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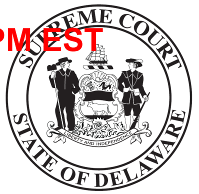

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARNELL MARTIN, Defendant Below, Appellant, v. STATE OF DELAWARE Plaintiff Below, Appellee.	No. 112, 2021

ON RETURN FROM REMAND TO
THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRIEF OF *AMICI CURIAE* IN SUPPORT OF REVERSAL

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State v. Cooke,
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Steck v. State,
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Younger v. State,
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10 U.S.C. § 504(a) 10

28 U.S.C. § 1865(b)(5) 10

Del. Super. Ct. Crim. R. 61 .... 4, 5, 13, 15

Other Authorities

American Bar Association, *Collateral Consequences of Criminal Convictions: Judicial Bench Book*, Office of Justice Programs' National Criminal Justice Reference Service (Mar. 2018) 11

Benchbook 2023, Delaware Sentencing Accountability Commission (Oct. 2022) 11

Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008) 18

Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 Mich. L. Rev. 3 (2020) 14

David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & Soc. Inquiry 5 (2008) 11, 12

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FBI, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review* (Apr. 20, 2015) 19

Frank R. Baumgartner et. al., *The Mayhem of Wrongful Liberty: Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration*, 81 Alb. L. Rev. 1263 (2018) 18

J.J. Prescott, et al., *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 8 (2020) 13

Jeffrey Selbin et. al., *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. Crim. L. & Criminology 1 (2018) 10

Levels of Supervision and Services, Bureau of Community Corrections (last visited Feb. 9, 2023)..11

Marvin Zalman, et al., *Measuring Innocence: How to Think About the Rate of Wrongful Conviction*, 24 New Crim. L. Rev. 601 (2021) 17

National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward*, Washington, DC: The National Academies Press (2009)...19

National Registry of Exonerations (last visited Feb. 9, 2023)................................16

Paul C. Giannelli, *Microscopic Hair Comparisons: A Cautionary Tale*, 46 Crim. Law Bulletin 531 (2010) 19

Ryan Tack-Hooper, *Every Sentence Should Not Equal a Life Sentence: Collateral Consequences Reform in Delaware*, ACLU of Delaware (Apr. 2016) 10

Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. St. L. Rev. 1 (2014) 11, 12

IDENTITIES AND INTERESTS OF *AMICI*

Amici are non-profit organizations who litigate post-conviction cases and provide legal assistance to individuals burdened by the collateral consequences of criminal convictions. We believe that our unique perspectives and expertise will assist the Court in resolving the questions this case presents, which are of general public importance.[1] In particular, the Court has asked for briefing on how to resolve this case in light of "competing policy considerations of finality and fairness."[2] As explained below, *Amici* are well-positioned to assist the Court in weighing these competing policy considerations.

Amicus American Civil Liberties Union Foundation of Delaware ("ACLU-DE") is a private, nonprofit membership corporation founded in 1961 as an affiliate of the American Civil Liberties Union. The ACLU-DE has over 3,300 members within the State of Delaware. The members of the ACLU-DE have a common interest in preserving and protecting fundamental constitutional rights and promoting equity within the criminal legal system. In pursuit of these efforts, ACLU-DE, along with its partners in the Clean Slate DE coalition, seeks to promote access to second chances for people living with arrest or conviction records and reduce the collateral consequences associated with convictions. Specifically, ACLU-DE has

[1] *See Giammalvo v. Sunshine Min. Co.*, 644 A.2d 407, 410 (Del. 1994).

[2] Briefing Letter.

been a leading advocate to expand eligibility for the State's expungement process and to create and implement Delaware's automatic expungement process, which is set to begin in August 2024.

Amicus Roderick & Solange MacArthur Justice Center ("MJC") is a national public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. As relevant to this case, MJC has helped secure the release of wrongly-convicted individuals, litigated post-conviction challenges to convictions, and advocated on behalf of exonerees. *See, e.g.*, Stip. pursuant to S. Ct. R. 46.1, *Williams v. Louisiana*, No. 17-1241 (S. Ct. May 30, 2018); *People v. Plummer,* 2021 IL App (1st) 200299; Br. of Exonerees as *Amici Curiae*, *Palmer v. Illinois*, 2021 IL 125621 (No. 125621), 2020 WL 7698662.

Amicus Innocence Network ("the Network") is an association of independent organizations dedicated to providing *pro bono* legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 69 current members of the Network represent hundreds of prisoners with innocence claims in 50 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Israel, Italy, the Netherlands, the United Kingdom, and Taiwan.[3] The Innocence Network and its

[3] The extensive list of the Innocence Network's member organizations is included in the Motion for Leave to File Brief as *Amici Curiae*.

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 Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

SUMMARY OF ARGUMENT

The State has a legitimate interest in the finality of criminal judgments. Justice Harlan gave that interest its most elegant expression when he wrote that "[n]o one … is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."[4]

Delaware law affords the State a variety of tools for vindicating its interest in finality. Del. Super. Ct. Crim. R. 61(i)(4) ("Rule 61(i)(4)") provides that collateral attacks are subject to the doctrine of *res judicata*, under which convictions are not, as Justice Harlan feared, open to "fresh litigation on issues already resolved."[5] Rule 61(i)(3) provides that collateral attacks are also subject to the doctrines of forfeiture and procedural default, under which convictions are generally not even open to challenge on issues which the challenger could have raised in previous proceedings.[6]

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[4] *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).

[5] *See Younger v. State*, 580 A.2d 552, 556 (Del. 1990) (Rule 61 movant cannot "relitigate in postconviction proceedings those claims which have been previously resolved."); *State v. Fink*, 2010 WL 2991579, at *2 (Del. Super. Ct. July 30, 2010), *aff'd*, 16 A.3d 937 (Del. 2011) (calling Rule 61(i)(4) "the criminal law equivalent of *res judicata*").

[6] *See* Rule 61(i)(3) ("Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows" cause and prejudice).

And under the doctrine of mootness, a conviction is not subject to challenge on any issue whatsoever if the challenger is no longer adversely affected by that conviction.[7] Finally, any collateral attack must be brought within one year of either the conviction becoming final or the grounds for the challenge becoming factually or legally available.[8] In short, Delaware law puts plenty of tools in the State's finality-protecting toolbox.

In this case, though, the State sought, and the Superior Court granted, a new tool for promoting finality: a strict version of Rule 61's "in custody" requirement which prohibits a defendant from challenging his conviction unless he is incarcerated or on probation. This interpretation effectively overruled *Gural v. State*, in which this Court permitted a person to collaterally attack a conviction if he could demonstrate that he was subject to specific collateral consequences of that

[7] *Gural v. State*, 251 A.2d 344 (Del. 1969) (dismissing post-conviction challenge as moot where defendant had served full sentence and had not proven any ongoing collateral consequences of the conviction at issue)

[8] Rule 61(i)(1).

conviction.[9] This Court has repeatedly indicated that this exception applies to Rule 61 motions.[10]

The Superior Court decided that *Gural*'s fairness concerns had to yield to the State's interest in finality. But because this new interpretation operates alongside the existing finality-promoting doctrines, it only comes into play in timely-filed cases in which the issues were not, and could not reasonably have been, previously litigated, and in which the Rule 61 movant has a sufficient interest in the case to prevent it from being moot. This is a bridge too far.

Finality is an important interest, but it is not the only important interest. Fairness requires that those convicted of a crime have at least one full opportunity to challenge the conviction's legality—as long as they are subject to ongoing legal disabilities due to that conviction. If they have had that opportunity, existing law already bars them from relitigating their claims. If they have not already had that opportunity, it should not matter whether the harm they suffer due to the conviction is legal custody (which could be unsupervised probation) or collateral consequences

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[9] *Gural*, 251 A.2d at 344-45 ("[T]he satisfaction of the sentence renders the case moot unless, in consequence of the conviction or sentence, the defendant suffers collateral legal disabilities or burdens; in which event the defendant is considered to have a sufficient stake in the conviction or sentence to survive the satisfaction of the sentence and to permit him to obtain a review or institute a challenge.").

[10] *See, e.g., Paul v. State*, 26 A.3d 214, 2011 WL 3585607 at *1 (Del. 2011); *Anderson v. State*, 105 A.3d 988, 2014 WL 7010017 at *1 (2014).

(which can include deprivations of important civil, political, and economic rights). After all, and as explained below, collateral consequences dramatically and adversely affect a person's life.

This Court struck the correct balance between finality and fairness in *Gural*, and that balance has proven workable for over 50 years. The Superior Court took it upon itself to overrule *Gural* and lock the courthouse doors to Delawareans suffering from collateral consequences of convictions. *Amici* respectfully submit that this Court should reverse that decision and reaffirm *Gural*. In support of this position, *Amici* advance three arguments: (1) that the Superior Court's rule is unfair to convicted individuals, (2) that the State's interest in finality is adequately protected by existing law, and (3) that the State, judiciary, and public also have an interest in fairness.

ARGUMENT

In the remand order in this case, this Court reminded the Superior Court that, while defendants who have completed probation generally do not have standing to pursue post-conviction relief, there is a long-standing exception for those who "suffer[] collateral legal disabilities or burdens."[11] This Court asked the Superior Court to answer two narrow questions to aid in its application of this exception to Mr. Martin's case: "whether a person convicted of a felony for the first time faces collateral consequence under *Gural*," and "whether a person who has received a pardon must be treated the same as a first-time felon for purposes of analyzing the collateral consequences rule."[12]

The Superior Court went in a very different direction. It believed that this Court was mistaken about the continued vitality of the collateral consequences exception to the "in custody" requirement. Despite the discussion of *Gural* in the remand order, the Superior Court decided that this Court had implicitly overruled the *Gural* exception, and determined that Mr. Martin could not challenge his conviction even if he could show that it carried collateral consequences because he was no longer "in custody."

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[11] Remand Order at 3-4 (quoting *Gural*, 251 A.2d at 344-45).

[12] Remand Order at 5.

Mr. Martin explains that this is incorrect as a matter of law. *Amici* agree, and also respectfully submit that the Superior Court's interpretation of the "in custody" requirement is fundamentally unfair, and that the State's interest in the finality of convictions does not offset this unfairness.

I. THE SUPERIOR COURT'S DECISION IS UNFAIR TO CONVICTED INDIVIDUALS.

If the Superior Court's version of the "in custody" requirement is allowed to stand, there will no longer be any means for someone convicted of a felony and released from judicial supervision to collaterally attack their conviction under Delaware law. Even if they could definitively prove that they were factually innocent, or that they were unconstitutionally convicted, they would find the courthouse doors closed and the collateral consequences of their convictions undisturbed.

And these collateral consequences are serious. Regardless of the nature or severity of the underlying offense, Delaware law bars anyone with a felony conviction from, among other things, running for office,[13] holding certain jobs,[14] and

[13] Del. Const. art. II, § 21 (no person convicted of any "infamous crime" is "eligible to a seat in either House of the General Assembly, or capable of holding any office of trust, honor or profit under this State."); 15 Del. C. § 7555(c) ("Unless otherwise specified in the town charter … A candidate for municipal government shall not have been convicted of a felony").

[14] *See, e.g.,* 2 Del. Admin. C. § 2218-9.1.11 (no person convicted of a felony can be employed by a commercial driver training school or a commercial truck driver

obtaining certain scholarships.[15] People with some convictions are also barred from voting.[16] Then there are the federal collateral consequences, which can include deportation from the United States,[17] disqualification from serving in the armed forces,[18] and ineligibility to serve on federal juries.[19] These specific state and federal consequences barely scratch the surface: "[a]cross the nation … people with criminal records are subjected to roughly 45,000 sanctions, disabilities, disqualifications, or other negative consequences,"[20] and in Delaware, there are nearly 800 collateral consequences, many of which "are automatic and do not consider the circumstances of the crime, how long ago it was committed, or what has happened since."[21]

school); 16 Del. Admin. C. § 4106-4.0 (no person convicted of a felony can obtain a "permit to practice direct entry/non-nurse midwifery"); 16 Del. Admin. C. § 4501-3.3.2.1 (no person convicted of a felony can be certified as an animal euthanasia technician).

[15] *See, e.g.,* 14 Del. C. § 3424A (Delaware Advance Scholarship Program initial eligibility); 14 Del. C. § 3426A (maintaining eligibility).

[16] Del. Const. art V, § 2. It is also important to note that people with Delaware convictions who now live in other states can be barred from voting in those states based on their Delaware convictions even though people with the same conviction can vote in Delaware.

[17] *See* 8 U.S.C. § 1182(a)(2)(A)(i); 8 U.S.C. § 1227.

[18] 10 U.S.C. § 504(a).

[19] 28 U.S.C. § 1865(b)(5).

[20] Jeffrey Selbin et. al., *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. Crim. L. & Criminology 1, 15 (2018) (footnotes omitted).

[21] Ryan Tack-Hooper, *Every Sentence Should Not Equal a Life Sentence: Collateral Consequences Reform in Delaware*, ACLU of Delaware, 4 (Apr. 2016),

Convicted individuals also face extralegal collateral consequences such as discrimination in the housing and labor markets.[22]

The collateral consequences that attach to felony convictions "can in many cases be more punitive than the sentence[s] imposed by [] court[s]."[23] For example, non-violent felonies in Classes E, F, and G carry presumptive sentences of one year or less on Level II probation, which typically involves visiting a probation officer's office once per month.[24] While probation requirements can be temporarily disruptive

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https://www.aclu-de.org/sites/default/files/wp-content/uploads/2016/05/Collateral-Consequences-Reform-in-Delaware-booklet-April-2016_small2.pdf.

[22] *See, e.g.,* Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. St. L. Rev. 1, 10 (2014) ("the most serious and pervasive collateral consequence faced by former prisoners is employment discrimination."); David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & Soc. Inquiry 5, 12 (2008) (roughly four of every five landlords in the private market use background checks to screen prospective tenants).

[23] American Bar Association, *Collateral Consequences of Criminal Convictions: Judicial Bench Book*, Office of Justice Programs' National Criminal Justice Reference Service, 9 (Mar. 2018), https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf.

[24] *Benchbook 2023*, Delaware Sentencing Accountability Commission, 2 (Oct. 2022), https://cjc.delaware.gov/wp-content/uploads/sites/61/2022/12/Benchbook-2023-120122.pdf (describing presumptive sentences); 11 Del. C. § 4204(c)(2) (providing for levels of probation); *see also Levels of Supervision and Services*, Bureau of Community Corrections, https://doc.delaware.gov/views/comm_corrections.blade.shtml#C4 (last visited Feb. 9, 2023) (Level II supervision includes "[1.] Regularly scheduled office visits - usually one office visit a month[, 2.] Reporting required as directed by Probation & Parole Officer[, 3.] Abide by

to a person's life, and judges can set more-burdensome conditions for particular probationers, the collateral consequences of the conviction can be life-changing. For example, the convicted individual could lose their home or job.[25] If they are not a U.S. citizen, they could be deported.[26] If they are in the military, they can be discharged and denied veterans benefits.[27]

Under the strict interpretation of the "in custody" requirement adopted by the Superior Court, someone on Level II, or even Level I, probation is sufficiently "in custody" to maintain a Rule 61 motion, while someone suffering from severe collateral consequences is not. Unlike Rule 61's procedural default clause and its time and numerical limits, the "in custody" requirement is not subject to the

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conditions imposed by the Court[, 4.] Communication with Probation & Parole Officer required to ensure compliance with all Court ordered programs and/or treatment.").

[25] *Supra* Bell at n.22; *supra* Thacher at n.22.

[26] All non-violent felonies in Classes E, F, and G carry maximum sentences exceeding one year in prison. 11 Del. C. § 4205(b)(5)-(7). Consequently, none of them are 'petty crimes' under immigration law. 8 U.S.C. § 1182(a)(2)(A)(ii)(II). They therefore render the convicted individual inadmissible (and, by extension, subject to deportation) if the offense involved moral turpitude or controlled substances. 8 U.S.C. § 1182(a)(2)(A)(i). So, to give just one example, theft of more than $1,500 carries a presumptive sentence of probation, but a collateral consequence of deportation. *See* 11 Del. C. § 841(c)(1) (providing that theft of $1,500 or more is a Class G felony); *see also Briseno–Flores v. Att'y Gen.*, 492 F.3d 226, 228 (3d Cir. 2007) (recognizing that even petty theft qualifies as a crime involving moral turpitude).

[27] *See* 38 C.F.R. § 3.12(d)(3).

"miscarriage of justice" exception in Rule 61(i)(5). Consequently, once someone is released from probation, even if they are exonerated by DNA evidence and the State arrests and convicts the true perpetrator of the crime for which they were convicted, the Superior Court ruling leaves no mechanism for them to seek judicial review of their conviction. They will continue to suffer serious collateral consequences for a crime they can prove they did not commit.[28]

Additionally, barring individuals from seeking relief under Rule 61 impacts the benefits available to them through Delaware's expungement process. Cases terminated in an individual's favor, including those in which a defendant's conviction is vacated through a Rule 61 motion, are immediately eligible for mandatory expungement.[29] Other conviction records can only be expunged after a waiting period and through a separate petition process.[30] Consequently, by

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[28] A pardon may reduce some of the collateral consequences associated with a conviction, but the pardon process is discretionary and does not seal records from public view. A wrongful conviction deprives someone of their political, social, and economic rights, and the restoration of those legal rights cannot be discretionary. Nobody should have to depend on the State to restore to them, as a matter of charity and mercy, the rights which it wrongly took from them by operation of law.

[29] *See* 11 Del. C. § 4373(a)(1)(a).

[30] If the conviction cannot be vacated through Rule 61, the defendant will need to satisfy additional eligibility criteria and navigate additional legal processes to clear their record, which makes it less likely that they will obtain relief. *See* 11 Del. C. § 4373, 4374, and 4375; *see also,* J.J. Prescott, et al., *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 8, 2501-2510 (2020) (describing the common barriers that prevent eligible individuals from successfully obtaining

narrowing access to Rule 61 motions, the Superior Court's strict "in custody" requirement also denies people who were wrongly convicted the opportunity to obtain near-immediate and certain relief from the collateral consequences of their conviction through the expungement process.

The Superior Court's strict version of the "in custody" requirement is also unfair in another way—it would punish defendants, and reward the State, for delays in processing Rule 61 motions. For defendants with short sentences, even ordinary delays resulting from crowded dockets would, through no fault of the defendants, entirely foreclose any judicial reexamination of their convictions. This would be true even if the State did not abuse its newfound power to make Rule 61 motions go away by dragging its feet until the movant is released from custody, at which time the timely-filed Rule 61 motion would be automatically dismissed without regard to its merits.

To illustrate the injustice this would cause, consider two similarly situated movants who file identical Rule 61 motions. In both cases the State makes an incorrect legal argument. In one case the judge correctly rejects the argument, while

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expungements); Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 Mich. L. Rev. 3, 541 (2020) ("[G]etting one's second chance through petition-based processes may include enduring a bureaucratic process, amassing information through a variety of sources, and being evaluated … [t]he high cost of doing so in many cases may be insurmountable.")

in the other the judge wrongly accepts it. The first movant's conviction is vacated, but the second has to appeal. Even if this Court ultimately decides that the second movant is right on the law, their case will become moot before their conviction can be vacated unless their sentence is long enough that they are "in custody" for the entire duration of the initial proceedings, the appeal, and the remand proceedings. The Superior Court's strict "in custody" requirement rewards the State for its incorrect argument and ensures that the second movant continues to face the collateral consequences of the unsound conviction. Due to the State's error, and the Superior Court's "in custody" rule, the second movant could be fired, evicted, deported, or barred from voting while the first movant's conviction is vacated. The second movant is sacrificed to finality.

II. EXISTING LAW ADEQUATELY PROTECTS THE STATE'S INTEREST IN FINALITY.

The existing rules, from which the Superior Court departed, adequately protect the State's interest in finality. First, under Rule 61(i)(4), *res judicata* prevents people from relitigating any claim that the courts have already decided. Next, under Rule 61(i)(3), anybody seeking to raise a new claim needs to show that they did not *forfeit* it by failing to raise it on direct review or in a past collateral proceeding, or that there was legally sufficient cause to excuse the *procedural default* which ordinarily results from forfeiture. Third, under Rule 61(i)(1), any collateral attack must be brought within one year of either the conviction becoming final or the

grounds for the challenge becoming factually or legally available. Finally, throughout the proceeding, the claimant must maintain a sufficiently direct and substantial interest in the outcome of the litigation to prevent the claim from being *moot*. These doctrines all protect the State's interest in finality.

Under the Superior Court's strict reading of the "in custody" requirement, a convicted individual who overcomes each of those hurdles—someone who asserts a timely legal claim that has never been litigated, which could not reasonably have been litigated sooner, and which, if successful, would relieve that individual of the collateral consequences of their conviction—would *still* not have the merits of their claim considered. In fact, these are the only claims barred by the stricter "in custody" requirement, because every other claim is barred by one of the doctrines already discussed. This is too much finality.

Finality is not an unmitigated good. Since 1989, at least 3,373 wrongly-convicted individuals have been exonerated.[31] They collectively served more than 28,700 years in prison.[32] Because most organizations working to exonerate the wrongly convicted only represent people serving lengthy prison sentences, and because these organization can only serve a small fraction of those people, this

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[31] The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Feb. 9, 2023).

[32] *Id*.

number is just the tip of the iceberg.[33] Without exceptions to finality, many of these people would either have been executed or would have remained in prison.[34] People wrongly convicted of less serious crimes do not face execution, but they should still be entitled to relief from the damaging collateral consequences of their wrongful convictions.

III. FAIR CRIMINAL PROCEEDINGS BENEFIT THE STATE, JUDICIARY, AND PUBLIC.

The convicted person is not the only one with an interest in the fairness of criminal proceedings. As a "sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," the State's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done.[35] As for the judiciary, "[t]he United States Supreme Court and this Court have held that the judiciary has an independent interest in ensuring … that legal proceedings are fair."[36]

The general public also has an interest in the fairness of criminal proceedings. "Society wins not only when the guilty are convicted but when criminal trials are

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[33] Marvin Zalman, et al., *Measuring Innocence: How to Think About the Rate of Wrongful Conviction*, 24 New Crim. L. Rev. 601 (2021).

[34] Some of these people served their full sentences before they were exonerated, which only further emphasizes the importance of making collateral review proceedings available to people who are not in custody.

[35] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[36] *Lewis v. State*, 757 A.2d 709 (Del. 2000).

fair; our system of the administration of justice suffers when any accused is treated unfairly."[37] In this context, the public has three concrete interests in ensuring the fairness of criminal proceedings by affording access to collateral review. First, more than a third of exonerations "result[] in the inculpation of the actual perpetrator, providing a significant law enforcement benefit."[38] This is especially important because the actual perpetrator often continues to commit crimes while the innocent person suffers the direct and collateral consequences of the conviction.[39]

Second, even when an exoneration does not help solve a past crime, exonerations can nonetheless demonstrate that certain tactics and practices in our criminal justice system make it more likely that a guilty person will escape punishment and remain at large while an innocent person is punished in their place. These policies and practices make everybody less safe, so there is a substantial public interest in identifying and reforming them.

For example, most states' courts, including this Court, once allowed so-called expert witnesses to testify that, based on microscopic examination, two hairs came

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[37] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[38] Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 119 (2008).

[39] *See* Frank R. Baumgartner et. al., *The Mayhem of Wrongful Liberty: Documenting the Crimes of True Perpetrators in Cases of Wrongful Incarceration*, 81 Alb. L. Rev. 1263 (2018) (collecting examples).

from the same person or from a person of a certain race.[40] The National Academy of Sciences (NAS) has determined that this testimony was "of limited probative value,"[41] and the FBI now admits that 96% of this testimony was scientifically erroneous.[42] Both the NAS report and the FBI's decision to stop using the previously-common forms of microscopic hair analysis were motivated by exonerations through collateral review proceedings.[43]

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[40] *See, e.g., Parson v. State*, 222 A.2d 326 (Del. 1966) (a first-degree murder case in which this Court accepted "[e]xpert testimony of F.B.I. special agents establish[ing] that from microscopic examination it is possible to determine … the race of the individual from whom it originated, i.e., the Caucasian race, the Mongoloid race or the Negroid race. … [and] whether or not the particular hair in question could have originated from a particular individual by comparison of it with a known sample of his hair."); *see also State v. Cooke*, 914 A.2d 1078, 1094 (Del. Super. Ct. 2007) (allowing microscopic hair comparison evidence).

[41] National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward*, Washington, DC: The National Academies Press, 161 (2009); *see also* Paul C. Giannelli, *Microscopic Hair Comparisons: A Cautionary Tale*, 46 Crim. Law Bulletin 531 (2010).

[42] *See* FBI, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review* (Apr. 20, 2015), https://www.fbi.gov/news/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review#:~:text+In%20the%20268%20cases%20where,94%20percent)%20of%20those%20cases.

[43] *Id.* ("The FBI and DOJ agreed to conduct a review of criminal cases involving microscopic hair analysis after the exoneration of three men convicted at least in part because of testimony by three different FBI hair examiners whose testimony was scientifically flawed."); NAS, *Strengthening Forensic Science* at 4-5 (discussing the role of exonerations in motivating reexamination of forensic science disciplines).

These reforms, and others like them, have made the criminal system fairer and more reliable—and were only possible because finality gave way to fairness. Foreclosing collateral review for a substantial percentage of people convicted of crimes, as the Superior Court did, would cut off this important "quality assurance" mechanism in the criminal justice system, denying the public information they need to keep themselves safe, both from crime and from being wrongly convicted of committing a crime.

Third, and even when the issue is legal error, rather than factual innocence, the public still has an interest in criminal proceedings being conducted fairly. Delawareans elect both the Attorney General and the state legislators who confirm judicial nominees and set the budget for the courts and public defenders. Collateral review proceedings concerning legal errors typically turn on whether prosecutors, judges, and public defenders performed their legal duties. Voters and their representatives have an interest in knowing that the state officials they elect, confirm, and/or pay are acting in accordance with the law.

IV. THE COURT SHOULD NOT ISSUE AN ADVISORY OPINION ON WHETHER SOMEONE WHO HAS BEEN RELEASED FROM CUSTODY CAN FILE A RULE 61 MOTION.

Because Mr. Martin filed his Rule 61 motion while he was indisputably "in custody," his case does not present the question of whether defendants who have been released from custody, but who experience collateral consequences from their

convictions, can file Rule 61 motions challenging those convictions. Any opinion on that question in this case would be merely advisory.[44] The Court should resolve that question, after full briefing and argument, in a case which properly presents it.[45]

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask this Court to hold that someone convicted of a crime can maintain a Rule 61 motion if they suffer collateral consequences of that conviction.

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[44] *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208 (Del. 2014).

[45] Mr. Martin interprets this Court's precedents to prohibit defendants from filing Rule 61 motions after their release and suggests that this Court's discussion of the collateral consequences exception in *Steck v. State* is "erroneous." *See* Appellant's Supplemental Opening Brief at 19-20, 24-27 & n.97. In *Steck*, the Court reasoned that the defendant, who had been released from custody before filing his Rule 61 motion, was ineligible to seek relief through Rule 61 *unless* he could "specifically identify a right lost or disability or burden imposed as a result of the 2008 case that would overcome the general rule mooting his claims for postconviction relief." *Steck v. State*, 115 A.3d 1216, 2015 WL 2357161 at *2 (Del. 2015) (citing *Gural*, internal quotation marks omitted). Consequently, "*because* Steck did not identify such a right lost or disability or burden imposed, the Court conclude[d] that Steck lacked standing to seek postconviction relief under Rule 61." *Id*. (emphasis added). *Amici* submit that *Steck* correctly states the law under *Gural* and its progeny. Mr. Martin seeks to harmonize the "collateral consequences" rule with the "in custody" requirement by arguing that the latter determines who can file a Rule 61 motion, while the former determines who can maintain such a motion. But this Court has frequently referred to the "collateral consequences" rule as an "exception" to the "in custody" requirement. *See, e.g., Paul v. State*, 26 A.3d 214, 2011 WL 3585607 (Del. 2011); *Anderson v. State*, 105 A.3d 988, 2014 WL 7010017 at *1 n.6 (2014). This implies, as *Steck* contemplated, that people who can demonstrate that they face collateral consequences from a conviction can file a Rule 61 motion even if they have been released from custody.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word. This brief complies with the type-volume limitations of Rule 14(d)(i) and Rule 28(d) because it contains 4,998 words, which were counted by Microsoft Word.

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