No. 103150

In the Court of Appeals
Eighth Appellate District
Cuyahoga County, Ohio

STATE OF OHIO,
Appellant,

v.

FERNANDO COLON,
Appellee.

Appeal from the Court of Common Pleas, Cuyahoga County
Case No. CR-04-0458174

BRIEF OF AMICUS CURIAE THE INNOCENCE NETWORK IN SUPPORT OF DEFENDANT-APPELLEE FERNANDO COLON

Dustin B. Rawlin (0072870)
Jennifer L. Mesko (0087897)
Jeffrey C. Sindelar Jr. (0084252)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
Telephone: (216) 592-5000
Facsimile: (216) 592-5009

Attorneys for Amicus Curiae
The Innocence Network

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CONSENT TO FILE AMICUS CURIAE BRIEF

Pursuant to Ohio Rule of Appellate Procedure 17, the Innocence Network has obtained written consent of all parties to file an amicus curiae brief in support of Defendant-Appellee, Fernando Colon.

TIMOTHY J. MCGINTY
CUYAHOGA COUNTY PROSECUTOR

/s/ Anthony T. Miranda
T. ALLAN REGAS (0067336)
Appellate Unit Supervisor
ANTHONY T. MIRANDA (0090759)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Phone: (216) 443-7416
aregas@prosecutor.cuyahogacounty.us
amiranda@prosecutor.cuyahogacounty.us

ROBERT TOBIK
COUNTY PUBLIC DEFENDER

/s/ Cullen Sweeney
CULLEN SWEENEY (0077187)
ERIKA CUNLIFFE (0074480)
Assistant Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
Phone: (216) 443-7583
csweeney@cuyahogacounty.us
ecunliffe@cuyahogacounty.us

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Innocence Network is an association of organizations dedicated to providing *pro bono* legal and/or investigative services to prisoners for whom post-conviction exculpatory evidence can provide a basis for actual innocence. The 69 current members of the Innocence Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Canada, Australia, Argentina, Ireland, Israel, Italy, New Zealand, Puerto Rico, and South Africa. The Innocence 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 Innocence Network advocates for study and reform designed to enhance the truth-seeking functions of the criminal justice system to insure that future wrongful convictions are prevented. The Innocence Network members have exonerated over 370 innocent people and served as counsel in a majority of those cases. The Innocence Network's work on behalf of such people gives it a strong interest in ensuring that appropriate procedural vehicles are available to individuals seeking to access exculpatory evidence in the post-conviction context. Moreover, the Innocence Network and its member organizations have substantial familiarity with, and expertise in, dealing with these issues, and respectfully submits that this brief will assist the Court in deciding them.

II. STATEMENT OF FACTS

The Innocence Network adopts and incorporates the Appellee, Fernando Colon's, Statement of Facts, and provides only a brief recitation of pertinent facts here. In 2005, Mr. Colon was convicted of six counts of gross sexual imposition based largely on the efforts and testimony of the now-infamous Ariel Castro. (*See generally* Mot. for New Trial 2, 4, 8-15, No. CR-04-458174 June 17, 2015.) Castro was instrumental to Mr. Colon's conviction, initiating the

police investigation against Mr. Colon, testifying against Mr. Colon at trial, and ensuring Mr. Colon's alleged victims (Castro's biological daughters) testified against him. Since Mr. Colon's conviction, new evidence has come to light regarding Castro's kidnapping, rape, and torture of three women for over a decade beginning in 2002. Ariel Castro was arrested, charged, and pleaded guilty to 937 counts of rape, kidnapping, and aggravated murder. He was sentenced to life plus 1,000 years in prison without the chance of parole, a sentence which he served for a short time before committing suicide. This evidence, undiscoverable at the time of Mr. Colon's trial, casts serious doubt on the allegations against Mr. Colon and the reliability of the evidence presented against him.

III. ARGUMENT

A. Post-conviction exculpatory evidence has been critical in proving the innocence of hundreds of wrongfully convicted individuals.

As one court aptly recognized: "Our system of criminal justice is not infallible." *State v. Nash*, 212 N.J. 518, 540, 58 A.3d 706, 718 (2013). For that reason, post-conviction relief "provides a built-in safeguard that ensures that a defendant was not unjustly convicted." *Id.* (quotations and citations omitted). Ultimately a petition for post-conviction relief is "a defendant's last chance to challenge the fairness and reliability of a criminal verdict . . . . If an error led to a miscarriage of justice in an earlier trial, the [post-conviction relief] proceeding must provide a meaningful opportunity to root it out." *Id.* (quotations and citations omitted).

It is impossible to know for certain how many innocent people are currently incarcerated in the United States, but the swell of exonerations in the last decade suggests that the "number is not insignificant." *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 131–32 (2004); David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1028–29 n.2

(2010) (approximating that as many as 46,000 people are incarcerated in the United States for crimes they did not commit). Since 2010, 543 individuals have been exonerated based on new evidence of innocence. National Registry of Exonerations, University of Michigan Law School, *available at* http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Nov. 14, 2015).

For a time, new DNA testing technologies contributed to a large number of exonerations. *See* Wolitz, 52 ARIZ. L. REV. at 1028–29. In recent years, the number of exonerations arising from non-DNA evidence has grown and now substantially outnumbers DNA exonerations. Specifically, in 2010, there were 55 reported non-DNA exonerations and only 17 DNA exonerations. National Registry of Exonerations, Michigan Law School, available at http://www.law.umich.edu/special/exoneration/Pages/browse.aspx. In 2011, of 71 reported exonerations, only 17 were attributed to newly discovered or tested DNA evidence. *Id.* In 2012, there were 96 total exonerations reported, 79 of which were non-DNA exonerations. *Id.* In 2013, there were 91 exonerations, with only 12 classified as DNA exonerations. *Id.* In 2014, 127 of the 139 total exonerations reported were non-DNA exonerations. *Id.* This year, only 8 of the 123 exonerations reported so far cite DNA evidence as a significant contributing factor to exoneration. *Id*.

Four cases in particular illustrate the important role non-DNA evidence that undermines the credibility of a key prosecution witness can serve in supporting post-conviction petitioners' actual innocence claims and ultimately leading to their exonerations.

Dewey Bozella

In 1983, Dewey Bozella was convicted of the murder of an elderly woman based on the testimony of two career criminals—Lamar Smith and Wayne Moseley—who repeatedly changed their stories, admitted to being under the influence of mind-altering drugs on the day of the murder, and testified only after receiving favorable deals in exchange for their testimony. This conviction was overturned based on a *Batson* violation. *People v. Bozella*, 25 Misc.3d 1215(A), 901 N.Y.S.2d 908, *1, *10 (N.Y. Co. Ct. 2009). In 1990, Mr. Bozella was again convicted of second-degree murder and subsequently sentenced to 20 years to life. *Id.* at *7. At Mr. Bozella's second trial, Lamar's brother, Stanley Smith, along with two other witnesses contradicted Lamar and Wayne's respective testimonies. *Id.* at *10.

Mr. Bozella moved to set aside the judgment, arguing that the State withheld *Brady* material that "not only supports Bozella's theory of the case at trial, but also contradicts the testimony of the People's key trial witnesses . . . who testified against Dewey Bozella only after securing beneficial deals with the District Attorney." *Id.* at *1. Specifically, Mr. Bozella's post-conviction investigation revealed *Brady* material that had not been turned over before the first trial, including "a portion of the Police Complaint Report containing statements of several neighbors of [the victim] which contradict key testimony of Lamar Smith and Wayne Moseley [the prosecution's key witnesses] and the transcribed interviews of these neighbors," amongst other materials. *Id.* at *7. The court found that disclosure of the neighbor's statements would "most certainly" have been used to support the defense theory of the case that a different suspect had committed the crime. *Id.* at *10. Noting the underwhelming evidence at trial, the court found that "it cannot be said that any evidence, no matter how slight, supporting the defendant's theory of the case, would not have led to a "reasonabl[e] possibility" of a different verdict." *Id.* at *11

("[T]he potential testimony of the neighbors, at best, wholly contradicts the People's eyewitnesses and, at least, seriously calls their version of the events into question.").

In October 2009, the prosecution decided not to retry Mr. Bozella and dismissed all charges. *See* Dewey Bozella, National Registry of Exonerations, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3038.

Askia Jabir Nash

In October 2000, two 12-year-old boys, one of them a special-education student (J.B.), in a middle school in Newark, New Jersey, accused the school's librarian, Askia Jabir Nash, of sexual molestation. *See* A. Jabir Nash, National Registry of Exonerations, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4416 (last visited Nov. 16, 2015). Mr. Nash testified at trial, denying all allegations of sexual assault and insisting that he could not have committed the crime because an aide escorted J.B. around the school at all times. *State v. Nash*, 212 N.J. 518, 526, 58 A.3d 706, 710 (2013). In rebuttal, the prosecution called the school principal, who testified that J.B. was not assigned a "personal aide." According to the Court, the principal's testimony "undermined a main pillar of the defense and marked Nash as a liar." *Id.* Mr. Nash was convicted and sentenced to 22 years in prison.

After trial, Mr. Nash presented the trial court with newly discovered evidence—sworn or certified statements of school officials attesting that J.B. *was* assigned a "classroom" aide who accompanied him throughout the day. *Id.* at 526–27, 58 A.3d at 710. In January 2013, after Mr. Nash was released on parole, the New Jersey Supreme Court reversed the denial of his motion for a new trial. The Court found that the principal's trial testimony "conveyed the false impression that Nash had not been telling the truth about the assignment of an aide to J.B. That testimony shattered Nash's credibility, branding him a liar." *Id.* at 553, 58 A.3d at 726. As a

result, "had that evidence been presented to the jury, the outcome of the case probably would have been different." *Id.* at 527–28, 58 A.3d at 710–11. The Court also found that this evidence was not discoverable by reasonable diligence before trial because the principal instituted a gag order, which prohibited the affiants from cooperating with the defense at the time of trial, and, therefore, a new trial was warranted. *Id.* at 552, 58 A.3d at 725.

On April 29, 2013, the prosecution dismissed the charges. *See* A. Jabir Nash, National Registry of Exonerations, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4416 (last visited Nov. 16, 2015).

Jeffrey Santos

On December 12, 1997, 40-year-old Jeffrey Santos was arrested in Manhattan after a teenager accused him of theft. Mr. Santos was taken to the Manhattan Detention Center, and he was accused of rifling through the bag of an intake worker while he was in the receiving area. He denied doing so, but was immediately moved to a holding cell. Mr. Santos claimed that Captain Edward Lanza and another jail officer named Gonzalez came to the holding cell and cited him for an infraction. Mr. Santos said that the officers beat him when he objected. Lanza and Gonzalez told a vastly different story, reporting that when they told Mr. Santos he was being cited for attempting to steal from the bag, Mr. Santos came at them and began kicking and beating them. Mr. Santos was charged with four counts of second degree assault. At trial, Lanza testified that Mr. Santos punched Lanza in the face. Gonzalez testified that he tried to help Lanza, and he and other officers subdued Mr. Santos. On October 9, 1998, a jury convicted Mr. Santos of two counts of assault on Lanza and acquitted him of assaulting Gonzalez. He was sentenced to six years in prison. *See* Jeffrey Santos, National Registry of Exonerations, *available*

at http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4328 (last visited Nov. 16, 2015).

More than two years later, Mr. Santos filed a motion for a new trial, citing newly discovered evidence that Lanza was being investigated for using excessive force on inmates and falsifying records to conceal those assaults. *People v. Santos*, 306 A.D.2d 197, 198, 761 N.Y.S. 651 (Ct. App. 2003), *aff'd*, 1 N.Y.3d 548. After Mr. Santos's trial, Lanza pleaded guilty in an administrative proceeding to three assaults on inmates. *Id.* The Court granted Mr. Santos's petition, vacated his conviction, and ordered a new trial. The Court found that the "complainant's history of assaultive behavior went to the very heart of this defendant's trial defense," and was a critical issue "in a case where the prime witness admittedly had assaulted three prison inmates before this trial and . . . where credibility was the most significant issue at trial." *Id.* On September 28, 2004, Mr. Santos was acquitted by a jury. *See* Jeffrey Santos, National Registry of Exonerations, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4328.

Peter Ambler

Peter Ambler was charged with first-degree murder in the shooting of Robert Voelkli, whose body was discovered by Tina Visgar, Suzanne Swinoconos, and Frederick Mitchell. *State v. Ambler*, 146 Wis.2d 686, 431 N.W.2d 328, *1 (1988). As the three approached the house where they found the body, they saw a man leaving the house. Tina Visgar—who had pending charges for felony burglary, felony theft, and misdemeanor theft—identified Mr. Ambler as that man. *Id.* at *1–2. After she testified at Mr. Ambler's preliminary hearing, the prosecutor dismissed the felony charges against her; she pleaded guilty to the misdemeanor violation; and,

on the prosecutor's recommendation, her sentence was withheld and she was placed on probation. *Id.* at *1.

There were no fingerprints or other physical evidence linking Mr. Ambler to the crime. No murder weapon was ever found. And a test for gunshot residue on Mr. Ambler was inconclusive. *Id.* At trial, the only direct evidence against Mr. Ambler was Visgar's identification, making her the prosecution's "key witness." *Id.* at *2–3. Mr. Ambler's attorney attempted to cross-examine Visgar about the disposition of the charges against her, but the judge sustained an objection from the prosecutor and refused to allow the questioning. *Id.* Swinconos testified for the defense that she had known Mr. Ambler for years and that he was not the man leaving the house. *Id.* Given the conflicting testimony, the credibility of Visgar and Swinconos was a "crucial issue" in the case. *Id.* The jury ultimately believed Visgar and convicted Mr. Ambler, who was sentenced to life in prison.

The Wisconsin Court of Appeals reversed Mr. Ambler's conviction, ruling that the judge had erred in forbidding cross-examination on the disposition of Visgar's charges because the information was "crucial" for the jury to make a determination of Visgar's credibility. *Id.* at *3. In March 1989, Mr. Ambler went on trial a second time. His attorneys were allowed to cross-examine Visgar about the charges against her, and the jury acquitted Mr. Ambler. *See* Peter Ambler, National Registry of Exonerations, *available at* http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4050.

While *Ambler* does not involve newly discovered evidence, it shows that knowledge of a star prosecution witness's criminal history—even relatively minor burglary and theft charges when compared to the kidnapping, raping, and aggravated murder charges at issue here—can be crucial to the jury's credibility assessment of that witness.

Despite the undeniable rise in the number of non-DNA exonerations, "[i]t is not unusual, in a non-DNA innocence case, no matter how compelling the evidence of innocence, for the state to respond to a motion for new trial by arguing that no relief should be granted because the proffered new evidence is not like DNA." Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1189 (2011). But a wrongful conviction is equally offensive to the United States criminal justice system and just as much a denial of individual liberty regardless of the type of evidence the actual innocence claim is based on. Unless or until prosecutors have an ethical[1] or statutory duty to disclose potentially exculpatory evidence—whether DNA or otherwise—post-conviction, trial courts should, at a minimum, have the discretion to permit post-conviction discovery when the defendant raises a colorable claim of actual innocence, as Mr. Colon has here. Otherwise, wrongly convicted individuals do not have the ability to obtain the only evidence that could lead to their exoneration. Individuals with colorable actual innocence claims should not be hamstrung in their efforts to discover evidence that supports their claims simply because the exculpatory evidence is not DNA-based.

B. The trial court has discretion to allow post-conviction discovery in a case involving a colorable claim of actual innocence.

The Ohio Supreme Court has recognized that trial courts "have extensive jurisdiction over discovery, including inherent authority." *State ex rel. Abner v. Elliott*, 85 Ohio St. 3d 11, 16, 1999-Ohio-199, 706 N.E.2d 765, 769; *see also Buszkiewicz v. DiFranco*, 140 Ohio App. 3d 126, 134, 746 N.E.2d 712 (8th Dist. Cuyahoga 2000); *State ex rel. Corn v. Russo*, 133 Ohio App. 3d

[1] Proposals have been made to enact ethical rules requiring prosecutors to disclose post-conviction *Brady* materials. Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 111, 112 (2011) (printing of the summer 2010 draft of the ABA Standards for Criminal Justice: Proposed Revisions to Standards for the Prosecution Function).

57, 63, 726 N.E.2d 1052, 1056 (8th Dist. Cuyahoga 1999); *State ex rel. Grandview Hosp. & Med. Ctr. v. Gorman*, 51 Ohio St. 3d 94, 95, 554 N.E.2d 1297, 1298 (1990). An appellate court cannot "second guess the trial court's ruling on discovery issues in the absence of an abuse of discretion." *Scott v. Schnieder*, 8th Dist. Cuyahoga No. 74120, 1999 WL 401567, *1 (June 17, 1999).

In the exercise of its inherent authority, the trial court has the discretion to determine whether discovery may be allowed on a post-conviction claim. *State v. Mack*, 8th Dist. Cuyahoga No. 101261, 2015-Ohio-2149, ¶ 50; *see also State v. McKelton*, 12th Dist. Butler No. CA2015-02-028, 2015-Ohio-4228, ¶ 41 ("The granting or overruling of a discovery motion rests within the sound discretion of the trial court"); *State v. Montgomery*, 10th Dist. Franklin No. 13AP-1991, 2015-Ohio-500 ¶ 16 (finding it "within the sound discretion of the trial court whether to grant some limited form of discovery to [a post-conviction petitioner] in order to permit additional factual development of his post-conviction claims"); *State v. Stojetz*, 12th Dist. Madison No. CA2009-06-013, 2010-Ohio-2544, ¶ 75 (same); *State v. Wiles*, 125 Ohio App. 3d 71, 79, 709 N.E.2d 898 (11th Dist. Portage 1998) (same). Indeed, while R.C. § 2953.21 does not *entitle* a post-conviction petitioner to discovery, discovery may nonetheless be warranted "when the petitioner sets forth operative facts that demonstrate a substantive claim for relief." *McKelton* at ¶ 41; *see also State v. Osie*, 12th Dist. Butler No. CA2014-10-222, 2015-Ohio-3406, ¶ 33.

Ohio is not alone in giving the trial court discretion to allow discovery in post-conviction proceedings. For example, the Uniform Post-Conviction Procedure Act, adopted in various forms in multiple states, allows courts to permit discovery in post-conviction proceedings upon a showing of good cause. *See* Unif. Post-Conviction Proc. Act. 1966 § 7 (making "[a]ll rules and statutes applicable in civil proceedings through pre-trial and discovery procedures" available to

petitioners); Unif. Post-Conviction Proc. Act. 1980 § 8 (permitting the court, for good cause, to allow post-conviction petitioner to use the discovery procedures available in criminal or civil proceedings); *see also* Am. Bar Ass'n, Standards for Postconviction Remedies § 4.5 (1978 version).

People v. Fitzgerald, 123 Ill.2d 175, 526 N.E.2d 131 (1988), is illustrative. In *Fitzgerald*, the trial court denied the State's Motion to Quash subpoenas for discovery depositions issued by a post-conviction petitioner. *Id.*, 123 Ill.2d at 178, 526 N.E.2d at 132. Upon the State's Request for Reconsideration, the trial court narrowed its ruling, allowing only two depositions and quashing the remaining subpoenas. *Id.* The State filed a writ of mandamus to the Illinois Supreme Court, arguing, similar to the State's argument here, that the trial judge exceeded his authority in ordering the taking of discovery depositions in a post-conviction case. *Id.* Despite noting that the relevant rules and statutes "neither authorized nor prohibited" the taking of discovery depositions in post-conviction proceedings, the Illinois Supreme Court concluded that the trial court had the discretion within its inherent authority to permit the depositions and, therefore, denied the State's Writ. *Id.*, 123 Ill.2d at 183, 526 N.E.2d at 135. The Illinois Supreme Court did not open the floodgates to post-conviction discovery, cautioning trial judges to exercise their inherent authority only upon "good cause shown." *Id.*, 123 Ill.2d at 183–84, 526 N.E.2d at 135. Trial courts were instructed to "consider, among other relevant circumstances, the issues presented in the post-conviction petition, the scope of the discovery sought, the length of time between the conviction and the post-conviction proceeding, the burden that the [requested discovery] would impose on the opposing party and on the witness, and the availability of the desired evidence through other sources." *Id.*

Post-conviction discovery was also a pivotal reason for granting a new trial in *Smith v. Cain*, 565 U.S. ___, 132 S. Ct. 627 (2012). Smith was convicted of killing five people during an armed robbery based on the testimony of a single eyewitness. *Id.* at 628. As part of Smith's post-conviction petition, he requested and obtained police investigative files that revealed undisclosed *Brady* material that directly contradicted the testimony of the eyewitness. *Id.* at 629–30. The Supreme Court found that the withheld material was favorable to the defense and material to the verdict and, therefore, undermined confidence in the conviction. *Id.* at 630–31.

Here, as in *Fitzgerald*, the trial court has, and correctly exercised, inherent authority to grant Defendant-Appellee's Motion for Discovery. Simply put, the petitioner, consistent with the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, cannot bear the burden to prove entitlement to post-conviction relief, R.C. § 2953.21, and subsequently be denied any meaningful opportunity to obtain the evidence needed to meet that burden. *See Goldberg v. Kelly*, 397 U.S. 253, 267 (1970); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); U.S. Constitution, Fourteenth Amendment; Ohio Constitution, Article 1, Section 16; *see also Keener v. Ridenour*, 594 F.2d 581, 590 (6th Cir. 1979) (expressing concern over Ohio's inadequate and "ineffective" post-conviction statutory scheme). This is especially true where the evidence is not available from another source. (6/10/15 Journal Entry and Op. 2 (noting that the Public Defender's office unsuccessfully tried to obtain additional evidence to support Mr. Colon's actual innocence claims from both state and federal law enforcement).)

In *People v. Rensing*, 14 N.Y.2d 210 (Ct. App. 1964), the court granted a new trial where the star witness in the prosecution's murder case—the convicted codefendant, Krombholz—was declared insane after his testimony in Rensing's trial. The defendant argued that Krombholz's diagnosis was "newly discovered evidence" that warranted a new trial because Krombholz's

testimony had a "tremendous impact upon the jurors and that the verdict might well have been different had they known of his long history of mental illness." *Id.* at 212. The court agreed, granting a new trial and finding that the jury may have weighed Krombholz's testimony differently had they been aware of the fact that he had a long history of mental illness. *Id.* at 213–14.

A new trial is similarly warranted here. Mr. Colon's companion Motion for Leave to File a Motion for New Trial sets forth compelling, newly discovered evidence that supports his actual innocence claim, namely that the prosecution's star witness, Ariel Castro, pleaded guilty to 937 counts of rape, kidnapping, and aggravated murder, which is now a matter of public record—and international notoriety. This conduct was ongoing during the time of Castro's testimony against Mr. Colon and could not have been discovered at the time of Mr. Colon's trial. (6/10/15 Journal Entry and Op. 2–3.) This undisputed, newly discovered evidence eviscerates the credibility of the prosecution's star witness.[2] Mr. Colon is simply asking for additional discovery to further bolster and prove his actual innocence claim. Under these circumstances, a trial court must be allowed to exercise discretion under its inherent authority to grant discovery.

[2] While Mr. Colon does not currently have any information indicating that a *Brady* violation occurred during the State's prosecution against him, as a matter of principle, if discovery is never available in post-conviction cases, there is no way to ensure that the prosecution has fulfilled its obligation to disclose all *Brady* material. *See, e.g.*, Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 510 (2009) ("prosecutorial suppression of *Brady* material constitutes a leading cause of wrongful convictions"); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1738 (1993) (noting that the defendant might never learn of withheld *Brady* material without post-conviction discovery); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 439 (1992) ("It is not an understatement to say that prosecutorial suppression of evidence presents perhaps one of the principal threats to a system of rational and fair fact-finding.").

IV. Conclusion

Mr. Colon has set forth compelling, undisputed, and newly discovered evidence that supports his actual innocence claim by shattering the credibility of the prosecution's star witness, Ariel Castro, who pleaded guilty to 937 counts of rape, kidnapping, and aggravated murder. Mr. Colon is simply asking for additional discovery to further bolster and prove his actual innocence claim. Under these circumstances, a trial court must be allowed to exercise discretion under its inherent authority to grant additional discovery. Accordingly, this Court should affirm the trial court's order granting discovery.

Respectfully submitted,

/s/ Dustin B. Rawlin
Dustin B. Rawlin (0072870)
Jennifer L. Mesko (0087897)
Jeffrey C. Sindelar Jr. (0084252)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
Telephone: (216) 592-5000
Facsimile: (216) 592-5009

Attorneys for Amicus Curiae
The Innocence Network

PROOF OF SERVICE

In compliance with App.R. 13(D), a copy of the foregoing was served on all counsel of record on November 30, 2015, via the Court's electronic filing system. In addition, pursuant to App.R. 13(C)(6), a copy of the forgoing was also served on November 30, 2015 via email to:

T. ALLAN REGAS (0067336)
Appellate Unit Supervisor
ANTHONY T. MIRANDA (0090759)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Phone: (216) 443-7416
aregas@prosecutor.cuyahogacounty.us
amiranda@prosecutor.cuyahogacounty.us

CULLEN SWEENEY (0077187)
ERIKA CUNLIFFE (0074480)
Assistant Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
Phone: (216) 443-7583
csweeney@cuyahogacounty.us
ecunliffe@cuyahogacounty.us

/s/ Dustin B. Rawlin
One of the Attorneys for Amicus Curiae
The Innocence Network