testing technology. With each advancement, testing becomes more sensitive and reliable, and accurate testing can be conducted on smaller and less pristine samples.[4] Early DNA tests required a sample the size of a quarter, but DNA tests can now be run with just a few cells. Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1469-70 & nn.107-08 (2007). Even degraded samples can now yield accurate results. Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood*: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 281-82 (2008) (hereinafter "Bay, *Old Blood, Bad Blood*"); *2002 NIJ Report* at 5. And methods have been developed to test formerly untestable hair, bone, and tooth fragments. Bay, *Old Blood, Bad Blood*, at 282.

The rise in DNA exonerations directly correlates with advancements in DNA testing. See Garrett, *Claiming Innocence*, at 1658-59. The testing of formerly useless or inconclusive biological evidence has set many innocent people free. Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1242-43 (2005) (hereinafter "Jones, *Evidence Destroyed*"). In exoneree

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[4] See NAT'L INST. OF JUST., *Using DNA to Solve Cold Cases*, NIJ SPECIAL REPORT 5-7 (July 2002), https://www.ncjrs.gov/pdffiles1/nij/194197.pdf (hereinafter "*2002 NIJ Report*").

Drew Whitley's case, for example, forensic testimony at trial established that hairs found at the murder scene were similar to his, but DNA testing 16 years later showed the hairs were not in fact his.[5] Exoneree Kevin Byrd was convicted of rape in part based on a now-primitive analysis of rape kit swabs and misleading forensic testimony, but DNA testing 12 years later definitively established that Mr. Byrd was not the rapist.[6]

DNA testing often provides a wrongfully convicted prisoner's only hope for exoneration. A study of the first 200 DNA exonerations demonstrated that the vast majority of those innocent people filed direct appeals and other collateral proceedings but were unable to obtain relief until exculpated by DNA testing. Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2926-27 (2009) (hereinafter "Jones, *Right Remedy*"); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 61, 94-116 (2008) (hereinafter "Garrett, *Judging Innocence*").

Aside from exonerating the wrongfully convicted, DNA evidence is invaluable in solving old crimes. In

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[5] INNOCENCE PROJECT, Profile of Drew Whitley, http://www.innocenceproject.org/Content/Drew_Whitley.php (last visited Aug. 8, 2011).

[6] INNOCENCE PROJECT, Profile of Kevin Byrd, http://www.innocenceproject.org/Content/Kevin_Byrd.php (last visited Aug. 8, 2011).

nearly half of the DNA exonerations to date, the very test that exonerated an innocent person implicated someone else.[7] Specially formed teams focusing on cold cases are using current technology to find suspects in decades-old crimes.[8] Thus, preserving biological evidence is vital not only to the rights of the wrongfully convicted but also to apprehending the true perpetrator.

B. Lost Or Destroyed Biological Evidence Presents A Tragic Obstacle To Exonerating The Innocent And Apprehending The Guilty.

For biological evidence to free the innocent and find the guilty, it must be preserved and available when prisoners need it—often decades after their conviction. On average, the 273 DNA exonerees spent 13 years in prison before being exonerated, and some of those exonerees were imprisoned much longer before exoneration.[9]

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[7] INNOCENCE PROJECT, *supra* note 2 ("The true suspects and/or perpetrators have been identified in 123 of the DNA exoneration cases.").

[8] See INNOCENCE PROJECT, Evidence Preservation, http://www.innocenceproject.org/fix/Evidence-Handling.php (last visited Aug. 8, 2011); Christine Vendel, *KC Crime Lab's Long-Ago Foresight to Preserve Evidence Has Helped Crack Cold Cases*, KANSAS CITY STAR, Sept. 26, 2010, *available at* 2010 WLNR 19118450.

[9] INNOCENCE PROJECT, *supra* note 2; see, e.g., INNOCENCE PROJECT, Profile of James Bain, http://www.innocenceproject.

(Continued on following page)

Delays in requesting or obtaining DNA testing can occur for many reasons. For example, prosecutors may withhold information about the existence of biological evidence or of exculpatory test results. This Court had before it one such egregious case just last Term. See *Connick* v. *Thompson*, 131 S. Ct. 1350 (2011). Prosecutors never told exoneree Armand Villasana about a set of DNA samples in his case, and prosecutors withheld exculpatory test results from exonerees Darryl Hunt and John Willis.[10] Further, Mr. Hunt, exoneree Dana Holland, and exoneree Marlon Pendleton were falsely told that the DNA samples in their cases were untestable.[11] Even without prosecutorial misconduct, prisoners, especially in older cases, simply may not know that biological evidence even exists until a post-conviction investigation. For example, exoneree James O'Donnell did not

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org/Content/James_Bain.php (last visited Aug. 8, 2011) (imprisoned 35 years before exoneration); INNOCENCE PROJECT, Profile of Lawrence McKinney, http://www.innocenceproject.org/Content/Lawrence_McKinney.php (last visited Aug. 8, 2011) (imprisoned over 31 years before exoneration).

[10] See Garrett, *Claiming Innocence*, at 1662-63, 1666-67; INNOCENCE PROJECT, Profile of John Willis, http://www.innocenceproject.org/Content/John_Willis.php (last visited Aug. 8, 2011); see also Garrett, *Claiming Innocence*, at 1660-61 (generally discussing the concealment of potentially exculpatory DNA evidence).

[11] See Garrett, *Claiming Innocence*, at 1662-63; CENTER ON WRONGFUL CONVICTIONS, Dana Holland, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilHollandSummary.html (last visited Aug. 8, 2011); INNOCENCE PROJECT, Profile of Marlon Pendleton, http://www.innocenceproject.org/Content/Marlon_Pendleton.php (last visited Aug. 8, 2011).

know that a rape kit had been made, and exoneree Terry Chalmers had no idea that a rape kit and items of clothing had not been destroyed.[12]

Even since the advent of DNA testing, post-conviction DNA testing still may be necessary for those and other reasons, such as the quick pace of technological advancement, misconduct by forensics experts, or lack of testing because of ineffective lawyering. Garrett, *Claiming Innocence*, at 1634, 1658, 1661. For example, at the time of exoneree Andrew Gossett's trial in 2000, the lab did not have the technology to test the small amount of biological evidence available, but he was exonerated seven years later after more advanced DNA testing proved him innocent.[13] Resistance from law enforcement can also slow down the DNA testing process. Garrett, *Judging Innocence*, at 119-20. All of those reasons for delay increase the risk of loss or destruction of vital biological evidence.

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[12] See INNOCENCE PROJECT, Profile of Terry Chalmers, http://www.innocenceproject.org/Content/Terry_Chalmers.php (last visited Aug. 8, 2011); INNOCENCE PROJECT, Profile of James O'Donnell, http://www.innocenceproject.org/Content/James_ODonnell.php (last visited Aug. 8, 2011).

[13] INNOCENCE PROJECT, Profile of Andrew Gossett, http://www.innocenceproject.org/Content/Andrew_Gossett.php (last visited Aug. 8, 2011); see also INNOCENCE PROJECT, Profile of Ricardo Rachell, http://www.innocenceproject.org/Content/Ricardo_Rachell.php (last visited Aug. 8, 2011) (biological evidence not tested for more than five years after his 2003 conviction).

In fact, "the widespread loss and destruction of biological evidence presents one of the greatest impediments to the use of DNA technology to exonerate the wrongly convicted." Jones, *Right Remedy*, at 2897. Kept in overcrowded, disorganized storage rooms, biological evidence can be hard to find in the best of circumstances. *Id.* at 2900. And some state authorities have implemented outright evidence purges to free up storage space for newer cases. *Ibid*.[14] Indeed, in ten states, evidence purges over the past decade have destroyed biological evidence in nearly 6,000 rape and murder cases.[15] Thus, it is often a "race to test the evidence before it is destroyed."[16]

All of these situations make it difficult to determine whether biological evidence ever existed, still exists, is hopelessly lost, or has been destroyed. Even in post-conviction proceedings, a response to a request for biological evidence that the evidence is lost

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[14] Sometimes, circumstances suggest evidence might be destroyed for reasons other than a lack of storage space. For example, the same week the Texas governor pardoned Kevin Byrd based on DNA test results of specimens in an old rape kit found in the clerk's office of Harris County, Texas, the evidence custodians in that office began to destroy all old rape kits. Jones, *Evidence Destroyed*, at 1239-40.

[15] Miles Moffeit & Susan Greene, *Trashing the Truth: Room for Error in Evidence Vaults*, DENVER POST, July 23, 2007, 11:51 PM, http://www.denverpost.com/evidence/ci_6439646.

[16] INNOCENCE PROJECT, *250 Exonerated, Too Many Wrongfully Convicted* 1, http://www.innocenceproject.org/docs/Innocence Project_250.pdf.

or destroyed is often incorrect.[17] Evidence can be stored in or somehow make its way to a myriad of unexpected places:

> "Formerly lost" biological evidence subsequently used to exonerate innocent prisoners has been fortuitously discovered years later at various locations inside the courthouse, in closed files at the state forensics lab, in a storage closet in the prosecutor's office, and even in a garbage dumpster. In the case of Kirk Bloodsworth, the first death row inmate exonerated with DNA evidence, the biological evidence of the rape-murder that could have been legally destroyed after his conviction was affirmed had been saved by the judge in his chambers to prevent destruction.

Jones, *Evidence Destroyed*, at 1245 (footnotes omitted). In many of the DNA exoneration cases, the critical biological evidence was originally reported lost or destroyed before hard work or happenstance unearthed it. For example:

- As chronicled in the movie *Conviction*, exoneree Kenny Waters's sister repeatedly searched for the biological evidence in her brother's case and was told that it had been destroyed, but eventually a clerk found a

[17] See NAT'L INST. OF JUST., *Post-Conviction DNA Testing: Recommendations for Handling Requests* 45 (Sept. 1999), https://www.ncjrs.gov/pdffiles1/nij/177626.pdf (hereinafter "*1999 NIJ Report*") ("Many times all parties believe that the evidence has been destroyed, when in fact it has not.").

long-forgotten box of evidence stored for two decades in the courthouse basement.[18]

- It took 11 years to locate the rape kit in exoneree Alan Newton's case, even though it was eventually found in the exact barrel indicated on the evidence voucher.[19]
- The hairs that exonerated Drew Whitley were thought lost in a flood of the evidence room but turned up ten years later.[20]
- All biological evidence in exoneree Marvin Anderson's case was lost for seven years until saved samples were found in a lab analyst's notebook.[21]
- Prosecutors found the rape kit in exoneree Calvin Johnson's case in a trash can after the judge's clerk had discarded it.[22]

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[18] See Decca Aitkenhead, *Betty Anne Waters: "We Thought Kenny Was Coming Home,"* THE GUARDIAN, Dec. 11, 2010, http://www.guardian.co.uk/film/2010/dec/11/betty-anne-waters-interview.

[19] INNOCENCE PROJECT, Profile of Alan Newton, http://www.innocenceproject.org/Content/Alan_Newton.php (last visited Aug. 8, 2011); Susan Greene & Miles Moffeit, *Trashing the Truth: Bad Faith Difficult to Prove*, DENVER POST, Oct. 1, 2001, 12:35 PM, http://www.denverpost.com/search/ci_6429277.

[20] INNOCENCE PROJECT, Profile of Drew Whitley, *supra* note 5.

[21] INNOCENCE PROJECT, Profile of Marvin Anderson, http://www.innocenceproject.org/Content/Marvin_Anderson.php (last visited Aug. 8, 2011).

[22] Sharon Cohen, *Sheer Luck Saves Some Whose DNA Evidence was Almost Destroyed*, GRAND FORKS HERALD, Oct. 8, 2000, *available at* 2000 WLNR 2298281.

- Exoneree Michael Green's stepfather searched the prosecutor's office and several hospitals and police stations before finding the critical evidence in the basement of an old courthouse.[23]

This is but the tip of the iceberg.[24]

Given the decades of actual experience and the significant role biological evidence plays in freeing the innocent and avoiding wrongful execution, the rights of a citizen should not depend on luck. It is imperative that this Court establish minimum standards for the preservation and maintenance of biological evidence.

Sound evidence preservation policies work. Two labs stand out as shining examples confirming that conclusion. In the late 1970s and early 1980s, Dallas

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[23] Connie Schultz, *Knowledge is Power*, PLAIN DEALER, Oct. 14, 2002, http://www.cleveland.com/burden/index.ssf?/burden/more/103459650317930.html.

[24] In at least 26 of the 273 DNA exoneree cases, the biological evidence was initially reported to be lost or destroyed. See, e.g., INNOCENCE PROJECT, Evidence Found, http://www.innocenceproject.org/Content/Evidence_Found.php (last visited Aug. 8, 2011); MID-ATLANTIC INNOCENCE PROJECT, Victor Burnette, http://www.exonerate.org/2009/victor-burnette (last visited Aug. 8, 2011); Jeffrey Bils, *Accusers Finally Agree: He's Innocent*, CHI. TRIB., Nov. 24, 1994, *available at* 1994 WLNR 4293233; Paul J. Passanante, *Innocence Project Unfairly Assails Joyce*, ST. LOUIS POST-DISPATCH, Aug. 6, 2002, *available at* 2002 WLNR 13350062; Locke E. Bowman, *Gov. Ryan Should Sign Bill Requiring Preservation of DNA*, CHI. TRIB., May 9, 2000, *available at* 2000 WLNR 8297742.

County, Texas's Institute for Forensic Sciences began meticulously storing and cataloging biological evidence. This evidence has been used to solve old crimes and has exonerated 21 prisoners, the most of any county in the nation.[25] Similarly, the decades-long policy of carefully preserving and organizing all biological evidence at Kansas City, Missouri's Regional Crime Laboratory has led to convictions in over 100 cold murder and sexual assault cases since 2000.[26]

II. State Law Does Not Adequately Protect Biological Evidence.

"[E]very state currently permits at least some form of post-trial relief on the basis of newly discovered evidence." Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 51 n.318 (2009) (citation and quotation marks omitted). All but two states (Oklahoma and Massachusetts) explicitly provide post-conviction DNA testing through DNA access statutes.[27] For DNA access to be meaningful,

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[25] Kevin Johnson, *Storage of DNA Evidence Crucial to Exonerations*, USA TODAY, Mar. 28, 2011, 9:05 AM, http://www.usatoday.com/news/nation/2011-03-28-crimelab28_ST_N.htm?csp=34news.

[26] Vendel, *supra* note 8.

[27] INNOCENCE PROJECT, Reforms by State (State DNA Access Laws), http://www.innocenceproject.org/news/LawView2.php (last visited Aug. 8, 2011).

however, the evidence must remain available for testing. This is where state laws are inadequate to protect the rights of the wrongfully convicted. At least 24 states provide inadequate or no protection for biological evidence.

Eight states currently have *no* statute that addresses post-conviction preservation of biological evidence: Delaware, Idaho, Massachusetts, New Jersey, New York, North Dakota, Vermont, and West Virginia. Though seven of these states (all but Massachusetts) have enacted some sort of DNA access statute, having a statute providing for post-conviction DNA testing is an empty promise without an assurance that the evidence will be preserved and available for testing.[28] Those DNA access statutes "purport to establish a right to DNA testing for prisoners, but fail to mandate preservation of the biological evidence needed to give that right any real meaning." Jones, *Evidence Destroyed*, at 1253.

Even among states that have enacted statutes that in some way address preservation, many of them are so weak as to be of little value. Seven states require automatic preservation of evidence, but not necessarily for the entire length of a defendant's

[28] See DEL. CODE ANN. tit. 11, § 4504; IDAHO CODE § 19-4902(b); N.J. STAT. ANN. § 2A:84A-32a; N.Y. CRIM. PROC. LAW § 440.30(1-a)(a); N.D. CENT. CODE § 29-32.1-15; VT. STAT. ANN. tit. 13, § 5561; W. VA. CODE ANN. § 15-2B-14.

incarceration.[29] Nine states—including Alabama—impose a duty to preserve DNA evidence that is triggered by some sort of request by the defendant.[30] Yet these statutes do no more than codify the principle of spoliation that evidence must not be destroyed

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[29] See ARK. CODE ANN. § 12-12-104(b)(2) (preserves evidence after conviction permanently for violent offenses, 25 years for sex offenses, and 7 years for certain other felonies); IOWA CODE § 81.10(10) (preserves evidence for three years beyond the limitations for the commencement of criminal action); LA. CODE CRIM. PROC. ANN. art. 926.1H(4), as amended by 2011 La. Sess. Law Serv. Act 250 (H.B. 116) (automatic preservation only for certain felonies and only through 2012); MICH. COMP. LAWS § 770.16(1), (12) (duty to preserve for convictions before January 8, 2001 expires on January 2, 2012); MONT. CODE ANN. § 46-21-111(1)(a) (generally preserves evidence for a minimum of three years after conviction); OHIO REV. CODE ANN. § 2933.82(B)(7) (preserves evidence for five years (and until appeals exhausted) for guilty or no contest plea cases unless defendant shows good cause); S.C. CODE ANN. § 17-28-320(C) (preserves evidence for a maximum of seven years from sentencing date for guilty or nolo contendere plea cases); see also VA. CODE ANN. § 19.2-270.4:1(B) (automatic preservation only in death cases).

[30] See ALA. CODE § 15-18-200(d); IND. CODE §§ 35-38-7-5, -14; KAN. STAT. ANN. § 21-2512(a), (b)(2); 42 PA. CONS. STAT. § 9543.1(a), (b)(2); S.D. CODIFIED LAWS § 23-5B-5; TENN. CODE ANN. §§ 40-30-303, -309; UTAH CODE ANN. § 78B-9-301(2), (5); WASH. REV. CODE ANN. § 10.73.170(6) (preservation can be ordered on defendant's or court's own motion); WYO. STAT. ANN. §§ 7-12-303(c), -304(d). Also, Arizona, Louisiana, and Virginia automatically preserve biological evidence for some classes of felonies but require a request for it to be preserved post-conviction in all other felony cases. See ARIZ. REV. STAT. ANN. §§ 13-4221(A), -4240(A), (H); LA. CODE CRIM. PROC. ANN. art. 926.1H(2)-(4), as amended by 2011 La. Sess. Law Serv. Act 250 (H.B. 116); VA. CODE ANN. § 19.2-270.4:1(A), (B).

after a party specifically requests it in a court of law. Even under such codification, "a qualified duty to preserve evidence does not shield biological evidence from destruction during the time when the evidence is most likely to be destroyed—after the defendant has been convicted and before the petition for testing is filed." Jones, *Evidence Destroyed*, at 1254.

Moreover, because many of the statutes—including Alabama's—allow DNA testing only if the defendant can specify the precise biological evidence at issue, these limited statutes may not even apply if the defendant does not know about or otherwise cannot list all the available biological evidence.[31] Given the sometimes lengthy delays in unearthing the need for DNA testing and discovering all biological evidence that can be tested, evidence in those states may be destroyed by the time it is needed and identified.

Even the most comprehensive state laws offer no protection for evidence lost or destroyed before their enactment. Moreover, varying state evidence management laws may not be well implemented, or worse, flat-out ignored, further compelling the need for guidance from this Court.

> Even when a jurisdiction has an established evidence management policy in place, the

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[31] See, e.g., ALA. CODE § 15-18-200(c)(1), (e)(2); N.Y. CRIM. PROC. LAW § 440.30(1-a)(a); VT. STAT. ANN. tit. 13, § 5561(a)(1); VA. CODE ANN. § 19.2-270.4:1(A).

> retention of physical evidence is still largely a function of luck and happenstance. Prisoner advocates have discovered that, contrary to the evidence management policy, some evidence within the same facility is kept for decades and other evidence is destroyed weeks after the case is closed.

Jones, *Evidence Destroyed*, at 1245 (footnotes omitted). As the National Institute for Justice found, "[e]ach State, local, or county jurisdiction varies in its methods of collecting, storing, and preserving evidence. These methods may not conform to existing statutes and regulations." *1999 NIJ Report* at 45.

Former Virginia death row inmate Robin Lovitt knows this all too well. When he petitioned for post-conviction DNA testing of the blood-stained murder weapon, he discovered that it had been destroyed, *after* Virginia passed a law requiring preservation of such evidence. Though the Virginia governor commuted Lovitt's sentence to life imprisonment, the evidence that could have conclusively established his innocence (or guilt) is gone forever, despite Virginia's biological evidence preservation statute. Jones, *Right Remedy*, at 2894-95.

III. Mr. Arthur's Case Demonstrates The Importance Of Properly Protecting Biological Evidence.

The circumstances in Mr. Arthur's case forcefully illustrate the need for this Court to establish evidence

protection standards. Two pieces of evidence are at issue: a rape kit and a wig.

Bobby Ray Gilbert has confessed to murdering Troy Wicker, stating he wore the wig to disguise himself and that he had unprotected sexual intercourse with Mrs. Wicker after the murder. Pet. 5. Mrs. Wicker disputes this. *Id.* at 3-4, 12. DNA testing on the rape kit and wig could thus corroborate Mr. Gilbert's confession if either contains his DNA.

After years of opposing access to the biological evidence, Alabama now asserts that the rape kit has been destroyed. *Id.* at 4-6. This conclusion is shaky at best, based on a speculative interpretation of an undated document with a notation to destroy unrelated evidence and on a few phone calls made by an Assistant Attorney General several years after the State contends the evidence was destroyed. *Id.* at 9-13.[32] Indeed, other physical evidence, such as the wig and Mrs. Wicker's clothing, still exists, which suggests that the rape kit also might still exist (or at least further highlights Alabama's haphazard evidence maintenance methods). Based on dozens of other cases of formerly lost evidence turning up after more diligent searching and the lack of strong evidence that the rape kit has actually been destroyed, hope remains that the rape kit can be found with a

[32] Later-filed affidavits from the county clerk's office and the district attorney's office state that they do not have the rape kit. *Id.* at 14.

proper effort. Alabama should not be able to avoid conducting a thorough search for such highly valuable evidence.

Although DNA testing was conducted on the wig in July 2009, it produced no testable results because Alabama's crime lab equipment could not develop a profile based on the quantity and quality of the specimen available. *Id.* at 25-26. Newer, more sensitive DNA tests than those available in the Alabama lab have the capability to develop DNA profiles on smaller samples of old, degraded evidence such as the wig. *Id.* at 15. Mr. Arthur has a legitimate interest both in ensuring that the wig is not destroyed and in securing access to the wig to conduct DNA testing with this more sophisticated technology, which is better suited for generating an identifiable DNA profile than the techniques the Alabama lab used.

Because it would be inequitable to deny Mr. Arthur *any* opportunity to corroborate Mr. Gilbert's confession, his request to conduct more advanced DNA testing on the wig—at the expense of his pro bono counsel—should be granted. This is especially true because nothing prevents the State from destroying, losing, or allowing further deterioration of the wig worn by the perpetrator.

Mr. Arthur first requested access to the rape kit and other physical evidence in 2002. *Id*. at 4. Over the next six years, Alabama fought Mr. Arthur's right to receive that evidence but apparently took no steps to segregate or preserve it. *Id.* at 4-9. Now, Alabama

says the rape kit is lost. Even though Alabama enacted a law allowing limited access to DNA testing in 2009, that was too late to be of any use to Mr. Arthur, given that Alabama first disclosed its belief that the rape kit had been destroyed in 2008—one day before Mr. Arthur's scheduled execution date.

DNA test results on the rape kit or the wig could exonerate Mr. Arthur. Mr. Arthur should have a meaningful opportunity to conduct those tests. The integrity of our criminal justice system demands no less. Mr. Arthur's luck—or lack thereof—should not be the deciding factor in having a chance to prove his innocence. Because of Alabama's apparent failure to preserve key physical evidence that could be dispositive of his guilt or innocence, Mr. Arthur should not be subject to the ultimate punishment of death.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

PETER J. NEUFELD
DAVID LOFTIS
JASON KREAG
THE INNOCENCE PROJECT
40 Worth Street,
Suite 701
New York, New York
10013
212.364.5340

J. GORDON COONEY, JR.
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania
19103
215.963.4806
jgcooney@morganlewis.com

D'ANDRA MILLSAP SHU
CLAIRE SWIFT KUGLER
SHANNON A. LANG
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street,
Suite 4000
Houston, Texas 77002
713.890.5000

KATHERINE C. MILGRAM
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
212.309.6000

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