

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	
)	
Plaintiff-Appellee,	)	Case No. 2009-0605
)	
v.	)	On Appeal From
	)	The Summit County Court
DOUGLAS PRADE,)	Of Appeals, Ninth Appellate
)	District
Defendant-Appellant.)	(9th District Case No. 24296)

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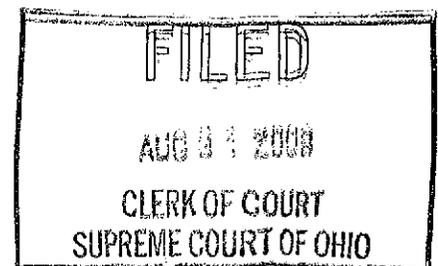


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I. INTRODUCTION

“Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now possible to determine whether a biological tissue matches a suspect with near certainty.” *District Attorney’s Office for the Third Jud. Dist. v. Osborne* (2009), 129 S. Ct. 2308, 2316. DNA evidence “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). The ability of DNA evidence to enhance the truth-finding process is reflected by the fact that it has exonerated over 200 convicted persons, including 14 who had been sentenced to death. See Brandon L. Garrett, “Judging Innocence,” 108 *Colum. L. Rev.* 55, 57, 140 (Jan. 2008).

This appeal, however, involves *denying* modern DNA testing to Douglas Prade, a former Akron Police Captain. In 1998, Mr. Prade was convicted of the aggravated murder of Dr. Margo Prade, his ex-wife. He is currently serving a life sentence. At the time of trial in 1998, DNA tests were performed on Dr. Prade’s blood-stained lab coat over a bite mark her killer left on her arm. Those tests, which used now-outdated

polymerase chain reaction (or “PCR”) DNA testing technology, identified only the DNA from Dr. Prade’s blood on the lab coat and detected no DNA from the killer’s saliva. Thus, while those tests had “definitive” or even “conclusive” results – they established that the blood on Dr. Prade’s lab coat was Dr. Prade’s – they said nothing about who killed her. Not surprisingly, those results were not a central focus at trial.

Since 1998, there have been major advances in DNA testing technology, including the development of short tandem repeat (or “STR”) and Y-chromosome STR (or “Y-STR”) DNA testing. These new, sensitive testing methods can identify trace amounts of DNA, including extremely small quantities of male DNA located within large quantities of female DNA.

In response to these advances in DNA testing technology, the Ohio General Assembly enacted Ohio’s DNA testing statute in 2003 and has since twice amended it. “[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, 2007-Ohio-1334, 868 N.E.2d 742, ¶ 18, appeal denied, 114 Ohio St. 3d 1511, 2007-Ohio-4285, 872 N.E.2d 952.

In February 2008, Mr. Prade filed an application seeking new DNA testing in the trial court below. Both sides' experts in those proceedings said that subjecting Dr. Prade's lab coat to testing using modern DNA testing methods developed after 1998 might identify Dr. Prade's killer's DNA in the bite mark on her lab coat (or elsewhere).

The courts below, however, found that, under Ohio's DNA testing statute, the PCR DNA testing conducted in 1998 precludes additional testing using the modern STR and Y-STR DNA testing techniques. Specifically, they found that, even though the 1998 PCR DNA tests provided no information about Dr. Prade's killer, they (1) were "prior definitive DNA test[s]" that, under R.C. 2953.74(A), bar new DNA testing; and (2) meant that any new test results would be duplicative and, therefore, could not be "outcome determinative" as R.C. 2953.74(B) requires.

These findings cannot be reconciled with the Ohio DNA testing statute's purpose or language. That statute was enacted precisely for cases like this one, where applying modern DNA testing methods might produce results that could bear significantly on a claim of actual innocence. This Court should reverse.

II. STATEMENT OF 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 a bite mark 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 Trial Test. ["TT"] at 1125:13-22 (Supp. at 23)).¹ 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 (Supp. at 64)).

¹ Pursuant to Supreme Court Rule VII, relevant excerpts from the original trial transcript, the experts' trial court submissions relating to Mr. Prade's February 2008 application for DNA testing, and the reports from the 1998 DNA testing are collected in the separately-bound Supplement To Merit Brief Of Appellant Douglas Prade, which is cited as "Supp. at ##."

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 (Supp. at 14)). 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 (Supp. at 20)). 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 (Supp. at 23)).

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

(Supp. at 12-13); 1102:18-1105:8 (Supp. at 15-18); 1117:5-10 (Supp. at 22)).

The case against Mr. Prade rested in part on testimony about the Prades' difficult relationship before and after their April 1997 divorce. The only physical evidence that purportedly tied Mr. Prade to the crime was expert testimony about the bite mark impression 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 (Supp. at 28)). The State's other expert said the mark "was made by Captain Prade." (Marshall TT at 1406:12-14 (Supp. at 41)). 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 (Supp. at 65)).

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 (Supp. at 33-35); 1273:7-23 (Supp. at 36); 1278:9-22 (Supp. at 37)). 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 (Supp. at 51-53); Myers TT 1058:24-1059:22 (Supp. at 10-11); Lacy TT 1791:6-1792:11 (Supp. at 68-69)). Mr. Prade called an alibi witness who said she saw Mr. Prade exercising at roughly the time of the murder. (Lynch TT at 1527:2-4, 18-22 (Supp. at 56)).

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, 745 N.E.2d 475, appeal dismissed (2000), 90 Ohio St. 3d 1490, 739 N.E.2d 816. He is currently incarcerated serving a life sentence.

B. Advances In DNA Testing Since 1998.

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 Appl. For DNA Testing) (Supp. at 94-95)). 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 (Supp. at 94)). “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 1, 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 (Jan. 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. Since that early 2008 tally, DNA testing has exonerated two more Ohioans – Robert McClendon and Joseph Fears.² They had been imprisoned for, respectively, 18 and 25 years.

C. The DNA Testing Application And 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 had particular merit under the DNA testing statute as revised by Senate Bill No. 262. Sub. S.B. No. 262, 2006 Ohio Legis.

² See AP News Release “Judge Clears Convicted Ohio Rapist After DNA Test” (Aug. 11, 2008) (copy available at <http://truthinjustice.org/mcclendon2.htm>) (last visited Aug. 28, 2009); Columbus Dispatch “DNA Tests Cleared Joseph Fears After 25 Years Behind Bars” (Mar. 10, 2009) (copy available at http://www.dispatch.com/live/content/local_news/stories/2009/03/10/fears_web.html?sid=101) (last visited Aug. 28, 2009).

Serv. Ann. L-2173 (West) (eff. July 11, 2006). A private testing lab agreed to conduct testing in all “Operation 262” cases without charge.

In response to Mr. Prade’s application, the Summit County Prosecutor’s Office engaged Dr. Elizabeth Benzinger of the Ohio Bureau of Criminal Identification & Investigation. She said that, although contamination is always 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. Appl. For DNA Testing at A-24-25) (Supp. at 98)). 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 (App. at 20).³ 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.

³ Pursuant to § 3(5) of Supreme Court Rule VI, copies of the notice of appeal, the opinions below, and the Ohio DNA testing statute are attached in the separately-numbered appendix to this brief, which will be cited as “App. at ##.”

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 (App. at 4). 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 (App. at 9). 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.* (App. at 10).

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 (App. at 6, 10). Rejecting a standard based on what “newer DNA testing methods” might show, *id.* at ¶ 13 (App. at 9), the court instead adopted a dictionary definition of “definitive” under which earlier tests were “definitive” if they produced a

result that can be said to be “final” or “conclusive.” Id. at ¶ 8 (App. at 7). 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 (App. at 10).

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 (App. at 11). 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 (App. at 12) (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, although he requested free testing and was not asked to state the

legal bases for it, Mr. Prade failed to preserve that issue because his application did not specify the statutory or constitutional bases for free testing. 2009-Ohio-704, ¶ 19 (App. at 13). The Ninth District denied Mr. Prade's application for reconsideration on March 11, 2009.

On April 3, 2009, Mr. Prade filed his notice of appeal and memorandum in support of jurisdiction with this Court. (See Notice of Appeal (App. at 1)). On April 7, 2009, the State filed a notice of waiver of memorandum in opposition. This Court accepted jurisdiction on June 17, 2009. *State v. Prade*, 122 Ohio St. 3d 1409, 2009-Ohio-2751, 907 N.E.2d 1193.

III. ARGUMENT

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 at the time of Mr. Prade's 1998 trial, including DNA testing on Dr. Prade's blood-stained lab coat over the killer's bite mark. Those tests identified only the DNA from the victim's blood, an obvious result that was of no consequence because it did nothing to identify Dr. Prade's killer.

In these proceedings, both sides' experts said 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 unavailable in 1998 and has not been used in this case – new testing might, for the first time, identify traces of the killer’s DNA that 1998 testing methods could never have detected. Nonetheless, the Ninth District found that, because the 1998 DNA tests produced results that were “final” or “conclusive” based on 1998 DNA testing standards (i.e., they “finally” and “conclusively” identified the murder victim’s DNA in her blood), those results (1) were “prior definitive DNA test[s]” that, under R.C. 2953.74(A), bar new testing; and (2) meant that new DNA test results could not be “outcome determinative” as R.C. 2953.74(B) requires.

These determinations rest on the wooden application of a dictionary’s definition to determine whether there was a “prior definitive DNA test” under R.C. 2953.74(A), and they conflict with the Ohio DNA testing statute’s purpose and language. Fundamentally, the courts below failed to ask the common sense question that lies at the core of assessing when the statute permits new DNA testing: Would using current DNA testing methods likely produce new and different results that may bear significantly on a potential claim of actual innocence? When the answer to that question is “no,” earlier tests may well be “prior definitive DNA test[s]” under R.C. 2953.74(A), and new tests likely are not “outcome determinative” as R.C. 2953.74(B) mandates. But when, as

here, the answer is “yes,” testing should go forward, and neither R.C. 2953.74(A) nor 2953.74(B) is to the contrary. This Court should reverse.⁴

A. Ohio’s DNA Testing Statute – R.C. 2953.71 – 2953.84.

Ohio is among the “[f]orty-six states [that] ... have recently enacted DNA testing statutes.” *Osborne*, 129 S. Ct. at 2326 n.6 (Alito, J., concurring) (citations omitted). The General Assembly passed Ohio’s DNA testing statute in 2003 and has since twice amended it. R.C. 2953.71 – 2953.84.⁵ “[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, 2007-Ohio-1334, 868 N.E.2d 742, ¶ 18, appeal denied, 114 Ohio St. 3d 1511, 2007-Ohio-4285, 872 N.E.2d 952; accord *State v. Elliott*, 1st Dist. No. C-050606, 2006-Ohio-4508, ¶¶ 6-8.

Ohio’s DNA testing scheme allows “eligible inmates” to file an application for DNA testing in the court in which they were tried.

⁴This appeal presents questions of law that this Court reviews de novo. See, e.g., *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St. 3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 34.

⁵ See Sub. S.B. No. 11, 2003 Ohio Legis. Serv. Ann. L-1809 (West) (eff. Oct. 29, 2003); Sub. H.B. No. 525, 2004 Ohio Legis. Serv. Ann. L-2627 (West) (eff. May 18, 2005); Sub. S.B. No. 262, 2006 Ohio Legis. Serv. Ann. L-2173 (West) (eff. July 11, 2006). The text of the current version of the Ohio DNA testing statute is reproduced at pages 22 through 47 (App. 22-47) of the attached appendix.

R.C. 2953.72 - 2953.73. 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)(2) (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).

B. The 1998 DNA Tests Were Not “Prior Definitive Test[s]” Under R.C. 2953.74(A).

In assessing whether the DNA tests conducted at the time of Mr. Prade’s 1998 trial were “prior definitive DNA test[s]” that bar additional

testing under R.C. 2953.74(A), the Ninth District observed that “[t]he Revised Code does not define the phrase ‘definitive DNA test.’” *State v. Prade*, 9th Dist. No. 24296, 2009-Ohio-704, ¶ 8 (App. at 6). The court then noted 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.⁶ *Id.* at ¶ 13 (App. at 10). And the court “acknowledge[d]” that, in this case, “it is possible that newer DNA testing methods could detect additional DNA material that older methods were unable to detect.” *Id.* (App. at 9).

But the Ninth District ultimately rejected assessing the “definitiveness” of prior DNA tests for purposes of R.C. 2953.74(A) based on a comparison of the earlier tests’ results with those that might be produced using modern testing methods. Its only explanation for doing so was that “the General Assembly did not include the availability of new testing methods as a factor that a court must consider in determining whether an eligible inmate has had a prior definitive DNA test.” *Id.* (citing R.C. 2953.74(A)).

Instead, the Ninth District applied a dictionary’s definition of “definitive” under which earlier DNA testing is “definitive” for purposes of R.C. 2953.74(A) if the earlier tests produced results that can be said to

⁶ As discussed below at pages 22 and 23 and in footnote 7, the federal DNA testing statute and many other states’ DNA testing statutes use this standard.

be “final” or “conclusive.” Id. at ¶¶ 8, 13 (referencing Merriam-Webster’s Collegiate Dictionary at 327 (11th ed. 2004)). 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.

But defining a “prior definitive DNA test” under R.C. 2953.74(A) without reference to what the results of testing using current testing methods might show is erroneous for three reasons. Specifically, it (1) conflicts with the Ohio DNA testing statute’s purpose, (2) misreads the relevant statutory context, and (3) ignores the statute’s definition of an “inconclusive result” in R.C. 2953.71(J).

1. The Ohio DNA Testing Statute’s Purpose Requires Defining A “Prior Definitive DNA Test” By Reference To Results Current Testing Methods Might Produce.

“[I]n cases of statutory construction, [the] paramount concern is the legislative intent in enacting the statute.” *State v. Buehler*, 113 Ohio St. 3d 114, 2007-Ohio-1246, 863 N.E.2d 124, ¶ 29 (quoting *State ex rel. Steele v. Morrissey*, 103 Ohio St. 3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21). The General Assembly enacted Ohio’s DNA testing statute in 2003 to, among other things, afford inmates convicted before there was modern DNA testing an opportunity to establish their innocence using current DNA testing methods, including STR and Y-STR

DNA testing. *Emerick*, 114 Ohio App. 3d 647, 2007-Ohio-1334, 868 N.E.2d 742, ¶ 18; *Elliott*, 1st Dist. No. C-050606, 2006-Ohio-4508, ¶¶ 6-8. As the Second District observed, “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 [convicted inmates] trial[s].” *Emerick*, 114 Ohio App. 3d 647, 2007-Ohio-1334, 868 N.E.2d 742, ¶ 18.

The Ninth District’s definition of a “prior definitive DNA test” cannot be reconciled with the Ohio DNA testing statute’s underlying purpose. That definition takes no account of the fact that DNA testing methods have evolved over time or that current testing methods, unlike those used in 1998, might identify Dr. Prade’s killer’s DNA in saliva left on her lab coat. Instead, it allows earlier DNA testing using outmoded testing methods to bar new DNA testing that may bear on guilt or innocence so long as the earlier testing produced some result that, no matter how inconsequential, can be said to be “final” or “conclusive.”

Significantly, the Ninth District’s definition, as applied here, means that outdated DNA testing conducted years before the Ohio DNA testing statute was enacted precludes the very testing the statute was designed to permit. This definition of a “prior definitive DNA test” simply cannot be squared with the Ohio DNA testing statute’s purpose – giving inmates

“the opportunity to take advantage of *advances in technology* that were *not available at the time of their trial.*” *Id.* (italics added).

2. The Ninth District’s Definition Of A “Prior Definitive Test” Ignores The Statutory Context.

When interpreting a statute, courts must “read[] words and phrases in context.” *Buehler*, 113 Ohio St. 3d 114, 2007-Ohio-1246, 863 N.E.2d 124, ¶ 29 (citation omitted). R.C. 2953.74(A)’s prohibition on new DNA testing when there was a “prior definitive DNA test” is one of several filters in Ohio’s DNA testing statute. It helps separate, on the one hand, cases where testing should go forward because the testing may produce significant new results from, on the other hand, cases where testing should not go forward because it would be pointless.

Another filter in the statute is R.C. 2953.74(B), which permits new testing only 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. See R.C. 2953.71(L) (“[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).

Indeed, the prohibition against new testing when there was “a prior definitive 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 definitive DNA test” standard in R.C. 2953.74(A) are, proverbially, “two sides of the same coin.” And, because they are so directly related, these provisions should be judged by the same scientific standard – namely, 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 114, 2007-Ohio-1246, 863 N.E.2d 124, ¶ 29 (citation omitted).

Significantly, if the assessment of whether earlier testing was “definitive” is based on the state of science at the time of the inmate’s trial many years earlier, then Ohio’s DNA testing statute has a gaping hole. Unlike inmates tried before there was 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.”

This would not only create concerns based on Equal Protection and fundamental fairness, it would bar testing under Ohio's DNA testing statute when, under the federal and many other states' DNA testing statutes, testing would be permitted. 18 U.S.C. § 3600(a)(3)(B); Ark. Code Ann. § 16-112-202(3) (2009); Cal. Penal § 1405 (West 2009); Fla. Stat. Ann. § 925.11(1)(a)(2) (West 2009); 725 Ill. Comp. Stat. Ann. 5/116-3(a)(2) (West 2009); Kan. Stat. Ann. § 21-2512(a)(3) (2009); Me. Rev. Stat. Ann. tit. 15, § 4-A(C) (2009); Mich. Comp. Laws Ann. § 770.16(3)(b)(ii) (West 2009); Minn. Stat. Ann. § 590.01a(2) (West 2009); Neb. Rev. Stat. § 29-4120(1)(c) (2009); N.H. Rev. Stat. Ann. § 651-D:2(III)(f) (West 2009); N.J. Stat. Ann. § 2A:84A-32d(6)(b) (West 2009); Tex. Code Crim. Proc. Ann. Art. 64.01(b)(2) (Vernon 2009); Wis. Stat. Ann. § 974.07(2)(c) (2009).⁷ For example, under the federal DNA testing statute, evidence

⁷ **Arkansas:** Ark. Code Ann. § 16-112-202(3) (2009) (“the person ... requests testing that uses a new method or technology that is substantially more probative than the prior testing”); **California:** Cal. Penal § 1405 (West 2009) (the evidence “was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative”); **Florida:** Fla. Stat. Ann. § 925.11(1)(a)(2) (West 2009) (requiring “a statement that ... subsequent scientific developments in DNA testing techniques would likely produce a definitive result”); **Illinois:** 725 Ill. Comp. Stat. Ann. 5/116-3(a)(2) (West 2009) (the evidence “can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results”); **Kansas:** Kan. Stat. Ann. § 21-2512(a)(3) (2009) (the evidence “can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results”); **Maine:** Me. Rev. Stat. Ann. tit. 15, § 4-A(C) (2009) (the evidence “will be subject to DNA analysis technology that was not available when the person was convicted”); **Michigan:** Mich. Comp. Laws Ann. § 770.16(3)(b)(ii) (West

may be retested if the court finds that “the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing.” 18 U.S.C. § 3600(a)(3)(B).

“In construing a statute, it is presumed that ... [a] just and reasonable result is intended.” R.C. 1.47. The Legislature should not be presumed to have intended the illogical, unfair result that follows from the Ninth District’s reading of R.C. 2953.74(A). See *In re T.R.*, 120 Ohio St. 3d 136, 2008-Ohio-5219, 896 N.E.2d 1003, ¶ 16 (courts “must avoid ... construing statutes” to “lead to an illogical or absurd result”).

(continued...)

2009) (the evidence “will be subject to DNA testing technology that was not available when the defendant was convicted”); **Minnesota**: Minn. Stat. Ann. § 590.01a(2) (West 2009) (“The evidence was not subject to the testing because ... the technology for the testing was not available at the time of the trial.”); **Nebraska**: Neb. Rev. Stat. § 29-4120(1)(c) (2009) (the evidence “can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results”); **New Hampshire**: N.H. Rev. Stat. Ann. § 651-D:2(III)(f) (West 2009) (“the technology requested was not available at the time of trial”); **New Jersey**: N.J. Stat. Ann. § 2A:84A-32d(6)(b) (West 2009) (the evidence “was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative”); **Texas**: Tex. Code Crim. Proc. Ann. Art. 64.01(b)(2) (Vernon 2009) (the evidence “can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test”); **Wisconsin**: Wis. Stat. Ann. § 974.07(2)(c) (2009) (the evidence “may now be subjected to another test using a scientific technique that was not available ... and that provides a reasonable likelihood of more accurate and probative results”).

3. The 1998 DNA Testing In This Case Was “Inconclusive” Under R.C. 2953.71(J) And, Therefore, Those Tests Were Not “Prior Definitive DNA Test[s]” Under R.C. 2953.74(A).

As noted above, “related sections of the Revised Code must be construed together.” *Buehler*, 113 Ohio St. 3d 114, 2007-Ohio-1246, 863 N.E.2d 124, ¶ 29 (citation omitted). In explaining its reasons for defining a “prior definitive DNA test” under R.C. 2953.74(A) as it did, the Ninth District noted 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*, 9th Dist. No. 24296, 2009-Ohio-704, ¶ 13. Yet the results of the 1998 DNA testing conducted in this case fit easily within R.C. 2953.71(J)’s definition of “inconclusive” and, therefore, those tests cannot be “prior definitive DNA test[s]” under R.C. 2953.74(A) as the Ninth District found.⁸

R.C. 2953.71(J) defines an “inconclusive result” as one “rendered when a *scientifically appropriate* and *definitive* DNA analysis or result, or both, cannot be determined.” (Italics added). It is true, as the Ninth

⁸ R.C. 2953.74(A) provides that: “If an eligible inmate submits an application for DNA testing ... and a prior definitive test has been conducted regarding the same biological evidence ..., the court shall reject the inmates 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 ..., the court shall review the application and has the discretion ... to either accept or reject the application.” Thus, under R.C. 2953.74(A), earlier DNA tests are either “prior definitive test[s]” or “prior inconclusive” ones, but cannot be both.

District observed, that R.C. 2953.71(J) does not define all test results “obtained via older testing method[s]” as “inconclusive” (because they are not).⁹ But R.C. 2953.74(J) is neither silent nor unclear as it applies here. That is because it expressly recognizes that scientific knowledge and methods evolve over time by defining “inconclusive result[s]” by reference to whether they were “scientifically appropriate and definitive.”

Where, as here, (1) results were obtained using outdated 1998 PCR DNA testing technology and (2) “newer DNA testing methods could detect additional DNA material,” the earlier tests did not produce “*scientifically appropriate and definitive* DNA analys[e]s or result[s].” Indeed, with respect to any of the killer’s saliva that was in the bite mark on Dr. Prade’s lab coat (or in any of the other evidence that remains available for testing), the 1998 DNA testing produced no results at all. Thus, the 1998 DNA tests conducted in this case were “inconclusive” under R.C. 2953.71(J) and, for that reason, they were not “prior definitive DNA test[s]” under R.C. 2953.74(A).

⁹ For example, a result obtained with an older DNA testing method would be a “prior definitive DNA test” – and not an “inconclusive result” – if it placed the inmate at the scene of a crime when the inmate’s claim of actual innocence was based on not having been there.

C. The “DNA Exclusions” Produced In 1998 DNA Tests Do Not Mean That The Results Of Any New DNA Testing Could Not Be “Outcome Determinative.”

As detailed above, the Ninth District’s finding that the 1998 DNA tests conducted in this case were “prior definitive DNA tests” that bar new testing under R.C. 2953.74(A) rested on a flawed premise. Namely, the court found that, for purposes of evaluating any preclusive effect the 1998 DNA tests should have on Mr. Prade’s 2008 DNA testing application, the 1998 tests’ “definitiveness” should be evaluated based on the DNA testing technology available in 1998. The Ninth District then imported this approach into its analysis of whether an “exclusion result” produced by additional DNA testing could be “outcome determinative” under R.C. 2953.74(B). Thus, the court “fail[ed] to see how *yet another* ‘DNA exclusion ... would have been outcome determinative’ as R.C. 2953.74(B) requires. *Prade*, 9th Dist. No. 24296, 2009-Ohio-704, ¶ 16 (italics added).

But the only “DNA exclusion[s]” here were those produced subject to the limitations of 1998 DNA testing technology. Measured against what current DNA testing technology might detect (i.e., the killer’s DNA in the saliva on the lab coat or elsewhere), the 1998 testing did not produce an “exclusion result.” Instead, and for the reasons discussed above at pages 24 and 25, the 1998 tests were “inconclusive” ones if, as

they should be, they are judged by comparison to what current tests might identify. And, just as the Ninth District erred in finding that the state of DNA testing technology as of 1998 was the correct frame of reference for evaluating whether new DNA test results are “prior definitive DNA test[s]” under R.C. 2953.74(A), it also erred when it applied that frame of reference to assess whether new DNA test results could produce an “exclusion result” that would be “outcome determinative” under R.C. 2953.74(B).

That is because an “exclusion result” produced using modern DNA testing methods could be completely different from those produced in this case in 1998. The 1998 “exclusion results” here showed only that the blood on the lab coat was Dr. Prade’s and, in that sense, “excluded” Mr. Prade. As the State’s DNA expert testified at Mr. Prade’s trial, the 1998 DNA “test results d[id] not give [him] any information about the killer.” (Callaghan TT at 1125:23-1126:2 (Supp. at 23)).

If, however, new DNA testing in this case produces an “exclusion result” showing that the DNA from the killer’s saliva on Dr. Prade’s lab coat over the bite mark does not match Mr. Prade’s DNA, that would not be merely “*yet another* DNA exclusion.” *Prade*, 9th Dist. No. 24296,

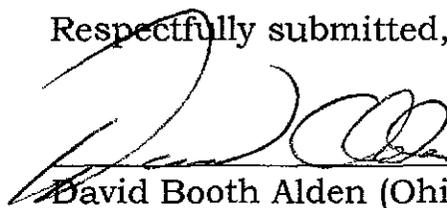
2009-Ohio-704, ¶ 16 (italics added). Instead, and as R.C. 2953.74(B) requires, any such “exclusion result” would be “outcome determinative.”¹⁰

IV. CONCLUSION

For the foregoing reasons, this Court should reverse and remand with the direction that DNA testing should go forward.

August 31, 2009

Respectfully submitted,



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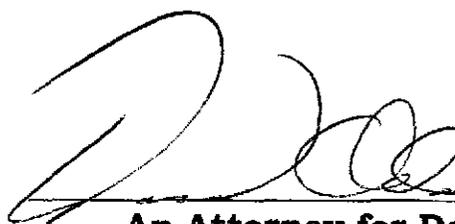
¹⁰ When assessing whether potential “exclusion results” that might be produced by new DNA testing satisfy R.C. 2953.74(B)’s “outcome determinative” requirement, other courts have considered potential results that might be produced using *current* testing methods. E.g., *Emerick*, 170 Ohio App. 3d 647, 2007-Ohio-1334, 868 N.E.2d 742, ¶ 18 (finding that new DNA test results using Y-STR DNA testing might be “outcome determinative”); *Elliott*, 1st Dist. No. C-050606, 2006-Ohio-4508, ¶ 15 (same). Defendant is aware of no courts that have, as the lower courts did here, assumed that new test results would simply duplicate those produced using outmoded, less-sensitive DNA testing techniques.

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CERTIFICATE OF SERVICE

Copies of the foregoing document and the appendix that follows were served this 31st day of August, 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.

A handwritten signature in black ink, appearing to read 'Douglas Prade', written over a horizontal line.

An Attorney for Douglas Prade

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	
)	
Plaintiff-Appellee,	)	Case No. 2009-0605
)	
v.	)	On Appeal from the
	)	Summit Cty. Court of Appeals
DOUGLAS PRADE,	)	Ninth Appellate District
	)	(Ninth District Case No. 24296)
Defendant-Appellant.)	

APPENDIX TO MERIT BRIEF OF APPELLANT DOUGLAS PRADE

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

DOUGLAS PRADE,

Defendant-Appellant.

09-0605

On Appeal from the
Summit County Court of Appeals
Ninth Appellate District

Court of Appeals
Case No. 24296

NOTICE OF APPEAL OF APPELLANT DOUGLAS PRADE

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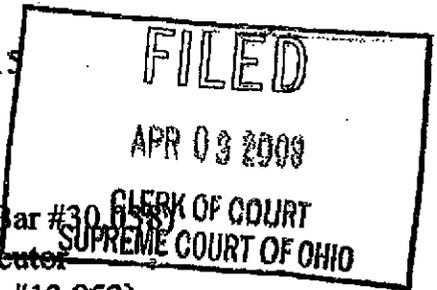
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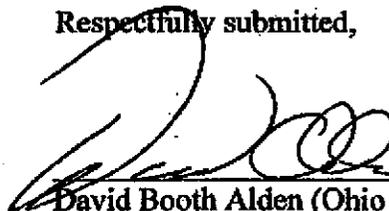
Notice of Appeal of Appellant Douglas Prade

Appellant Douglas Prade hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered on February 18, 2009 in Court of Appeals Case No. 24296.

This case presents a question of the interpretation Ohio's postconviction DNA testing statute. Specifically, it presents a question of interpreting (1) R.C. 2953.74(A)'s prohibition on DNA testing for convicted inmates when there was "a prior definitive DNA test;" and (2) R.C. 2953.74(B)'s requirement that persons seeking postconviction DNA testing show that new DNA test results would be "outcome determinative." It is one of great public importance.

April 3, 2009

Respectfully submitted,



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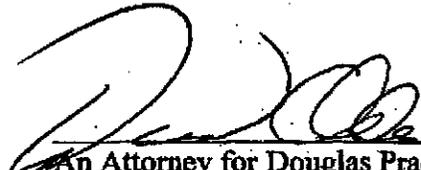
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CERTIFICATE OF SERVICE

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

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24296

Appellee

v.

DOUGLAS PRADE

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

Appellant

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.

DANIEL M. HERRIGAN

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	)	<u>ORDER</u>
)	
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

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 statute.

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.

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."

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

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.

It is so ordered


JUDGE MARY F. SPICER

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tc/ctb
CR98-0463

Ohio Rev. Code § 2953.71 - Post conviction DNA testing definitions.

As used in sections 2953.71 to 2953.83 of the Revised Code:

(A) “Application” or “application for DNA testing” means a request through postconviction relief for the state to do DNA testing on biological material from whichever of the following is applicable:

(1) 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 under sections 2953.71 to 2953.81 of the Revised Code;

(2) The case in which the inmate pleaded guilty or no contest to the offense for which the inmate is requesting the DNA testing under section 2953.82 of the Revised Code.

(B) “Biological material” means any product of a human body containing DNA.

(C) “Chain of custody” means a record or other evidence that tracks a subject sample of biological material from the time the biological material was first obtained until the time it currently exists in its place of storage and, in relation to a DNA sample, a record or other evidence that tracks the DNA sample from the time it was first obtained until it currently exists in its place of storage. For purposes of this division, examples of when biological material or a DNA sample is first obtained include, but are not limited to, obtaining the material or sample at the scene of a crime, from a victim, from an inmate, or in any other manner or time as is appropriate in the facts and circumstances present.

(D) “Custodial agency” means the group or entity that has the responsibility to maintain biological material in question.

(E) “Custodian” means the person who is the primary representative of a custodial agency.

(F) “Eligible inmate” means an inmate who is eligible under division (C) of section 2953.72 of the Revised Code to request DNA testing to be conducted under sections 2953.71 to 2953.81 of the Revised Code.

(G) “Exclusion” or “exclusion result” means a result of DNA testing that scientifically precludes or forecloses the subject inmate as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the inmate is an eligible inmate and for which the sentence of death or prison term was imposed upon the inmate or, regarding a request for DNA testing made under section 2953.82 of the Revised

Code, in relation to the offense for which the inmate made the request and for which the sentence of death or prison term was imposed upon the inmate.

(H) "Extracting personnel" means medically approved personnel who are employed to physically obtain an inmate DNA specimen for purposes of DNA testing under sections 2953.71 to 2953.81 or section 2953.82 of the Revised Code.

(I) "Inclusion" or "inclusion result" means a result of DNA testing that scientifically cannot exclude, or that holds accountable, the subject inmate as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the inmate is an eligible inmate and for which the sentence of death or prison term was imposed upon the inmate or, regarding a request for DNA testing made under section 2953.82 of the Revised Code, in relation to the offense for which the inmate made the request and for which the sentence of death or prison term was imposed upon the inmate.

(J) "Inconclusive" or "inconclusive result" means a result of DNA testing that is rendered when a scientifically appropriate and definitive DNA analysis or result, or both, cannot be determined.

(K) "Inmate" means an inmate in a prison who was sentenced by a court, or by a jury and a court, of this state.

(L) "Outcome determinative" means that had the results of DNA testing of the subject inmate been presented at the trial of the subject inmate requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the inmate is an eligible inmate and is requesting the DNA testing or for which the inmate is requesting the DNA testing under section 2953.82 of the Revised Code, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, there is a strong probability that no reasonable factfinder would have found the inmate guilty of that offense or, if the inmate was sentenced to death relative to that offense, would have found the inmate guilty of the aggravating circumstance or circumstances the inmate was found guilty of committing and that is or are the basis of that sentence of death.

(M) "Parent sample" means the biological material first obtained from a crime scene or a victim of an offense for which an inmate is an eligible inmate or for which the inmate is requesting the DNA testing under section 2953.82 of the Revised Code, and from which a sample will be presently taken to do a DNA comparison to the DNA of the subject inmate under sections 2953.71 to 2953.81 or section 2953.82 of the Revised Code.

(N) "Prison" has the same meaning as in section 2929.01 of the Revised Code.

(O) "Prosecuting attorney" means the prosecuting attorney who, or whose office, prosecuted the case in which the subject inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA testing or for which the inmate is requesting the DNA testing under section 2953.82 of the Revised Code.

(P) "Prosecuting authority" means the prosecuting attorney or the attorney general.

(Q) "Reasonable diligence" means a degree of diligence that is comparable to the diligence a reasonable person would employ in searching for information regarding an important matter in the person's own life.

(R) "Testing authority" means a laboratory at which DNA testing will be conducted under sections 2953.71 to 2953.81 or section 2953.82 of the Revised Code.

Effective Date: 10-29-2003; 07-11-2006

Ohio Rev. Code § 2953.72 - Application for testing.

(A) Any eligible inmate who wishes to request DNA testing under sections 2953.71 to 2953.81 of the Revised Code shall submit an application for the testing to the court of common pleas specified in section 2953.73 of the Revised Code, on a form prescribed by the attorney general for this purpose. The eligible inmate shall submit the application in accordance with the procedures set forth in section 2953.73 of the Revised Code. The eligible inmate shall specify on the application the offense or offenses for which the inmate is an eligible inmate and is requesting the DNA testing. Along with the application, the eligible inmate shall submit an acknowledgment that is on a form prescribed by the attorney general for this purpose and that is signed by the inmate. The acknowledgment shall set forth all of the following:

(1) That sections 2953.71 to 2953.81 of the Revised Code contemplate applications for DNA testing of eligible inmates at a stage of a prosecution or case after the inmate has been sentenced to a prison term or a sentence of death, that any exclusion or inclusion result of DNA testing rendered pursuant to those sections may be used by a party in any proceeding as described in section 2953.81 of the Revised Code, and that all requests for any DNA testing made at trial will continue to be handled by the prosecuting attorney in the case;

(2) That the process of conducting postconviction DNA testing for an eligible inmate under sections 2953.71 to 2953.81 of the Revised Code begins when the inmate submits an application under section 2953.73 of the Revised Code and the acknowledgment described in this section;

(3) That the eligible inmate must submit the application and acknowledgment to the court of common pleas that heard the case in which the inmate was convicted of the offense for which the inmate is an eligible offender and is requesting the DNA testing;

(4) That the state has established a set of criteria set forth in section 2953.74 of the Revised Code by which eligible inmate applications for DNA testing will be screened and that a judge of a court of common pleas upon receipt of a properly filed application and accompanying acknowledgment will apply those criteria to determine whether to accept or reject the application;

(5) That the results of DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code will be provided as described in section 2953.81 of the Revised Code to all parties in the postconviction proceedings and will be reported to various courts;

(6) That, if DNA testing is conducted with respect to an inmate under sections 2953.71 to 2953.81 of the Revised Code, the state will not offer the inmate a retest if an inclusion result is achieved relative to the testing and that, if the state were to offer a retest after an inclusion result, the policy would create an atmosphere in which endless testing could occur and in which postconviction proceedings could be stalled for many years;

(7) That, if the court rejects an eligible inmate's application for DNA testing because the inmate does not satisfy the acceptance criteria described in division (A)(4) of this section, the court will not accept or consider subsequent applications;

(8) That the acknowledgment memorializes the provisions of sections 2953.71 to 2953.81 of the Revised Code with respect to the application of postconviction DNA testing to inmates, that those provisions do not give any inmate any additional constitutional right that the inmate did not already have , that the court has no duty or obligation to provide postconviction DNA testing to inmates, that the court of common pleas has the sole discretion subject to an appeal as described in this division to determine whether an inmate is an eligible inmate and whether an eligible inmate's application for DNA testing satisfies the acceptance criteria described in division (A)(4) of this section and whether the application should be accepted or rejected, that if the court of common pleas rejects an eligible inmate's application, the inmate may seek leave of the supreme court to appeal the rejection to that court if the inmate was sentenced to death for the offense for which the inmate is requesting the DNA testing and, if the inmate was not sentenced to death for that offense, may appeal the rejection to the court of appeals, and that no determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an inmate or regarding postconviction DNA testing under those provisions is reviewable by or appealable to any court;

(9) That the manner in which sections 2953.71 to 2953.81 of the Revised Code with respect to the offering of postconviction DNA testing to inmates are carried out does not confer any constitutional right upon any inmate, that the state has established guidelines and procedures relative to those provisions to ensure that they are carried out with both justice and efficiency in mind, and that an inmate who participates in any phase of the mechanism contained in those provisions, including, but not limited to, applying for DNA testing and being rejected, having an application for DNA testing accepted and not receiving the test, or having DNA testing conducted and receiving unfavorable results, does not gain as a result of the participation any constitutional right to challenge, or,

except as provided in division (A)(8) of this section, any right to any review or appeal of, the manner in which those provisions are carried out;

(10) That the most basic aspect of sections 2953.71 to 2953.81 of the Revised Code is that, in order for DNA testing to occur, there must be an inmate sample against which other evidence may be compared, that, if an eligible inmate's application is accepted but the inmate subsequently refuses to submit to the collection of the sample of biological material from the inmate or hinders the state from obtaining a sample of biological material from the inmate, the goal of those provisions will be frustrated, and that an inmate's refusal or hindrance shall cause the court to rescind its prior acceptance of the application for DNA testing for the inmate and deny the application;

(11) That, if the inmate is an inmate who pleaded guilty or no contest to a felony offense and who is using the application and acknowledgment to request DNA testing under section 2953.82 of the Revised Code, all references in the acknowledgment to an "eligible inmate" are considered to be references to, and apply to, the inmate and all references in the acknowledgment to "sections 2953.71 to 2953.81 of the Revised Code" are considered to be references to "section 2953.82 of the Revised Code."

(B) The attorney general shall prescribe a form to be used to make an application for DNA testing under division (A) of this section and section 2953.73 of the Revised Code and a form to be used to provide the acknowledgment described in division (A) of this section. The forms shall include all information described in division (A) of this section, spaces for an inmate to insert all information necessary to complete the forms, including, but not limited to, specifying the offense or offenses for which the inmate is an eligible inmate and is requesting the DNA testing or for which the inmate is requesting the DNA testing under section 2953.82 of the Revised Code, and any other information or material the attorney general determines is necessary or relevant. The forms also shall be used to make an application requesting DNA testing under section 2953.82 of the Revised Code, and the attorney general shall ensure that they are sufficient for that type of use, and that they include all information and spaces necessary for that type of use. The attorney general shall distribute copies of the prescribed forms to the department of rehabilitation and correction, the department shall ensure that each prison in which inmates are housed has a supply of copies of the forms, and the department shall ensure that copies of the forms are provided free of charge to any inmate who requests them.

(C)

(1) An inmate is eligible to request DNA testing to be conducted under sections 2953.71 to 2953.81 of the Revised Code only if all of the following apply:

(a) The offense for which the inmate claims to be an eligible inmate is a felony , and the inmate was convicted by a judge or jury of that offense.

(b) The inmate was sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section and is in prison serving that prison term or under that sentence of death.

(c) On the date on which the application is filed, the inmate has at least one year remaining on the prison term described in division (C)(1)(b) of this section, or the inmate is in prison under a sentence of death as described in that division.

(2) An inmate is not an eligible inmate under division (C)(1) of this section regarding any offense to which the inmate pleaded guilty or no contest.

Effective Date: 10-29-2003; 07-11-2006

Ohio Rev. Code § 2953.73 - Form and service of application.

(A) An eligible inmate who wishes to request DNA testing to be conducted under sections 2953.71 to 2953.81 of the Revised Code shall submit an application for DNA testing on a form prescribed by the attorney general for this purpose and shall submit the form to the court of common pleas that sentenced the inmate for the offense for which the inmate is an eligible inmate and is requesting DNA testing.

(B) If an eligible inmate submits an application for DNA testing under division (A) of this section, upon the submission of the application, all of the following apply:

(1) The eligible inmate shall serve a copy of the application on the prosecuting attorney and the attorney general.

(2) The application shall be assigned to the judge of that court of common pleas who was the trial judge in the case in which the eligible inmate was convicted of the offense for which the inmate is requesting DNA testing, or, if that judge no longer is a judge of that court, it shall be assigned according to court rules. The judge to whom the application is assigned shall decide the application. The application shall become part of the file in the case.

(C) If an eligible inmate submits an application for DNA testing under division (A) of this section, regardless of whether the inmate has commenced any federal habeas corpus proceeding relative to the case in which the inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting DNA testing, any response to the application by the prosecuting attorney or the attorney general shall be filed not later than forty-five days after the date on which the eligible inmate submits the application. The prosecuting attorney or the attorney general, or both, may, but are not required to, file a response to the application. If the prosecuting attorney or the attorney general files a response under this division, the prosecuting attorney or attorney general, whoever filed the response, shall serve a copy of the response on the eligible inmate.

(D) If an eligible inmate submits an application for DNA testing under division (A) of this section, the court shall make the determination as to whether the application should be accepted or rejected. The court shall expedite its review of the application. The court shall make the determination in accordance with the criteria and procedures set forth in sections 2953.74 to 2953.81 of the Revised Code and, in making the determination, shall consider the application, the supporting affidavits, and the documentary evidence and, in addition to those materials, shall consider all the files and records pertaining to the

proceedings against the applicant, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript and all responses to the application filed under division (C) of this section by a prosecuting attorney or the attorney general, unless the application and the files and records show the applicant is not entitled to DNA testing, in which case the application may be denied. The court is not required to conduct an evidentiary hearing in conducting its review of, and in making its determination as to whether to accept or reject, the application. Upon making its determination, the court shall enter a judgment and order that either accepts or rejects the application and that includes within the judgment and order the reasons for the acceptance or rejection as applied to the criteria and procedures set forth in sections 2953.71 to 2953.81 of the Revised Code. The court shall send a copy of the judgment and order to the eligible inmate who filed it, the prosecuting attorney, and the attorney general.

(E) A judgment and order of a court entered under division (D) of this section is appealable only as provided in this division. If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and the court of common pleas rejects the application under division (D) of this section, one of the following applies:

(1) If the inmate was sentenced to death for the offense for which the inmate claims to be an eligible inmate and is requesting DNA testing, the inmate may seek leave of the supreme court to appeal the rejection to the supreme court. Courts of appeals do not have jurisdiction to review any rejection if the inmate was sentenced to death for the offense for which the inmate claims to be an eligible inmate and is requesting DNA testing.

(2) If the inmate was not sentenced to death for the offense for which the inmate claims to be an eligible inmate and is requesting DNA testing, the rejection is a final appealable order, and the inmate may appeal it to the court of appeals of the district in which is located that court of common pleas.

(F) Notwithstanding any provision of law regarding fees and costs, no filing fee shall be required of, and no court costs shall be assessed against, an eligible offender who is indigent and who submits an application under this section.

(G) If a court rejects an eligible inmate's application for DNA testing under division (D) of this section, unless the rejection is overturned on appeal, no court shall require the state to administer a DNA test under sections 2953.71 to 2953.81 of the Revised Code on the eligible inmate.

Effective Date: 10-29-2003; 05-18-2005; 07-11-2006

Ohio Rev. Code § 2953.74 - Effect of prior tests.

(A) 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. The court may direct a testing authority to provide the court with information that the court may use in determining whether prior DNA test results were definitive or inconclusive and whether to accept or reject an application in relation to which there were prior inconclusive DNA test results.

(B) 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.

(C) 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 all of the following apply:

(1) The court determines pursuant to section 2953.75 of the Revised Code that biological material was collected from the crime scene or the victim of the offense for which the inmate is an eligible inmate and is requesting the DNA testing and that the parent sample of that biological material against which a sample from the inmate can be compared still exists at that point in time.

(2) The testing authority determines all of the following pursuant to section 2953.76 of the Revised Code regarding the parent sample of the biological material described in division (C)(1) of this section:

(a) The parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample.

(b) The parent sample of the biological material so collected is not so minute or fragile as to risk destruction of the parent sample by the extraction described in division (C)(2)(a) of this section; provided that the court may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(c) The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.

(3) The court determines that, 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, the identity of the person who committed the offense was an issue.

(4) The court determines that one or more of the defense theories asserted by the inmate at the trial stage in the case described in division (C)(3) of this section or in a retrial of that case in a court of this state was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative.

(5) The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that inmate.

(6) The court determines pursuant to section 2953.76 of the Revised Code from the chain of custody of the parent sample of the biological

material to be tested and of any test sample extracted from the parent sample, and from the totality of circumstances involved, that the parent sample and the extracted test sample are the same sample as collected and that there is no reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected.

(D) If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code, the court, in determining whether the “outcome determinative” criterion described in divisions (B)(1) and (2) of this section has been satisfied, shall consider all available admissible evidence related to the subject inmate’s case.

(E) If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and the court accepts the application, the eligible inmate may request the court to order, or the court on its own initiative may order, the bureau of criminal identification and investigation to compare the results of DNA testing of biological material from an unidentified person other than the inmate that was obtained from the crime scene or from a victim of the offense for which the inmate has been approved for DNA testing to the combined DNA index system maintained by the federal bureau of investigation.

If the bureau, upon comparing the test results to the combined DNA index system, determines the identity of the person who is the contributor of the biological material, the bureau shall provide that information to the court that accepted the application, the inmate, and the prosecuting attorney. The inmate or the state may use the information for any lawful purpose.

If the bureau, upon comparing the test results to the combined DNA index system, is unable to determine the identity of the person who is the contributor of the biological material, the bureau may compare the test results to other previously obtained and acceptable DNA test results of any person whose identity is known other than the eligible inmate. If the bureau, upon comparing the test results to the DNA test results of any person whose identity is known, determines that the person whose identity is known is the contributor of the biological material, the bureau shall provide that information to the court that accepted the application, the inmate, and the prosecuting attorney. The inmate or the state may use the information for any lawful purpose.

Effective Date: 10-29-2003; 07-11-2006

Ohio Rev. Code § 2953.75 - Prosecutor to use reasonable diligence to obtain biological material for test.

(A) If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code, the court shall require the prosecuting attorney to use reasonable diligence to determine whether biological material was collected from the crime scene or victim of the offense for which the inmate is an eligible inmate and is requesting the DNA testing against which a sample from the inmate can be compared and whether the parent sample of that biological material still exists at that point in time. In using reasonable diligence to make those determinations, the prosecuting attorney shall rely upon all relevant sources, including, but not limited to, all of the following:

- (1) All prosecuting authorities 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 and in the appeals of, and postconviction proceedings related to, that case;
- (2) All law enforcement authorities involved in the investigation of the offense for which the inmate is an eligible offender and is requesting the DNA testing;
- (3) All custodial agencies involved at any time with the biological material in question;
- (4) The custodian of all custodial agencies described in division (A)(3) of this section;
- (5) All crime laboratories involved at any time with the biological material in question;
- (6) All other reasonable sources.

(B) The prosecuting attorney shall prepare a report that contains the prosecuting attorney's determinations made under division (A) of this section and shall file a copy of the report with the court and provide a copy to the eligible inmate and the attorney general.

Effective Date: 10-29-2003

Ohio Rev. Code § 2953.76 - Prosecutor to consult with testing authority.

If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code, the court shall require the prosecuting attorney to consult with the testing authority and to prepare findings regarding the quantity and quality of the parent sample of the biological material collected from the crime scene or victim of the offense for which the inmate is an eligible inmate and is requesting the DNA testing and that is to be tested, and of the chain of custody and reliability regarding that parent sample, as follows:

(A) The testing authority shall determine whether there is a scientifically sufficient quantity of the parent sample to test and whether the parent sample is so minute or fragile that there is a substantial risk that the parent sample could be destroyed in testing. The testing authority may determine that there is not a sufficient quantity to test in order to preserve the state's ability to present in the future the original evidence presented at trial, if another trial is required. Upon making its determination under this division, the testing authority shall prepare a written document that contains its determination and the reasoning and rationale for that determination and shall provide a copy to the court, the eligible inmate, the prosecuting attorney, and the attorney general. The court may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(B) The testing authority shall determine whether the parent sample has degraded or been contaminated to the extent that it has become scientifically unsuitable for testing and whether the parent sample otherwise has been preserved, and remains, in a condition that is suitable for testing. Upon making its determination under this division, the testing authority shall prepare a written document that contains its determination and the reasoning and rationale for that determination and shall provide a copy to the court, the eligible inmate, the prosecuting attorney, and the attorney general.

(C) The court shall determine, from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample and from the totality of circumstances involved, whether the parent sample and the extracted test sample are the same sample as collected and whether there is any reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected. Upon making its determination under this division, the court shall prepare and retain a written document that contains its determination and the reasoning and rationale for that determination.

Effective Date: 10-29-2003

2953.77 - Chain of custody.

(A) If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and if the application is accepted and DNA testing is to be performed, the court shall require that the chain of custody remain intact and that all of the applicable following precautions are satisfied to ensure that the parent sample of the biological material collected from the crime scene or the victim of the offense for which the inmate is an eligible inmate and requested the DNA testing, and the test sample of the parent sample that is extracted and actually is to be tested, are not contaminated during transport or the testing process:

(1) The court shall require that the chain of custody be maintained and documented relative to the parent sample and the test sample actually to be tested between the time they are removed from their place of storage or the time of their extraction to the time at which the DNA testing will be performed.

(2) The court, the testing authority, and the law enforcement and prosecutorial personnel involved in the process, or any combination of those entities and persons, shall coordinate the transport of the parent sample and the test sample actually to be tested between their place of storage and the place where the DNA testing will be performed, and the court and testing authority shall document the transport procedures so used.

(3) The testing authority shall determine and document the custodian of the parent sample and the test sample actually to be tested after they are in the possession of the testing authority.

(4) The testing authority shall maintain and preserve the parent sample and the test sample actually to be tested after they are in the possession of the testing authority and shall document the maintenance and preservation procedures used.

(5) After the DNA testing, the court, the testing authority, and the original custodial agency of the parent sample, or any combination of those entities, shall coordinate the return of the remaining parent sample back to its place of storage with the original custodial agency or to any other place determined in accordance with this division and section 2953.81 of the Revised Code. The court shall determine, in consultation with the testing authority, the custodial agency to maintain any newly created, extracted, or collected DNA material resulting from the testing. The court and testing authority shall document the return procedures for original materials and for any newly created, extracted, or collected DNA

material resulting from the testing, and also the custodial agency to which those materials should be taken.

(B) A court or testing authority shall provide the documentation required under division (A) of this section in writing and shall maintain that documentation.

Effective Date: 10-29-2003

Ohio Rev. Code § 2953.78 - Selection of testing authority.

(A) If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and if the application is accepted and DNA testing is to be performed, the court shall select the testing authority to be used for the testing. A court shall not select or use a testing authority for DNA testing unless the attorney general approves or designates the testing authority pursuant to division (C) of this section and unless the testing authority satisfies the criteria set forth in section 2953.80 of the Revised Code.

(B) If a court selects a testing authority pursuant to division (A) of this section and the eligible inmate for whom the test is to be performed objects to the use of the selected testing authority, the court shall rescind its prior acceptance of the application for DNA testing for the inmate and deny the application. An objection as described in this division, and the resulting rescission and denial, do not preclude a court from accepting in the court's discretion, a subsequent application by the same eligible inmate requesting DNA testing.

(C) The attorney general shall approve or designate testing authorities that may be selected and used to conduct DNA testing, shall prepare a list of the approved or designated testing authorities, and shall provide copies of the list to all courts of common pleas. The attorney general shall update the list as appropriate to reflect changes in the approved or designated testing authorities and shall provide copies of the updated list to all courts of common pleas. The attorney general shall not approve or designate a testing authority under this division unless the testing authority satisfies the criteria set forth in section 2953.80 of the Revised Code. A testing authority that is equipped to handle advanced DNA testing may be approved or designated under this division, provided it satisfies the criteria set forth in that section.

(D) The attorney general's approval or designation of testing authorities under division (C) of this section, and the selection and use of any approved or designated testing authority, do not afford an inmate any right to subsequently challenge the approval, designation, selection, or use, and an inmate may not appeal to any court the approval, designation, selection, or use of a testing authority.

Effective Date: 10-29-2003; 07-11-2006

Ohio Rev. Code § 2953.79 - Obtaining sample from applicant.

(A) If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and if the application is accepted and DNA testing is to be performed, a sample of biological material shall be obtained from the inmate in accordance with this section, to be compared with the parent sample of biological material collected from the crime scene or the victim of the offense for which the inmate is an eligible inmate and requested the DNA testing. The inmate's filing of the application constitutes the inmate's consent to the obtaining of the sample of biological material from the inmate. The testing authority shall obtain the sample of biological material from the inmate in accordance with medically accepted procedures.

(B) If DNA testing is to be performed for an inmate as described in division (A) of this section, the court shall require the state to coordinate with the department of rehabilitation and correction as to the time and place at which the sample of biological material will be obtained from the inmate. The sample of biological material shall be obtained from the inmate at the facility in which the inmate is housed, and the department shall make the inmate available at the specified time. The court shall require the state to provide notice to the inmate and to the inmate's counsel of the date on which, and the time and place at which, the sample will be so obtained.

The court also shall require the state to coordinate with the testing authority regarding the obtaining of the sample from the inmate.

(C)

(1) If DNA testing is to be performed for an inmate as described in division (A) of this section, and the inmate refuses to submit to the collection of the sample of biological material from the inmate or hinders the state from obtaining a sample of biological material from the inmate, the court shall rescind its prior acceptance of the application for DNA testing for the inmate and deny the application.

(2) For purposes of division (C)(1) of this section:

(a) An inmate's "refusal to submit to the collection of a sample of biological material from the inmate" includes, but is not limited to, the inmate's rejection of the physical manner in which a sample of the inmate's biological material is to be taken.

(b) An inmate's "hindrance of the state in obtaining a sample of biological material from the inmate" includes, but is not limited to, the inmate being physically or verbally uncooperative or

antagonistic in the taking of a sample of the inmate's biological material.

(D) The extracting personnel shall make the determination as to whether an eligible inmate for whom DNA testing is to be performed is refusing to submit to the collection of a sample of biological material from the inmate or is hindering the state from obtaining a sample of biological material from the inmate at the time and date of the scheduled collection of the sample. If the extracting personnel determine that an inmate is refusing to submit to the collection of a sample or is hindering the state from obtaining a sample, the extracting personnel shall document in writing the conditions that constitute the refusal or hindrance, maintain the documentation, and notify the court of the inmate's refusal or hindrance.

Effective Date: 10-29-2003

Ohio Rev. Code § 2953.80 - Criteria for testing authority.

(A) The attorney general shall not approve or designate a testing authority for conducting DNA testing under section 2953.78 of the Revised Code, and a court shall not select or use a testing authority for DNA testing under that section, unless the testing authority satisfies all of the following criteria:

(1) It is in compliance with nationally accepted quality assurance standards for forensic DNA testing or advanced DNA testing, as published in the quality assurance standards for forensic DNA testing laboratories issued by the director of the federal bureau of investigation.

(2) It undergoes an annual internal or external audit for quality assurance in conformity with the standards identified in division (A)(1) of this section.

(3) At least once in the preceding two-year period, and at least once each two-year period thereafter, it undergoes an external audit for quality assurance in conformity with the standards identified in division (A)(1) of this section.

(B) As used in division (A) of this section:

(1) "External audit" means a quality assurance review of a testing authority that is conducted by a forensic DNA testing agency outside of, and not affiliated with, the testing authority.

(2) "Internal audit" means an internal review of a testing authority that is conducted by the testing authority itself.

Effective Date: 10-29-2003; 07-11-2006

Ohio Rev. Code § 2953.81 - Test results.

If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and if DNA testing is performed based on that application, upon completion of the testing, all of the following apply:

(A) The court or a designee of the court shall require the state to maintain the results of the testing and to maintain and preserve both the parent sample of the biological material used and the inmate sample of the biological material used. The testing authority may be designated as the person to maintain the results of the testing or to maintain and preserve some or all of the samples, or both. The results of the testing remain state's evidence. The samples shall be preserved during the entire period of time for which the inmate is imprisoned relative to the prison term or sentence of death in question and, if that prison term expires or the inmate is executed under that sentence of death, for a reasonable period of time of not less than twenty-four months after the term expires or the inmate is executed. The court shall determine the period of time that is reasonable for purposes of this division, provided that the period shall not be less than twenty-four months after the term expires or the inmate is executed.

(B) The results of the testing are a public record.

(C) The court or the testing authority shall provide a copy of the results of the testing to the prosecuting attorney, the attorney general, and the subject inmate.

(D) If the postconviction proceeding in question is pending at that time in a court of this state, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to any court of this state, and, if it is pending in a federal court, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to that federal court.

(E) The testing authority shall provide a copy of the results of the testing to the court of common pleas that decided the DNA application.

(F) The inmate or the state may enter the results of the testing into any proceeding.

Effective Date: 10-29-2003

Ohio Rev. Code § 2953.82 - Criteria for requesting test.

(A) An inmate who pleaded guilty or no contest to a felony offense may request DNA testing under this section regarding that offense if all of the following apply:

(1) The inmate was sentenced to a prison term or sentence of death for that felony and is in prison serving that prison term or under that sentence of death.

(2) On the date on which the inmate files the application requesting the testing with the court as described in division (B) of this section, the inmate has at least one year remaining on the prison term described in division (A)(1) of this section, or the inmate is in prison under a sentence of death as described in that division.

(B) An inmate who pleaded guilty or no contest to a felony offense, who satisfies the criteria set forth in division (A) of this section, and who wishes to request DNA testing under this section shall submit, in accordance with this division, an application for the testing to the court of common pleas. Upon submitting the application to the court, the inmate shall serve a copy on the prosecuting attorney. The inmate shall specify on the application the offense or offenses for which the inmate is requesting the DNA testing under this section. Along with the application, the inmate shall submit an acknowledgment that is signed by the inmate. The application and acknowledgment required under this division shall be the same application and acknowledgment as are used by eligible inmates who request DNA testing under sections 2953.71 to 2953.81 of the Revised Code.

(C) Within forty-five days after the filing of an application for DNA testing under division (B) of this section, the prosecuting attorney shall file a statement with the court that indicates whether the prosecuting attorney agrees or disagrees that the inmate should be permitted to obtain DNA testing under this section. If the prosecuting attorney agrees that the inmate should be permitted to obtain DNA testing under this section, all of the following apply:

(1) The application and the written statement shall be considered for all purposes as if they were an application for DNA testing filed under section 2953.73 of the Revised Code that the court accepted, and the court, the prosecuting attorney, the attorney general, the inmate, law enforcement personnel, and all other involved persons shall proceed regarding DNA testing for the inmate pursuant to sections 2953.77 to 2953.81 of the Revised Code, in the same manner as if the inmate was an eligible inmate for whom an application for DNA testing had been accepted.

(2) Upon completion of the DNA testing, section 2953.81 of the Revised Code applies.

(D) If the prosecuting attorney disagrees that the inmate should be permitted to obtain DNA testing under this section, the prosecuting attorney's disagreement is final and is not appealable by any person to any court, and no court shall have authority, without agreement of the prosecuting attorney, to order DNA testing regarding that inmate and the offense or offenses for which the inmate requested DNA testing in the application.

(E) If the prosecuting attorney fails to file a statement of agreement or disagreement within the time provided in division (C) of this section, the court may order the prosecuting attorney to file a statement of that nature within fifteen days of the date of the order.

Effective Date: 10-29-2003; 05-18-2005; 07-11-2006

Ohio Rev. Code § 2953.83 - Rules of criminal procedure applicable.

In any court proceeding under sections 2953.71 to 2953.82 of the Revised Code, the Rules of Criminal Procedure apply, except to the extent that sections 2953.71 to 2953.82 of the Revised Code provide a different procedure or to the extent that the Rules would by their nature be clearly inapplicable.

Effective Date: 10-29-2003

Ohio Rev. Code § 2953.84 - Statutory post-conviction DNA testing not exclusive.

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.

Effective Date: 07-11-2006