No. 18-444

In the Supreme Court of the United States

STATE OF MONTANA, PETITIONER,

v.

RONALD DWIGHT TIPTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE OF VIRGINIA, ARKANSAS, COLORADO, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MINNESOTA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, AND WASHINGTON IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI AND SUMMARY OF ARGUMENT[1]

The Commonwealth of Virginia and the States of Arkansas, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Minnesota, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, and Washington (collectively, Amici States) urge this Court to grant certiorari to re-examine *Stogner* v. *California*, 539 U.S. 607 (2003), and decide whether a State may constitutionally extend the statute of limitations for a criminal offense based on a conclusive DNA identification.

"The advent of DNA technology is one of the most significant scientific advancements of our era" and "the utility of DNA identification in the criminal justice system is already undisputed." *Maryland* v. *King*, 569 U.S. 435, 442 (2013). Unlike other types of evidence, DNA has the ability to objectively and conclusively identify the perpetrator of a crime. As this case well illustrates, "DNA testing [thus] has an unparalleled ability both to exonerate the wrongfully convicted and to identify the guilty." *District Atty's Office for the Third Jud. Dist.* v. *Osborne*, 557 U.S. 52, 55 (2009).[2] And as this case also illustrates, DNA evidence frequently plays a critical role in the investigation and prosecution of sex-related offenses.

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[1] The parties' counsel of record received notice of the intent to file this brief.

[2] According to the Innocence Project, 362 prisoners have been exonerated and 158 assailants have been identified to-date through post-conviction DNA testing. Innocence Project, https://www.innocenceproject.org/. This number excludes DNA identifications made in the absence of a wrongful conviction.

The Amici States have a strong interest in realizing the full benefit of DNA evidence collected in the wake of criminal activity. Many states provide for "actual innocence" DNA testing years after the offense.[3] On the flip side, 27 States (including Montana) have extended or tolled their otherwise-applicable statutes of limitations for situations where the government obtains DNA evidence identifying a perpetrator.[4]

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[3] Ala. Code § 15–18–200; Alaska Stat. § 12.73.010; Ariz. Rev. Stat. Ann. § 13–4240; Ark. Stat. Ann. § 16–112–208; Cal. Penal Code § 1405; Colo. Rev. Stat. Ann. § 18–1–412; 11 Del. Code Ann. § 4504; Fla. Stat. § 925.11; Ga. Code Ann. § 5–5–41(c); Haw. Rev. Stat. Ann. § 844D–121; Idaho Code § 19–4902(b); 725 Ill. Comp. Stat. Ann. 5/116–3; Ind. Code Ann. § 35–38–7–5; Iowa Code Ann. § 81.10; Kan. Stat. Ann. § 21–2512; Ky. Rev. Stat. § 422.285; La. Code Crim. Proc. Ann. art. 926.1; Me. Rev. Stat. Ann. tit. 15 § 2137; Md. Code Ann., Crim. Proc. § 8–201; Mich. Comp. Laws Ann. § 770.16; Minn. Stat. Ann. § 590.01; Miss. Code Ann. § 99–39–5; Mo. Rev. Stat. § 547.035; Mont. Code Ann. § 46–21–110; Neb. Rev. Stat. § 29–4120; Nev. Rev. Stat. § 176.0918; N.H. Rev. Stat. Ann. § 651–D:2; N.J. Stat. Ann. § 2A:84A–32a; N.M. Stat. Ann. § 31–1A–2; N.Y. Crim. Proc. Law § 440.30; N.C. Gen. Stat. § 15A–269; N.D. Cent. Code Ann. § 29–32.1–15; Ohio Rev. Code Ann. § 2953.72; Or. Rev. Stat. § 138.690; 42 Pa. Cons. Stat. § 9543.1; R.I. Gen. Laws § 10–9.1–11; S.C. Code Ann. § 17–28–30; S.D. Codified Laws Ann. § 23–5B–1; Tenn. Code Ann. § 40–30–303; Tex. Crim. Proc. Code Ann. § 64.01; Utah Code Ann. § 78B–9–301; Vt. Stat. Ann. tit. 13, § 5561; Va. Code Ann. § 19.2–327.1; Wash. Rev. Code Ann. § 10.73.170; W. Va. Code § 15–2B–14; Wis. Stat. § 974.07; Wyo. Stat. § 7–12–303.

[4] Ark. Code Ann. § 5–1–109(b)(1)(B), (j); Cal. Penal Code § 803(g); Colo. Rev. Stat. Ann. § 16–5–401(8)(a.5); Conn. Gen. Stat. Ann. § 54–193b; 11 Del. Code Ann. § 205; Ga. Code Ann. § 17–3–1; Haw. Rev. Stat. Ann. § 701–108; 720 Ill. Comp. Stat. Ann. 5/3–5; Ind. Code Ann. § 35–41–4–2; Iowa Code Ann. § 802.2B; Kan. Stat. Ann. § 21–5107; La. Code Crim. Proc. Ann. art. 572(B); Mich. Comp. Laws Ann. § 767.24; Minn. Stat. Ann.

At least as construed by the lower courts, however, *Stogner* stands as an unfortunate and unnecessary obstacle to DNA evidence's ability to reach its full "potential to significantly improve both the criminal justice system and police investigative practices." *Osborne*, 557 U.S. at 55. Because of *Stogner*, both the States and the federal government are currently prohibited from extending lapsed limitations periods for criminal offenses—regardless of the circumstances or the certainty with which a wrongdoer can now be identified. *Stogner* harms States and their citizens by allowing dangerous offenders to remain at large and preventing vindication of victims' rights. And those harms are particularly pronounced in the context of sex-related offenses, where DNA evidence is routinely collected but where (as here, see Pet. 4–6) there often are delays in testing the evidence and identifying the perpetrator. The Amici States thus share petitioner's view that this Court should grant review to clarify *Stogner*'s holding or to overrule it entirely.

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§ 628.26; N.J. Stat. Ann. § 2C:1–6; N.M. Stat. Ann. § 30–1–9.2; N.D. Cent. Code Ann. § 29–04–03.1; Ohio Rev. Code Ann. § 2901.13; Okla. Stat. Ann. tit. 22, § 152; Or. Rev. Stat. Ann. § 131.125; 42 Pa. Cons. Stat. § 5552; Tex. Crim. Proc. Code Ann. § 12.01; Utah Code Ann. § 76–1–302; Wash. Rev. Code Ann. § 9A.04.080; Wis. Stat. § 939.74; accord *People v. Ramos*, 13 N.Y.3d 881, 881–82 (2009) (holding that New York's limitations period for rape was tolled until the defendant's "DNA profile from the rape kit . . . was matched to DNA evidence taken from [the] defendant pursuant to a subsequent incarceration" because his whereabouts were "continuously unknown and continuously unascertainable" until that time).

ARGUMENT

The lower courts have generally understood *Stogner* v. *California*, 539 U.S. 607 (2003), as barring States from enforcing statutes that would otherwise give law enforcement the ability to prosecute a criminal offense where the perpetrator has been identified by DNA evidence. That is, even where a State has conclusive evidence that a specific person committed a particular crime, the State is prohibited from prosecuting the guilty party if the otherwise-applicable limitations period ever expired before the DNA identification evidence was obtained. *Stogner* thus stands as a roadblock to States' efforts to reform their limitations periods—which are designed to address evidentiary concerns associated with large lapses in time—in light of new technologies that eliminate those very concerns.

A. States have a significant interest in their ability to extend limitations periods in light of DNA technology

Before DNA evidence became commonplace, States had designed their limitations periods for criminal offenses based on concerns about the viability of evidence after a significant lapse in time. But DNA evidence fundamentally changes that calculus by making it possible in some cases (like this one) to conclusively identify a guilty party even long after an offense occurred. The petition for a writ of certiorari thus presents an important question: on what terms may a State modify its otherwise-applicable limitations to account for the possibility that a perpetrator

will be conclusively identified by DNA evidence in the future?

1. As petitioner's case starkly highlights, DNA technology has fundamentally changed the way States investigate and seek to prove many of the most serious crimes. What most distinguishes DNA from other types of evidence is that a conclusive identification can be made even many years after the events in question. Unlike memories, properly preserved DNA evidence does not fade, nor is it subject to interpretation or manipulation. Here, for example, respondent could provide no innocent explanation for the presence of his DNA inside an eight-year-old girl's underwear.

Given DNA's unique capacity "to identify the guilty," *Osborne*, 557 U.S. at 55, many States have chosen to extend the otherwise-applicable limitations period in situations where such evidence becomes available. See note 3, *supra*. That decision makes perfect sense given the purpose of limitations periods: to protect people from prosecution where "the basic facts may have become obscured by the passage of time." *United States* v. *Marion*, 404 U.S. 307, 323 (1971). Because DNA evidence allows States to prosecute cold cases without relying on fading memories or degraded physical evidence, the principal justification for a limitations period falls away.

2. States also have increased their capacity to engage in DNA testing in cold cases. Until 2005, States often lacked the funding necessary to test the rapidly accumulating quantity of DNA evidence collected by law enforcement. Between 2005 and 2008, however,

the National Institute for Justice helped state and local authorities increase their DNA processing capabilities almost threefold.[5] And since 2011, the Department of Justice has granted nearly $500 million to reduce DNA testing backlogs at the state and local levels.[6]

Nor have States simply been relying on the federal government to increase their capacities. In Virginia, for example, the Attorney General secured $3.5 million in funding in 2016 to help eliminate a substantial backlog of untested rape kits.[7] Other States have likewise implemented efforts to increase their DNA testing capabilities in recent years.[8]

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[5] *Office of Justice Programs Fact Sheet*, U.S. DEP'T OF JUSTICE, https://ojp.gov/newsroom/factsheets/ojpfs_dnabacklog.html.

[6] *DNA Evidence: Preliminary Observations on DOJ's DNA Capacity Enhancement and Backlog Reduction Grant Program*, U.S. Gov't Accountability Office, https://www.gao.gov/products/GAO-18-651T; accord AG's Office Wins $3M Federal Grant to Process Backlogged Sexual Assault DNA Evidence, https://www.atg.wa.gov/news/news-releases/ag-s-office-wins-3m-federal-grant-process-backlogged-sexual-assault-dna-evidence. DNA testing conducted based on these grants has been instrumental in obtaining convictions in cold cases. See *Commonwealth* v. *Churchill*, No. 2280 EDA 2016, 2018 WL 617073 (Pa. Super. Ct. Jan. 30, 2018).

[7] *Attorney General Herring Hosts OAG Cold Case Sexual Assault Training Conference as Part of PERK Testing Project*, Commonwealth of Virginia Office of the Attorney General, https://www.oag.state.va.us/media-center/news-releases/1054-october-12-2017-herring-hosts-cold-case-sexual-assault-training-conference-as-part-of-perk-testing-project.

[8] In spite of these efforts, a recent investigation found a backlog of 70,000 DNA testing kits across just 1,000 police departments. Steve Reilly, *Tens of thousands of rape kits go untested*

3. The States have a compelling interest in prosecuting perpetrators in cold cases involving DNA identification evidence. As petitioner points out, many of the cold cases that could be solved by DNA evidence involve rape and sexual crimes against children. See Pet. 14–19; accord *State ex rel. Nicholson* v. *State*, 169 So. 3d 344 (La. 2015) (DNA evidence linked two unrelated rape and kidnapping cases). Indeed, many States have specifically adjusted their limitations periods for sexually based crimes in light of new information about the complicated effect such abuse can have on victims (particularly child victims), including its relationship to delayed reporting of such crimes.[9]

B. The lower courts' interpretation of *Stogner* hamstrings States' ability to prosecute cold cases with known perpetrators

The previous Section explained why States have a powerful interest in ensuring that perpetrators who can be conclusively identified by DNA are brought to justice. But *Stogner*, at least as it has been interpreted by lower courts, is standing in the way.

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across USA, USA TODAY (July 16, 2015), *updated* July 30, 2015, https://www.usatoday.com/story/news/2015/07/16/untested-rape-kits-evidence-across-usa/29902199/. Those departments represent a tiny fraction of the 18,000 police departments in the United States. *Id.*

[9] See Alaska Stat. § 09.10.065; Conn. Gen. Stat. Ann. § 54–193; D.C. Code § 23–113(a)(2) (2005 Supp.); Ga. Code Ann. § 17–3–1; 720 Ill. Comp. Stat. Ann. 5/3–6(i); Mass. Gen. Laws Ann. ch. 277, § 63; Me. Rev. Stat. Ann. tit. 17–A, § 8; N.H. Rev. Stat. Ann. § 625:8(III)(d); N.J. Stat. Ann. § 2C:1–6; N.M. Stat. Ann. § 30–1–8; N.Y. Crim. Proc. Law § 30.10; see also 18 U.S.C. § 3283.

The lower courts have understood *Stogner* as invalidating *all* laws that give law enforcement the option to prosecute a crime after the otherwise-applicable limitations period has lapsed—even where the extension is linked to a conclusive DNA identification. Indeed, *every* decision that we are aware of has concluded that *Stogner* prevents a limitations period from being extended after it has lapsed.[10] And *none* of those decisions has attached any significance to the unique status of DNA identification evidence and the critical and distinct role it plays.

The Amici States thus join petitioner in asking this Court to clarify *Stogner*'s holding as it relates to DNA evidence or, alternatively, to overrule *Stogner*

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[10] See *United States* v. *Seale*, 542 F.3d 1033 (5th Cir. 2008) (concluding that a de facto extension to a federal kidnapping limitations period violated *Stogner*); *Aetna Life Ins. Co.* v. *Enterprise Mortg. Acceptance Co., LLC*, 391 F.3d 401, 410 (2d Cir. 2004) ("[T]he resurrection of previously time-barred claims has an impermissible retroactive effect."); *State* v. *Garcia*, 169 P.3d 1069, 1075 (Kan. 2007) ("Under the holdings of *Stogner* and *Nunn*, we conclude that application of the amended [limitations period] resurrects a previously time-barred prosecution and violates Article I, § 10, clause 1 of the United States Constitution."); *Commonwealth* v. *Price*, No. 2005-CA-000435-MR, 2007 WL 4553688, at *4 (Ky. Ct. App. Dec. 28, 2007) ("[W]e believe that the trial court correctly interpreted *Stogner*, and that the repeal of [the prior limitations period] cannot be constitutionally interpreted to allow the prosecution of any crime previously barred by that statute, which occurred prior to the date of its repeal."); *State ex rel. Nicholson* v. *State*, 169 So. 3d 344, 347 (La. 2015) (relying on *Stogner* to find that "retroactive application of the DNA exception . . . to revive the prescribed charges in relator's case violates the Ex Post Facto Clauses of the federal and state constitutions"); *State* v. *E.W.*, 992 A.2d 821, 825 & n.2 (N.J. Super. Ct. App. Div. 2010) (same).

altogether. Absent this Court's intervention, *Stogner* will continue to limit the States' ability to use DNA evidence to its full potential and thus vindicate important interests underlying the criminal law. As interpreted by the lower courts, *Stogner* requires States to tell victims whose cases have languished because of inadequate funding or backlogs in testing that nothing can be done even if DNA *conclusively* identifies the person who harmed them. For the reasons given in the petition for a writ of certiorari, the Constitution does not require that result. See Pet. 13–30.

C. This case is a good vehicle

This case presents an ideal vehicle for this Court to assess how DNA evidence fits within the contours of the Ex Post Facto Clause.

The basic facts are undisputed. Early in the morning of March 20, 1987, a man entered an eight-year-old girl's house and raped her. Pet. App. 3a. DNA evidence collected from the girl's underwear led to the identification of respondent and exonerated a different person who had spent more than eight years in prison for the crime. *Id.* 3a–4a.

The constitutional issue is likewise squarely presented. Having been conclusively identified by his DNA, respondent had only one defense for a serious crime: that the statute of limitations for the crime had expired years earlier. See Mont. Code Ann. § 45–1–205(1)(b) (1985). Although Montana amended this limitations period in 2007 to account for DNA identifications, *id.* § 45–1–205(9), there was a window where the limitations period had lapsed with respect to

respondent's offense. Pet. App. 2a. As a result, the case squarely implicated the lower courts' current understanding of *Stogner*, and the Supreme Court of Montana dismissed the charges on that basis. *Id.* at 19a.

In short, this case offers a clear set of facts, conclusive DNA evidence, and a lapsed limitations period that was subsequently extended. It thus presents an ideal vehicle to address the important questions presented by petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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