Original

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee, - against - CLARENCE D. ROBERTS, Appellant.	Case No. 11-1882 On Appeal from the Court of Appeals for Guernsey County, Fifth Appellate District Court of Appeals Case No. 10CA000047

MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF APPELLANT CLARENCE D. ROBERTS

Counsel for Appellee

DANIEL G. PADDEN (#0038781)
Prosecuting Attorney
(*Counsel of Record*)
Guernsey County Prosecutor's Office
139 West 8th Street
Cambridge, Ohio 43725
Telephone: (740) 439-2082
Fax: (740) 439-7161

Counsel for Appellant

OFFICE OF THE OHIO PUBLIC DEFENDER

CRAIG M. JAQUITH (#0052997)
Assistant State Public Defender
(*Counsel of Record*)
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Telephone: (614) 466-5394
Fax: (614) 752-5167
E-mail: craig.jaquith@opd.ohio.gov

Counsel for Amicus Curiae

DAVIS POLK & WARDWELL LLP

SHARON KATZ
(N.Y. Bar #1788090)*
(*Counsel of Record*)
JULIA NESTOR
(N.Y. Bar #4537916)
DAVID C. NEWMAN
(N.Y. Bar #4590808)
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4508
Fax: (212) 701-5508
E-mail: sharon.katz@davispolk.com

**Motion to admit pro hac vice pending*

FILED
NOV 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
NOV 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGE

EXPLANATION OF WHY THIS CASE IS OF GREAT PUBLIC INTEREST 1

INTEREST OF THE AMICUS CURIAE 2

STATEMENT OF FACTS 3

ARGUMENT 4

Proposition of Law: Section 2933.82 of the Ohio Revised Code Requires Preservation of DNA Evidence in the State's Possession as of the Statute's Effective Date 4

I. R.C. 2933.82 Mandates the Preservation of Evidence in Government Custody 4

II. The Appellate Court's Decision Is Completely at Odds With the Legislature's Intent 7

A. Lawmakers' Public Statements Confirm That Ohio's Preservation Law Was Intended to Benefit Individuals Already Serving Their Sentences 7

B. R.C. 2933.82 Was Built Upon an Older Statutory Framework Designed to Facilitate Access to Potentially Exculpatory DNA Testing 9

III. The Appellate Court's Decision Prevents Ohio Prisoners From Benefiting From Advances in DNA Testing Technology 10

CONCLUSION 13

EXPLANATION OF WHY THIS CASE IS OF GREAT PUBLIC INTEREST

This appeal presents critically important questions concerning a recently enacted portion of Ohio's landmark DNA testing law, R.C. 2933.82, which governs the retention of biological evidence. The Fifth District Court of Appeals interpreted R.C. 2933.82 to be applicable only to evidence obtained by the State since the statute took effect. In erroneously suggesting that a "retroactive application" of the statute would be required to cover the preservation of all other biological evidence presently within the State's possession, the court erred by departing from the statute's plain meaning and ignoring the intent of Ohio's legislature. Even if there were any ambiguity in the text of the statute, which there is not, the legislative history reveals a clear intent to broadly preserve all evidence currently in the State's possession, irrespective of when that evidence was collected or when the underlying case was adjudicated.

The appellate court's ruling undermines the purpose of Ohio's post-conviction law and bars those with legitimate claims of innocence from obtaining DNA testing. Since the advent of DNA technology, there have been 278 exonerations nationwide based in whole or in part on the application of scientific breakthroughs in DNA testing. Acknowledging that DNA evidence helps exonerate the innocent and identify the guilty, Ohio enacted legislation in 2003 to provide inmates with access to post-conviction DNA testing. Thereafter, in large part due to investigative reporting by the *Columbus Dispatch* and support from the Ohio Innocence Project, three innocent Ohioans were exonerated and the real perpetrators in four cases were convicted. In response to these exonerations and reports of endemic flaws in Ohio's DNA testing program, including defects in evidence preservation, the legislature enacted R.C. 2933.82.

The new law is part of a comprehensive scheme establishing procedures for DNA testing, as well as collection, preservation, and retention of biological evidence. The General Assembly

included R.C. 2933.82 as a crucial part of this scheme in recognition that DNA testing of evidence is possible only if that evidence has been preserved. One of the statute's main goals is to ensure that the wrongfully convicted are given access to the tools necessary to prove their innocence. Many of the innocent people exonerated through DNA testing were charged, tried and convicted long before testing was available and spent decades in prison before they were proven innocent. Yet the decision of the Court of Appeals, if permitted to stand, would thwart the legislature's attempt to protect from destruction much of the evidence currently in the State's possession and would unjustifiably preclude post-conviction testing access to those most likely to benefit from it – thereby denying justice to the wrongfully convicted, to victims of serious crime, and to society as a whole. Given the great public importance of this issue, this Court should accept jurisdiction and reverse the appellate court's decision.

INTEREST OF THE AMICUS CURIAE

The Innocence Network is an association of 65 organizations dedicated to providing pro bono legal and investigative services to 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, Australia, and New Zealand. The Innocence Network pioneered the use of post-conviction challenges based on DNA evidence, which to date have exonerated 278 innocent persons.

Cutting-edge advances in forensic DNA testing have provided scientific proof that our criminal justice system is susceptible to wrongful convictions, but science can only go so far. The innocent can be exonerated by DNA only if steps are taken to preserve biological evidence and make it available for testing as new and improved technologies are developed. As DNA

testing may often be the best source of exculpatory evidence (just as it may also help in the resolution of unsolved cold cases), the Innocence Network has a strong interest in ensuring that states adopt appropriate policies for the preservation of DNA evidence.

STATEMENT OF FACTS

Appellant Clarence D. Roberts was convicted of aggravated robbery and aggravated murder in 1997. Asserting that modern DNA testing of the biological evidence in his case would prove his innocence, on September 30, 2010, Mr. Roberts moved *pro se* for an order requiring the State to preserve and produce an inventory of the biological evidence in his case pursuant to Ohio's recently enacted R.C. 2933.82.

The Guernsey County Court of Common Pleas denied Mr. Roberts's request, *State v. Roberts*, No. 97-CR-63 (Ct. Com. Pl. Guernsey Cnty. Nov. 30, 2010), and Mr. Roberts appealed to the Fifth District Court of Appeals. On September 22, 2011, the Court of Appeals affirmed, holding that R.C. 2933.82, which took effect on July 6, 2010, could not be "retrospectively" applied to evidence from Mr. Roberts's 1997 case. *State v. Roberts*, 5th Dist. No. 10CA000047, 2011-Ohio-4969, at ¶¶ 13-14, 18-19.

The Court of Appeals erred in its interpretation of R.C. 2933.82. Retrospective application of the statute is neither sought nor required in this case. Instead, Mr. Roberts simply requests that R.C. 2933.82 be applied in accordance with its plain meaning to any evidence in his case that is currently in the possession of the government. In support of this position, the Innocence Network presents the following argument.

ARGUMENT

Proposition of Law: Section 2933.82 of the Ohio Revised Code Requires Preservation of DNA Evidence in the State's Possession as of the Statute's Effective Date.

I. R.C. 2933.82 Mandates the Preservation of Evidence in Government Custody

The appellate court's holding that R.C. 2933.82 is inapplicable to evidence retained in connection with Mr. Roberts's criminal case unless the statute is "applied retrospectively," *Roberts*, 2011-Ohio-4969, at ¶ 13, ignores the statute's plain meaning. By its clear and unambiguous language, R.C. 2933.82 applies to government entities *possessing* biological evidence *as of the effective date of July 6, 2010*, and contains no limitation to evidence collected after the effective date, or to criminal defendants arrested, indicted, or convicted after that date.

When a statute's meaning is clear and unambiguous, it must be applied as written. *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St. 3d 493, 2008-Ohio-6323, 900 N.E.2d 601, at ¶ 9. A statute may not be restricted, constricted, qualified, narrowed, enlarged, or abridged in its application. Significance and effect should be accorded to every word, phrase, and sentence. *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St. 3d 510, 2010-Ohio-2550, 929 N.E.2d 448, at ¶ 21. To understand a particular word used in a statute, a court is to read it in context and construe it according to the rules of grammar and common usage. Undefined terms should be accorded their plain and ordinary meaning. *Rhodes v. City of New Philadelphia*, 129 Ohio St. 3d 304, 2011-Ohio-3279, 951 N.E.2d 782, at ¶ 17.

In failing to consider whether R.C. 2933.82 could apply to biological evidence retained in connection with Mr. Roberts's case, the appellate court disregarded the unambiguous language of the statute. R.C. 2933.82 is directed toward any "governmental evidence-retention entity that *possesses* biological evidence." R.C. 2933.82(B)(3), (B)(4), (B)(5), (B)(7) (emphasis added). There is no qualification of the word "possesses" based on when the evidence came into the

government's care. Under R.C. 2933.82, if a government entity "possesses" certain biological evidence, it must retain that evidence in a prescribed amount and manner, prepare an inventory of the evidence upon a defendant's request, and comply with certain conditions before destroying the evidence within a specified time period. *Id.* The common meaning of the verb "possess," as applied to tangible items such as biological evidence, is to "have as property; own." *Am. Heritage Coll. Dictionary* 1087 (4th ed. 2007). As the only alternative potential meaning – to "gain or seize" – is obsolete, *id.*, repeated references to a government entity "that *possesses* biological evidence" demonstrate the legislature's focus on the fact of present ownership of evidence, and not the manner or timing by which ownership was achieved.

Likewise, R.C. 2933.82 directs that a "governmental evidence-retention entity that *secures* any biological evidence in relation to an investigation or prosecution" of certain crimes "shall *secure* the biological evidence" for a prescribed time period. R.C. 2933.82(B)(1) (emphases added). The most common meaning of the verb "secure" – and the only meaning that could reasonably apply to both instances of the word in R.C. 2933.82(B)(1) and thus avoid raising the "ridiculous" inference that the Ohio legislature intended for one word to have two meanings in the same statutory sentence, *Buckeye Power, Inc. v. Kosydar* (1973), 35 Ohio St. 2d 137, 140, 298 N.E.2d 610 – is to "guard from danger or risk of loss." *Am. Heritage Coll. Dictionary* 1254.

Clearest of all, R.C. 2933.82 charges a "preservation of biological evidence task force" with two separate duties: first, to create standards for evidence collection and retention "for ongoing investigations and prosecutions," and second, to make recommendations relating to evidence "*already in the possession* of governmental evidence-retention entities." R.C. 2933.82(C)(1) (emphasis added). The statute's ambit thus reaches not only newly collected

evidence, but also evidence – consistent with the common meaning of the words "possesses" and "secures" – that the government may have already retained for some period of time.

The appellate court's conclusion that R.C. 2933.82 does not apply to Mr. Roberts because he "was charged, tried, and convicted" prior to the effective date of the statute, *Roberts*, 2011-Ohio-4969, at ¶ 13, is therefore contrary to the statute's plain meaning. Similarly, the court's statement that the law does not apply to evidence that "has not been preserved pursuant to the practices and protocols under the new task force," *id.* ¶ 18, lacks any basis in the statute. By its clear terms, the statute applies if the government "possesses" evidence, regardless of whether the evidence has been subject to newly established practices and protocols for the *entire* duration of the government's custody. Under the appellate court's interpretation, R.C. 2933.82 would place no limits on the government's ability to destroy biological evidence retained in connection with an *unsolved* case in which the evidence was collected prior to July 6, 2010.

The court's characterization of Mr. Roberts as seeking "retroactive" or "retrospective" application of R.C. 2933.82 is misplaced. Mr. Roberts does *not* ask the State to "do what it did not know it had to do[,] i.e., meet R.C. 2933.82 standards in cases prior to its effective date," *Roberts*, 2011-Ohio-4969, at ¶ 14. To the extent that any biological evidence relating to his case may have been discarded *prior* to July 6, 2010, the statute affords Mr. Roberts no relief. All he asks is that any biological evidence that the government *now* "possesses" be preserved in the future according to the requirements of R.C. 2933.82. Such preservation is compelled by the statute's unambiguous language and, in any event, implicates none of the concerns underlying the normal presumption, R.C. 1.48, against the retroactive application of statutes. For instance, applying R.C. 2933.82 to evidence in the government's continuing possession would not impair any previously vested rights, increase the liability of any government or private entity, or impose

any new duties based on past conduct. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *State v. LaSalle*, 96 Ohio St. 3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, at ¶ 13.

II. The Appellate Court's Decision Is Completely at Odds With the Legislature's Intent

There can be no doubt that the Ohio General Assembly intended to benefit defendants who were already serving their sentences when it passed R.C. 2933.82. Moreover, Ohio's broader statutory framework for DNA testing reflects a sustained legislative commitment to facilitating access to potentially exculpatory DNA testing. The appellate court's decision, which would deny such access to the overwhelming majority of convicted offenders in Ohio's criminal justice system and permit the destruction of evidence that could be used to find perpetrators in older cases, contradicts R.C. 2933.82's animating purpose.

A. Lawmakers' Public Statements Confirm That Ohio's Preservation Law Was Intended to Benefit Individuals Already Serving Their Sentences

A 2008 series in the *Columbus Dispatch* entitled "Test of Convictions" drew significant attention to flaws in Ohio's post-conviction DNA testing system, including the frequency with which DNA evidence was lost or destroyed, and prompted DNA testing that led to the exoneration of two Ohioans, Robert McClendon and Joseph R. Fears, Jr. *See* Geoff Dutton & Mike Wagner, *Lost Hope; When DNA Evidence Goes Missing, So Does the Chance for an Exoneration*, Columbus Dispatch, Jan. 27, 2008, at 1A; *DNA Series Wins National Award; Testing Led to Freedom for Two Men*, Columbus Dispatch, Apr. 14, 2009, at 1B. During the legislative process that produced R.C. 2933.82, proponents of the law repeatedly stated that the law was inspired by the hard-won exonerations of wrongfully convicted Ohioans.

For example, Sen. David Goodman, a sponsor of the bill that ultimately became R.C. 2933.82, stated that the legislation was prompted by "Test of Convictions," which had "convincingly demonstrated that uneven evidence retention systems and other problems were

frustrating the intent of previous DNA legislation [the legislature had] passed . . . that opened DNA testing to those who felt they were wrongfully convicted."[1] Upon signing the bill into law, then-Governor Ted Strickland reiterated that the preservation law was meant to help already convicted offenders avail themselves of potentially exculpatory DNA testing. *See* Jon Craig, *DNA Testing Becomes Law in Ohio*, Cincinnati Enquirer, Apr. 6, 2010 ("'There is a percentage of people in our prisons who are innocent of crimes,' said [Governor Ted] Strickland . . . . 'The new procedures will help improve criminal investigations and save lives.'"). The centrality of the exonerated Ohioans' stories to the statute's passage, and the expressed commitment of the bill's proponents to preventing such stories from recurring, demonstrate that R.C. 2933.82 was intended to apply to offenders already serving their sentences as of the statute's effective date.

Moreover, both the original November 2010 guidelines and the updated May 2011 guidelines released by the newly created Preservation and Retention of Biological Evidence Task Force state that "[r]etention of biological evidence and/or material pertains to long-term storage of *evidence from inactive cases, cold cases or after litigation*."[2] The fact that the preservation requirements in R.C. 2933.82 apply to cold cases – as confirmed by the very entity created to help implement the requirements – is compelling proof that evidence from cases initiated prior to the statute's effective date was intended to be captured by its provisions.

---

[1] *See* Statements of Sen. David Goodman, 128th Gen. Assembly (June 24, 2009), *available at* http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=120939, at 24:48.

[2] Preservation of Biological Evidence Task Force, *Guidelines for Preservation and Retention of Biological Evidence* 14 (Nov. 29, 2010), *available at* http://ohiopa.org/bertf.pdf (emphasis added); Preservation of Biological Evidence Task Force, *Guidelines for the Preservation and Retention of Evidence* 13 (updated May 2011), *available at* http://www.ohioattorneygeneral.gov/getattachment/9078c579-5b34-467c-924e-5a6c465e06b5/Guidelines-for-Preservation-and-Retention-of-Biolo.aspx.

B. R.C. 2933.82 Was Built Upon an Older Statutory Framework Designed to Facilitate Access to Potentially Exculpatory DNA Testing

Viewed in context, R.C. 2933.82 is the latest in a series of legislative steps expanding DNA testing opportunities and remedying wrongful convictions.

Ohio first enacted its post-conviction DNA-testing access law in 2003. *See* R.C. 2953.71 *et seq*. The decision to permit post-conviction DNA testing in the first place reflects the General Assembly's appreciation of the role of biological evidence in correcting human error and exonerating the innocent, as well as in convicting the guilty. The effective date of the post-conviction DNA access law – predating R.C. 2933.82 by nearly seven years – belies the argument that R.C. 2933.82 was enacted in a vacuum and intended to apply only to cases initiated after July 6, 2010.

The General Assembly's commitment to increasing prisoners' access to DNA testing is also evidenced by amendments to the 2003 law that went into effect contemporaneously with R.C. 2933.82. After it came to light that restrictions in the 2003 law were forcing inmates to choose between staying in prison and retaining their eligibility to apply for DNA testing, and being released on parole and losing such eligibility – Robert McClendon, for example, opted to stay in prison – the General Assembly amended R.C. 2953.72 in 2010 to make post-conviction DNA testing available to a larger pool of felony offenders, including those on parole. *See* 2010 Sub. S.B. 77, Ohio 128th Gen. Assembly (eff. July 6, 2010); Statements of Sen. Bill Seitz, 128th Gen. Assembly (June 24, 2009), *available at* http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=120939, at 36:21-37:18. These amendments to Ohio's DNA testing statutes, which purposefully increased the availability of post-conviction DNA testing in order to prevent stories like McClendon's from recurring, cannot be reconciled with the appellate court's highly restrictive reading of related R.C. 2933.82.

III. The Appellate Court's Decision Prevents Ohio Prisoners From Benefiting From Advances in DNA Testing Technology

DNA evidence has the "unparalleled ability" to exonerate the wrongfully convicted and identify the guilty. *Dist. Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2312 (2009); *see also State v. Ayers*, 185 Ohio App. 3d 168, 2009-Ohio-6096, 923 N.E.2d 654, at ¶ 22. To date, 278 individuals in the United States convicted of crimes they did not commit have been exonerated based on DNA evidence.[3] The overwhelming majority of the convictions in these cases were obtained at times when DNA evidence, if it existed at all, was not as widely used as it is today, and DNA testing was not as accurate. In Ohio, the 10 individuals who have been exonerated by DNA evidence were wrongfully incarcerated for an average of 15 years before justice was finally served – some for much longer.[4] In many cases, the exoneration of the innocent also led to the conviction of the real perpetrators.[5]

Although the use of DNA evidence in criminal investigations and prosecutions is still developing, many defendants now have the ability prior to trial to request DNA testing of

---

[3] *See* Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php.

[4] *See* Innocence Project, Browse the Profiles, http://www.innocenceproject.org/know/Browse-Profiles.php; Innocence Project, Profile of Raymond Towler, http://www.innocenceproject.org/Content/Raymond_Towler.php (imprisoned more than 28 years before exoneration); Innocence Project, Profile of Joseph Fears, Jr., http://www.innocenceproject.org/Content/Joseph_Fears_Jr.php (imprisoned 25 years before exoneration).

[5] In 125 of the 278 DNA exonerations to date, the true perpetrator was identified. *See* Innocence Project, *supra* note 3; *see, e.g.*, Innocence Project, Profile of Danny Brown, http://www.innocenceproject.org/Content/Danny_Brown.php (DNA test that exonerated Brown implicated an incarcerated felon, who had been convicted of a similar killing); Innocence Project, Profile of Clarence Elkins, http://www.innocenceproject.org/Content/Clarence_Elkins.php (new Y-STR DNA test exonerating Elkins matched the profile of a convicted rapist); Innocence Project, Profile of Michael Green, http://www.innocenceproject.org/Content/Michael_Green.php (after Green's exoneration, the real perpetrator confessed and was convicted).

evidence collected in their cases. Defendants convicted years ago, however, may not have had the opportunity to obtain the high-caliber, often conclusive testing now available – or any testing at all. The vast majority of cases that can benefit from such testing are older cases in which convictions were obtained long before advancements in DNA technology became available.

In recent years, DNA testing has become more sensitive and reliable. Each technological advancement has enhanced the ability to conduct accurate testing on smaller and less pristine DNA samples. *See* Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L. Rev. 1453, 1469-70 & nn.107-09 (2007). There is a direct correlation between advancements in DNA testing technology and the increase in the number of exonerations, and the testing of formerly inconclusive biological evidence has led to many exonerations. *See* Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1658-59 (2008); Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 Am. Crim. L. Rev. 1239, 1242-43 (2005). Newer technology and smaller sample sizes are expected to yield even more exonerations in older cases in the near future.

Several of the Ohio exonerations were made possible by advancements in DNA testing technology – and, in fact, Ohio's laws providing access to post-conviction DNA testing were intended "'to allow otherwise qualified inmates the opportunity to take advantage of advances in technology that were not available at the time of their trials.'" *State v. Prade*, 126 Ohio St. 3d 27, 2010-Ohio-1842, 930 N.E.2d 287, at ¶ 29 (quoting *State v. Emerick*, 170 Ohio App. 3d 647, 2007-Ohio-1334, 868 N.E.2d 742, at ¶ 18). For example, at the time of Raymond Towler's trial in 1981, no DNA test had been conducted on the victim's clothing, and in 2004 the laboratory

was still unable to find any biological evidence.[6] However, in 2010, after Towler's claim of actual innocence was featured in the *Columbus Dispatch*, the clothing was re-tested using relatively new technology, exonerating Towler.

For biological evidence to free the innocent, however, it must be *preserved* to be available for later testing. Many defendants are unaware of their ability to seek DNA testing and lack resources to obtain testing. Of the first 200 individuals exonerated by DNA evidence, the vast majority were not exculpated until after their appeals were exhausted. *See* Cynthia E. Jones, *The Right Remedy for the Wrongfully Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 Fordham L. Rev. 2893, 2926-27 (2009).

Given the lengthy process and many obstacles to obtaining post-conviction DNA testing, such testing would be nearly impossible in older cases if the evidence were destroyed, lost, or otherwise not properly preserved. Therefore, given the indisputable importance of DNA evidence to exonerations nationwide and in Ohio, and the fact that evidence-preservation laws ensure access to DNA samples for future testing, the appellate court's decision here – interpreting Ohio's preservation statute not to apply to any evidence from older cases – constitutes a serious error worthy of this Court's review.

---

[6] *See* Profile of Raymond Towler, *supra* note 4; *see also* Innocence Project, Profile of Donte Booker, http://www.innocenceproject.org/Content/Donte_Booker.php (new biological testing in 2005 excluded Booker as the perpetrator of a 1986 rape).

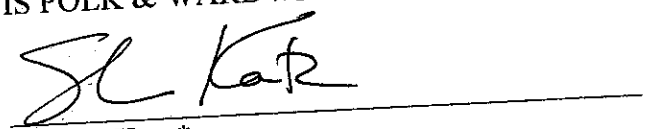
CONCLUSION

For the reasons set forth above and in the brief filed by Mr. Roberts, this case involves matters of public and great general interest. The Innocence Network therefore respectfully requests that this Court accept jurisdiction, so that the important issue presented here can be reviewed on the merits and the erroneous decision of the Court of Appeals reversed.

Dated: November 5, 2011

Respectfully submitted,

DAVIS POLK & WARDWELL LLP

By: 

Sharon Katz*
Julia Nestor
David C. Newman

450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4508
Fax: (212) 701-5508
E-mail: sharon.katz@davispolk.com

Counsel for Amicus Curiae the Innocence Network

** Motion to admit pro hac vice pending*

CERTIFICATE OF SERVICE

A copy of the foregoing document was served on this 5th day of November, 2011, by Federal Express overnight delivery services, on (1) Daniel G. Padden, Prosecuting Attorney, Guernsey County Prosecutor's Office, 139 West 8th Street, Cambridge, Ohio 43725; and (2) Craig M. Jaquith, Assistant State Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

David C. Newman

Sworn to before me this
5th day of November, 2011

RYAN A. ALBERTS
NOTARY PUBLIC, State of New York
No. 01AL6228140
Qualified in New York County
Commission Expires Sept. 13, 2014

NOTARY PUBLIC
Ryan Alexander Alberts