No. 13-30084

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-vs.-
BILL TYRONE JAMES DESCHARM WATSON,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Montana, Great Falls Division

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Colin M. Stephens of Smith and Stephens, P.C., representing the Innocence Network respectfully submits this brief in support of Movant-Appellant's request for DNA testing and further requests oral argument pursuant to Federal Rule of Appellate Procedure 34. Per Rule 29(c)(5), Appellant's counsel authored the brief in part.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Innocence Network ("the Network") is an affiliation of 62 organizations dedicated to providing *pro bono* legal and investigative services to indigent prisoners for whom evidence discovered after conviction can provide conclusive proof of innocence. These organizations represent hundreds of prisoners with claims of actual innocence in 50 states, the District of Columbia, Canada, the United Kingdom, Netherlands, Australia, and New Zealand. The Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system. The Network also advocates study and reform to improve the truth-seeking functions of the criminal justice system.

The Network has pioneered the use of post-conviction challenges based on DNA evidence. To date, DNA evidence has exonerated 311 people in the United States, many of which occurred through litigation by the Network. Since 2004, 244 exonerations can be attributed to advances in technology and the development of

statutes enabling post-conviction relief through DNA testing. In 152 cases post-conviction DNA testing established the actual perpetrators of those crimes. The Innocence Project, DNA Exonerations Nationwide, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (accessed Aug. 1, 2013). For example in 2004, Uriah Courtney, a Network client, was convicted of kidnapping and rape due to eyewitness testimony. Initial DNA testing failed to provide any meaningful results; however, in July 2013, post-conviction DNA testing exonerated Courtney and identified the real perpetrator—a convicted sex offender. John Wilkens, *Can Eyewitness Testimony Be Trusted?: Mistaken identity faulted in cases of wrongful convictions.* Union Tribune San Diego, July 6, 2013 (accessed at: http://www.utsandiego.com/news/2013/jul/06/mistaken-eyewitness-ID-wrongful-conviction/). Additionally, Josiah Sutton, another Network client, was wrongly convicted of rape due to an invalid and faulty DNA report coupled with misleading expert testimony. Subsequent post-conviction testing, proved Sutton's innocence with conclusive, exculpatory evidence. Innocence Project, *Know the Cases: Josiah Sutton*, http://www.innocenceproject.org/Content/Josiah_Sutton.php. As Attorney General Janet Reno noted, "DNA aids the search for truth by exonerating the innocent." *Convicted by Juries, Exonerated by Science*, NAT'L INSTIT. JUST., U.S. Dept. Just., NCJ161258 (June 1996).

In 2004, Congress enacted The Innocence Protection Act ("the Act"). Members of the Innocence Network assisted in creating this statute, which provides post-conviction DNA testing to those convicted and incarcerated under federal jurisdiction. This 10-element statute requires applicants to make a prima facie case in order to be eligible for a grant of testing. 18 U.S.C. § 3600(a).

Appellant Bill Watson's case examines this important law in two ways that are of consequence to the Network's clients. Procedurally, this case impacts the statute of limitations and timeliness element. Substantively, it reinforces the value of DNA evidence to prove innocence and identify the guilty. In short, the Court's interpretation of this statute will impact the access to DNA evidence that the Network's clients require to win exoneration.

STATEMENT OF THE FACTS AND PROCEDURE

Watson was convicted of the crime of Attempted Sexual Abuse based on the testimony of JCB, an intoxicated 17-year-old male. E.R. 47-53. JCB claimed he saw Watson, naked from the waist down, engaged in full penetrative intercourse with his 14-year-old sister, JMB, at a house party on March 30, 2006. E.R. 47-53. None of the physical evidence supported JCB's account. E.R. 26-37, 38-47. A sexual assault examination conducted within hours of the assault was inconclusive regarding whether an assault had occurred. E.R. 26-37. Further, limited DNA testing of the undergarment placed on the victim after the assault was inconclusive

as to whether Watson's DNA was present. E.R. 38-47. At the time of testing, the sample was too small for 2006 testing to create a full DNA profile, thus the testing could not exclude any male in the population. *Id.* Multiple items also collected from the scene were not tested for DNA, including the victim's shorts, unidentified hairs, and vaginal swabs taken at the hospital. *Id.*

DNA testing methodology and capability has advanced significantly since Watson's trial in July of 2006. E.R. 42. Greg Hampikian, Ph.D., forensic geneticist, supplied an affidavit describing these developments:

> Since 2006, DNA analysis has progressed in its ability to extract DNA profiles from ever smaller and degraded samples. Specifically, adoption of mini-STR testing beginning in 2007 has enhanced the ability to create DNA profiles from samples originally believed to be compromised due to either quantity or quality. Additionally, "touch DNA" analysis has created an ability to detect and profile deposited skin cells on an item or person. These methods would have been unavailable during 2006. *Id.*

In this case, Watson seeks DNA testing of physical evidence that has never been DNA tested and would now be subject to new, advanced methods that were previously unavailable. *Id.* Specifically, Watson seeks to test three items, vaginal swabs, shorts, and hair samples, which were never tested for DNA by the FBI. E.R. 38-47. He also seeks to apply new testing methods to the undergarments, which were subjected to limited, inconclusive DNA testing. *Id.* Advances in DNA technology provide the opportunity to identify previously undetectable "touch

DNA" left by skin cells and the ability to access mtDNA from hair shafts. *Id.* Additionally, advances in technology allow for successful DNA testing from extremely small samples, such as the semen sample on the undergarments that initially proved inconclusive. *Id.* Watson's requested testing submits to the parameters of the statute of "newly discovered DNA evidence."

Watson seeks DNA testing under 18 U.S.C. § 3600, et seq. Upon denial by the United States District Court for the District of Montana of Watson's motion on March 26, 2013, counsel filed a timely appeal on April 1, 2013. Watson remains incarcerated in a federal correctional institution in Louisiana with an expected release date of May 29, 2019.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE AND INTENT OF CONGRESS SUPPORT TESTING FOR WATSON.

As the United States Supreme Court stated in *Dist. Attorney's for Third Judicial Dist. v. Osborne*, "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." 557 U.S. 52, 55 (2009). In passing The Act, Congress aimed to explicitly lay out the steps a defendant must take to obtain post-conviction testing for this purpose.

18 U.S.C. § 3600(a) functions much like a checklist. Each element requires fulfillment by the applicant, who must be convicted of a federal offense and

petition the court by written motion. Watson's appeal presents two specific contentions. First, Watson shows good cause rebutting the presumption against timeliness as established by § 3600(a)(10)(B)(iv). Second, Watson presents newly discovered DNA evidence within the plain meaning of the statute. *Id.* at 3600(a)(10)(B)(ii). Each of these questions is answered by the plain language of 18 U.S.C. § 3600 and by its legislative history.

A. Watson satisfies the broad timeliness exception of good cause.

The Innocence Protection Act requires a showing of timeliness as the tenth and final hurdle for an applicant. 18 U.S.C. § 3600(a)(10). The first subsection of element ten mandates that applicants file petitions within 60 months of the Act's enactment or within 36 months of conviction to satisfy a presumption of timeliness. 18 U.S.C. § 3600(a)(10)(A). However, if this deadline cannot be met, the second subsection provides an applicant with four pathways through which to rebut the presumption of untimeliness. 18 U.S.C. § 3600(a)(10)(B). Specifically, timeliness is satisfied if: 1) the applicant's incompetence contributed to the delay of the motion; 2) the evidence is newly discovered DNA evidence; 3) the applicant presents the motion on more than a mere assertion of innocence and to deny the motion would result in a manifest injustice; and 4) the applicant shows good cause. 18 U.S.C. 3600(a)(10)(B)(i-iv). This subsection serves to ensure that those who

are wrongfully convicted maintain the protection of this law indefinitely, and not be procedurally time-barred in their quest for justice.

Congress created, debated, and enacted the second subsection with the express determination to offer a broad pathway to testing. During the Senate's debate of the bill, Senator Patrick Leahy explained the purposeful broadness of the "good cause" exception to his colleagues:

> As I explained in an earlier floor statement, the Justice Department has complained that the "good cause" exception is so broad you could drive a truck through it, and its stubborn opposition to the IPA turned in large part on the inclusion of this language. *But while I agree that the language is broad, it is intentionally so; I would not agree to a presumption of untimeliness that could not be rebutted in most cases.*

150 Cong. Rec. S11609-01, 2004 WL 2639662, [emphasis added]. Sen. Leahy recognized the difficulty of the language of the rebuttable presumption calling it, "a late and hastily-drafted addition." *Id.* However, the intent remains clear: A prescriptive barrier to timeliness was never intended; instead, this language is meant to serve as "specific guidance on how to weed out frivolous motions." *Id.* The Northern District Court of Mississippi reflected this Congressional intent regarding timeliness. In *Boose*, the Court explicitly stated, "Indeed, the entire purpose of the statute is to permit collateral review of convictions through DNA testing—no matter how much time has transpired—or what other deadlines have

passed. What the statute seeks—with its narrow tailoring—is justice itself." *United States v. Boose*, 498 F.Supp.2d 887, 889 (N.D. Miss. 2007).

Notably, no state in the Ninth Circuit imposes a time limitation for requesting DNA testing when the request is based upon a new or more probative DNA testing method. *See e.g.,* Alaska Stat. § 12.73.020; Ariz. Rev. Stat. § 13-4240 (2013); Cal. Penal Code §1405 (2005); Haw. Rev. Stat. §844-D121 (2013); Idaho Code §19-4902 (2013); Mont. Code Ann. §46-21-110 (2013); Nev. Rev. Stat. Ann §176.0918 (2009), Amended by 2013 Nevada Laws Ch. 300 (A.B. 233); Or. Rev. Stat. §138.690 (2007); Wash. Rev Code §10.73.170 (2005).

Here, the District Court unrealistically suggests that Watson, an indigent prisoner, should have known about the new and emerging forms of DNA testing available and requested appropriate testing within the three years following his conviction. In doing so, the court ignored the complicated scientific nature of DNA testing and created a rule that would preclude the use of new testing methodologies if those methodologies originate after the three-year presumption of timeliness. To support this reading would defeat the legislative intent entirely.

As Senator Leahy stated, "In rejecting a time limit, Congress recognized that the need for DNA testing is not temporary." 150 Cong. Rec. S11609-01. (2004). Watson's need for DNA testing is more urgent than ever today. An indigent client, Watson has only now been able to secure *pro bono* legal representation, and locate

key physical evidence that can now be subjected to new, reliable methods of DNA testing unavailable at the time of his trial and conviction. Watson made a viable, complete, and non-frivolous request, placing himself within the class of people the statute sought to protect. This Court ought to reject the rigid interpretation of the Act and recognize that good cause should be granted in any non-frivolous case in order for this statute to retain its intent and purpose.

B. Watson satisfies the timeliness exception of "newly discovered DNA evidence" in accordance with the statute's plain meaning and intent.

The District Court denied Watson's petition due to timeliness, specifically asserting that Watson did not satisfy the second rebuttable presumption exception, whereby an applicant is exempted from the statutory deadlines if "the evidence to be tested is newly discovered DNA evidence." E.R. 7-11;18 U.S.C.§ 3600(a)(10)(B)(ii). The District Court stated:

> I cannot conclude . . . that I can, under the umbrella of this language, [in 18 U.S.C. § 3600] order additional testing of evidence that has been present and known about since day one of this case, or at least since before the case went to trial.

ER 10. The District Court's reasoning is problematic because it conflicts with the very statute itself. Under the District Court's interpretation, no defendant would ever meet the new evidence exception. Specifically, if an applicant satisfied the fourth element, which mandates the evidence to be tested has been subject to a

proper chain of custody, s/he would ensure that s/he could never produce "newly discovered DNA evidence." Under the fourth element, a defendant must prove that "the specific evidence to be tested is in the possession of the Government." 18 U.S.C. § 3600(a)(4). If the evidence is in the possession of the Government, by the District Court's definition it can never be "newly discovered." The satisfaction of both elements becomes mutually exclusive. This logical dissonance defies practical application of the statute and the intent of Congress itself. As the United States Supreme Court found in *United States v. Brown*, "No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences." 333 U.S. 18, 27 (1948). The District Court misinterprets "new evidence," failing to recognize that it is not the physical object of evidence, but rather the pinpointed, genetic material found upon it, that is desired and governed by statute. An applicant seeks, and Congress sought to ensure, access to the results of scientific testing that provides precise identification evidence.

II. DNA TESTING COULD EXONERATE WATSON AND IDENTIFY THE ACTUAL PERPETRATOR.

DNA testing has revolutionized the criminal justice system. The National Academies of Science classify DNA testing as "universally recognized" as the standard against which other evidence of identity is judged. *Strengthening Forensic Science in the United States: A Path Forward*, National Research Council of the National Academy of Sciences, 130 (2009). "The probative power of DNA

is high," because the methods have been rigorously experimented and validated. *Id.* at 133. Continuously, advances in DNA technology allow smaller and more degraded samples to be subject to viable and trustworthy results. Brandon L. Garrett, *Claiming Innocence,* 92 Minn. L. Rev. 1629, 1647-48, 1658-59 (2007-08). Specifically in Watson, mini-STR, Y-STR, and mtDNA testing could identify a previously unknown profile in the physical evidence. E.R. 40-41.

In the present case, the United States does not contest that new methods of DNA testing are available to examine previously untested vaginal swabs, hairs, and shorts for biological evidence. E.R. 3-4. Nor does it contest that new, more probative methods could yield an actual profile from the previous inconclusively tested undergarment of JMB. *Id.* Instead, the Government simply asserts that an eyewitness, JCB, identified Watson engaged in a sexual act with the witness's sister and suggests it is unlikely further testing would establish Watson's innocence. *Id.* This position ignores the fact that in almost all of the 311 DNA exonerations to date, originally, a jury found that proof beyond a reasonable doubt existed to convict the defendant. That is why DNA evidence is so crucial: DNA evidence has the ability to reverse overwhelming guilt and prove innocence.

Here, the only evidence presented against Watson was an eyewitness identification made by an intoxicated juvenile. Yet, DNA exonerations have shown that "Eyewitness misidentification is the most prominent cause of wrongful

convictions in the United States..." Britton Douglas, *"That's What She Said": Why Limiting the Use of Uncorroborated Eyewitness Identification Testimony Could Prevent Wrongful Convictions in Texas,* 41 Tex. Tech L. Rev. 561, 571 (2009). Eyewitness testimony can be particularly unreliable in that it may be perjured. In fact, "at least one sort of perjury is reported in over 40 percent of all exonerations." Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 New Crim. L. Rev. 333, 343-44 (2011).

DNA evidence is both precise and objective and, unlike other commonly used forms of evidence, DNA evidence is not vulnerable to the vagaries presented by other forms identity evidence:

> 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).

Watson seeks the same or similar DNA testing that has exonerated innocent people and identified actual perpetrators in crimes across the country. For example, Kirk Bloodsworth was convicted of rape and murder of a young girl in

Maryland based on the testimony of five eyewitnesses, a shoeprint, and knowledge of a "bloody rock." Post-conviction DNA testing definitively excluded Bloodsworth as the semen contributor and later identified the real perpetrator—a convicted pedophile. Bloodworth was the first person to be exonerated from death row in 1993. *Convicted by Juries, Exonerated by Science*, NAT'L INSTIT. JUST., U.S. Dept. Just., NCJ161258 (June 1996) at 36-37; James Dao, *In Same Case, DNA Clears Convict and Finds Suspect,* N.Y. Times, Sept. 6, 2003, at A7.

Additionally, Ron Williamson and Dennis Fritz were falsely convicted of a rape and murder in Oklahoma, based on informant and jailhouse admissions testimony. In 1999, post-conviction DNA testing conducted on hair and semen evidence proved their innocence and identified the true perpetrator—the informant, who testified against the defendants at trial. *See* Charles T. Jones, *DNA Tests Clear Two Men in Prison Escapee Sought in Slaying of Waitress*, DAILY OKLAHOMA, April 16, 1999, at 1; Scheck et al. ACTUAL INNOCENCE 163-202.

Furthermore, Charles Dabbs was convicted in New York of rape based on identification by the victim who was familiar with him and by misleading serology testimony linking him to the crime. In 1991, subsequent DNA testing of the victim's underwear proved his innocence. *Know the Cases: Charles Dabbs* (http://www.innocenceproject.org).

Bruce Godschalk was convicted of rape and burglary in Pennsylvania, based

on victim misidentification and a false confession. Godschalk petitioned the courts multiple times for DNA testing, which when finally granted, exonerated him in 2002. *Know the Cases: Bruce Godschalk* (http://www.innocenceproject.org).

Watson stands convicted by a single, uncorroborated, intoxicated eyewitness. No physical evidence ties him to the crime. In *Fasano,* the Court granted testing under 18 U.S.C. § 3600 despite considerably more damning evidence than that offered against Watson, including: video-camera footage of the robbery, four eyewitnesses, vehicle records and eyewitness descriptions that connected Fasano to the get-away vehicle, and Fasano's fingerprints on the demand note. *United States v. Fasano*, 577 F.3d 572, 574-576 (5th Cir. 2009).

Proof of Watson's guilt or innocence could be shown via a number of analytical approaches using DNA. If Watson's DNA is in fact present in the undergarment, hairs, vaginal swabs or on JMB's shorts, the evidence supports his guilt and JCB's testimony, establishing that justice has been served.

However, if Watson's DNA is excluded from the items relevant to the sexual assault, DNA testing would provide evidence impeaching JCB's testimony and exculpating Watson. If an unknown profile is discovered on one or more of the testable items and the profile does not match the victim or Watson, then DNA testing has identified a likely third-party perpetrator's DNA. Alternately, if a third-party perpetrator's DNA profile is identified in any item and that profile is matched

to one of the party attendees, such as JCB or others, then the likely perpetrator has been affirmatively identified and not only has JCB's testimony been undermined, but the actual perpetrator can be investigated and brought to justice. For JCB's testimony to be true, there would almost certainly be skin cells remaining on or around the victim's vaginal area. In the circumstance that DNA testing identifies no DNA contribution from anyone but the victim, it would be reasonable to surmise that no crime was committed and JCB fabricated or was mistaken in his accusations against Watson. Under any of these scenarios, exculpatory DNA evidence would critically undermine the trial evidence upon which the conviction was based, and proof of innocence would be manifest.

CONCLUSION

Congress enacted The Innocence Protection Act to help ensure accuracy in the justice system by providing DNA testing for all non-frivolous post-conviction requests. Watson's case places him squarely within the intended class of individuals the statute seeks to protect. We respectfully request this Court reverse the District Court and grant Watson's request for DNA testing, or in the alternative, remand the matter for a full and fair hearing.

Respectfully submitted this 7th day of August, 2013

/s/ Colin M. Stephens
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Innocence Network

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, this Appellant's Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because it contains less than half the maximum allowable words or pages for an appellant's principle brief, excluding tables and certificates. The brief is 15 pages and approximately 3408 words as calculated by my Microsoft Word software.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced type face using Microsoft Word software, in a Times New Roman 14 point font.

DATED this 7th day of August, 2013.

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CERTIFICATE OF SERVICE
Fed. R. App. P. 25

I hereby certify that on August 7th, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the Appellate CM/ECF system.

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