ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee, - against - CLARENCE D. ROBERTS, Appellant.	Case No. 2011-1882 On Appeal from the Court of Appeals for Guernsey County, Fifth Appellate District Court of Appeals Case No. 10CA000047

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

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FILED
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CLERK OF COURT
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Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 Fordham L. Rev. 1453 (2007) 14

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DNA Series Wins National Award; Testing Led to Freedom for Two Men, Columbus Dispatch (Apr. 14, 2009), at 1B 9

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Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629 (2008) 14

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Cynthia E. Jones, *The Right Remedy for the Wrongfully Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 Fordham L. Rev. 2893 (2009)..... 15-16

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INTRODUCTORY STATEMENT

This appeal concerns a recently enacted provision of Ohio's post-conviction DNA testing law, R.C. 2933.82, which governs the retention of biological evidence secured in connection with an investigation or prosecution which is in the State's possession. The Court of Appeals, in holding that Appellant was not entitled, pursuant to R.C. 2933.82, to the preservation and inventory of the biological evidence in his case, distinguished between evidence that entered the State's possession after the statute's effective date of July 6, 2010 and evidence that was collected prior to that date and remained in the State's possession afterward. According to the court below, only evidence collected after July 6, 2010 is subject to the protections of R.C. 2933.82, and Appellant therefore is not entitled to the preservation and inventory of the biological evidence collected in connection with his 1997 criminal case, even if it still remains in the State's possession.

The decision below should be reversed because the distinction made by the lower court is contradictory to both the plain meaning and the intent of the statute. R.C. 2933.82, as written, unambiguously applies to biological evidence in the State's possession on July 6, 2010 or thereafter, without regard to the date when the evidence first entered the custody of the State or the date of the crime. The decision below is likewise inconsistent with the legislative history of R.C. 2933.82—which clearly evinces the Legislature's intent to make DNA testing of biological evidence available in cases both old and new—and with the uniform practice of other states that, like Ohio, have codified requirements to preserve biological evidence for DNA testing.

Furthermore, the decision below does not comport with common sense. Advances in DNA testing technology have helped exonerate 289 individuals convicted in the United States of crimes that they did not commit, in many cases years after the fact. These advances have also

allowed law enforcement to bring the real perpetrators to justice. Laws like R.C. 2933.82 are meant to ensure that future technological advances can, to the greatest extent possible, continue to help identify the guilty and free the innocent. The lower court's reading of the statute unreasonably limits its intended effect by authorizing the destruction of potentially exculpatory or inculpatory evidence based on the arbitrary circumstance of when the evidence was collected.

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 289 innocent persons in the United States.

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 evidence 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. Mr. Roberts timely appealed, and this Court accepted his appeal on February 1, 2012. *See 02/01/2012 Case Announcements*, 2012-Ohio-331.

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 in the government's possession. 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 holding of the court below 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, is incorrect and 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 applies to biological evidence retained in connection with Mr. Roberts's case, the appellate court disregarded the unambiguous language of the statute. By its terms, 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).

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 lower court's conclusion that R.C. 2933.82 does not apply to Mr. Roberts's case 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 lower 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 "possesses" be preserved 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.

Courts interpreting similar evidence preservation statutes of other states are in accord, holding that newly enacted evidence preservation laws apply to *existing* evidence, even if that application might be labeled "retrospective" because the evidence already exists. *See Gregg v. Maryland*, 409 Md. 698, 715-16, 976 A.2d 999, 1008-09 (Md. Ct. App. 2009) (giving what was labeled "retrospective effect" to Maryland's evidence preservation statute, in holding that a 2003 amendment applied to a petition filed by a defendant in 2005 with respect to evidence collected in 2002); *see also Blake v. Maryland*, 395 Md. 213, 223, 909 A.2d 1020, 1026 (Md. 2006) ("The statute, as drafted, presumes that the evidence a petitioner requests to be tested in fact exists, and does not, on its face, contemplate circumstances *where the evidence has been destroyed before the adoption of the statute*, or where there is a factual dispute over the existence of DNA testing evidence." (emphasis added)).[1]

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

Even assuming *arguendo* that the text of R.C. 2933.82 were ambiguous, which it is not, there can be no doubt that the Ohio General Assembly intended the statute to apply to cases initiated prior to July 6, 2010. The cases of three Ohio inmates who were wrongfully convicted

[1] That evidence preservation statutes have been drafted and interpreted in this manner is also consistent with the federal recommendations that prompted many such efforts. The National Commission on the Future of DNA Evidence, created in 1998 at the request of Attorney General Janet Reno, and chaired by Wisconsin Supreme Court Chief Justice Shirley S. Abrahamson, set out proposed guidelines for post-conviction DNA testing that distinguished between "cases in which biological evidence was collected *and still exists*" (emphasis added) and "cases in which biological evidence was never collected, or cannot be found despite all efforts, or was destroyed, or was preserved in such a way that it cannot be tested." *See Blake*, 395 Md. at 219-21, 909 A.2d at 1023-25. Thus, the obvious assumption behind evidence preservation laws enacted in response to these recommendations was that they would apply to *whatever evidence existed in testable form* at the time of such enactment.

in the 1980s and 1990s and were later exonerated as a result of post-conviction DNA testing were directly related to the enactment of the preservation statute. Furthermore, the legislative history of R.C. 2933.82 confirms that the statute was intended to benefit wrongfully convicted defendants already serving their sentences as of the statute's effective date, and this Court repeatedly has endorsed consulting legislative history as a means of discerning legislative intent, *see, e.g.*, *Meeks v. Papadopulos* (1980), 62 Ohio St. 2d 187, 191 (statutes "are to be read in the light of attendant circumstances and conditions, and are to be construed as they were intended to be understood, when they were passed") (quotation marks omitted); *State ex rel. Gareau v. Stillman* (1969), 18 Ohio St. 2d 63, 64 (per curiam).

Moreover, Ohio's broader statutory framework for DNA testing reflects a sustained legislative commitment to facilitating prisoners' access to potentially exculpatory DNA testing. The appellate court's decision, which would deny such access to the majority of defendants in Ohio's criminal justice system and permit the destruction of evidence that could be used to find perpetrators in older cases, defies R.C. 2933.82's animating purpose.

A. Public Statements of Legislators and the Governor Confirm That R.C. 2933.82 Was Meant to Benefit Individuals Already Serving Their Sentences

Proponents of R.C. 2933.82 stated throughout the legislative process that the act was inspired by the hard-won exonerations of wrongfully convicted Ohioans, including Columbus's Robert McClendon and Joseph R. Fears Jr. The Columbus Dispatch's 2008 series "Test of Convictions" drew attention to unforeseen flaws in Ohio's inmate DNA testing system, including the frequency with which DNA evidence was lost or destroyed, *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 ("In DNA cases across the state, lost or destroyed evidence ended any chance for the convicts to use scientific advances that often were

unavailable during their trials."), and prompted DNA testing that led to the release of McClendon and Fears in 2008 and 2009, respectively, *DNA Series Wins National Award; Testing Led to Freedom for Two Men*, Columbus Dispatch (Apr. 14, 2009), at 1B. McClendon and Fears, along with Walter Smith, another Ohioan exonerated based on DNA evidence in 1996, were present the day the Ohio Senate passed Substitute Senate Bill 77, which ultimately became R.C. 2933.82. That day, the bill's lead sponsor, Senator David Goodman, confirmed in his remarks that the bill 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 I passed during the 125th General Assembly [in 2003] that opened DNA testing to those who felt they were wrongfully convicted."[2] He further stated:

> Nationally, there have been 240 postconviction exonerations resulting from DNA evidence, and the number continues to grow. When I started working on this legislation just over a year ago, there were six Ohio exonerees; now, there are eight.[3] Collectively, these eight Ohioans have spent over 111 years in prison . . . , all for crimes they didn't commit. This legislation seeks to prevent such travesties from happening by enacting simple yet meaningful changes to our system of justice that will modernize Ohio's best practices.[4]

Senator Goodman then recognized McClendon, Fears and Smith, and concluded by telling them, "we can't bring back those lost years, but the passage of this legislation will give you some sense of comfort that this might not happen again to other individuals in the state of Ohio." *See also*

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

[3] Since Senator Goodman's statements, this number has risen to ten. *See* Innocence Project, *Know the Cases: Browse the Profiles*, *at* http://www.innocenceproject.org/know/Browse-Profiles.php (last visited Apr. 20, 2012).

[4] Statements of David Goodman, *supra* note 2 (emphasis added).

Statements of Sen. Eric Kearney, 128th Gen. Assembly (June 24, 2009) ("What I would say about the policy of this bill is the stories of the men . . . who testified about being in prison wrongly and knowing that there was evidence available that could prove their innocence [were] very moving . . . ."); Statements of Sen. Bill Seitz, 128th Gen. Assembly (June 24, 2009) (wrongful convictions can result when "the evidence that [defendants] need to get a DNA test [is] improperly handled or not retained. So the evidence that would prove actual innocence has gone missing. This bill solves that").

The legislative intent behind R.C. 2933.82 is explicit in these Senators' statements. The words of then-Governor Ted Strickland after he signed the bill into law further corroborate that R.C. 2933.82 was meant to help already-convicted individuals avail themselves of potentially exculpatory DNA testing. *See* Jon Craig, *DNA Testing Becomes Law in Ohio*, The Cincinnati Enquirer (Apr. 6, 2010) ("'There is a percentage of people in our prisons who are innocent of crimes,' said [Gov. 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 further injustices from recurring, demonstrate that R.C. 2933.82 was intended to apply to individuals already serving their sentences as of the statute's effective date.

B. The Preservation of Biological Evidence Task Force Twice Has Interpreted R.C. 2933.82 To Apply to Cold and Inactive Cases

The November 2010 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.*"[5]

[5] Preservation of Biological Evidence Task Force, *Guidelines for Preservation and Retention of Biological Evidence* 14 (Nov. 29, 2010) (emphasis added), *available at*

The fact that the preservation requirements in R.C. 2933.82 apply to inactive and 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.

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

In 2003, the Ohio legislature enacted an initial framework for DNA testing: R.C. 2953.72 sets forth the eligibility requirements for post-conviction DNA testing; R.C. 2953.74 charges the courts with deciding whether a defendant who previously received DNA testing is entitled to additional testing; R.C. 2953.75 requires prosecutors to use reasonable diligence in searching for DNA evidence collected from the crime scene and/or the victim; and R.C. 2953.81 mandates the preservation of DNA evidence used or produced in post-conviction testing for no fewer than two years after the individual's sentence, parole, and/or post-release supervision ends.[6] These statutes reflect the General Assembly's understanding that DNA evidence must be treated with special care, and its recognition of the value of preserving such evidence for use in later DNA tests or by courts in assessing whether previously tested defendants are entitled to additional testing. The effective date of these provisions, nearly seven years before that of R.C. 2933.82, belies the argument that the preservation standards contained in R.C. 2933.82 were

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http://ohiopa.org/bertf.pdf. The updated guidelines, released in May 2011, contain identical language. *See* 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.

[6] The statute requires that the DNA evidence be preserved for a "reasonable" period of time of not less than the period indicated above, with the court determining "the period of time that is reasonable." R.C. 2953.81(A).

made out of whole cloth and were intended to apply only to cases initiated after July 6, 2010. The existence of these related statutes prior to R.C. 2933.82's effective date demonstrate that R.C. 2933.82 was just another legislative step toward expanding DNA testing opportunities and remedying wrongful convictions of individuals already serving prison sentences.

Later amendments to the foregoing statutes reflect the General Assembly's sustained commitment to increasing convicted individuals' access to DNA testing. As the Court of Appeals recently acknowledged in *State v. Ayers*, amendments to R.C. 2953.72 in 2006 operated to make "postconviction DNA testing more available to inmates and lower[ed] the outcome determinative standard for establishing entitlement to DNA testing." 185 Ohio App. 3d 169, 2009-Ohio-6096, 923 N.E.2d 654 ¶ 19. But within two years of these amendments, the General Assembly realized that those reforms had not gone far enough; because R.C. 2953.72 at that time restricted post-conviction DNA testing to individuals then in prison with at least one year left to serve, defendants who had completed prison terms or were less than one year away from doing so were categorically precluded from seeking testing. *See, e.g.*, Statements of Sen. Goodman, *supra* note 2 (explaining this inequity in the law and relating how Robert McClendon had opted to stay in prison rather than be released on parole in order to ensure his ability to undergo DNA testing). In order to cure this glaring deficiency, Substitute Senate Bill 77 amended R.C. 2953.72's eligibility provision to make post-conviction DNA testing available to a much larger pool of individuals convicted of a felony, including those serving non-incarcerative sentences. *See* 2010 Sub. S.B. 77, 128th Gen. Assembly (eff. July 6, 2010). These amendments to Ohio's DNA testing regime, which purposefully increased the availability of post-conviction DNA testing in order to prevent stories like Robert 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 is "one of the most powerful tools" to exonerate the wrongfully convicted and identify the guilty. *Ayers*, 2009-Ohio-6096, at ¶ 22 (internal citations omitted). DNA technology today yields more conclusive evidence than any testing conducted in the past. In fact, new developments in DNA testing technology have made it possible to positively conclude whether a biological sample matches a suspect.

Post-conviction DNA testing has led to the exoneration of 289 individuals to date in the United States.[7] In fact, there have been nine *new* exonerations since the Innocence Network first filed its jurisdictional amicus curiae brief on November 7, 2011 in support of Mr. Roberts' appeal.[8] The overwhelming majority of the *convictions* in these 289 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. By contrast, the majority of these *exonerations*—222 in total—have taken place since 2000, when the use of DNA evidence became more prevalent.[9] In many of these cases, DNA testing has not only exonerated the innocent, but has also led to the conviction of the real perpetrators.[10]

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

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

[8] *See* Innocence Project, *supra* note 3.

[9] *See* Innocence Project, *supra* note 7.

[10] In 139 of the 289 DNA exonerations to date, the true perpetrator was identified. *See* Innocence Project, *supra* note 7.

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 advancements in DNA testing technology are older cases in which convictions were obtained long before such improved testing became available.

In recent years, DNA testing has become more sensitive and reliable. Since the first DNA exoneration in 1989, DNA technology has continued to advance, enhancing 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. Furthermore, the quick pace of technological advancement in DNA testing, misconduct by forensics experts, or lack of testing due to ineffective assistance of counsel may require testing of older evidence for some time to come. *See* Garrett, *Claiming Innocence*, at 1634, 1658, 1661.

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.[11] 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. Similarly, as a result of re-testing small DNA samples in the State's possession with more sophisticated testing technology, Donte Booker and Robert McClendon were exonerated of rape.[12]

Given the length of time that most of the wrongfully convicted are incarcerated prior to exoneration, there are likely still individuals who have legitimate claims of innocence that have not had the opportunity to obtain post-conviction DNA testing with the advent of new technology. In Ohio, the 10 individuals who have been exonerated by DNA evidence to date were wrongfully incarcerated for an average of 15 years before justice was finally served—some for much longer.[13] Of the first 200 individuals exonerated by DNA evidence nationwide, the vast majority were not exculpated until after their appeals were fully exhausted. *See* Cynthia E. Jones, *The Right Remedy for the Wrongfully Convicted: Judicial Sanctions for Destruction of*

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[11] *See* Innocence Project, Browse the Profiles, Raymond Towler, http://www.innocenceproject.org/know/Browse-Profiles.php.

[12] *See* Innocence Project, Browse the Profiles, Donte Booker and Robery McClendon, http://www.innocenceproject.org/know/Browse-Profiles.php.

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

DNA Evidence, 77 Fordham L. Rev. 2893, 2926-27 (2009). Numerous causes lead to delays in obtaining DNA testing, including that many defendants are unaware of their ability to seek DNA testing and lack resources to obtain such testing.

In addition to exonerating the wrongfully convicted, DNA evidence is extremely helpful in solving crimes. In 139 of the exonerations to date, the very DNA test that exonerated the innocent implicated the guilty.[14] In the Ohio exonerations of Danny Brown, Clarence Elkins and Robert McClendon, the real perpetrator was identified through the post-conviction testing that led to each man's exoneration.[15] Thus, the existence of biological evidence is essential not only to those wrongfully convicted but also to apprehend the true perpetrators of unsolved crimes.

For biological evidence to free the innocent and convict the guilty, however, it must be *preserved* to be available for later testing—often long after an initial conviction has been obtained. None of the nation's DNA exonerations would have been possible had the biological evidence been lost or destroyed. In the past eight years, the Innocence Project has had to close 22% of its cases because evidence was not properly preserved and was either lost or destroyed.[16]

More than 30 states have adopted legislation requiring the automatic preservation of evidence upon a defendant's conviction. Many of these laws are similar to Ohio's and provide—as does Ohio—that evidence in the government's possession on the effective date of the statute must be preserved. We have found no court, *with the sole exception of the Court of Appeals in this case*, that has construed any of these statutes to tacitly limit their protection to evidence

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[14] See Innocence Project, *supra* note 7.

[15] *See* Innocence Project, Browse the Profiles, Danny Brown, Clarence Elkins, and Robert McClendon, http://www.innocenceproject.org/know/Browse-Profiles.php.

[16] *See* Innocence Project, *supra* note 7.

collected or defendants charged or convicted after the statute's effective date. *See, e.g.*, *In re Bowman*, No. 03-09-00212-CR, 2009 Tex. App. LEXIS 8187, at *9-10 (Tex. App. Oct. 21, 2009) (Texas preservation statute applies to evidence in the State's possession as of the effective date of the statute); *State v. Bryant*, No. A-05-948, 2007 Neb. App. LEXIS 178, at *14-15 (Neb. Ct. App. Sept. 18, 2007) (same for Nebraska); Ga. Code Ann. § 17-5-56 (requiring Georgia to preserve certain evidence in its possession as of the effective date of the statute); Mich. Comp. Laws § 770.16(12) (same for Michigan); Miss. Code Ann. § 99-49-1 (same for Mississippi).

Indeed, in jurisdictions with statutes providing that evidence must be preserved as of the statute's effective date, courts have applied the preservation requirement to cases where the crimes occurred prior to the effective date. *See, e.g.*, *Hood v. United States*, 28 A.3d 553, 566 (D.C. 2011) (applying preservation law enacted in 2002 to crimes that occurred in 1989, but denying access to non-biological evidence not covered by the statute); *People v. Schutz*, 344 Ill. App. 3d 87, 96 (Ill. App. 1st Dist. 2003) (applying preservation law enacted in 2001 to crimes that occurred in 1970); *Moore v. Commonwealth*, 357 S.W.3d 470, 2011 Ky. LEXIS 91, at *58-62 (Ky. 2011) (applying preservation law enacted in 2002 to crimes that occurred in 1979).

The reason for the consistent approach in other states is self-evident: if the chief purpose of post-conviction DNA testing laws is to exonerate the wrongfully convicted, then laws or policies permitting the destruction of evidence that could potentially lead to an exoneration contradict that purpose.

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.

CONCLUSION

For all of the reasons set forth above and in the brief of Appellant Clarence D. Roberts, amicus curiae the Innocence Network respectfully urges this Court to reverse the decision of the Court of Appeals below and to hold that R.C. 2933.82 must be given its plain meaning of applying to biological evidence already in the State's possession on or after July 6, 2010.

Dated: April 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing document was served on this 20st day of April, 2012, by Federal Express, on (1) Daniel G. Padden, Prosecuting Attorney, Guernsey County Prosecutor's Office, 139 West 8th Street, Cambridge, Ohio 43725; and (2) Kristopher Haines, Assistant State Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

Sharon Katz

Sworn to before me this
20st day of April, 2012

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