IN THE SUPREME COURT OF OHIO

09-0605

STATE OF OHIO,	)	
	)	
Plaintiff-Appellee,	)	On Appeal from the
	)	Summit County Court of Appeals
v.	)	Ninth Appellate District
	)	
DOUGLAS PRADE,	)	Court of Appeals
	)	Case No. 24296
Defendant-Appellant.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT DOUGLAS PRADE

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Proposition of Law: Whether (a) earlier DNA test results were "definitive" for purposes of R.C. 2953.74(A), and (b) new DNA test results might be "outcome determinative" under R.C. 2953.74(B), must be assessed by comparing (1) the results of the prior DNA testing to (2) potential results from new DNA testing using current DNA testing methods. 11

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***State v. Prade*, 9th Dist. No. 24296, 2009-Ohio-704 (Feb. 18, 2009)**

***State v. Prade*, Summit County Common Pleas No. CR 98 02 0468 (June 2, 2008)**

THIS APPEAL RAISES AN ISSUE OF GREAT PUBLIC IMPORTANCE

This appeal focuses on R.C. 2953.74(A), which prohibits statutory postconviction DNA testing when there was "a prior definitive DNA test," and R.C. 2953.74(B), which conditions new DNA testing on a showing that new DNA test results would be "outcome determinative." The courts below found that new DNA testing may not go forward in this case because (1) DNA tests conducted at the time of defendant's 1998 trial were "prior definitive DNA test[s]," and (2) given the results of the 1998 testing, new DNA test results would not be "outcome determinative." Those courts reached these conclusions even though (a) the 1998 test results were meaningless; (b) the testing method used in 1998 is now outdated; and (c) DNA tests using modern, more sensitive testing methods might establish actual innocence. The plain language and purpose of Ohio's DNA testing statute require reversal.

* * *

This case raises an issue of great public importance regarding the application of Ohio's statutory scheme for postconviction DNA testing, a scheme the Legislature created in 2003 and significantly revised in 2006. R.C. 2953.71 – 2953.84. This Court twice has interpreted these provisions, first in *State v. Buehler* (2007), 113 Ohio St. 3d 114, 2007-Ohio-1246, and then in *State v. Sterling* (2007), 113 Ohio St. 3d 255, 2007-Ohio-1790.

The Legislature's (and this Court's) focus on postconviction DNA testing reflects the "concern about the injustice that results from the conviction of an innocent person [that] has long been at the core of our criminal justice system." *Schlup v. Delo* (1995), 513 U.S. 298, 325. Indeed, courts have found that "the Due Process Clause ... grants a convicted offender access to physical evidence for the purpose of DNA testing if it can be performed with negligible cost to the state and exculpatory results would undermine confidence in the outcome of the trial."

McKithen v. Brown (E.D.N.Y. 2008), 565 F. Supp. 2d 440, 444; accord *Osborne v. Dist. Attorney's Office* (9th Cir.), 521 F.3d 1118, cert. granted, 129 S. Ct. 488 (U.S. 2008) (No. 08-06).

Modern DNA evidence goes to the heart of the criminal justice system's function: "to convict the guilty and free the innocent." *Herrera v. Collins* (1993), 506 U.S. 390, 398. It "does not become weaker over time in the manner of testimonial proof." Urban Inst. Just. Policy Ctr., The DNA Field Experiment: Cost-Effectiveness Analysis of the Use of DNA in the Investigation of High-Volume Crimes at 9 (2008). Its ability to enhance the truth-finding process is reflected by the fact that it has exonerated over 200 convicted persons. See Brandon L. Garrett, "Judging Innocence," 108 Colum. L. Rev. 55, 57 (2008).

Unfortunately, however, this case does not involve modern DNA testing. Instead, it involves *denying* that testing to former Akron Police Captain Douglas Prade, even if it could be performed at no cost to the State. In 1998, Mr. Prade was convicted of murdering his ex-wife, Dr. Margo Prade, and he currently is serving a life sentence. The State's case relied heavily on dental experts' opinions that a bite mark Dr. Prade's killer left on her skin through two layers of clothing – a lab coat and a blouse – either matched or was consistent with Mr. Prade's dentition. Experts for both the State and the defense testified that the killer likely left DNA on the blood-stained lab coat over the bite mark. Yet DNA testing done in 1998 using the then-current testing method – polymerase chain reaction (or "PCR") testing – could detect only Dr. Prade's DNA (from the blood), an obvious result that was of no use in identifying Dr. Prade's killer. This testing failure was no surprise. PCR testing is subject to an "overwhelm effect" where large quantities of one person's DNA (here, the DNA in Dr. Prade's blood) "overwhelms" smaller amounts of another person's DNA (here, any of the killer's DNA left from the bite).

In the decade since Mr. Prade's 1998 trial, DNA testing technology has advanced substantially. The PCR DNA testing method used in 1998 has been replaced by the short tandem repeat (or "STR") and Y-chromosome STR (or "Y-STR") testing methods. STR DNA testing "increase[ed] exponentially the reliability of forensic identification over earlier techniques" and was "qualitatively different from all that proceeded it." *Harvey v. Horan* (4th Cir. 2002), 285 F.3d 298, 305 & n.1 (Luttig, J., respecting the denial of rehearing en banc). Y-STR testing "detects only the male Y-chromosome" and, therefore, "ignore[es] the overwhelming percentage of female DNA present that may otherwise 'drown out' the male perpetrator's DNA profile." Johnson Aff. at ¶ 3 (Ex. A to Application for DNA Testing).

In his February 2008 application for DNA testing that is at issue here, Mr. Prade sought DNA testing either under Ohio's DNA testing statute or, alternatively, at an outside laboratory that had agreed to conduct testing in this case for free. Although Mr. Prade sought testing of all remaining evidence that can be tested, his primary focus was on Y-STR testing of Dr. Prade's lab coat over the killer's bite mark, which had been a main focus of the State's case at trial.

Both the State's and Mr. Prade's DNA testing experts in these proceedings said that subjecting the lab coat over the bite mark to Y-STR testing might identify the killer's DNA. Yet the trial court denied the application because R.C. 2953.74(A) "precludes post-conviction DNA testing where a prior definitive test has already been performed" and, in that court's view, any new testing results here would be duplicative. June 2, 2008 Order at 5-6.

On February 18, 2008, the Ninth District Court of Appeals affirmed. *State v. Prade*, 9th Dist. No. 24296, 2009-Ohio-704. The court agreed that "it is possible that newer DNA testing methods could detect additional DNA material that older methods were unable to detect." Id. at ¶ 13. But, because "the General Assembly did not include the availability of newer testing

methods as a factor that a court must consider in determining whether an eligible inmate has had a prior definitive DNA test," it did not consider results new testing methods might produce in assessing whether the earlier tests were "prior definitive DNA test[s]" under R.C. 2953.74(A). Id. at ¶ 13. Instead, applying a dictionary definition of "definitive," the court found that tests are "prior definitive DNA test[s]" and bar new testing under R.C. 2953.74(A) if the earlier tests' results were "final" or "conclusive." Id. at ¶ 8. The court then found that the 1998 DNA tests here were "prior definitive DNA test[s]" because they produced results that, however useless in terms of identifying the killer, were "definitive" – they identified the blood as Dr. Prade's.

This wooden reading of R.C. 2953.74(A) runs afoul of multiple canons of statutory interpretation and construction. It conflicts with the DNA testing statute's fundamental purpose, which is the "'paramount concern'" in "cases of statutory construction." *Buehler*, 113 Ohio St. 3d at 119, 2007-Ohio-1246, ¶ 29. It fails to "'read[] words and phrases in context." Id. And, although "related sections of the Revised Code must be construed together," *Buehler*, 113 Ohio St. 3d at 118, 2007-Ohio-1246, ¶ 29, it ignores R.C. 2953.71(J)'s definition of an "inconclusive result," which is the converse of "a prior definitive DNA test."

Further, reading R.C. 2953.74(A) to prohibit DNA testing that could establish actual innocence creates collateral problems. Because it makes DNA testing unavailable to persons who previously had DNA testing that used now-outdated testing methods, its creates Due Process and Equal Protection issues. See *Osborne*, 521 F.3d at 1131-32; *McKithen*, 565 F. Supp. 2d at 444. Those issues might never arise if R.C. 2953.74(A) is read, as it should be, to require that courts assess the "definitiveness" of earlier DNA testing by reference to what tests using current methods might reveal. This Court should, as it did in *Buehler* and *Sterling*, accept jurisdiction and provide guidance to lower courts.

STATEMENT OF THE CASE AND FACTS

A. Dr. Prade's Murder And Mr. Prade's Trial And Conviction

On November 26, 1997, Dr. Margo Prade was fatally shot while she was in her van parked outside her Akron medical offices. No one witnessed her murder. The killer's gun was not found. Dr. Prade apparently attempted to defend herself by using her arm to push the killer away. The killer bit her arm so hard that, through two layers of clothing – Dr. Prade's lab coat and blouse – the killer's teeth left an impression on her skin.

In February 1998, Dr. Prade's ex-husband, Akron Police Captain Douglas Prade, was charged with Dr. Prade's murder. At his September 1998 trial, the State's DNA testing expert agreed that the lab coat over the bite mark on Dr. Prade's arm was "the best possible source of DNA evidence as to [Dr. Prade's] killer's identity." (Callaghan TT at 1125:13-22). Similarly, Mr. Prade's dental expert testified that the killer "probably slobbered all over" the lab coat over the bite mark. (Baum TT at 1629:5-10).

But the DNA testing technology used in 1998 – polymerase chain reaction (or "PCR") DNA testing – "ha[d] been around for over ten years." (Callaghan TT at 1088:6-8). PCR DNA testing cannot identify trace amounts of one person's DNA if there are large quantities of another person's DNA present. Because Dr. Prade's lab coat over the bite mark was soaked with her blood, "the fact that there [was] blood there and blood's got a lot of DNA in it" ruled out detecting other DNA with PCR DNA testing. (Id. at 1111:6-14). Thus, PCR DNA testing of the lab coat over the bite mark in 1998 had a "definitive" result – it identified Dr. Prade's DNA from her blood. And it "excluded" Mr. Prade in the sense that the DNA found was not his. But that "exclusion" was meaningless because the killer's DNA could not be detected. The State's expert agreed that the 1998 DNA "test results d[id] not give [him] any information about the killer" and that "the bite mark show[ed] [him Dr.] Margo Prade's DNA only." (Id. at 1125:23-1126:2).

Other PCR DNA testing conducted in 1998 yielded similarly inconclusive results. It failed to produce results in some instances due to the small quantities of biological material available; showed Dr. Prade's DNA on some evidence; and revealed a DNA mixture in Dr. Prade's fingernail clippings that, while it was not Dr. Prade's or Mr. Prade's, could not be identified. (Callaghan TT at 1086:11-1087:24; 1102:18-1105:8; 1117:5-10).

The case against Mr. Prade rested largely on testimony about the Prades' difficult relationship before and after their April 1997 divorce. But there also was expert testimony about the bite mark the killer made on Dr. Prade's arm through her lab coat and blouse. Even today, "the scientific basis" for bite mark identification "is insufficient to conclude that bite mark comparisons can result in a conclusive match." Comm. on Science, Tech., Law, Strengthening Forensic Science in the U.S.: A Path Forward at 128 (2009). One of the State's experts said the bite mark was "consistent with" Mr. Prade's teeth, but thought "there's just not enough [evidence] to say one way or the other" that it was Mr. Prade's. (Levine TT at 1219:5-10). The State's other expert said the mark "was made by Captain Prade." (Marshall TT at 1406:12-14). A defense expert said that Mr. Prade's loose denture meant "the act of biting for Mr. Prade, [wa]s a virtual impossibility." (Baum TT at 1641:17-20).

The State also offered testimony from two eye witnesses. One testified that he saw Mr. Prade near the murder scene before the murder, but admitted that, although he learned of the murder the day it occurred, he came forward nine months later after months of press coverage that had featured Mr. Prade's picture. (Husk TT at 1263:4-1265:17; 1273:7-23; 1278:9-22). The other was standing in the parking lot as the killer's car "peel[ed] off" and, although he "didn't pay it no attention" and did not identify anyone in police interviews in the months immediately after the murder, identified Mr. Prade as the man inside the car in February 2008 during the

witness's third interview. (Brooks TT 1424:14-1426:1; Myers TT 1058:24-1059:22; Lacy TT 1791:6-1792:11). Mr. Prade called an alibi witness who said she saw Mr. Prade working out at roughly the time of the murder. (Lynch TT at 1527:2-4, 18-22).

A jury convicted Mr. Prade on September 23, 1998, and his conviction was affirmed. *State v. Prade* (9th Dist. 2000), 139 Ohio App. 3d 676, app. dismissed (2000), 90 Ohio St. 3d 1490. He currently is incarcerated serving a life sentence.

B. <u>Advances In DNA Testing Since 1998</u>

Technological advances in DNA testing since Mr. Prade's 1998 trial mean that "a DNA profile may now be developed from items which were previously unsuccessfully typed or potentially not attempted due to the compromised or limited nature of the sample." Johnson Aff. at ¶ 8 (Ex. A to Prade's Appl. for DNA Testing). PCR DNA testing, which was used in this case in 1998, has not only been improved, but has been largely replaced by two newer technologies – short tandem repeat (or "STR") and Y-chromosome STR (or "Y-STR") testing. The STR DNA testing method "increase[ed] exponentially the reliability of forensic identification over earlier techniques" and was "qualitatively different from all that proceeded it." *Harvey v. Horan* (4th Cir. 2002), 285 F.3d 298, 305 & n.1 (Luttig, J., respecting the denial of rehearing en banc). STR DNA test results also can be compared to the DNA of 6.5 million known offenders using a computerized database – Combined DNA Index System or "CODIS" – that could not be used with the PCR DNA test results in this case. See R.C. 2953.74(E) (providing for use of CODIS).

One problem with older DNA testing methods was that, as seen in the tests conducted on Dr. Prade's lab coat over the killer's bite mark here, if there was a substantial quantity of the victim's DNA present, it might overwhelm and prevent detection of the perpetrator's DNA. Johnson Aff. at ¶ 6. "Y-STR testing avoids this problem, because it detects only the male Y-

chromosome on the swab, thus ignoring the overwhelming percentage of female DNA present that may otherwise 'drown out' the male perpetrator's DNA profile." Id.

These advances in DNA testing technology have had real world consequences. As noted above at page 2, postconviction DNA testing had exonerated over 200 persons as of early 2008, including 14 who had been sentenced to death. Brandon L. Garrett, "Judging Innocence," 108 Colum. L. Rev. 55, 57, 132-142 (2008). Six of those persons were convicted in Ohio, including Clarence Elkins who, just like Mr. Prade, was convicted in Summit County in 1998. Id. at 132-34, 137-38. And, since that early 2008 tally, DNA testing has exonerated two more Ohioans.

C. Ohio's DNA Testing Statute – R.C. 2953.71 – 2953.84

Ohio and more than 40 other states have passed statutes governing access to post-conviction DNA testing. Id. at 58; R.C. 2953.71 – 2953.84. "[I]t was partially the development of Y-STR technology that prompted the General Assembly to enact" Ohio's DNA testing statute "to take advantage of advances in technology that were not available at the time of their trial." *State v. Emerick* (2d Dist.), 114 Ohio App. 3d 647, 651, 2007-Ohio-1334, ¶ 18, app. denied, 114 Ohio St. 3d 1511, 2007-Ohio-4285. Ohio's DNA testing scheme allows "eligible inmates" to file an application for DNA testing in the court in which they were tried. R.C. 2953.72-.73. If there was "a *prior definitive DNA test* ... regarding the same biological evidence that the inmate seeks to have tested, the court shall reject the inmate's application." R.C. 2953.74(A) (italics added). The statute does not define "a prior definitive DNA test."

If "a *prior inconclusive DNA test* has been conducted," then "the court shall review the application and has the discretion, on a case-by-case basis, to either accept or reject the application." Id. (italics added). The statute defines an "inconclusive result" as "a result of DNA testing that is rendered when a scientifically appropriate and definitive DNA analysis or result, or both, cannot be determined." R.C. 2953.71(J). To obtain testing under the statute,

inmates must establish that new DNA test results excluding the inmate, "when analyzed in the context of and upon consideration of all admissible evidence," would "have been *outcome determinative* at the trial stage." R.C. 2953.74(B) (italics added). "Outcome determinative" DNA test results are ones that, if "analyzed in the context of and upon consideration of all admissible evidence," would have created "a strong probability that no reasonable factfinder would have found the inmate guilty." R.C. 2953.71(L). The procedures for obtaining state-funded postconviction DNA testing in R.C. 2953.71 to 2953.82 "are not the exclusive means by which an inmate may obtain postconviction DNA testing" and "do not limit or affect any other means by which an inmate may obtain postconviction DNA testing." R.C. 2953.84.

D. Mr. Prade's DNA Testing Application And The Rulings Below

On February 5, 2008, Mr. Prade filed the DNA testing application at issue here. His case is one of 30 selected by "Operation 262," a project of The Columbus Dispatch, the Ohio Innocence Project, and Ohio Public Defenders. After reviewing over 300 cases where testing had been denied under Ohio's 2003 DNA testing statute, this case and 29 others were selected as ones that, under the revised 2006 DNA testing statute, Senate Bill No. 262, had particular merit. A private testing lab agreed to conduct testing in all "Operation 262" cases without charge.

The Summit County Prosecutor's Office engaged Dr. Elizabeth Benzinger of the Ohio Bureau of Criminal Identification & Investigation. She said that, although contamination always is a concern, "Y-STR testing has the potential to identify any male DNA that might be contained within [Dr. Prade's] lab coat bite mark sample." Benzinger Letter at 2 (State's Mem. Opp. at A-24-25). The Summit County Prosecutor's Office nonetheless opposed the application.

In a June 2, 2008 order, the Summit County Court of Common Pleas denied Mr. Prade's request for testing because, in that court's view, the DNA testing done at the time of Mr. Prade's trial in 1998 was "a prior definitive DNA test" that, under R.C. 2953.74(A), prohibited further

testing. June 2, 2008 Order at 6. The court also found that the application failed under R.C. 2953.74(B) because "an exclusion result would only duplicate the result at trial and would not be outcome determinative." Id. It did not address the request for free DNA testing.

Mr. Prade raised three assignments of error in his appeal to the Ninth District, which affirmed the trial court on February 18, 2009. *State v. Prade*, 9th Dist. No. 24296, 2009-Ohio-704. His first assignment was that the trial court erred in finding that further testing was barred here under R.C. 2953.74(A) because the 1998 testing was "a prior definitive DNA test." The Ninth District agreed that "it is possible that newer DNA testing methods could detect additional DNA material that older methods were unable to detect." Id. at ¶ 13. But that court found that the inconclusive 1998 test results were "prior definitive DNA test[s] regarding the same biological evidence that [Mr. Prade] s[ought] to have tested" and affirmed the trial court's finding that R.C. 2953.74(A) prohibits further state-funded testing here. Id.

In reaching this result, the Ninth District began its analysis by noting that the statute neither defines "a prior definitive DNA test" nor expressly mandates that "the availability of newer testing methods [be] a factor that a court must consider in determining whether an eligible inmate has had a prior definitive DNA test." Id. at ¶¶ 8, 13. Rejecting a standard based on what "newer testing methods" might show, id. at ¶ 13, the court instead adopted a dictionary definition of "definitive" under which earlier tests are "definitive" if they produced a result that can be said to be "final" or "conclusive." Id. at ¶ 8. And, because the 1998 PCR DNA tests here produced results that were "final" and "conclusive" with respect to the blood on Dr. Prade's lab coat (i.e., it was Dr. Prade's), the court found those tests were "prior definitive DNA test[s]" even though "it is possible that newer DNA testing methods could detect additional DNA material that [the] older method[] w[as] unable to detect." Id. at ¶ 13.

The second assignment of error challenged the trial court's finding that results of new DNA testing could not be "outcome determinative" as R.C. 2953.74(B) requires. The Ninth District found that this issue was moot in light of its finding that R.C. 2953.74(A) prohibits testing. Id. at ¶ 15. Then, building on its erroneous finding that, under R.C. 2953.74(A), meaningless DNA test results produced using older testing methods somehow bar using newer, more sophisticated DNA testing methods to possibly establish actual innocence, the court said that it "fail[ed] to see how yet another 'DNA exclusion ... would have been outcome determinative at the trial stage.'" Id. at ¶ 16 (quoting R.C. 2953.74(B)).

The third assignment of error was that the trial court erred by failing to permit free testing. See R.C. 2953.84. The Ninth District found that Mr. Prade failed to preserve that issue because, although he requested free testing and was not asked to state the legal bases for it, his application did not specify the statutory or constitutional bases for free testing. 2009-Ohio-704, ¶ 19.

Mr. Prade's application for reconsideration was denied on March 11, 2009.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: Whether (a) earlier DNA test results were "definitive" for purposes of R.C. 2953.74(A), and (b) new DNA test results might be "outcome determinative" under R.C. 2953.74(B), must be assessed by comparing (1) the results of the prior DNA testing to (2) potential results from new DNA testing using current DNA testing methods.

DNA testing was conducted on some of the physical evidence at the time of Mr. Prade's trial in 1998, including DNA testing on Dr. Prade's blood-stained lab coat over the killer's bite mark. Those tests were not a central focus at trial because the only conclusive result was identifying Dr. Prade's DNA, an obvious result that did nothing to identify the killer. Both sides' experts in these proceedings agreed that, if Dr. Prade's lab coat over the killer's bite mark is subjected to Y-STR DNA testing – a new, more sensitive testing technique that was not

available in 1998 – the new testing might, for the first time, identify traces of the killer's DNA that 1998 testing methods could never have detected.

Consistent with the experts' views, the Ninth District found that "it is possible that newer DNA testing methods could detect additional DNA material that older methods were unable to detect." *State v. Prade*, 9th Dist. No. 24296, 2009-Ohio-704, ¶ 13. And, because current testing methods could produce new results that might establish innocence, the 1998 DNA tests could hardly be less "definitive" for purposes of R.C. 2953.74(A)'s prohibition against additional testing when there was "a prior definitive DNA test."

The Ninth District, however, reached the opposite conclusion based on a fundamental misunderstanding and misreading of that statute. The court noted, but rejected, the correct standard for assessing whether earlier DNA testing was "definitive;" namely, whether new tests using modern testing methods may yield results that establish innocence. Id. at ¶ 13. Instead, relying on a dictionary's definition of "definitive," the court found that earlier DNA testing is "definitive" for purposes of R.C. 2953.74(A) if the earlier tests produced results that can be said to be "final" or "conclusive." Id. at ¶¶ 8, 13. And, because the 1998 PCR DNA tests here produced results that were "final" and "conclusive" with respect to the blood on Dr. Prade's lab coat (i.e., it was Dr. Prade's), the court found R.C. 2953.74(A) barred new testing. Defining "a prior definitive DNA test" without reference to what the results of testing using current testing methods might show, however, is not only unprecedented, but erroneous for three reasons.

First, it conflicts with the statute's fundamental purpose, which is the "'paramount concern'" in "cases of statutory construction." *State v. Buehler*, 113 Ohio St. 3d 114, 119, 2007-Ohio-1246, ¶ 29 (citation omitted). As noted above at page 8, "it was partially the development of Y-STR technology that prompted the General Assembly to enact" Ohio's DNA testing statute

"to take advantage of advances in technology that were not available at the time of their trial." *Emerick*, 114 Ohio App. 3d at 651, 2007-Ohio-1334, ¶ 18. In a statute prompted by the advent of Y-STR testing and designed to afford inmates "the opportunity to take advantage of *advances in technology* that were *not available at the time of their trial*," id. (italics added), old DNA test results using testing methods that pre-dated Y-STR testing should not bar new testing when, as here, newer DNA testing methods "could detect additional DNA material."

Second, the lower court's definition of "a prior definitive DNA test" ignores the relevant statutory context. When interpreting a statute, courts must "'read[] words and phrases in context.'" *Buehler*, 113 Ohio St. 3d at 119, 2007-Ohio-1246, ¶ 29 (citation omitted). R.C. 2953.74(B) allows new testing when exclusion results from that testing "would have been outcome determinative" if introduced at trial. Courts necessarily must assess whether new testing would be "outcome determinative" based on what the results of new tests using current DNA testing technology might show. Indeed, that is the only reasonable interpretation of R.C. 2953.71(L), which provides that "'[o]utcome determinative' means that had the results of DNA testing ... been presented at trial, ... there is a strong probability that no reasonable factfinder would have" convicted.

But the prohibition against new testing when there was "a prior determinative DNA test" in R.C. 2953.74(A) is simply a specific instance in which new testing cannot be "outcome determinative" under R.C. 2953.74(B) (i.e., when prior tests produced results with the same evidentiary significance as what new testing might produce, new testing cannot be "outcome determinative"). Thus, the "outcome determinative" standard in R.C. 2953.74(B) and the "prior determinative DNA test" standard in R.C. 2953.74(A) are, proverbially, "two sides of the same coin." Accordingly, they should be judged by the same scientific standard – what new tests

using today's technology might show – because "related sections of the Revised Code must be construed together." *Buehler*, 113 Ohio St. 3d at 119, 2007-Ohio-1246, ¶ 29 (citation omitted).

If, as the Ninth District found, the assessment of whether earlier testing was "definitive" can be based on the state of science at the time of the inmate's trial many years earlier, the DNA testing statute has a gaping hole. Unlike inmates tried before there was any DNA testing and those tried now, inmates who, like Mr. Prade, may be able to establish their innocence through modern DNA testing that would be "outcome determinative" are denied testing simply because there was older, less-sensitive DNA testing that happened to produce some results that can be said to be "final" or "conclusive." The Legislature should not be presumed to have intended that illogical, unfair result. See *In re T.R.*, 120 Ohio St. 3d 126, 139, 2008-Ohio-5229, ¶ 16 (courts "must avoid ... construing statutes" to "lead to an illogical or absurd result").

Third, the lower court misread R.C. 2953.71(J), which defines an "inconclusive result" – the converse of "a prior definitive DNA test." Plainly, "related sections of the Revised Code must be construed together." *Buehler*, 113 Ohio St. 3d at 118, 2007-Ohio-1246, ¶ 29 (citation omitted). The Ninth District found that "the General Assembly [did not] further define the term 'inconclusive' [in R.C. 2953.71(J)] to include a DNA testing result obtained via an older testing method." *Prade*, 2009-Ohio-704, ¶ 13. While, of course, R.C. 2953.71(J) does not define all test results "obtained via older testing method[s]" as "inconclusive" (because they are not), R.C. 2953.71(J) is neither silent nor unclear as it applies here.

R.C. 2953.71(J) expressly recognizes that scientific knowledge and methods evolve over time by defining an "inconclusive result" as one "rendered when a *scientifically appropriate* and definitive DNA analysis or result, or both, cannot be determined." (Italics added). Where, as here, (a) results were obtained using outdated 1998 PCR DNA testing technology and (b) "newer

DNA testing methods could detect additional DNA material," there is no "*scientifically appropriate* and definitive DNA analysis or result." Because they are not "scientifically appropriate" based on current scientific standards, the 1998 PCR DNA testing results are "inconclusive results" under R.C. 2953.71(J), not "definitive" ones under R.C. 2953.74(A).'

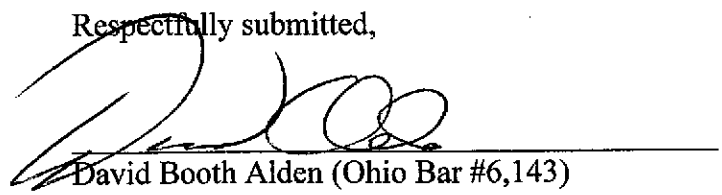
Separately, the Ninth District observed that it "fail[ed] to see how yet another 'DNA exclusion ... would have been outcome determinative" as R.C. 2953.74(B) requires. *Prade*, 2009-Ohio-704, ¶ 16. As detailed above, the 1998 DNA test results of Dr. Prade's lab coat over the killer's bite mark were "inconclusive" because they failed to detect the killer's DNA, which new, more sensitive testing methods might find. The fact that the 1998 testing of the lab coat "excluded" Mr. Prade was meaningless because, as the State's DNA expert testified at trial, those "test results d[id] not give [him] any information about the killer." (Callaghan TT at 1125:23-1126:2). New test results identifying DNA in the bite mark that was neither Dr. Prade's nor Mr. Prade's could not fairly be said to be "yet another 'DNA exclusion.'" Id. at ¶ 16. They would be "outcome determinative." See *Emerick*, 170 Ohio App. 3d at 651, 2007-Ohio-1334, ¶ 25 (when DNA testing of evidence central to the State's case might identify the perpetrator, testing was "outcome determinative" for purposes of R.C. 2953.74(B)).

CONCLUSION

For the foregoing reasons, this Court should accept jurisdiction.

April 3, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing document was served this 3d day of April, 2009, by U.S. Mail, postage prepaid, on (1) Sherri Bevan Walsh, Prosecuting Attorney, and Richard S. Kasay, Assistant Prosecuting Attorney, Appellate Division, Summit County Safety Building, 53 University Avenue, Akron, Ohio 44308; and (2) Richard Cordray, Ohio Attorney General, Ohio Attorney General's Office, DNA Testing Unit, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215.

An Attorney for Douglas Prade

APPENDIX

COURT OF APPEALS
DANIEL M. HORRIGAN
2009 FEB 18 AM 7:
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

DOUGLAS PRADE

Appellant

C.A. No. 24296

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 1998-02-0463

DECISION AND JOURNAL ENTRY

Dated: February 18, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Douglas Prade, appeals from the order of the Summit County Court of Common Pleas, denying his renewed application for post-conviction DNA testing. This Court affirms.

I

{¶2} On September 24, 1998, a jury found Prade guilty of the aggravated murder of his ex-wife, Dr. Margo Prade. The jury also found Prade guilty of possessing criminal tools and engaging in multiple instances of intercepting a wire, oral, or electronic communication. The trial court sentenced Prade to life in prison, and this Court affirmed his convictions on direct appeal. *State v. Prade* (2000), 139 Ohio App.3d 676.

{¶3} On October 29, 2004, Prade filed an application for DNA testing pursuant to R.C. 2953.71, et seq. On May 2, 2005, the trial court denied Prade's application. The court determined that Prade did not qualify for DNA testing because R.C. 2953.74(A) precludes post-

conviction DNA testing when "a prior definitive DNA test has been conducted." The trial court noted that DNA evidence was introduced at Prade's trial and excluded Prade as the source of the DNA samples taken from Margo. Prade sought to appeal from the trial court's order, but filed a late notice of appeal. As such, this Court dismissed the appeal as untimely. See *State v. Prade*, 9th Dist. No. 22718.

{¶4} On February 5, 2008, Prade filed a second application for DNA testing. On June 2, 2008, the trial court denied Prade's second application. The court again determined that Prade did not qualify for post-conviction DNA testing because prior definitive DNA testing had been conducted. The court further determined that Prade failed to show that additional DNA testing would be outcome determinative, as required by R.C. 2953.74(B), because the prior DNA testing had excluded Prade as a source of the DNA tested and other evidence at trial supported his convictions.

{¶5} Prade now appeals from the trial court's denial of his second application for DNA testing and raises three assignments of error for our review.

II

Assignment of Error Number One

"IN LIGHT OF ADVANCES IN DNA TESTING METHODS SINCE DEFENDANT'S 1998 TRIAL, THE TRIAL COURT ERRED IN CONCLUDING THAT INCONCLUSIVE DNA TESTS CONDUCTED IN 1998 WERE 'PRIOR DEFINITIVE DNA TEST[S]' AND IN DENYING DEFENDANT'S APPLICATION FOR PUBLICLY-FUNDED TESTING FOR THAT REASON BASED ON R.C. § 2953.74(A)."

{¶6} In his first assignment of error, Prade argues that the trial court erred in denying his application for post-conviction DNA testing on the basis that his prior DNA testing was definitive. Specifically, he argues that his prior DNA testing was not definitive because newer

testing methods and databases could conceivably identify the perpetrator of Margo's murder. We disagree.

{¶7} This Court applies a de novo standard of review to the legal conclusions reached by a trial court in its decision to deny an application for post-conviction DNA testing pursuant to R.C. 2953.73, et seq. *State v. Wilkins*, 9th Dist. No. 22493, 2005-Ohio-5193, at ¶6. R.C. 2953.73(A) permits an eligible inmate to submit an application for DNA testing to the court of common pleas. The court then must determine, based on the criteria and procedures set forth in R.C. 2953.74 to R.C. 2953.81, whether to accept or reject the application. R.C. 2953.73(D). R.C. 2953.74(A) provides, in relevant part, that:

> "If an eligible inmate submits an application for DNA testing *** and a *prior definitive* DNA test has been conducted regarding the same biological evidence that the inmate seeks to have tested, the court *shall reject* the inmate's application. If an eligible inmate files an application for DNA testing and a *prior inconclusive* DNA test has been conducted regarding the same biological evidence that the inmate seeks to have tested, the court *shall review* the application and has the discretion, on a case-by-case basis, to either accept or reject the application." (Emphasis added.)

Consequently, if an eligible inmate has had a prior DNA test, a trial court first must determine whether the test was definitive or inconclusive. Id. A conclusion that an inmate's prior DNA test was definitive mandates the denial of the application. Id.

{¶8} The Revised Code does not define the phrase "definitive DNA test." *Wilkins* at ¶9. The Revised Code does provide, however, that an inconclusive DNA testing result is one "rendered when a scientifically appropriate and definitive DNA analysis or result, or both, cannot be determined." R.C. 2953.71(J). As such, a scientifically appropriate DNA test that produces an inconclusive result is at least one example of a DNA test that is not definitive. Id. When the Revised Code does not define a term or phrase, this Court applies "the time-honored rule that words used by the General Assembly are to be construed according to their common

usage." *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 103. The term "definitive" means "serving to provide a final solution or to end a situation[.]" Merriam-Webster's Collegiate Dictionary (11th Ed. 2004) 327. This construction of the term "definitive" comports with the Revised Code's use of the term "definitive." See R.C. 2953.71(J) (providing that an inconclusive DNA test result is not a definitive result); R.C. 2953.74(A) (juxtaposing a prior "definitive" DNA result, which bars further testing, with a prior "inconclusive" DNA result, which allows further testing). Accordingly, we must conclude that a "definitive DNA test" is a DNA test that serves to provide a final, conclusive solution. See, e.g., *State v. Williams*, 5th Dist. No. 05-CA-36, 2006-Ohio-1381, at ¶81 (concluding that a DNA test performed on a minute sample was not definitive because it only produced a partial DNA profile, which 1 in 64 individuals possess).

{¶9} The trial court denied Prade's second application for DNA testing because it determined that Prade had a definitive DNA test at his trial. Prade concedes that DNA evidence was introduced at his trial, but argues that the DNA test results were not definitive because: (1) not all of the evidence contained enough biological material to be tested based on the testing methods available at the time; and (2) newer testing methods could yield additional results, such as the presence of another male's DNA, and possibly identify another perpetrator if run through a national DNA database.[1] For these reasons, Prade argues, the DNA test results introduced at his trial were inconclusive, not definitive. See id.

---

[1] Although the State argues that res judicata bars Prade's second application for DNA testing, Prade correctly points out that the State waived the affirmative defense of res judicata by raising it for the first time on appeal. See *North Olmsted Auto Paint & Supply Co. v. Lettieri* (July 22, 1992), 9th Dist. No. 91CA005211, at *3 (concluding that affirmative defense was waived when not raised at the trial level).

{¶10} Four pieces of evidence were tested for the presence and identification of biological markers: (1) Margo's fingernail clippings; (2) a bite mark left on the fabric of the lab coat that Margo was wearing when she was murdered; (3) a broken, gold tennis bracelet discovered on the ground next to the passenger's door of the vehicle in which Margo was murdered; and (4) a link that had separated from the broken, gold tennis bracelet and had fallen inside of Margo's vehicle. Thomas Callaghan, a forensic DNA examiner for the FBI, testified that he performed Polymerase Chain Reaction ("PCR") testing on the foregoing evidence. Callaghan explained that PCR testing allows for the extraction and multiplication of "very small amounts of DNA." According to Callaghan, the tests performed on Margo's fingernail clippings and the swabs from the bite mark on her lab coat "absolutely excluded" Prade as a contributor of the DNA Callaghan found on those items. Callaghan specified that Prade "could not have contributed the DNA that was identified." Further, Callaghan stated that "I believe that the conclusions from my report are that [Prade] is excluded as a contributor to all the DNA that was typed in this case." Callaghan's lab report confirmed that Prade could not have contributed to the DNA discovered on either Margo's fingernail clippings or her lab coat.

{¶11} Other additional lab reports reflected the foregoing results. The Laboratory Corporation of America ("LCA") conducted tests on the link from Margo's broken, gold tennis bracelet. A Certificate of Analysis from the LCA concluded, based on a PCR test, that the DNA profile of the blood found on the tennis bracelet link was "different than the DNA profile obtained from the reference sample from Douglas Prade[.]" The Serological Research Institute ("SRI") performed tests on a cutting from the area of Margo's lab coat that contained the bite mark. The SRI report indicated that a saliva test was performed on the cutting, but that no amylase, the testable component of saliva, was detected. Further testing, however, uncovered

cellular material on the lab coat cutting and allowed for DNA extraction and amplification by PCR. Based on the PCR testing, the SRI report concluded that the DNA detected on the lab coat cutting could not have come from Prade.

{¶12} DNA test results may be "inconclusive" for a variety of reasons. See, e.g., *State v. Hatton*, 4th Dist. No. 05CA38, 2006-Ohio-5121, at ¶16 (noting expert's opinion that DNA analysis was inconclusive because sample did not contain sufficient DNA); *State v. Schlee*, 11th Dist. No. 2004-L-207, 2006-Ohio-2391, at ¶29-30 (noting inconclusive DNA testing result on hair samples and refusing further testing to potentially gain an exclusion result); *State v. Blackburn*, 5th Dist. No. 05CA3, 2005-Ohio-4710, at ¶4; ¶40 (refusing additional testing on one item of evidence after initial testing indicated the sample was too degraded to determine its source); *State v. Hayden*, 2d Dist. No. 20747, 2005-Ohio-4025, at ¶12 (noting that prior DNA test was inconclusive because it could not exclude the defendant as the perpetrator). The DNA results obtained for Prade's trial, however, were not inconclusive. All of the test results excluded Prade as a contributor to the DNA extracted from the various pieces of evidence. Prade asks this Court to conclude that an exclusion result is not a definitive result. Yet, an exclusion result provides a final, conclusive solution. See Merriam-Webster's Collegiate Dictionary (11th Ed. 2004) 327 (defining the term "definitive"). Therefore, we must conclude that Prade's DNA tests, all of which produced exclusion results, constituted prior, definitive DNA tests within the meaning of R.C. 2953.74(A).

{¶13} This Court acknowledges Prade's argument that it is possible that newer DNA testing methods could detect additional DNA material that older methods were unable to detect. The emergence of newer and arguably better technologies always remains as a possibility. Indeed, the newer testing methods upon which Prade seeks to rely now may become obsolete in

another ten years. Yet, the General Assembly did not include the availability of newer testing methods as a factor that a court must consider in determining whether an eligible inmate has had a prior definitive DNA test. See R.C. 2953.74(A). Nor did the General Assembly further define the term "inconclusive" to include a DNA testing result obtained via an older testing method. See R.C. 2953.71(J). "[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom." *Hubbard v. Canton City School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718, at ¶14. As such, we conclude that the trial court correctly denied Prade's application on the basis that Prade received a prior definitive DNA test regarding the same biological evidence that he seeks to have tested in his second application for DNA testing. See R.C. 2953.74(A). Prade's first assignment of error is overruled.

Assignment of Error Number Two

> "IN LIGHT OF ADVANCES IN DNA TESTING METHODS SINCE DEFENDANT'S 1998 TRIAL, THE TRIAL COURT ERRED IN CONCLUDING THAT ADDITIONAL TESTING WOULD MERELY 'DUPLICATE THE RESULTS PRESENTED AT TRIAL' AND, FOR THAT REASON, DENYING DEFENDANT'S APPLICATION FOR PUBLICLY-FUNDED TESTING BECAUSE IT WOULD NOT BE 'OUTCOME DETERMINATIVE' AS REQUIRED BY R.C. § 2953.74([B])."

{¶14} In his second assignment of error, Prade argues that the trial court erred in denying his application for post-conviction DNA testing on the basis that additional testing would not be outcome determinative. Specifically, he argues that it is probable additional testing would be outcome determinative because it could potentially identify the perpetrator of Margo's murder rather than merely excluding Prade as the source of the DNA.

{¶15} R.C. 2953.74(B) provides, in relevant part, that:

> "If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code, the court may accept the application only if one of the following applies:
>
> "***
>
> "(2) The inmate had a DNA test taken at the trial stage in the case in which the inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA testing regarding the same biological evidence that the inmate seeks to have tested, the test was not a prior definitive DNA test that is subject to division (A) of this section, and the inmate shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject inmate's case as described in division (D) of this section would have been outcome determinative at the trial stage in that case."

Prade argues that the trial court erred in determining that he failed to satisfy the outcome determinative prong of R.C. 2953.74(B). To reach the issue of outcome determination, however, one first must conclude that an eligible inmate did not have a prior definitive DNA test. R.C. 2953.74(A). Because this Court already has determined that Prade had a prior definitive DNA test, his argument is moot.

{¶16} Moreover, Prade already had DNA exclusion results introduced at his trial, and the jury convicted him in spite of those results. See *Prade*, 139 Ohio App.3d at 696-700 (affirming jury's verdict and concluding that Prade's aggravated murder conviction was not against the manifest weight of the evidence). None of the cases that Prade cites in support of his argument involve a defendant who had a DNA exclusion result introduced at trial. See *State v. Emerick*, 2d Dist. No. 21505, 2007-Ohio-1334, at ¶17-22 (permitting additional DNA testing when exclusion result could not be obtained at time of trial); *State v. Elliot*, 1st Dist. No. C-050606, 2006-Ohio-4508, at ¶2-3 (permitting DNA testing when exclusion result discovered after testing one piece of evidence one year after trial); *State v. Hightower*, 8th Dist. Nos. 84248 & 84398, 2005-Ohio-3857, at ¶1; ¶29 (permitting DNA testing when testing was not available at

the time of conviction). We fail to see how yet another "DNA exclusion *** would have been outcome determinative at the trial stage in [this matter]." R.C. 2953.74(B). Prade's second assignment of error is overruled.

Assignment of Error Number Three

> "WHERE A LABORATORY AGREED TO CONDUCT DNA TESTING THAT MAY ESTABLISH DEFENDANT'S INNOCENCE WITHOUT CHARGE, THE TRIAL COURT ERRED AND DENIED DEFENDANT HIS CONSTITUTIONAL RIGHTS IN FINDING THAT SUCH PRIVATELY-FUNDED DNA TESTING WAS 'PROHIBITED' AS THE RESULT OF A PURPORTED FAILURE TO SATISFY THE REQUIREMENTS FOR PUBLICLY-FUNDED DNA TESTING UNDER R.C. § 2953.73 ET SEQ."

{¶17} In his third assignment of error, Prade argues that the trial court erred in refusing to make the physical evidence from his trial available for DNA testing funded from a private source. Specifically, he argues that both R.C. 2953.84 and due process considerations afford him the right to have privately-funded DNA testing conducted.

{¶18} R.C. 2953.84 provides that:

> "The provisions of sections 2953.71 to 2953.82 of the Revised Code by which an inmate may obtain postconviction DNA testing are not the exclusive means by which an inmate may obtain postconviction DNA testing, and the provisions of those sections do not limit or affect any other means by which an inmate may obtain postconviction DNA testing."

The statute does not specify what "other means" an inmate may employ to obtain postconviction DNA testing. Id. According to Prade, privately-funded testing constitutes such an alternative mean.

{¶19} The record reflects that Prade failed to preserve this argument in the court below. Prade argues that he preserved this issue because his application clearly noted three times that a private source was available to fund the DNA testing and also cited to the U.S. and Ohio Constitutions. We cannot conclude, however, that three references to free DNA testing equate to

a request for DNA testing by "other means" through the application of R.C. 2953.84. Prade's application does not even cite to R.C. 2953.84, much less rely upon it as a basis for granting further DNA testing. Similarly, Prade's application cites to the U.S. and Ohio Constitutions solely to argue the existence of a "right to conduct discovery" in the event that the State "claim[ed] that [it could not] find any relevant biological material suitable for DNA testing[.]" The application does not rely upon the Constitutions to argue a constitutional right to privately-funded DNA testing. Moreover, we cannot conclude that Prade's ultimate request that the trial court "[o]rder such other and further relief to which Douglas Prade may be justly entitled" sufficiently preserves his argument. If such broad language sufficed, then any party seeking relief in a trial court could preserve every conceivable argument for appeal simply by making a general request for relief. This Court has recognized that "arguments not brought to the attention of the court below may not be raised for the first time on appeal." *Morgan Bank, N.A. v. Security-Connecticut Life Ins. Co.* (Dec. 5, 2001), 9th Dist. No. 20594, at *4. Because Prade failed to bring this argument to the attention of the trial court, we will not consider it for the first time on appeal. Prade's third assignment of error is overruled.

III

{¶20} Prade's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

SLABY, J.
MOORE, P. J.
CONCUR

APPEARANCES:

DAVID BOOTH ALDEN, and ANN NETZEL, Attorneys at Law, for Appellant.

MARK GODSEY, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.

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DANIEL M. HORRIGAN

2008 JUN -2 PM 3:33

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STATE OF OHIO	)	CASE NO. CR 1998-02-0463
	)	
Plaintiff	)	JUDGE SPICER
	)	
-vs-	)	
	)	
DOUGLAS PRADE	)	**ORDER**
	)	
Defendant	)	

- - -

This matter is before the Court upon the Defendant's renewed motion for post-conviction DNA testing pursuant to R.C. 2953.73. The State of Ohio responds in opposition, The Defendant replies.

On September 23, 1998, following a trial by jury, the Defendant was convicted of one count of Aggravated Murder with a Firearm Specification; six counts of Interception of Wire, Oral, or Electronic Communications, two of which were felonies of the third degree with the remaining four counts being felonies of the fourth degree; and one count of Possessing Criminal Tools, a felony of the fifth degree.

The Court imposed a mandatory three-year sentence on the Firearm Specification, and life imprisonment on the Aggravated Murder charge; two years for each of the third degree felony charges of Interception of Wire, Oral, or Electronic Communications, one and one-half

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years on each of the remaining fourth degree felony counts of Interception of Wire, Oral, or Electronic Communications, and one year on the Possessing Criminal Tools charge. The Court ordered the Firearm Specification be served consecutively with the Aggravated Murder charge. The Defendant is currently serving this sentence, and has more than one year remaining to serve from the date of his renewed application.

On October 29, 2004, the Defendant made his first application for post-conviction DNA testing under former R.C. 2953.73. The Court deemed the Defendant's first application as timely, and finding that he had met the other requirements for eligibility, analyzed his application pursuant to the standards set forth in R.C. 2953.74.

In short, the Court found that the statute prohibited post-conviction DNA testing when prior definitive DNA testing had been performed at trial. Finding that such testing had been performed in the Defendant's case, the Court denied the Defendant's application.

The Court also denied the Defendant's alternative motion to stay his motion until more advanced DNA testing techniques could be developed, which could possibly identify a third-party as a suspect. The Court found that its inquiry was limited to assessing what effect an exclusion result alone would have had on the question of guilt or innocence at trial, and as such, the statute did not support an open-ended inquiry to develop further evidence.

The Defendant appealed the Court's decision, which was dismissed as untimely. Subsequently, Senate Bill 262 was enacted, which permanently made DNA testing part of Ohio law by re-enacting in large part R.C. 2953.7 et sec. with several modifications. The Defendant subsequently has filed a renewed petition for post-conviction DNA testing under the current statue.

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He contends the statute incorporates important changes to the definition of "outcome determinative," as well as provides a mechanism for comparing the DNA testing results with the larger CODIS database. Moreover, the Defendant asserts that a new DNA testing technology has been developed, namely Y-chromosome STR DNA Testing ("Y-STR"), that detects exclusively the DNA sequences contained on the male Y-chromosome. The Defendant contends the advent of this technology allows for detection of minor amounts of male DNA in a sample containing an overwhelming percentage of female DNA, where prior testing technologies utilized on the same sample would have detected the presence of female DNA only.

In its prior order, the Court summarized the prior DNA testing conducted in this case. To recap:

> "[T]he State introduced at trial the testimony of Thomas F. Callaghan, Ph.D., a forensic DNA examiner with the Federal Bureau of Investigation, and the supervisor of its DNA Analysis Unit. He testified that several items were submitted to his laboratory for testing - the victim's lab coat and blouse; and ten fingernail clippings, four cheek swabs, and two bite mark swabs - all taken from the victim.
>
> Dr. Callaghan testified that his laboratory performed Polymerase Chain Reaction DNA analysis, using polymarker and DQ-alpha typing techniques, on several pieces of the submitted evidence where the presence of DNA was detected. Dr. Callaghan testified that these results were then compared with known DNA samples taken from the victim, Timothy Holston, and the Defendant. Based upon this analysis, Dr. Callaghan testified that the Defendant was definitively excluded as a source of any of the DNA found."

The Defendant contends the application of Y-STR DNA testing to this evidence could reveal the presence of male DNA in those samples taken from the victim's lab coat and blouse that previously presented only the victim's profile. The Defendant argues any male DNA discovered from these samples would most likely have originated from her attacker and killer, and thus a result excluding him as its source would be outcome determinative.

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Additionally, the Defendant contends the fingernail scrapings should be retested to clarify the unknown DNA profile previously discovered by the prior tests, and the results compared with the CODIS database to develop alternative suspects or at the very least to check for redundancies at the crime scene.

The Defendant contends that the statute was re-enacted precisely to allow for the use of new DNA testing techniques in cases like his, citing in support defense counsel's testimony given to the Ohio Legislature before the re-enactment of the statute and *State v. Emerick*, 170 Ohio App.3d 647. Moreover, the Defendant states an applicant is entitled to post-conviction DNA testing when such results would be "outcome determinative."

The Court does not find *State v. Emerick* persuasive on this issue. The Second District Court in *Emerick* was presented with an entirely different factual scenario than the one presented here. In that case, only two pieces of evidence were tested for DNA, which yielded inconclusive results. The Court was not asked to permit retesting with new technology after a previous test had delivered an exclusion result, and as such, *Emerick* did not examine the issue presented here.

As previously stated in the prior order,

> "The advent of DNA testing raises the question of what balance should be struck between the potential probative value of DNA testing with the strong presumption that verdicts are correct, judicial economy, and the need for finality. See *Postconviction DNA Testing: Recommendations for Handling Requests,* Nat'l Instit. Just. Programs, U.S. Dept. Just., Pub. No. NCJ 177626 (Sept. 1999) at pg. 9.
>
> 'The State Legislature has struck that balance in R.C. 2953.74, which confines the Court's analysis in evaluating an application for post-conviction DNA testing to determining what effect an exclusion result alone would have on the question of guilt or innocence."

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R.C. 2953.74 (A), still provides that:

"If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and a prior definitive DNA test has been conducted regarding the same biological evidence that the inmate seeks to have tested, the court shall reject the inmate's application. If an eligible inmate files an application for DNA testing and a prior inconclusive DNA test has been conducted regarding the same biological evidence that the inmate seeks to have tested, the court shall review the application and has the discretion, on a case-by-case basis, to either accept or reject the application...."

R.C. 2953.74 (B) then provides

"If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code , the court may accept the application only if one of the following applies:

(1) The inmate did not have a DNA test taken at the trial stage in the case in which the inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA testing regarding the same biological evidence that the inmate seeks to have tested, the inmate shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject inmate's case as described in division (D) of this section would have been outcome determinative at that trial stage in that case, and, at the time of the trial stage in that case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available.

(2) The inmate had a DNA test taken at the trial stage in the case in which the inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA testing regarding the same biological evidence that the inmate seeks to have tested, the test was not a prior definitive DNA test that is subject to division (A) of this section, and the inmate shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject inmate's case as described in division (D) of this section would have been outcome determinative at the trial stage in that case."

Thus, while the legislature incorporated important changes to the definition of "outcome determinative" in the re-enacted statute, the statute still precludes post-conviction

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DNA testing where a prior definitive test has already been performed. Moreover, the Court's analysis remains confined to assessing what effect an exclusion result would have had on the jury's deliberations at the trial stage.

As previously stated in its prior order,

> "If the Court were to order additional DNA testing using Y-STR analysis or any other future technology, an exclusion result would only duplicate the result presented at trial....the jury found the Defendant guilty after hearing the other evidence presented, despite also hearing testimony that the Defendant did not contribute any of the DNA found. The jury was free to consider what weight to give to the testimony that the Defendant was not the source of any of the DNA discovered."

While the Defendant attacks the reliability of the eyewitness and the bite mark evidence, the Court notes that the matter was appealed and the evidence was found sufficient to support a verdict. Moreover, the Court does not agree that the Defendant may use a prospect of developing a new suspect through comparison with the CODIS database to show that DNA testing would be outcome determinative. The Statute only provides for comparison with the CODIS database after the Court has already decided to permit testing.

As stated supra, the DNA testing performed in this case definitively excluded the Defendant as the source of any DNA discovered, and thus pursuant to R.C. 2953.74 (A), the Defendant's petition fails on this basis. Moreover, even if the Court could further consider the Defendant's petition, it fails under R.C. 2953.74 (B) as an exclusion result would only duplicate the result at trial and would not be outcome determinative.

Conclusion

Based upon the foregoing, the Court denies the Defendant's second application for DNA testing.

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It is so ordered

JUDGE MARY F. SPICER

cc: Richard S. Kasay, Assistant Summit County Prosecutor
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