IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

JUSTIN K. BLACK

Petitioner,

CIVIL ACTION NO. 13-C-486
INDICTMENT NO. 07-F-143
JUDGE ALFRED E. FERGUSON

v.

MARVIN C. PLUMLEY, WARDEN
HUTTONSVILLE CORRECTIONAL CENTER

Respondent.

BRIEF OF PROPOSED AMICUS CURIAE,
THE WEST VIRGINIA INNOCENCE PROJECT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution

Cases

Statutes

STATEMENT ON THE IDENTITY AND INTEREST OF AMICUS CURIAE

Proposed *amicus curiae* the West Virginia Innocence Project ("WVIP")[1] respectfully asks that this brief in support of Petitioner Justin Black's "Motion for Post-Conviction DNA Testing" be received by the Court.

The WVIP is dedicated to correcting wrongful convictions in West Virginia, and provides free representation to indigent individuals who are in prison for crimes they did not commit. In addition to litigation, WVIP also advocates for legislative reforms to improve the reliability of West Virginia's criminal justice system, thus better protecting the community and reducing the occurrence of wrongful convictions. The WVIP is a nonprofit legal clinic, part of the Clinical Law Program at West Virginia University College of Law. WVIP cases are handled by supervising attorneys—including Valena Beety, who is the Director of the WVIP, Deputy Director of the Clinical Law Program, and a member of the Innocence Network's Executive Board—and Rule 10 student attorneys.[2]

The WVIP has an interest in ensuring that DNA testing is available to individuals who may have been wrongfully convicted of crimes. As this case pertains to access to generally accepted methods of DNA testing in a case where the individual seeking testing has presented credible evidence of actual innocence, the WVIP has a serious interest in the matter.

[1] Counsel for Justin Black did not author this brief in whole or in part. Neither counsel for Justin Black nor any other person made any monetary contribution to fund the preparation or submission of this brief.

[2] The Innocence Network is an affiliation of 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. There are more than 60 current members of the Innocence Network representing prisoners with innocence claims in all 50 US states as well as several other countries. *See* The Innocence Network, http://innocencenetwork.org.

This brief accompanies a Motion for Leave to File Brief of Proposed Amicus Curiae The West Virginia Innocence Project.

I. INTRODUCTION

When testable DNA evidence is available, DNA testing can identify the perpetrator of a crime with scientific certainty. DNA testing can both identify the true perpetrator of a crime, as well as exonerate an innocent defendant.

DNA testing has become considerably more powerful and accurate since Justin Black's conviction in 2008. To date, 341 innocent men and women have been exonerated in the United States thanks to post-conviction DNA testing.[3] Post-conviction DNA testing pointed to the true perpetrator in 163 of those 341 cases.[4]

As this Court is surely aware, one of those cases took place in this very jurisdiction, Cabell County, West Virginia. In 1987, Glen Woodall was convicted of 19 crimes relating to the kidnapping and subsequent sexual assault of two women at separate times in Cabell County. DNA testing was not performed for his 1987 trial, although the defense requested it. Mr. Woodall continued fighting. Eventually, he was able to have PCR testing performed on spermatozoa found in the rape kits. The testing excluded him, and his conviction was vacated. After further testing confirmed that he was not the perpetrator, Mr. Woodall's case was dismissed. The DNA testing also identified the true perpetrator of this crime, as it has done in 162 other cases.

When drafting West Virginia Code §15-2B-14, the West Virginia Legislature recognized the importance of DNA testing. The statute establishes broad criteria for when testing is

[3] *See* Innocence Project: Cases, http://www.innocenceproject.org/all-cases.
[4] *See* Innocence Project: Cases, http://www.innocenceproject.org/all-cases (use filter to select "Real Perpetrator Found").

appropriate, and never precludes testing. DNA testing should be granted in this case. The statute favors testing, Justin Black meets all of the criteria of West Virginia Code §15-2B-14(f), and the State will not bear the cost of DNA testing because Mr. Black's counsel has agreed to pay for testing.

II. WEST VIRGINIA CODE § 15-2B-14 FAVORS DNA TESTING

A. The statute requires that testing be granted in certain circumstances, and never forbids testing.

The West Virginia statute governing access to post-conviction DNA testing, West Virginia Code § 15-2B-14, mandates DNA testing in some cases, and never forbids a court from granting DNA testing. Section 15-2B-14 sets out nine factors explaining when testing should be performed. *See* W. Va. Code Ann. § 15-2B-14(f)(1)–(9). The statute imposes a nondiscretionary duty on the court to grant testing if all nine factors are met, explaining, "The court shall grant the motion for DNA testing if it determines all of the following have been established." *See* W. Va. Code Ann. § 15-2B-14(f). On the other hand, the statute in no way prohibits a court from granting testing if some of the factors are not met. All nine factors are not required for the court to grant testing. In such cases, the statue leaves the court discretion to grant or deny testing. *See* W. Va. Code Ann. § 15-2B-14(f).

State ex rel. Burdette v. Zakaib, 224 W. Va. 325, 685 S.E.2d 903 (2009), a leading case on the statute, makes clear that a court is only *required* to grant testing if all nine factors are met. 685 S.E.2d at 912. However, *Burdette* does not say that the court can *only* grant testing if all nine

factors are met—nor could it, because that would directly contradict the plain language of West Virginia Code § 15-2B-14.[5]

In cases where the nine factors are met, courts must grant testing; in cases where the nine factors are not met, courts retain the discretion to either grant or testing. In mandating testing in some cases but never prohibiting a court from granting testing, the statute recognizes that DNA testing results are the best evidence of who committed a crime, and that DNA testing should be conducted whenever possible.

B. The statute's factors establish criteria for when testing is likely to be reliable and relevant.

Although testing can be granted even when all nine factors are not satisfied, the nine factors help clarify when testing is likely to be reliable and probative. For example, the statute would not call for testing in cases where the DNA sample has been contaminated and would not give a reliable result. Similarly, it would not call for testing in cases where the key question was not *who* committed a crime, but rather about consent or *mens rea*—rape cases where the key question is whether the alleged victim consented, or murder cases where the key question is whether the killing was in self-defense.

Generally, the factors focus on two issues: the reliability of testing and the relevance of testing. Addressing the relevance of the testing, the statute asks whether the testing results would raise a reasonable probability of a different outcome, but it in no way limits testing to cases where the DNA testing results would be outcome determinative.

[5] *Burdette* finds these nine factors only mandatory in the context of issuing a *Writ of Mandamus* requiring a circuit court to order testing. 685 S.E.2d at 912. The statute explicitly imposes a nondiscretionary duty on the court to grant testing if all nine factors are met, and authorizes the West Virginia Supreme Court of Appeals to issue a *Writ of Mandamus* if the circuit court does not carry out that nondiscretionary duty. *See* W. Va. Code Ann. § 15-2B-14(f).

1. Factors one, two, and seven ensure the reliability of the testing.

The first and second factors address the reliability of the testing by ensuring that the evidence itself is in a condition that would allow for reliable testing. The first factor explains, "The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion." W. Va. Code Ann. § 15-2B-14(f)(1). The second explains, "The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect." W. Va. Code Ann. § 15-2B-14(f)(2). These factors caution against testing in cases where the testing would not lead to a reliable result because there is a problem with the evidence.

The seventh factor addresses the reliability of the testing by ensuring that the method of testing is reliable. It requires that "[t]he testing requested employs a method generally accepted within the relevant scientific community." W. Va. Code Ann. § 15-2B-14(f)(7). This factor cautions against testing in cases where the testing may not be reliable.

2. Factors three, four, six, eight, and nine ensure the relevance of the testing.

The third and fourth factors address the relevance of the testing, by allowing testing only in situations where the identity of the perpetrator is a significant issue in the case. The third factor explains that testing is appropriate when "[t]he identity of the perpetrator of the crime was, or should have been, a significant issue in the case" and the fourth factor explains that testing is appropriate when "[t]he convicted person has made a prima facie showing that the evidence sought for testing is material to the issue of the convicted person's identity as the perpetrator of or accomplice to, the crime." W. Va. Code § 15-2B-14(f)(3), (f)(4). These factors discourage testing in situations where the key question was not who committed a crime but about the state of mind

of the victim or perpetrator (whether there was consent, or the perpetrator's state of mind at the time of the crime).

The sixth, eighth, and ninth factors also address the relevance of the testing. The sixth and eighth factors caution that an individual should not be granted testing post-conviction if he or she could have sought testing at the time of trial. *See* W. Va. Code Ann. § 15-2B-14(f)(6), (f)(8). Similarly, the ninth factor cautions that testing should not be granted where a motion for testing is made just to create delay. *See* W. Va. Code Ann. § 15-2B-14(f). These factors recognize that competent trial counsel will typically ensure that the most discriminating testing methods available be used to test any relevant, available evidence prior to trial.

The statute also recognizes that many situations exist in which the individual could not have sought testing at the time of trial—including situations where the evidence itself was not available, where advanced testing methods were not available, or where the individual was not represented by effective counsel. *See* W. Va. Code Ann. § 15-2B-14(f)(6), (f)(8).

3. The fifth factor also ensures the relevance of testing, by calling for testing where the results would raise a reasonable probability of a different outcome.

Finally, the fifth factor explains that testing should be granted when "[t]he requested DNA testing results would raise *a reasonable probability* that, in light of the all the evidence, the convicted person's *verdict or sentence* would have been *more favorable* if DNA testing results had been available at the time of conviction." W. Va. Code § 15-2B-14(f)(5) (emphasis added).

Notably, the statute does not say that testing should be granted only when the DNA testing results would be outcome determinative. In contrast to *State ex rel. Richey v. Hill*, 216 W. Va. 155, 603 S.E.2d 177 (2004), which West Virginia Code § 15-2B-14 superseded, Section 15-2B-14(f)(5) imposes no requirement that the testing be outcome determinative. No other provision of W. Va.

Code § 15-2B-14 imposes a requirement that testing be outcome determinative, either. Instead, the statute tells courts that testing must be conducted if there is a reasonable probability that the testing results would change the verdict or the sentence. *See* W. Va. Code § 15-2B-14(f)(5).

C. The statute permits testing to be performed outside of West Virginia.

A common sense interpretation of West Virginia Code § 15-2B-14(g), "[t]esting shall be conducted by a DNA forensic laboratory in this state," allows labs outside of West Virginia to perform the testing. Conduct typically means direct or guide, as a conductor conducts an orchestra, or a tour guide conducts a tour. The statute's use of "conducted" (rather than performed or tested) allows the West Virginia lab to delegate the testing to a lab with the technological resources to perform the required testing. A strictly limited reading of West Virginia Code § 15-2B-14(g) would be both impractical and unconstitutional.

There are two important reasons to construe "conducted" according to this common sense interpretation, rather than apply a narrow and contorted interpretation. First, if the State is suggesting that the West Virginia State Police Forensic Laboratory should be forced to perform the testing, even though another lab can do so at no cost to the State, this suggestion reveals a disregard for State resources.[6] This Court should not lose sight of the fact that if the "individual [who requested testing] is an indigent, the cost of DNA testing shall be borne by the state." W. Va. Code Ann. § 15-2B-14(i). In light of the fact that an outside lab is willing to perform DNA testing at no cost to the state, and has the capability to perform whatever testing is necessary, that lab should perform the testing.

[6] *See, e.g.,* Hoppy Kercheval, West Virginia's Budget Problems Getting Worse, WV Metro News (Apr. 22, 2016), *available at* http://wvmetronews.com/2016/04/22/west-virginias-budget-problems-getting-worse (discussing West Virginia's budget crisis).

Second, not allowing an outside lab to perform the testing undermines the overall purpose and logic of West Virginia Code § 15-2B-14 and exposes the statute to constitutional challenges. The West Virginia State Police Forensic Laboratory is the only forensic laboratory in this state, yet it is unable to perform mitochondrial DNA testing. This could lead to the incongruous result that no testing should be performed simply because the West Virginia State Police Forensic Laboratory does not have the resources to perform the necessary type of testing, even when another lab has offered to perform it at no cost to the State, thus rendering the statute subject to Due Process and Equal Protection challenges.

1. Not allowing an outside lab to perform DNA testing undermines the overall statutory scheme and violates principles of Due Process and Equal Protection.

This Court must interpret provisions of the DNA testing statute so as to promote the overall statutory scheme. *See Spencer v. Yerace*, 155 W. Va. 54, 60, 180 S.E.2d 868, 872 (1971) ("In ascertaining the legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation."); *see also King v. Burwell*, 135 S. Ct. 2480, 2496 (2015); *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 214, 530 S.E.2d 676, 687 (1999); *Smith v. State Workmen's Compensation Comm'r*, 159 W. Va. 108, 114, 219 S.E.2d 361, 365 (1975). Recently, the West Virginia Supreme Court of Appeals reaffirmed the principle that it is inappropriate to interpret a statute in a way that defeats its overall purpose. *See Wooton v. Walker*, No. 16-0226, at 12 (W. Va. Apr. 19, 2016).

The overall purpose of West Virginia Code § 15-2B-14 is to make DNA testing readily available to incarcerated individuals who may have been wrongfully convicted, not to create a narrow and illusory promise of testing. Several provisions in the statute evidence the statute's broad purpose, including: the provision for the appointment of counsel; the requirement that the

State pay for testing when the individual requesting testing is indigent; the nondiscretionary duty to grant testing if certain factors are met; the ability of courts to order the lab to prioritize testing ordered pursuant to the statute over other pending matters; even the requirement that the West Virginia Supreme Court of Appeals expedite its review of Petitions for Writs of Prohibition and Mandamus arising under the statute. *See* W. Va. Code Ann. § 15-2B-14(b)(3)(B); § 15-2B-14(f), (i), (j), (k).

An unreasonably narrow interpretation of "conducted" means the necessary testing may never be performed—even for someone who meets the requirements for DNA testing. This result is contrary to the purpose of the statute. Especially in light of the fact that the West Virginia State Police Forensic Laboratory itself entrusts an outside lab - the FBI - to perform mitochondrial DNA testing, denying testing by an outside lab to the petitioner would undermine the overall goal of the statute.

Second, the Court must not interpret provisions of the statute so as to make it vulnerable to constitutional challenge. *See West Virginia Human Rights Comm'n v. Garretson*, 196 W. Va. 118, 124, 468 S.E.2d 733, 739 (1996). A strict interpretation raises a Due Process issue because it undermines the statute's goals—exonerating the innocent, identifying the guilty, and promoting public confidence in the criminal justice system—without any rational basis. The State has not identified any rational end that would be served by prohibiting an outside lab from performing testing. *See generally, e.g., Thorne v. Roush*, 164 W. Va. 165, 261 S.E.2d 72 (1979); *State ex rel. Harris v. Calendine*, 160 W. Va. 172, 233 S.E.2d 318 (1977); *O'Neil v. City of Parkersurg* 160 W. Va 694, 237 S.E.2d 504 (1977).

A strict interpretation raises an Equal Protection issue, as well. Limiting the availability of DNA testing under the statute to only the type of testing available in West Virginia labs creates

two classes of people—on the one hand, people who meet the statutory requirements and can get testing in a West Virginia lab, and, on the other hand, people who meet the statutory requirements but nevertheless cannot get testing only because their case requires advanced testing techniques that West Virginia labs cannot perform. This disparity violates Equal Protection principles. *See* U.S. Const. amend. XIV, § 1, cl. 3& 4. More disturbing still is the fact that if a prosecutor or investigator wanted mitochondrial DNA testing to be performed prior to trial (or agreed to testing post-conviction), he or she would be able to contact the FBI and request mitochondrial DNA testing. This disparity is an even more troubling violation of Equal Protection principles.

Therefore, an outside lab should not be prevented from testing the evidence. An outside lab can comply with the requirement of West Virginia Code § 15-2B-14(g) by performing the DNA testing in consultation with the West Virginia State Police Forensic Laboratory. Although the outside lab will physically perform the testing, the lab can keep the West Virginia State Police Forensic Laboratory (as well as the Prosecuting Attorney's Office, the Circuit Court, and Justin Black) apprised of the testing and results.

III. DNA TESTING SHOULD BE GRANTED IN THIS CASE BECAUSE JUSTIN BLACK MEETS THE STATUTORY FACTORS

Justin Black meets all of the statute's criteria for granting post-conviction DNA testing.

First, the evidence that Mr. Black seeks to have tested is available and in a condition that would permit the requested DNA testing. As Mr. Black explains in his Motion for Post-Conviction DNA Testing, based on all the information available at this time the evidence is in the custody of local law enforcement and has been kept in a condition that would permit DNA testing.

Second, there is no question that the evidence to be tested has been subject to a sufficient chain of custody.

Third, the identity of the perpetrator was a significant issue in the case. As Mr. Black explains in his Motion, the identity of the perpetrator was the ultimate issue in his trial—this case is entirely about who killed Deanna Crawford; it is not a case about mens rea or consent.

Fourth, Mr. Black has made a prima facie showing that the evidence sought for testing is material to the issue of his identity as the perpetrator or accomplice to the crime. The evidence sought for testing includes a sexual assault kit; fingernail scrapings from the hands of the victim; the victim's clothing and hair band; hairs found in the victim's hand and near her body; and other items recovered near the victim's body, including cigarette butts, a mug, a bear can, and a snuff can. It practically goes without saying that some of this evidence could reveal who killed Ms. Crawford. The sexual assault kit and fingernail scrapings could show the identity of someone who assaulted her, and/or someone she violently struggled with before her death. Ms. Crawford's clothing could reveal some of the last people to make physical contact with her. Hairs and discarded items found on or near her body could reveal who was at the scene of her murder.

The State notes that DNA testing could not be relevant because other evidence puts Justin Black at the crime scene. However, the criminal justice system has learned vital lessons from the first 341 DNA exonerations—namely, that false confessions do occur, that juveniles are particularly at risk for making false confessions, and that snitch testimony is remarkably unreliable.

Fifth, the requested DNA results would raise a reasonable probability that in light of all the evidence, Justin Black's verdict or sentence would have been more favorable if DNA testing results had been available at the time of conviction. The requested DNA testing has the potential to show that someone other than Justin Black and his co-defendants assaulted Ms. Crawford, removed her clothing, and struggled violently with her. If someone other than Mr. Black and his co-defendants is the source of DNA found on the rape kit, in the fingernail scrapings, or on multiple

pieces of evidence found on or around her body—there is at the very least a reasonable probability, if not a near certainty, that the verdict would have been different.

Sixth, Mr. Black is requesting testing on some evidence that was not previously tested, and is requesting that more advanced testing methods be applied to evidence that has already been tested. DNA detection and testing methods have advanced significantly since the time of Mr. Black's trial.

Seventh, the requested testing employs a method generally accepted within the relevant scientific community. Mr. Black is requesting testing that is commonly performed in laborites across the country.

Eighth, as noted above and as Mr. Black also explains in his Motion, DNA science has advanced significantly since the time of Mr. Black's trial. However, to the extent that Mr. Black's counsel did not request that an existent DNA testing method be used, this failure constitutes ineffective assistance. Mr. Black steadfastly asserted his innocence at the time of his trial; moreover, DNA testing in this case was used to clear other suspects. In these circumstances, failing to request that an available DNA testing method be applied to the evidence in this case is an obvious example of ineffective assistance of counsel.

Ninth, the motion for DNA testing is not solely for the purpose of delay. There are no proceedings that Mr. Black seeks to delay—he is merely seeking to establish his innocence through DNA testing.

Therefore, Justin Black meets all of the criteria established in West Virginia Code § 15-2B-14.

IV. DNA TESTING SHOULD BE GRANTED IN THIS CASE BECAUSE DNA EVIDENCE CAN BOTH EXONERATE THE INNOCENT AND IMPLICATE THE GUILTY.

West Virginia Code § 15-2B-14 favors DNA testing for good reason: Where available, DNA testing results are the best evidence of who committed a crime. DNA testing results have the ability not only to exonerate the innocent, but also to find the true perpetrator of crimes. Even in situations where DNA testing results are not, standing alone, absolute conclusive proof of guilt or innocence, they can still reveal valuable information, and serve as a powerful law enforcement tool.

By requiring that "DNA testing results would raise a *reasonable probability* that . . . the convicted person's verdict or sentence would have been more favorable if DNA testing results had been available at the time of conviction," rather than requiring that testing results be outcome determinative, the statute recognizes the power of DNA as an investigative tool even where the DNA testing results alone do not necessarily dictate the outcome. W. Va. Code § 15-2B-14(f)(5).

There have been many cases where DNA testing results have made clear that other, seemingly reliable evidence was flawed. Unreliable statements of some sort—including false confessions and snitch testimony, as well as eyewitness misidentifications—have nearly always played a role in the 341 DNA exonerations to date. Furthermore, in 163 of the 341 DNA exonerations, DNA testing also revealed the true perpetrator of the crime.

Mr. Black's case bears a close resemblance to recent DNA exonerations.

In perhaps one of the most famous DNA exonerations, five young men were wrongfully convicted for the beating and rape of a jogger in New York City's Central Park that occurred in

the summer of 1989.[7] The victim, Trisha Meili, was left in a coma in critical condition and was unable to identify her attacker after she regained consciousness. The five young men, Kharey Wise, Kevin Richardson, Antron McCray, Yusef Salaam and Raymond Santana Jr. became suspects after reports that groups of teenagers were committing unrelated assaults in the park on the same night. Four of the five gave videotaped confessions, confessions that were inconsistent with one another. Afterward, the young men claimed that their confessions were coerced by the police officers. DNA evidence collected from the crime scene came from one source and did not match any of the codefendants. Still, the young men were convicted in two jury trials in 1990 on the strength of their so-called confessions. Meanwhile the true perpetrator, serial rapist Matias Reyes, was free to commit other crimes. Not only did Reyes rape a woman in Central Park two nights before Ms. Meili was attacked, he continued to brutally sexually assault women in the area until he was apprehended in August 1999. He developed a habit of cutting at and around women's eyes after he assaulted them, attempting to blind his victims. In 2002, the New York County District Attorney's office reexamined Ms. Meili's case after Reyes admitted his guilt. The district attorney's office was able to corroborate Reyes' confession with forensic evidence. The convictions of McCray, Richardson, Salaam, Santana and Wise were vacated on December 19, 2002.

There are commonalities between the cases of the Central Park Five and the murder of Ms. Crawford. In both, the inconsistent, and later recanted, testimony of several young men was used

[7] For additional information on this case, *see* Jim Dwyer, *In Botched Case of Park Jogger, an Altered Life, N.Y. Times*, June 26, 2014, http://www.nytimes.com/2014/06/27/nyregion/in-botched-case-of-park-jogger-an-altered-life.html?rref=collection%2Ftimestopic%2FCentral%20Park%20Jogger%20Case%20%281989%29&_r=0; Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack, N.Y. Times*, Dec. 20, 2002, http://www.nytimes.com/2002/12/20/nyregion/convictions-and-charges-voided-in-89-central-park-jogger-attack.html; Chris Smith, *Central Park Revisited*, *N.Y. Mag.*, Oct. 21, 2002, http://nymag.com/nymetro/news/crimelaw/features/n_7836/.

to convict an entire group. In this case, as in the Central Park Five case, DNA evidence can now be tested with advanced techniques that could reveal the true perpetrator.

In a similar case, another teenager was convicted after falsely confessing. On November 17, 1989 Angela Correa's body was found in Peekskill, New York.[8] Her body showed signs of rape. Police interviewed 16-year-old Jeff Deskovic, who was a friend of the victim. Mr. Deskovic became the primary suspect, even though seminal fluid and spermatozoa found in Ms. Correa's vaginal cavity was tested and indicated he was not the source. Under police pressure, Mr. Deskovic gave a false confession, and he was convicted of rape and murder. In June 2006, a new district attorney agreed to have the crime lab conduct a more sophisticated STR analysis on the semen found on the victim and to use CODIS to try to find a match for the profile. In November 2006, a match was found. Mr. Deskovic's conviction was subsequently vacated. Yet again, the true perpetrator had gone on to commit more heinous crimes. In this instance, Angela Correa's actual murderer, Steven Cunningham, murdered his girlfriend's sister in April 1993.

Mr. Deskovic's case is another example of young man who was convicted after falsely confessing to a crime, despite having no knowledge of the incident and with no DNA evidence connecting him to the crime.

In yet another example of a group of young men falsely confessing to a rape and murder, three young men were wrongfully convicted of raping and murdering Eva Patterson, and the true perpetrator was free to commit more crimes while they served time in prison.[9] Ms. Patterson was

[8] For additional information on this case, *see* Jeff Deskovic, Innocence Project: Cases, http://www.innocenceproject.org/cases/jeff-deskovic/.

[9] For additional information on this case, *see* Campbell Robinson, *30 Years Later, Freedom in a Case With Tragedy for All Involved*, *N.Y. Times*, Sept. 16, 2010, http://www.nytimes.com/2010/09/17/us/17exonerate.html?_r=0.

raped and killed in her home in Forrest County, Mississippi in 1979. Larry Ruffin, age 19 at the time, was the initial suspect. He confessed, saying he acted alone in the rape and murder of Ms. Patterson. Mr. Ruffin later recanted his confession. Before the trial, police interrogated Mr. Dixon, a mentally handicapped man who knew Mr. Ruffin. Mr. Dixon initially denied having any knowledge of Ms. Patterson's murder, but later falsely confessed that he watched Mr. Ruffin rape and murder Ms. Patterson. Mr. Dixon also implicated Mr. Bivens in the crime. Mr. Bivens and Mr. Dixon pled guilty under threat of the death penalty and agreed to testify in Mr. Ruffin's trial. All three men's initial confessions were wildly inconsistent. At Mr. Ruffin's trial, Mr. Dixon recanted his confession on the stand. Mr. Dixon was still found guilty by jury. DNA testing on the seminal fluid was not available in 1979, but testing finally occurred in June 2010. Not only did the testing exclude all three of the men, it implicated Andrew Harris, who lived near Ms. Patterson at the time. In 1982, three years after Ms. Patterson's murder, Andrew Harris was convicted of raping a woman in her home in the same county two years later. After 30 years in prison, the convictions of Mr. Dixon and Mr. Bivens were thrown out in September 2010. The DNA testing came too late for Mr. Ruffin, who died in prison in 2002, and for the woman Andrew Harris raped after escaping conviction for the rape and murder of Ms. Patterson.

This is yet another example, of many, of a group of people falsely confessing to a crime even though none of them was remotely involved. These cases, and the many others like them, show the power of DNA evidence to exonerate the innocent and identify the guilty, and the value of conducting DNA testing even if there is other evidence that seems to point to the defendant's guilt.

V. JUSTIN BLACK HAS AGREED TO BEAR THE EXPENSE OF DNA TESTING, WHICH MEANS THERE WILL BE NO COST TO THE STATE IF TESTING IS GRANTED.

Finally, this Court should note that Justin Black's counsel has agreed to bear the cost of the testing. Not only does Mr. Black satisfy all the criteria of West Virginia Code § 15-2B-14, but also the State will not have to pay for testing. Accordingly, there is no downside to conducting testing in this case, and no reason for this Court not to grant testing.

VI. CONCLUSION

For the foregoing reasons, *amicus* the West Virginia Innocence Project urges this Court to order DNA testing of any and all available evidence in Justin Black's case.

Respectfully submitted,

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