ORIGINAL

SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAY LEWIS BIGGS,

Defendant-Appellant.

Case No. 13-1463

On Appeal from the Stark County Court of Appeals, Fifth Appellate District, Case No. 2013CA00009

Trial Court Case No. 2008CR0653
Judge Charles E. Brown, Jr

BRIEF OF AMICUS CURIAE INNOCENCE NETWORK

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I. Introduction and Interest of Amicus.

The Innocence Network is an association of more than sixty organizations dedicated to providing pro bono legal and investigative services to convicted individuals seeking to prove their innocence. The sixty-five current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Canada, the United Kingdom, Ireland, Australia, New Zealand, and the Netherlands. The Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that wrongful convictions are prevented.

In over half of the 311 exonerations secured through post conviction DNA testing, the misapplication of forensic disciplines—such as blood type testing, hair analysis, fingerprint analysis, bite mark analysis, and more—has played a role in convicting the innocent. The Network seeks amicus curiae status in support of this Court's review in this matter because it believes, based on its experience exonerating innocent individuals and examining the causes of wrongful convictions, that, because unreliable or improper scientific evidence has often played a significant role in producing miscarriages of justice, the ability to access and review such evidence is imperative in any postconviction review.

In this proceeding, access to existing and available tissue slides that comprised the material evidence available to trial counsel is sought for expert scientific assessment to review potential postconviction remedies. A credible scientific review cannot reliably occur without the tissue slides. Such access assures that Ohio's postconviction remedial scheme is meaningful and in accord with constitutional due process expectations. In denying the requested access, the lower tribunals have used an inapplicable statute in the form of Ohio Rev. Code § 2953.71 et

al.—Ohio's postconviction DNA testing statute. This statute governs access to DNA testing that was unavailable at the time of trial. This DNA statute is inapplicable to the question on appeal, which is whether postconviction counsel may review the materials and evidence provided to trial counsel through Crim. R. 16. In addition, the lower courts accorded undue deference to the State's role as a custodian of scientific evidence. Because the issue of access to review the scientific evidence used to convict the defendant is increasingly a focal point for any threshold assessment of postconviction relief remedies (*see State v. Fitzpatrick*, Supreme Court of Florida, No. SC11-1509, 2013 Fla. LEXIS 1312 (June 27, 2013)), this proceeding offers this Court with an important opportunity to provide much needed guidance by judicially confirming the accessibility of such scientific material for postconviction relief assessments. Accordingly, review is sought in this Court because of the acknowledged lack of judicial guidance on the accessibility of non-DNA scientific material for postconviction remedy assessments.

II. Legal Argument in Support of Access to Tissues Slides.

A. Lower Courts Erred in Applying DNA Access Legal Standard of Review for Postconviction Relief Process.

Both the trial and appellate tribunals denied access to the tissue slides, explaining generally that the postconviction relief standard for access to DNA was not met. Foremost, procedurally, the request for access is not an application for postconviction relief. Accordingly, the issues of finality and timeliness are not ripe for review. What is sought is simply the biological evidence relied upon by the State's experts at trial. The question, then, unaddressed by the lower tribunals, is when a petitioner is entitled to access such evidence as a gateway to litigating a postconviction claim.

Further, the scientific evidence at issue is not DNA and it is not sought to prove whether, through DNA testing, the defendant is included or excluded as the perpetrator of the crime.

Tissue slides, as part of an autopsy which encompasses multiple pieces of information, are used to determine what happened—not who did it. Accordingly, applying the standard of review for DNA access is simply inapposite for the scientific evidence at issue. Many forms of scientific evidence, when processed under ever-changing or correct methodologies can have dramatically different results. For example, blood, hair, tissue material assessed scientifically under potentially different norms may impact the efficacy of the scientific review.

Where there is a reasoned question as to whether scientific evidence that is the sole or substantial basis of the conviction was processed in accordance with recognized scientific methodologies or newly recognized scientific methodologies, a postconviction relief assessment will require access to such scientific evidence. The lower tribunals' focus on the standard for obtaining and processing DNA should not apply to counsel's ability to make a threshold legal assessment of postconviction relief remedies, particularly where the assessment may conclude no petition should be pursued because there is not a qualified scientific basis to challenge the conviction. The DNA access standard, if deemed appropriate, effectively pre-empts the assessment of postconviction relief remedies, and, as a result, undermines Ohio's postconviction relief statutory scheme.

B. Ohio's Postconviction Relief Remedial Scheme Contemplates Meaningful Assessment which is Thwarted by Denial of Access to Scientific Material.

Ohio's postconviction relief process must be interpreted to confer access to the tissue slides if it is to be construed as providing minimal and adequate due process. Access for assessment of trial evidence is a necessity for postconviction review. Moreover, as a part of Ohio's postconviction relief remedial scheme, evidentiary hearings are permitted in postconviction proceedings, including affidavits and testimony—a process that inherently contemplates meaningful assessment of trial evidence. *State v. Roseborough*, 5th Dist. Ashland

Nos. 09 COA 003 and 004, 2010-Ohio-1832. Denying access to scientific material to prevent the threshold assessment of postconviction remedies thwarts Ohio's remedial scheme and increases the potential of constitutional due process deficiency due to inadequate procedures. Such constitutional jeopardy is unwarranted. It is also inconsonant with the clear trend in criminal trials of scientific evidence as the primary or material evidence offered in support of convictions. Allowing, as it must, a process for postconviction relief remedies, a State cannot then place unjustified obstacles to the exercise of that right in a category of cases that involve non-DNA scientific material evidence.

In *Dist. Attorney's Office of the Third Judicial Dist., et al. v. Osborne*, the Supreme Court held that a prisoner may have a liberty interest in demonstrating his innocence pursuant to state law governing postconviction relief. 557 U.S. 52, 68 (2009); *see also Grier v Klein,* No 05-05 Erie, 2011 WL 4971925, * 7 (W.D. PA Sept 19, 2011) (finding the defendant had a state-created liberty interest in demonstrating his innocence in the context of postconviction proceedings with appropriate evidence). Here, the Ohio Revised Code 2953.21 creates such an interest by allowing a postconviction petition right for "[a]ny person who has been convicted of a criminal offense . . . and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States . . ." R.C. 2953.21. "This 'state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.'" *Osborne,* 557 U.S. at 68 *(quoting Connecticut Bd. of Pardons v. Dumschat,* 452 U.S. 458, 463 (1981)).

The question, then, becomes whether the state procedures, as outlined by the lower courts in this case, for pursuing a defendant's postconviction right violate the defendant's procedural Due Process rights. Here, there is no state statute specifically governing access of counsel after

the jury verdict to those materials that were accessible to trial counsel through Crim. R. 16. (See July 29, 2013 App. Ct. Order at ¶¶ 12-13). As a result, the trial court denied defendant access to the biological slides he seeks for a number of reasons such as his decision to testify at trial and the possibility that he may use the slides to pursue a meritless postconviction petition. (Dec. 12, 2012 Trial Court Order at 13, 19). The Appellate Court noted that it was *"forced by analogy"* to review defendant's request using the standard for DNA because no other standard exists. (July 29, 2013 App. Ct. Order at ¶ 13). In other words, when faced with defendant's request, the courts determined that they had no clear standard or procedure at all for assessing whether a defendant was entitled to the biological slides he seeks.

C. State's Role as a Custodian of Evidence Should Not Be Transformed Into a Hoarder of Evidence by the Absence of Due Process Standards to Allow Access.

Denying access to the biological evidence that was available at trial inadvertently transforms the State into a hoarder of evidence. In this proceeding, there is no administrative or logistical impediment to permitting a cut of tissue slides to allow for appropriate scientific review for a threshold assessment of postconviction relief remedies. The State's role at this stage is as a custodian of evidence. Anticipating all of the reasons why postconviction relief should be denied as the justification for denying access essentially presents no more than a premature argument. Because of the unique collection and storage issues associated with biological evidence, access to such evidence in an adversarial postconviction proceeding presents unique issues of fundamental fairness. It is axiomatic that both the State and the defense increasingly rely on forensic evidence, as well illustrated by the trial proceedings here. It is equally true that post trial, the State is best situated to store and preserve biological trial evidence, both favorable and unfavorable to the State. For the wrongfully convicted, access to such biological evidence to assess and potentially commence postconviction

litigation proceedings must be constitutionally required to meet the due process adequacy standard. The argument that biological evidence *used at trial* is inaccessible because it is not a public record or is a confidential investigatory record simply makes no sense.

As a matter of policy, therefore, the better approach is to recognize that in determining the access for scientific material for the purpose of assessment postconviction remedies, the State's role is to preserve and protect the integrity of the evidence, not to block a reasonable basis for access by anticipating defenses to the postconviction relief proceeding. *See Hardin v. Com. of Kentucky*, 396 S.W.3d 909, 914 (Ky. 2013) (releasing biological evidence for DNA testing in non-capital cases in absence of statutory procedure). As the absence of a specific statutory scheme or procedure is not a bar to post-conviction DNA testing, there is no principled reason that the absence of a statute clearly addressing access of post-conviction counsel to review such biological evidence which was available to trial counsel should bar access to such material to assess potential postconviction remedies—especially when Crim. R. 16 and Ohio's postconviction statutory scheme demand review and assessment of such evidence. Similar to *Hardin,* petitioner's request for access to biological evidence must be considered as distinct from what the testing may ultimately reveal. The State's interest in the merits of any petition eventually filed can be assessed by an objective judicial process. The trial court, in its role as gatekeeper, will surely assume their role accordingly should a postconviction petition ever be filed in this case. Unfortunately, here, any assessment by postconviction counsel was completely thwarted by the premature assertion of unripe defenses.

D. Judicial Clarity Is Needed on the Applicable Standard for Non-DNA Scientific Material Where the Majority of Criminal Convictions Rest on Expert Assessments of Forensic Evidence.

The issue of access to scientific material for the assessment of postconviction relief remedies is overdue given the unabated trend of scientific evidence as the sole or predominate

basis of criminal convictions. It is estimated that approximately 75% of all cases in the criminal justice system involve forensic science evidence analysis. Indeed, the absence of any scientific evidence can be noteworthy and influential.

The use of forensic science, moreover, has been amplified by what legal scholars have referred to as the *"CSI Effect,"* or the real-world consequences of the portrayal of scientific evidence in popular television shows like the *CSI: Crime Scene Investigation* franchise. *National Research Council for the National Academies, Forensic Science Committee, note 22 at 9, 12, and 48.* These and other fictional television shows often present forensic work in criminal investigations as straightforward and infallible, and they "suggest that convictions are quick and no mistakes are made." Indeed, "jurors have come to expect the presentation of forensic evidence in every case, and they expect it to be conclusive." *Id.* As a result, forensic evidence has been elevated "to an unsupported level of certainty," and legal scholars have expressed concern that jurors will "blindly believe forensic evidence," even if there are good reasons to doubt its reliability. *Kimberlainne Podlas, "The CSI Effect": Exposing the Media Myth, 16 Fordham Intell. Prop. Media and Ent. L.J., 429, 437 (2006).* Given the significant weight placed by juries on scientific evidence, when a trial conviction is based on scientific evidence that is later shown to be false or inaccurate, the credibility of the trial's outcome is critically undermined.

Forensic evidence, regardless of validity, is extremely powerful at all stages in the criminal justice system. Prosecutors are more likely to pursue a conviction if forensic evidence is available in the case and jury members often may assign greater weight to scientific evidence than other forms of evidence. Some argue that forensic evidence has been elevated "to an unsupported level of certainty," and legal scholars have expressed concern that jurors will "blindly believe forensic evidence," even if there are good reasons to doubt its credibility. *Kimberlianne Podlas, "The CSI Effect": Exposing the Media Myth, 16 Fordham Intell. Prop.*

Media & Ent. L.I. 429, 437 (2006). When that evidence is incorrectly collected, analyzed or interpreted, there is a higher likelihood that an innocent defendant could be convicted.

Recognizing this, along with other concerns about the field, Congress authorized the National Academy of Sciences to conduct a study on forensic science. The findings of the Forensic Science Committee are set forth in the report of the National Research Council of the National Academies, entitled, *National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009) (hereafter NAS Report).* The committee found that "in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence" *(NAS Report, 4).*

1. Unreliable Forensic Evidence Is a Leading Cause of Wrongful Convictions.

Invalidated or improper forensic science is the second greatest contributor to wrongful convictions that have been overturned with DNA testing.[1] The use of improper forensic science has played a role in over 50% of the trials of those who were later exonerated through DNA testing.[2] An analysis of the first 200 DNA exoneration cases, which included examining the scientific testimony in every one of the 137 cases in which trial testimony of forensic analysts could be located, revealed that in 60% of the cases, "forensic analysts called by the prosecution provided invalid testimony at trial—that is, testimony with conclusions misstating empirical data

[1] See The Innocence Project, www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf (as of Jan 23, 2013)
[2] See The Innocence Project: Understand the Causes http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (as of Jan. 23, 2013)

or wholly unsupported by empirical data." *Brandon L. Garrett & Peter J. Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 1 (2009).* Although DNA testing has been developed and researched extensively at many of the leading academic centers and is considered the gold standard of forensic sciences, most other forensic science techniques have not undergone the same kind of rigorous evaluation and are not founded on solid scientific standards. *See NAS Report at 8* ("The simple reality is that the interpretation of forensic evidence is not always based on scientific studies to determine its validity. That is a serious problem.").

The danger from invalid scientific testimony is, of course, at its highest in cases where the prosecution relies almost entirely on scientific opinions to establish proof of a crime and identity of the perpetrator. The classic examples of such cases that have come to light in recent years are those involving unwitnessed child abuse, most notably cases involving abusive head trauma, allegedly caused either by violent shaking or impact or both. *See Deborah Tuerkheimer, Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken* Baby Syndrome, 62 Al. L Rev. 513 (2011).

The fact that defendants can be more easily wrongfully convicted in the modern CSI era based upon faulty or unreliable scientific methodology presented at trial, and such can be proved in a post conviction proceeding, should give any court great pause in denying simple access to scientific material used at trial for an assessment of postconviction remedies.

Below are cases that represent a small sampling in which a defendant was wrongfully convicted based upon faulty scientific evidence:

a) Audrey Edmunds

In 1995, Audrey Edmunds was charged with first-degree reckless homicide when a 7-month-old died while in her care. At trial, the State presented a number of medical expert witnesses who testified to "a reasonable degree of medical certainty" that the child's death was caused by violent shaking, or a combination of shaking and impact. *State v. Edmunds*, 746 N.W.2d 590, 592 (Wis. Ct. App. 2008). At trial, the issues included whether the child's death was caused by inflicted trauma, and if so, whether the injury had to have been sustained while the child was in the defendant's care. During the eleven years Edmunds served in prison, new scientific findings came to light suggesting that natural and accidental causes could have been the cause of death, and that children can experience a lucid interval of up to 72 hours or more after injury before exhibiting signs of illness, so the injuries could not be timed to the period when the child was in Edmunds's day care. Indeed, the pathologist who testified both to the cause of death and the near impossibility of a lucid interval at trial changed his original opinion, testifying at the post-conviction hearings that he no longer could say either that the child was shaken to death or that Edmunds was responsible. The Court of Appeals of Wisconsin filed an opinion in 2008 reversing Edmunds's conviction and granting her a motion for a new trial, citing "a shift in mainstream medical opinion since the time of [her] trial." *Id.* at 599.

b) Drayton Witt

Drayton Witt was convicted in 2002 of murdering his 4-month-old son, Steven, by shaking. Steven was a sick child from birth, suffering from symptoms that included seizures, fevers, vomiting, and pneumonia. After he had a devastating cardiac arrest and died, physicians

blamed his death on an episode of violent shaking, despite the history of unexplained symptoms.[3] Following his conviction, debate continued to grow within the medical community around shaking diagnoses. Witt presented many affidavits in his post-conviction motions, including support from Norman Guthkelch, a pediatric neurosurgeon and the originator of the Shaken Baby Syndrome hypothesis. "The death of Steven Witt is the type of case where a diagnosis of Shaken Baby Syndrome should not have been made," Guthkelch wrote.[4] A.L. Mosley, the medical examiner who performed Steven's autopsy, filed an affidavit that declared, "If I were to testify today, I would state that I believe Steven's death was likely the result of a natural disease process, not [shaken-baby syndrome]."[5] Based on the change in expert opinion, Witt was released in May of 2012 and an Arizona Superior Court Judge dismissed the case with prejudice in October of 2012.

c) Cathy Henderson

The Texas Court of Criminal Appeals granted Cathy Lynn Henderson's application for a writ of habeas corpus in December of 2012 and awarded her a new trial. *Ex parte Henderson*, 2012 WL 6629042 (December 5, 2012). Ms. Henderson was a babysitter and had been convicted of intentionally killing an infant in her care. At her trial, doctors testified that her claim that the infant's injuries were caused by a fall onto concrete was "false and impossible." *Id.* In 2007, an evidentiary hearing was held at which the medical expert who testified to the impossibility of a fall at trial stated that he "now believes that there is no way to determine with a reasonable

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[3] *See* Bazelon, "The Exoneration of Drayton Witt," available at: http://www.slate.com/articles/news_and_politics/jurisprudence/2012/10/what_the_exoneration_of_arizona_father_drayton_witt_means_for_shaken_baby.html

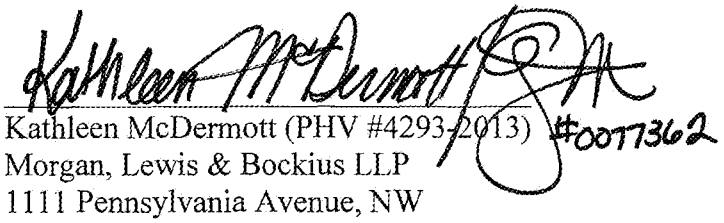
[4] *See* Ruelas, "New Doubts In 'Shaken Baby' Fatalities" available at: http://www.azcentral.com/arizonarepublic/news/articles/20120904shaken-baby-fatalities-doubts.html?nclick_check=1

[5] *Id.*

degree of medical certainty whether [the infant's] injuries resulted from an intentional act of abuse or an accidental fall." *Id.* Additionally, at the evidentiary hearing, six defense experts presented opinions, based on new research and changing science, that the infant's injuries could have been caused by an accidental short fall. The court concluded that Ms. Henderson had established "by clear and convincing evidence" that no reasonable juror would have convicted her of capital murder in light of her new evidence. *Id.; see also Bunch v. State*, 964 N.E.2d 274 (Ind. App. 2012) (reversing arson conviction and 60 year sentence based on four experts identifying fire victim toxicology methodology advances that render trial scientific evidence unreliable and potentially faulty).

As the above cases illustrate, unreliable forensic science can have grave and lasting consequences in the legal system. Denying access to biological evidence used at trial for the assessment of postconviction relief remedies is not a constitutionally adequate standard. Accordingly, the Network urges this Honorable Court to provide guidance consistent with the constitutional expectation of minimum and adequate due process for postconviction relief proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amicus, Innocence Network was delivered by U.S. Mail to Chryssa Hartnett, Assistant Prosecuting Attorney, John D. Ferrero, Stark County Prosecuting Attorney's Office, Start County Office Building, 110 Central Plaza South, Suite 510, Canton, OH 44702-1413 and to Paul Scarsella, Special Prosecutor, Mike DeWine, Ohio Attorney General, 150 East Gay Street, 16th Floor, Columbus, OH 43215 on this 12th day of September, 2013.

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