

IN THE SUPREME COURT OF OHIO
Supreme Court Case Number 09-0605

ORIGINAL

STATE OF OHIO

Appellee

v.

DOUGLAS PRADE

Appellant

On Appeal from the Summit
County Court of Appeals
Ninth Appellate District
Court of Appeals No. 24296

MERIT BRIEF OF APPELLEE
STATE OF OHIO

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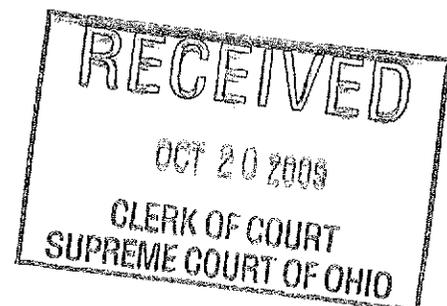
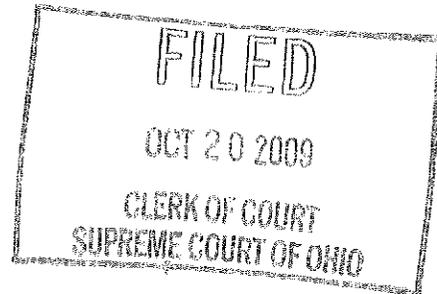


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STATEMENT OF FACTS

Appellant Douglas E. Prade appeals the Decision and Journal Entry, 2009-Ohio-704, affirming the denial of Prade's second application for DNA testing. The trial court denied the first application by Order dated May 2, 2005. No appeal was taken from that Order. The State opposed the second application.

The impetus for the second application was the passage of SB 262, effective July 11, 2006, that as relevant to this appeal modified the definition of outcome determinative, R.C. 2953.71(L) and also allowed comparison of any DNA test results to the DNA index system maintained by the FBI. Such comparison is allowed once the trial court accepts the application for DNA testing and tests show the presence of an unidentified person, R.C. 2953.74(E). Here, the trial court did not accept the application. Order dated June 2, 2008.

Prade was convicted of numerous offenses including the aggravated murder of his wife Margo Prade, a physician. The Ninth District affirmed the convictions in *State v. Prade* (2000), 139 Ohio App.3d 676 (Prade).

In summary the evidence at trial was that between 8:00 – 9:00 AM on November 26, 1997, Robin Husk of Rolling Acres Dodge (which adjoined the victim's office) saw Prade and asked if he could help him, to which Prade responded negatively and moved away. (T., 1262-1264).

Prade waited for the victim in his car, made to leave, stopped when the victim pulled in, and parked near the victim's van. (State's Exhibits #179, 180, 181). Prade gained swift entry into the van by key, or by the victim unlocking the doors. Prade had keys to the van. (State's Exhibits #179, 180, 181); *Prade*, supra *697. Six shots were fired into the victim. (T., 1141-1161).

The victim was bit during the struggle, which left bite marks that two forensic odontologists ascribed to Prade. In the words of Dr. Marshall who tried to exclude Prade as the person who left the bite marks, "Every mark lined up with every other mark." (T., 1226-1227, 1392, 1406).

The homicide was committed between 9:10 – 9:12 AM, as documented by the Rolling Acres Dodge security videotape. (T., 1044-1046; State's Exhibits #179, 180, 181). Prade claimed to be a six minute drive away from the murder scene when the murder occurred. *Prade*, *698.

As Prade drove away patient Howard Brooks saw him as Brooks exited the medical office building. (T., 1425-1426). So Prade was seen at the scene immediately before and after the killing. His bite mark was found on the victim.

A piece of evidence strongly indicative of premeditation was that before the killing Prade was experiencing money problems. He received \$75,000.00 after the death in insurance money. There was writing on one of Prade's deposit slips tallying his debts against that amount made more than a month before the murder. (T., 511-518, 1415-1453, 1463-1464; State Exhibit #194); *Prade*, *699.

Prade told police that he had started a workout at 9:30 am on November 26, 1997. T., 1034-1035. Prade arrived at the murder scene just after 11:00 am. T., 953. Prade claimed that he came directly from the gym, that was six minutes away and where he had been working out, but his appearance gave no hint that he had been working out. *Prade*, *698. Later, Prade attempted to construct an alibi based on his alleged workout at the time of the killing. But he had already admitted that he was not working out when the killing occurred.

Prade's purported alibi witness told police on January 22, 1998 that Prade arrived at the gym anywhere from 8:25 am to 9:25 am on November 26, 1997. T., 1545-1546. The Ninth District found that this alibi witness could not establish when her workout commenced (and so could not definitely say when Prade entered the gym). *Prade*, *699. In short Prade did not have an alibi and his own statement contradicted the alibi that he attempted to present. This is further powerful evidence of Prade's guilt.

There was DNA testing done prior to the trial. The DNA testing generated four reports. Those reports are summarized below. Copies of the reports are attached to the State's Memorandum filed March 21, 2008. Trial Court Docket, R. 346 and are reproduced in the Supplement to Prade's Merit Brief.

The first report is dated July 13, 1998. It was performed by Dale Laux of BCI. He tested a link of a diamond and gold tennis bracelet (worn by the victim). Blood was detected on this link.

The next report is dated July 24, 1998. It was performed by Dr. Thomas F. Callaghan of the FBI. Callaghan's trial testimony, that Prade was absolutely excluded as a source of the DNA found on the fingernail clippings and bite mark swabs, was summarized by the trial court in the Order dated May 2, 2005 denying Prade's first application for DNA testing:

More specifically, the 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 third report is dated August 17, 1998. It was performed by LabCorp at the request of the Prosecutor's Office. The item tested was the part of the tennis bracelet found to have blood on it by Dale Laux. LabCorp identified genetic material consistent with the blood sample of the victim and inconsistent with the blood sample from defendant.

The last report is dated September 9, 1998. It was performed on behalf of defendant by the Serological Research Institute. SERI tested three lab coat cuttings having tan and brown stains that tested positive for blood; this was from the part of the lab coat that was bitten. No amylase (saliva or perspiration) activity was found on the samples. A few skin cells were located on two of the samples. The cellular material was amplified by PCR. The results were that the DNA could have originated from the victim but not from Prade.

The Ninth District considered the lack of DNA evidence in considering whether the conviction for aggravated murder was based on insufficient evidence and was against the manifest weight of the evidence. *Prade*, *696-*700.

The trial court denied the second application for DNA testing on the basis that there had been prior definitive DNA tests that excluded Prade; and any exclusion resulting from additional testing would duplicate the prior results and would not be outcome determinative. Order dated June 2, 2008, 5-6.

After Prade filed his second application for DNA testing the State obtained a report from BCI DNA Quality Assurance Administrator Dr. Elizabeth Benzinger concerning Prade's request to perform Y-STR testing on the bite mark (lab coat). Dr. Benzinger was provided with the FBI and SERI reports referenced above. Dr. Benzinger has testified many times in the Summit County Court of Common Pleas as an expert witness on DNA testing. Her report dated March 14, 2008 is also attached to the State's Memorandum filed March 21, 2008. Trial Court Docket, R. 346. It is also in Prade's Supplement to the Merit Brief.

In summary, Dr. Benzinger reported that Y-STR testing can identify minor male contributions in an otherwise overwhelming female DNA environment. This aspect of Y-STR testing is well known and the State does not dispute it. Dr. Benzinger stated that if Y-STR testing did identify male DNA, any result would have to be interpreted in light of possible contamination from persons who may have come into contact with the exhibit.

Thus any Y-STR result that excluded Prade would duplicate the prior results. Any DNA from other male contributor(s) would not necessarily point to another person as the perpetrator of the killing.

PROPOSITION OF LAW I

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.

- A. Ohio’s DNA Testing Statute-
R.C. 2953.71 – 2953.84**
- B. The 1998 DNA Tests Were Not “Prior Definitive DNA Test(s)” Under R.C. 2953.74(A).**
 - 1. The Ohio DNA Testing Statute’s Purpose Requires Defining A “Prior Definitive DNA Test” By Reference To Results Current Testing Methods Might Produce.**
 - 2. The Ninth District’s Definition Of A “Prior Definitive DNA Test” Ignores The Statutory Context.**
 - 3. The 1998 DNA Testing In This Case Was “Inconclusive” Under R.C. 2953.71(J) And, Therefore, Those Tests Were Not “Prior Definitive Test(s)” Under R.C. 2953.74(A).**
- 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.”**

LAW AND ARGUMENT

Simply put this is a case where Prade wants to apply statutes as he wishes they were written instead of how they are written. The DNA testing statutes are not designed to provide discovery, utterly speculative discovery at that, to an inmate who had DNA tests performed at his trial and was excluded by those tests, particularly where there is extremely compelling evidence of his guilt as in this case.

This Court enunciated basic rules of statutory construction in *Portage County Board of Commissioners v. City of Akron*, 109 Ohio St.3d 106, 2006-Ohio-954:

Following a primary rule of statutory construction, we must apply a statute as it is written when its meaning is

unambiguous and definite. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words. *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519. See, also, *Morgan v. Ohio Adult Parole Auth.* (1994), 68 Ohio St.3d 344, 347, 626 N.E.2d 939. The purpose** of statutory construction is to discern the actual meaning of the statute. *First Natl. Bank of Wilmington v. Kosydar* (1976), 45 Ohio St.2d 101, 106, 74 O.O.2d 206, 341 N.E.2d 579.

Id., ¶52; See R.C. 1.42; *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, syllabus.

Prade poses the question whether using current DNA testing methods would likely produce new and different results bearing significantly on a potential claim of actual innocence. Brief, 14. This is Prade's motif in this appeal, that the DNA testing statutes must be interpreted to take into account current DNA technology. The State contends that by doing so this Court would be adding words to the statute(s). And the Supreme Court of the United States rejected the notion that speculation based on new DNA technology is entitled to much weight: "The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt." *District Attorney's Office for the Third Judicial District v. Osborne* (2009), 129 S.Ct. 2308, *2316.

Prade asserted in his second Application for DNA testing, Trial Court Docket, R. 343 at 35, that (another) exclusion of Prade, if any male DNA were located, would mean that Prade was not the killer. That is simply wrong.

The State's theory at trial was that the killer made the bite mark on the lab coat. But the coat could have been touched by many males as Dr. Benzinger points out. Those males could have included Tim Holston the victim's boyfriend, patients of the victim,

others working in the victim's office, lab employees, prosecutors, defense attorneys, or other innocent persons. See Benzinger Report at 2. The coat could have been tossed onto other places harboring male DNA such as a chair or table. A lab coat by its nature is designed and worn to keep unwanted bodily substances off the wearer of the coat.

Also, Y-STR tests could not determine "exactly whose profiles are under the victim's fingernails and other items." Second Application for DNA testing, Trial Court Docket, R. 343 at 36. Y-STR tests can exclude a male but cannot identify a specific male as a contributor since a positive result equally identifies all males in the person's paternal lineage. See Dept. of Justice, National Comm'n on the Future of DNA Evidence, *The Future of Forensic DNA Testing*, (2000), 49-50.

1. THERE HAS BEEN A PRIOR DEFINITIVE DNA TEST

Where there has been a prior definitive DNA test the application for DNA testing must be rejected. R.C. 2953.74(A). The statutes do not define a definitive DNA test. The Ninth District found that a definitive test was one that "serves to provide a final, conclusive solution." Decision and Journal Entry, ¶8. All of the DNA tests that were performed that could exclude Prade did exclude him. The Ninth District sensibly refused to accept Prade's argument that an exclusion result was not a definitive result. Decision and Journal Entry, ¶12.

The Ninth District considered and rejected the argument Prade principally relies on here, that results that might be obtained with new DNA technology must be considered in defining a prior definitive DNA test. The Ninth District correctly found that the statute did not include the availability of new technology in determining whether there had been a prior definitive DNA test. Nor does the definition of an inconclusive DNA test, R.C. 2953.71(J), include a test performed with old technology.

Decision and Journal Entry, ¶13. The Ninth District found that the trial court could not have accepted the second application.

Prade attacks the findings of the Ninth District on three grounds. First he says that it is the purpose of the statutes to allow inmates convicted before there was modern DNA testing to establish their innocence using current testing methods. Prade cites *State v. Emerick*, 170 Ohio App.3d 647, 2007-Ohio-1334 and *State v. Elliott*, 1st Dist. App. No. C-050606, 2006-Ohio-4508. Neither case supports Prade's argument.

In *Emerick* the defendant was convicted of two killings that occurred in 1994. There were no DNA tests done much less tests that excluded the defendant. The decision simply does not bear on the question here, whether an inmate who has been excluded by DNA tests at trial is entitled to more tests.

In *Elliott* the defendant was convicted of rape in 1996 a DNA test excluded the defendant as the source of blood found on the victim's nightshirt. *Id.* ¶3. Several years later the defendant applied for DNA testing of vaginal, oral, and rectal swabs of the victim, items that had never been tested. *Id.* The court of appeals found that an exclusion result would be outcome determinative. *Id.* ¶26. *Elliott* does not help Prade. Prade specifically requested DNA testing of the bite mark on the victim's lab coat and of the victim's fingernail scrapings in the second application. Trial Court Docket, R. 343, 35-36. Prade has been excluded on those items. Decision and Journal Entry, ¶10-¶11. In *Emerick* and *Elliott* the defendants never had DNA tests done on the items the appellate court ordered to be tested. Where no DNA tests have been done any DNA test is going to be technologically superior to any past method of testing biological material.

Second, Prade says that the Ninth District's definition of a prior definitive test ignores the statutory context. Prade again argues that the point of the statutes is to see

what current testing might reveal regardless of what prior tests revealed. Prade also suggests that his constitutional rights would be violated by not allowing him to test with current technology. This constitutional claim was not raised below is now waived. *State ex rel. Brady v. Pianka*, 106 Ohio St.3d 147, 2005-Ohio-4105, ¶14; See Decision and Journal Entry, ¶17-¶19.

Moreover, the argument goes nowhere because the Supreme Court of the United States held that a defendant has no substantive due process right to access to DNA evidence and to apply new DNA technology that might prove him innocent. *Osborne*, 129 S.Ct. at *2322. If a defendant has no constitutional right to DNA testing at all, then it is irrelevant how other States fashion their DNA testing statutes. *Osborne* makes the point that States have flexibility in deciding what procedures are necessary in postconviction relief including DNA testing. *Id.* *2320. Since the States are free to experiment in this area it cannot be wrong for one State to have a different procedure than another State.

Third, Prade says that the prior tests were not definitive. The definition of an inconclusive result, R.C. 2953.71(J) simply does not embrace the concept that a DNA test that excludes the eligible inmate can be ignored and further testing done. A “scientifically appropriate” DNA result excluded Prade. As noted below proposed changes to the DNA testing statutes defining a definitive DNA test, in SB 77 will accomplish what Prade wants to accomplish now, a determination that advances in DNA technology may result in the discovery of biological material that prior tests failed to discover. But the current statutes do not allow that determination.

2. A NEW DNA TEST WOULD EITHER IMPLICATE PRADE OR YIELD EQUIVOCAL RESULTS THAT WOULD NOT BE OUTCOME DETERMINATIVE.

If there has been a prior inconclusive DNA test, the application may be accepted or rejected in the court's discretion. R.C. 2953.74(A). An inconclusive result is one where either a scientifically appropriate analysis or result cannot be determined. R.C. 2953.71(J). Acceptance of an application hinges on a finding that either R.C. 2953.74(B)(1) or (B)(2) applies. R.C. 2953.74(B)(1) may apply where there was not a DNA test at trial. Here, there was DNA testing, which excluded Prade. Unless this Court finds that Prade did not have DNA tests at all R.C. 2953.74(B)(1) cannot apply in this case.

R.C. 2953.74(B)(2) may apply where there was DNA testing at trial but the test was not definitive and where a new test that excludes the defendant when considered in light of all admissible evidence would have been outcome determinative.

The definition of outcome determinative is in R.C. 2953.71(L)

(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.

(Emphasis added.)

If new DNA tests were done and Prade excluded again, that does not mean that the new exclusion would be outcome determinative. The jury knew that Prade had been excluded by the DNA tests and convicted him anyway. There was powerful evidence of Prade's guilt. *Prade*, *696-*700. Dr. Benzinger's Report points out that any new result must be interpreted in light of possible contamination.

3. PROPOSED CHANGES IN THE DNA TESTING STATUTES INCLUDE PRADE'S CLAIM IN THIS CASE AND SHOULD PRECLUDE INTERPRETATION OF CURRENT LAW AS INCLUDING THAT CLAIM

SB 77 passed the Ohio Senate on June 24, 2009 and is pending in the House. See Senate Bill – Status Report. Part of SB 77 is an amendment to R.C. 2953.71 that addresses the Ninth District's statement that current law does not define a definitive DNA test. Decision and Journal Entry, ¶18. SB 77 adds R.C. 2953.71(U):

(U) "Definitive DNA test" means a DNA test that clearly establishes that biological material from the perpetrator of the crime was recovered from the crime scene and also clearly establishes whether or not the biological material is that of the eligible inmate. *A prior DNA test is not definitive if the eligible inmate proves by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover.* Prior testing may have been a prior "definitive DNA test" as to some biological evidence but may not have been a prior "definitive DNA test" as to other biological evidence.

(Emphasis added.) SB 77 repeals existing R.C. 2953.71. SB 77, Section 2.

If the above statute were in effect now, then Prade's argument in this appeal would have a basis in law. But the presumption is that an amendment signifies legislative intent to change rather than clarify the prior law. 1A Sutherland Statutory Construction (6th ed.) Section 22:30; See *Board of Education of Putman County v. Board of Education of Hartsburg Rural Special School Dist. of Putnam County* (1925),

112 Ohio St. 108, *114. To the extent that legislative intent can be divined in this area it is that current law does not mean that a prior DNA test is inconclusive or is not definitive because of advances in DNA technology.

If SB 77 becomes law and includes the above definition, Prade is free to file another application and attempt to prove by a preponderance of the evidence that a new test can identify a perpetrator other than Prade. But for now the conclusion must be that neither the trial court nor the Ninth District erred.

CONCLUSION

Pursuant to the argument offered, the State respectfully contends that the judgment of the Ninth District Court of Appeals should be affirmed.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'R S Kasay', written over a horizontal line.

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Brief was sent by regular U.S. Mail to Attorneys David Booth Alden and Ann Netzel, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114; Mark Godsey and David M. Laing, Ohio Innocence Project, University of Cincinnati College of Law, P.O. Box 210040, and Richard Cordray, Ohio Attorney General, Ohio Attorney General's Office, DNA Testing Unit, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215, on this 19th day of October, 2009.



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APPENDIX

DIANA ZALESKI

2005 MAY -2 AM 10: 38

SUMMIT COUNTY
CLERK OF COURTS IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STATE OF OHIO)	CASE NO. CR 98 02 0463
)	
Plaintiff)	JUDGE SPICER
)	
-vs-)	
)	
DOUGLAS PRADE)	<u>ORDER</u>
)	
Defendant)	

- - -

This matter is before the Court upon the Defendant's application for post-conviction DNA testing pursuant to R.C. 2953.73 in regards to his conviction for Aggravated Murder. 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 on each of the two third degree felony charges of Interception of Wire, Oral, or Electronic Communications, one and 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 that 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 application,

October 29, 2004.

As the Defendant meets the criteria for an "eligible inmate" set forth in R.C. 2953.72 (C), and as the present application is timely pursuant to R.C. 2953.73 (A), the Court will proceed to consider whether to grant the application pursuant to the criteria set forth in R.C. 2953.74. In consideration thereof, the Court denies the present application.

R.C. 2953.74 (A) provides:

"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."

An examination of the trial transcript reveals that a prior DNA test was conducted from the physical evidence collected, and that a definitive exclusion result was presented for the jury's consideration.

More specifically, the 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 was then convicted following the testimony of two eyewitnesses placing him at the scene of the crime, and expert medical testimony that the Defendant caused the bite mark found on the victim. Accordingly, the Court finds that a prior and definite DNA test regarding the Defendant was performed at the trial stage in this case, and denies the present application.

Moreover, the Court notes that as a prior, definitive DNA test was conducted in this case, and as the Court must accordingly deny the present application on this basis, the requirements of R.C. 2953.75 have been rendered moot.

Additionally, the Court denies the Defendant's alternative request to stay his application until more sensitive DNA tests are developed. The Defendant argues additional testing may reveal the presence of another individual's DNA and implicate that individual as the actual perpetrator.

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(C)(5) provides that before an application for DNA testing may be granted, the Court must determine that "if DNA testing is conducted and an exclusion result is obtained, the results

of the testing will be outcome determinative regarding that inmate." Accordingly, the statute does not authorize additional DNA testing as part of an open-ended inquiry to develop further evidence, but rather only in those limited circumstances where an exclusion result would provide definitive proof of the Defendant's innocence.

In the present case, 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. As previously noted, 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. Accordingly, the Defendant's alternative request is beyond the scope of the statute, and moreover, the Defendant has not provided any authority that due process or any other constitutional guarantee requires the Court to grant his alternative request.

Based upon the foregoing, the Court denies the Defendant's application for post-conviction DNA testing.

It is so ordered.

JUDGE MARY F. SPICER

cc: Richard S. Kasay, Assistant Summit County Prosecutor
Mark Godsey, Ohio Innocence Project, University of Cincinnati, P.O. Box 210040,
Cincinnati, Ohio 45221-0040.
Jim Petro, Ohio Attorney General, DNA Testing Unit, 150 E. Gay St., Columbus, Ohio
43215
tc/dle CR98-0463

R.C. § 1.42

Baldwin's Ohio Revised Code Annotated Currentness

General Provisions

Chapter 1. Definitions; Rules of Construction (Refs & Annos)

Statutory Provisions (Refs & Annos)

1.42 Common and technical usage

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

CREDIT(S)

(1971 H 607, eff. 1-3-72)

Ohio Legislative Service Commission



**Senate Bills - Status Report of Legislation
128th General Assembly**

SB 77

Primary Sponsor(s): Goodman

Subject: DNA testing of criminals

Abbreviations used in the Status Report

A - Amended	P - Postponed	S - Substitute	* - Note
F - Failed to Pass	R - Rereferred	V - Vetoed	

Action by Chamber	Senate	House
Introduced	03/11/09	06/25/09
Committee Assigned	Judiciary Civil Justice	Criminal Justice
Committee Report	S06/18/09	
Passed 3rd Consideration	A06/24/09	
Further Action		
To Conference Committee		
Concurrence		
Sent to Governor		
End of 10-day period		
Governor's Action		
Effective Date		
Notes		

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128TH GENERAL ASSEMBLY

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SB 77

As Passed by Senate

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Bill Analyses

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Synopsis

Fiscal Notes

Status Report of Legislation

Votes

Bill Sponsors

SENATORS:
Goodman Seitz Miller, R.
Stewart Schuring Miller, D.
Kearney Cates Coughlin
Fedor Gibbs Gillmor Harris
Husted Niehaus Patton
Sawyer Schiavoni Smith
Strahorn Turner Waggoner
Wilson Morano

Other Versions of Bill
and Associated
Reports

As Reported by Senate
Committee

As Introduced

HELP - Field
Definitions for this
Page

As Passed by the Senate

128th General Assembly
Regular Session
2009-2010

Am. Sub. S. B. No. 77

Senator Goodman

Cosponsors: Senators Seitz, Miller, R., Stewart, Schuring, Miller, D., Kearney, Cates, Coughlin, Fedor, Gibbs, Gillmor, Harris, Husted, Niehaus, Patton, Sawyer, Schiavoni, Smith, Strahorn, Turner, Waggoner, Wilson, Morano

A BILL

To amend sections 109.573, 2901.07, 2953.21, 2953.23, 2953.71, 2953.72, 2953.73, 2953.74, 2953.75, 2953.76, 2953.77, 2953.78, 2953.79, 2953.81, 2953.83, and 2953.84, to enact sections 109.561, 2933.81, 2933.82, 2933.83, 2953.56, 2953.57, 2953.58, and 2953.59, and to repeal section 2953.82 of the Revised Code relative to the expansion of DNA testing for certain convicted felons, the elimination of the DNA testing mechanism for felons who pleaded guilty or no contest to the offense, the collection of DNA specimens from all persons eighteen years of age or older who are arrested for a felony offense, the sealing of the official records of persons who have their convictions vacated and set aside due to DNA testing, the preservation and accessibility of biological evidence in a criminal or delinquency investigation or proceeding, the improvement of eyewitness identification procedures, and the electronic recording of custodial interrogations.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 109.573, 2901.07, 2953.21, 2953.23, 2953.71, 2953.72, 2953.73, 2953.74, 2953.75, 2953.76, 2953.77, 2953.78, 2953.79, 2953.81, 2953.83, and 2953.84 be amended and sections 109.561, 2933.81, 2933.82, 2933.83, 2953.56, 2953.57, 2953.58, and 2953.59 of the Revised Code be enacted to read as follows:

Sec. 109.561. There is hereby established within the bureau of criminal identification and investigation a preservation of biological evidence task force. The task force shall consist of officers and employees of the bureau, a representative from the Ohio prosecutors association, a representative from the Ohio state coroners association, a representative from the Ohio association of chiefs of police, a representative from the Ohio public defenders office, in consultation with the Ohio Innocence project, and a representative from the buckeye state sheriffs association. The task force shall perform the duties and functions specified in division (C) of section 2933.82 of the Revised Code.

Sec. 109.573. (A) As used in this section:

- (1) "DNA" means human deoxyribonucleic acid.
- (2) "DNA analysis" means a laboratory analysis of a DNA specimen to identify DNA characteristics and to create a DNA record.
- (3) "DNA database" means a collection of DNA records from forensic casework or from crime scenes, specimens from anonymous and unidentified sources, and records collected pursuant to sections 2152.74 and 2901.07 of the Revised Code and a population statistics database for determining the frequency of occurrence of characteristics in DNA records.

(4) "DNA record" means the objective result of a DNA analysis of a DNA specimen, including representations of DNA fragment lengths, digital images of autoradiographs, discrete allele assignment numbers, and other DNA specimen characteristics that aid in establishing the identity of an individual.

(5) "DNA specimen" includes human blood cells or physiological tissues or body fluids.

(6) "Unidentified person database" means a collection of DNA records, and, on and after May 21, 1998, of fingerprint and photograph records, of unidentified human corpses, human remains, or living individuals.

(7) "Relatives of missing persons database" means a collection of DNA records of persons related by consanguinity to a missing person.

(8) "Law enforcement agency" means a police department, the office of a sheriff, the state highway patrol, a county prosecuting attorney, or a federal, state, or local governmental body that enforces criminal laws and that has employees who have a statutory power of arrest.

(9) "Administration of criminal justice" means the performance of detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. "Administration of criminal justice" also includes criminal identification activities and the collection, storage, and dissemination of criminal history record information.

(B)(1) The superintendent of the bureau of criminal identification and investigation may do all of the following:

(a) Establish and maintain a state DNA laboratory to perform DNA analyses of DNA specimens;

(b) Establish and maintain a DNA database;

(c) Establish and maintain an unidentified person database to aid in the establishment of the identity of unknown human corpses, human remains, or living individuals;

(d) Establish and maintain a relatives of missing persons database for comparison with the unidentified person database to aid in the establishment of the identity of unknown human corpses, human remains, and living individuals.

(2) If the bureau of criminal identification and investigation establishes and maintains a DNA laboratory and a DNA database, the bureau may use or disclose information regarding DNA records for the following purposes:

(a) The bureau may disclose information to a law enforcement agency for the administration of criminal justice.

(b) The bureau shall disclose pursuant to a court order issued under section 3111.09 of the Revised Code any information necessary to determine the existence of a parent and child relationship in an action brought under sections 3111.01 to 3111.18 of the Revised Code.

(c) The bureau may use or disclose information from the population statistics database, for identification research and protocol development, or for quality control purposes.

(3) If the bureau of criminal identification and investigation establishes and maintains a relatives of missing persons database, all of the following apply:

(a) If a person has disappeared and has been continuously absent from the person's place of last domicile for a thirty-day or longer period of time without being heard from during the period, persons related by consanguinity to the missing person may submit to the bureau a DNA specimen, the bureau may include the DNA record of the specimen in the relatives of missing persons database, and, if the bureau does not include the DNA record of the specimen in the relatives of missing persons database, the bureau shall retain the DNA record for future reference and inclusion as appropriate in that database.

(b) The bureau shall not charge a fee for the submission of a DNA specimen pursuant to division (B)(3)(a) of this section.

(c) If the DNA specimen submitted pursuant to division (B)(3)(a) of this section is collected by withdrawing blood from the person or a similarly invasive procedure, a physician, registered nurse, licensed practical nurse, duly licensed clinical laboratory technician, or other qualified medical practitioner shall conduct the collection procedure for the DNA specimen submitted pursuant to division (B)(3)(a) of this section and shall collect the DNA specimen in a medically approved manner. If the DNA specimen is collected by swabbing for buccal cells or a similarly noninvasive procedure, division (B)(3)(c) of this section does not require that the DNA specimen be collected by a qualified medical practitioner of that nature. No later than fifteen days after the date of the collection of the DNA specimen, the person conducting the DNA specimen collection procedure shall cause the DNA specimen to be forwarded to the bureau of criminal identification and investigation in accordance with procedures established by the superintendent of the bureau under division (H) of this section. The bureau may provide the specimen vials, mailing tubes, labels, postage, and instruction needed for the collection and

forwarding of the DNA specimen to the bureau.

(d) The superintendent, in the superintendent's discretion, may compare DNA records in the relatives of missing persons database with the DNA records in the unidentified person database.

(4) If the bureau of criminal identification and investigation establishes and maintains an unidentified person database and if the superintendent of the bureau identifies a matching DNA record for the DNA record of a person or deceased person whose DNA record is contained in the unidentified person database, the superintendent shall inform the coroner who submitted or the law enforcement agency that submitted the DNA specimen to the bureau of the match and, if possible, of the identity of the unidentified person.

(5) The bureau of criminal identification and investigation may enter into a contract with a qualified public or private laboratory to perform DNA analyses, DNA specimen maintenance, preservation, and storage, DNA record keeping, and other duties required of the bureau under this section. A public or private laboratory under contract with the bureau shall follow quality assurance and privacy requirements established by the superintendent of the bureau.

(C) The superintendent of the bureau of criminal identification and investigation shall establish procedures for entering into the DNA database the DNA records submitted pursuant to sections 2152.74 and 2901.07 of the Revised Code and for determining an order of priority for entry of the DNA records based on the types of offenses committed by the persons whose records are submitted and the available resources of the bureau.

(D) When a DNA record is derived from a DNA specimen provided pursuant to section 2152.74 or 2901.07 of the Revised Code, the bureau of criminal identification and investigation shall attach to the DNA record personal identification information that identifies the person from whom the DNA specimen was taken. The personal identification information may include the subject person's fingerprints and any other information the bureau determines necessary. The DNA record and personal identification information attached to it shall be used only for the purpose of personal identification or for a purpose specified in this section.

(E) DNA records, DNA specimens, fingerprints, and photographs that the bureau of criminal identification and investigation receives pursuant to this section and sections 313.08, 2152.74, and 2901.07 of the Revised Code and personal identification information attached to a DNA record are not public records under section 149.43 of the Revised Code.

(F) The bureau of criminal identification and investigation may charge a reasonable fee for providing information pursuant to this section to any law enforcement agency located in another state.

(G)(1) No person who because of the person's employment or official position has access to a DNA specimen, a DNA record, or other information contained in the DNA database that identifies an individual shall knowingly disclose that specimen, record, or information to any person or agency not entitled to receive it or otherwise shall misuse that specimen, record, or information.

(2) No person without authorization or privilege to obtain information contained in the DNA database that identifies an individual person shall purposely obtain that information.

(H) The superintendent of the bureau of criminal identification and investigation shall establish procedures for all of the following:

(1) The forwarding to the bureau of DNA specimens collected pursuant to division (H) of this section and sections 313.08, 2152.74, and 2901.07 of the Revised Code and of fingerprints and photographs collected pursuant to section 313.08 of the Revised Code;

(2) The collection, maintenance, preservation, and analysis of DNA specimens;

(3) The creation, maintenance, and operation of the DNA database;

(4) The use and dissemination of information from the DNA database;

(5) The creation, maintenance, and operation of the unidentified person database;

(6) The use and dissemination of information from the unidentified person database;

(7) The creation, maintenance, and operation of the relatives of missing persons database;

(8) The use and dissemination of information from the relatives of missing persons database;

(9) The verification of entities requesting DNA records and other DNA information from the bureau and the authority of the entity to receive the information;

(10) The operation of the bureau and responsibilities of employees of the bureau with respect to the activities described in this section.

(I) In conducting DNA analyses of DNA specimens, the state DNA laboratory and any laboratory with which the bureau has entered into a contract pursuant to division (B)(5) of this section shall give

DNA analyses of DNA specimens that relate to ongoing criminal investigations or prosecutions priority over DNA analyses of DNA specimens that relate to applications made pursuant to section 2953.73 ~~or 2953.02~~ of the Revised Code.

(J) The attorney general may develop procedures for entering into the national DNA index system the DNA records submitted pursuant to division (B)(1) of section 2901.07 of the Revised Code.

Sec. 2901.07. (A) As used in this section:

(1) "DNA analysis" and "DNA specimen" have the same meanings as in section 109.573 of the Revised Code.

(2) "Jail" and "community-based correctional facility" have the same meanings as in section 2929.01 of the Revised Code.

(3) "Post-release control" has the same meaning as in section 2967.01 of the Revised Code.

(4) "Head of the arresting law enforcement agency" means whichever of the following is applicable regarding the arrest in question:

(a) If the arrest was made by a sheriff or a deputy sheriff, the sheriff who made the arrest or who employs the deputy sheriff who made the arrest;

(b) If the arrest was made by a law enforcement officer of a law enforcement agency of a municipal corporation, the chief of police, marshal, or other chief law enforcement officer of the agency that employs the officer who made the arrest;

(c) If the arrest was made by a constable or a law enforcement officer of a township police department or police district police force, the constable who made the arrest or the chief law enforcement officer of the department or agency that employs the officer who made the arrest;

(d) If the arrest was made by the superintendent or a trooper of the state highway patrol, the superintendent of the state highway patrol;

(e) If the arrest was made by a law enforcement officer not identified in division (A)(4)(a), (b), (c), or (d) of this section, the chief law enforcement officer of the law enforcement agency that employs the officer who made the arrest.

(B)(1) On and after July 1, 2011, a person who is eighteen years of age or older and who is arrested on or after July 1, 2011, for a felony offense shall submit to a DNA specimen collection procedure administered by the head of the arresting law enforcement agency. The head of the arresting law enforcement agency shall cause the DNA specimen to be collected from the person during the intake process at the jail, community-based correctional facility, detention facility, or law enforcement agency office or station to which the arrested person is taken after the arrest. The head of the arresting law enforcement agency shall cause the DNA specimen to be collected in accordance with division (C) of this section.

(2) Regardless of when the conviction occurred or the guilty plea was entered, a person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense and, who is sentenced to a prison term or to a community residential sanction in a jail or community-based correctional facility for that offense pursuant to section 2929.16 of the Revised Code, and who does not provide a DNA specimen pursuant to division (B)(1) of this section, and a person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a misdemeanor offense listed in division (D) of this section and, who is sentenced to a term of imprisonment for that offense, and who does not provide a DNA specimen pursuant to division (B)(1) of this section, shall submit to a DNA specimen collection procedure administered by the director of rehabilitation and correction or the chief administrative officer of the jail or other detention facility in which the person is serving the term of imprisonment. If the person serves the prison term in a state correctional institution, the director of rehabilitation and correction shall cause the DNA specimen to be collected from the person during the intake process at the reception facility designated by the director. If the person serves the community residential sanction or term of imprisonment in a jail, a community-based correctional facility, or another county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility, the chief administrative officer of the jail, community-based correctional facility, or detention facility shall cause the DNA specimen to be collected from the person during the intake process at the jail, community-based correctional facility, or detention facility. The DNA specimen shall be collected in accordance with division (C) of this section.

~~(2)~~(3) Regardless of when the conviction occurred or the guilty plea was entered, if a person has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense or a misdemeanor offense listed in division (D) of this section, is serving a prison term, community residential sanction, or term of imprisonment for that offense, and does not provide a DNA specimen pursuant to division (B)(1) or (2) of this section, prior to the person's release from the prison term, community residential sanction, or imprisonment, the person shall submit to, and the director of rehabilitation and correction or the chief administrative officer of the jail, community-based correctional facility, or detention facility in which the person is serving the prison term, community residential sanction, or term of imprisonment shall administer, a DNA specimen collection procedure at the state correctional institution, jail, community-based correctional facility, or detention facility in which the person is serving the prison term, community residential sanction, or term of imprisonment. The DNA

specimen shall be collected in accordance with division (C) of this section.

~~(3)~~(4)(a) Regardless of when the conviction occurred or the guilty plea was entered, if a person has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense or a misdemeanor offense listed in division (D) of this section and the person is on probation, released on parole, under transitional control, on community control, on post-release control, or under any other type of supervised release under the supervision of a probation department or the adult parole authority for that offense, and did not provide a DNA specimen pursuant to division (B)(1), (2), or (3) of this section, the person shall submit to a DNA specimen collection procedure administered by the chief administrative officer of the probation department or the adult parole authority. The DNA specimen shall be collected in accordance with division (C) of this section. If the person refuses to submit to a DNA specimen collection procedure as provided in this division, the person may be subject to the provisions of section 2967.15 of the Revised Code.

(b) If a person to whom division (B)~~(3)~~(4)(a) of this section applies is sent to jail or is returned to a jail, community-based correctional facility, or state correctional institution for a violation of the terms and conditions of the probation, parole, transitional control, other release, or post-release control, if the person was or will be serving a term of imprisonment, prison term, or community residential sanction for committing a felony offense or for committing a misdemeanor offense listed in division (D) of this section, and if the person did not provide a DNA specimen pursuant to division (B)(1), (2), ~~(3)~~, or ~~(3)~~(4)(a) of this section, the person shall submit to, and the director of rehabilitation and correction or the chief administrative officer of the jail or community-based correctional facility shall administer, a DNA specimen collection procedure at the jail, community-based correctional facility, or state correctional institution in which the person is serving the term of imprisonment, prison term, or community residential sanction. The DNA specimen shall be collected from the person in accordance with division (C) of this section.

~~(4)~~(5) Regardless of when the conviction occurred or the guilty plea was entered, if a person has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a felony offense or a misdemeanor offense listed in division (D) of this section, the person is not sentenced to a prison term, a community residential sanction in a jail or community-based correctional facility, a term of imprisonment, or any type of supervised release under the supervision of a probation department or the adult parole authority, and the person does not provide a DNA specimen pursuant to division (B)(1), (2), (3), ~~(4)~~(a), or ~~(3)~~(4)(b) of this section, the sentencing court shall order the person to report to the county probation department immediately after sentencing to submit to a DNA specimen collection procedure administered by the chief administrative officer of the county probation office. If the person is incarcerated at the time of sentencing, the person shall submit to a DNA specimen collection procedure administered by the director of rehabilitation and correction or the chief administrative officer of the jail or other detention facility in which the person is incarcerated. The DNA specimen shall be collected in accordance with division (C) of this section.

(C) If the DNA specimen is collected by withdrawing blood from the person or a similarly invasive procedure, a physician, registered nurse, licensed practical nurse, duly licensed clinical laboratory technician, or other qualified medical practitioner shall collect in a medically approved manner the DNA specimen required to be collected pursuant to division (B) of this section. If the DNA specimen is collected by swabbing for buccal cells or a similarly noninvasive procedure, this section does not require that the DNA specimen be collected by a qualified medical practitioner of that nature. No later than fifteen days after the date of the collection of the DNA specimen, ~~the head of the arresting law enforcement agency regarding a DNA specimen taken pursuant to division (B)(1) of this section, the director of rehabilitation and correction or the chief administrative officer of the jail, community-based correctional facility, or other county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility; in which the person is serving the prison term, community residential sanction, or term of imprisonment regarding a DNA specimen taken pursuant to division (B)(2), (3), or (4)(b) of this section, the chief administrative officer of the probation department or the adult parole authority regarding a DNA specimen taken pursuant to division (B)(4)(a) of this section, or the chief administrative officer of the county probation office, the director of rehabilitation and correction, or the chief administrative officer of the jail or other detention facility in which the person is incarcerated regarding a DNA specimen taken pursuant to division (B)(5) of this section, whichever is applicable,~~ shall cause the DNA specimen to be forwarded to the bureau of criminal identification and investigation in accordance with procedures established by the superintendent of the bureau under division (H) of section 109.573 of the Revised Code. The bureau shall provide the specimen vials, mailing tubes, labels, postage, and instructions needed for the collection and forwarding of the DNA specimen to the bureau.

(D) ~~The director of rehabilitation and correction, the chief administrative officer of the jail, community-based correctional facility, or other county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility, or the chief administrative officer of a county probation department or the adult parole authority shall cause a DNA specimen to be collected in accordance with divisions (B) and (C) of this section from a person in its custody or under its supervision. DNA specimen collection duty set forth in division (B)(1) of this section applies to any person who is eighteen years of age or older and who is arrested on or after July 1, 2011, for any felony offense. The DNA specimen collection duties set forth in divisions (B)(2), (3), (4)(a), (4)(b), and (5) of this section apply to any person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to any felony offense or any of the following misdemeanor offenses:~~

(1) A misdemeanor violation, an attempt to commit a misdemeanor violation, or complicity in committing a misdemeanor violation of section 2907.04 of the Revised Code;

(2) A misdemeanor violation of any law that arose out of the same facts and circumstances and same act as did a charge against the person of a violation of section 2903.01, 2903.02, 2905.01,

2907.02, 2907.03, 2907.04, 2907.05, or 2911.11 of the Revised Code that previously was dismissed or amended or as did a charge against the person of a violation of section 2907.12 of the Revised Code as it existed prior to September 3, 1996, that previously was dismissed or amended;

(3) A misdemeanor violation of section 2919.23 of the Revised Code that would have been a violation of section 2905.04 of the Revised Code as it existed prior to July 1, 1996, had it been committed prior to that date;

(4) A sexually oriented offense or a child-victim oriented offense, both as defined in section 2950.01 of the Revised Code, that is a misdemeanor, if, in relation to that offense, the offender is a tier III sex offender/child-victim offender, as defined in section 2950.01 of the Revised Code.

(E) The director of rehabilitation and correction may prescribe rules in accordance with Chapter 119. of the Revised Code to collect a DNA specimen, as provided in this section, from an offender whose supervision is transferred from another state to this state in accordance with the interstate compact for adult offender supervision described in section 5149.21 of the Revised Code.

Sec. 2933.81. (A) As used in this section:

(1) "Custodial interrogation" means any interrogation involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses and in which a reasonable person in the subject's position would consider self to be in custody, beginning when a person should have been advised of the person's right to counsel and right to remain silent and of the fact that anything the person says could be used against the person, as specified by the United States supreme court in *Miranda v. Arizona* (1966), 384 U.S. 436, and subsequent decisions, and ending when the questioning has completely finished.

(2) "Detention facility" has the same meaning as in section 2921.01 of the Revised Code.

(3) "Electronic recording" or "electronically recorded" means an audio and visual recording that is an authentic, accurate, unaltered record of a custodial interrogation.

(4) "Local correctional facility" has the same meaning as in section 2903.13 of the Revised Code.

(5) "Place of detention" means a jail, police or sheriff's station, holding cell, state correctional institution, local correctional facility, detention facility, or department of youth services facility.

(6) "State correctional institution" has the same meaning as in section 2967.01 of the Revised Code.

(7) "Statement" means an oral, written, sign language, or nonverbal communication.

(B) All statements made by a person who is the suspect of a violation of or possible violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.041, 2903.05, or 2903.06, a violation of section 2907.02 or 2907.03, or an attempt to commit a violation of section 2907.02 of the Revised Code during a custodial interrogation in a place of detention shall be electronically recorded. It is presumed that the statements made by a person during the electronic recording of a custodial interrogation are voluntary if the law enforcement officer follows the proper procedures under this section with regard to the electronic recording of a custodial interrogation. The person making the statements during the electronic recording of the custodial interrogation has the burden of proving that the statements made during the custodial interrogation were not voluntary. There shall be no penalty against the law enforcement agency that employs a law enforcement officer if the law enforcement officer fails to electronically record as required by this division a custodial interrogation.

(C) A failure to electronically record a statement as required by this section shall not provide the basis to exclude or suppress the statement in any criminal proceeding, delinquent child proceeding, or other legal proceeding.

(D)(1) Law enforcement personnel shall clearly identify and catalogue every electronic recording of a custodial interrogation that is recorded pursuant to this section.

(2) If a criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded, law enforcement personnel shall preserve the recording until the later of when all appeals, post-conviction relief proceedings, and habeas corpus proceedings are final and concluded or the expiration of the period of time within which such appeals and proceedings must be brought.

(3) Upon motion by the defendant in a criminal proceeding or the alleged delinquent child in a delinquent child proceeding, the court may order that a copy of an electronic recording of a custodial interrogation of the person be preserved for any period beyond the expiration of all appeals, post-conviction relief proceedings, and habeas corpus proceedings.

(4) If no criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded pursuant to this section, law enforcement personnel shall preserve the related recording until all applicable state and federal statutes of limitations bar prosecution of the person for any offense or violation based on or related to any conduct discussed in the custodial interrogation, until the person dies, or for a period of thirty years, whichever occurs first.

Sec. 2933.82. (A) As used in this section:

(1)(a) "Biological evidence" means any of the following:

(i) The contents of a sexual assault examination kit;

(ii) Any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identifiable biological material that was collected as part of a criminal investigation or delinquent child investigation and that reasonably may be used to incriminate or exculpate any person for an offense or delinquent act.

(b) The definition of "biological evidence" set forth in division (A)(1)(a) of this section applies whether the material in question is catalogued separately, such as on a slide or swab or in a test tube, or is present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups or containers, or cigarettes.

(2) "Biological material" has the same meaning as in section 2953.71 of the Revised Code.

(3) "DNA" has the same meaning as in section 109.573 of the Revised Code.

(4) "Profile" means a unique identifier of an individual, derived from DNA.

(5) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(6) "Governmental evidence-retention entity" means all of the following:

(a) Any law enforcement agency, prosecutor's office, court, public hospital, crime laboratory, or other governmental or public entity or individual within this state that is charged with the collection, storage, or retrieval of biological evidence;

(b) Any official or employee of any entity or individual described in division (A)(6)(a) of this section.

(B)(1) Each governmental evidence-retention entity that secures any biological evidence in relation to an investigation or prosecution of a criminal offense or delinquent act that is a violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.041, 2903.06, 2907.02, or 2907.03 or division (A)(4) or (B) of section 2907.05 of the Revised Code or of section 2923.02 of the Revised Code in an attempt to commit a violation of section 2907.02 of the Revised Code shall secure the biological evidence for whichever of the following periods of time is applicable:

(a) For a violation of section 2903.01 or 2903.02 of the Revised Code, for the period of time that the offense or act remains unsolved;

(b) For a violation of section 2903.03, 2903.04, 2903.041, 2903.06, 2907.02, or 2907.03 or of division (A)(4) or (B) of section 2907.05 of the Revised Code or a violation of section 2923.02 of the Revised Code in an attempt to commit a violation of section 2907.02 of the Revised Code, for a period of thirty years if the offense or act remains unsolved;

(c) If any person is convicted of or pleads guilty to the offense, or is adjudicated a delinquent child for committing the delinquent act, for the period of time that the person remains incarcerated, in a department of youth services institution or other juvenile facility, under a community control sanction for that offense, under any order of disposition for that act, on probation or parole for that offense, under judicial release or supervised release for that act, under post-release control for that offense, involved in civil litigation in connection with that offense or act, or subject to registration and other duties imposed for that offense or act under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code or for a period of thirty years, whichever is earlier. If after the period of thirty years the person remains incarcerated, then the governmental evidence-retention entity shall secure the biological evidence until the person is released from incarceration or dies.

(2) This section applies to evidence that was in the possession of any governmental evidence-retention entity during the investigation and prosecution of a criminal case or delinquent child case involving a violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.041, 2903.06, 2907.02, or 2907.03 or of division (A)(4) or (B) of section 2907.05 of the Revised Code or a violation of section 2923.02 of the Revised Code in an attempt to commit a violation of section 2907.02 of the Revised Code and that, at the time the person is convicted of or pleads guilty to the offense or is adjudicated a delinquent child for the delinquent act, was likely to contain biological material.

(3) A governmental evidence-retention entity that possesses biological evidence shall retain the biological evidence in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence.

(4) Upon written request by the defendant in a criminal case or the alleged delinquent child in a delinquent child case involving a violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.041, 2903.06, 2907.02, or 2907.03 or of division (A)(4) or (B) of section 2907.05 of the Revised Code or a violation of section 2923.02 of the Revised Code in an attempt to commit a violation of section 2907.02 of the Revised Code, a governmental evidence-retention entity that possesses biological evidence shall prepare an inventory of the biological evidence that has been preserved in connection with the

defendant's criminal case or the alleged delinquent child's delinquent child case.

(5) A governmental evidence-retention entity that possesses biological evidence that includes biological material may destroy the evidence before the expiration of the applicable period of time specified in division (B)(1) of this section if all of the following apply:

(a) No other provision of federal or state law requires the state to preserve the evidence.

(b) The governmental evidence-retention entity, by certified mail, return receipt requested, provides notice of intent to destroy the evidence to all of the following:

(i) All persons who remain in custody, incarcerated, in a department of youth services institution or other juvenile facility, under a community control sanction, under any order of disposition, on probation or parole, under judicial release or supervised release, under post-release control, involved in civil litigation, or subject to registration and other duties imposed for that offense or act under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code as a result of a criminal conviction, delinquency adjudication, or commitment related to the evidence in question;

(ii) The attorney of record for each person who is in custody in any circumstance described in division (B)(5)(b)(i) of this section if the attorney of record can be located;

(iii) The state public defender;

(iv) The prosecutor of record in the case that resulted in the custody of the person in custody in any circumstance described in division (B)(5)(b)(i) of this section;

(v) The attorney general.

(c) No person who is notified under division (B)(5)(b) of this section does either of the following within one year after the date on which the person receives the notice:

(i) Files a motion for testing of evidence under sections 2953.71 to 2953.81 or section 2953.82 of the Revised Code;

(ii) Submits a written request for retention of evidence to the governmental evidence-retention entity that provided notice of its intent to destroy evidence under division (B)(5)(b) of this section.

(6) If, after providing notice under division (B)(5)(b) of this section of its intent to destroy evidence, a governmental evidence-retention entity receives a written request for retention of the evidence from any person to whom the notice is provided, the governmental evidence-retention entity shall retain the evidence while the person referred to in division (B)(5)(b)(i) of this section remains in custody, incarcerated, in a department of youth services institution or other juvenile facility, under a community control sanction, under any order of disposition, on probation or parole, under judicial release or supervised release, under post-release control, involved in civil litigation, or subject to registration and other duties imposed for that offense or act under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code as a result of a criminal conviction, delinquency adjudication, or commitment related to the evidence in question.

(7) A governmental evidence-retention entity shall not be required to preserve physical evidence pursuant to this section that is of such a size, bulk, or physical character as to render retention impracticable. When retention of physical evidence that otherwise would be required to be retained pursuant to this section is impracticable as described in this division, the governmental evidence-retention entity that otherwise would be required to retain the physical evidence shall remove and preserve portions of the material evidence likely to contain biological evidence related to the offense, in a quantity sufficient to permit future DNA testing before returning or disposing of that physical evidence.

(C)(1) The preservation of biological evidence task force established within the bureau of criminal identification and investigation under section 109.561 of the Revised Code shall establish a system regarding the proper preservation of biological evidence in this state. In establishing the system, the task force shall do all of the following:

(a) Devise standards regarding the proper collection, retention, and cataloguing of biological evidence for ongoing investigations and prosecutions;

(b) Recommend practices, protocols, models, and resources for the cataloguing and accessibility of preserved biological evidence already in the possession of governmental evidence-retention entities.

(2) In consultation with the preservation of biological evidence task force described in division (C)(1) of this section, the division of criminal justice services of the department of public safety shall administer and conduct training programs for law enforcement officers and other relevant employees who are charged with preserving and cataloguing biological evidence regarding the methods and procedures referenced in this section.

Sec. 2933.83. (A) As used in this section:

(1) "Administrator" means the person conducting a photo lineup or live lineup.

(2) "Blind administrator" means the administrator does not know the identity of the suspect. "Blind administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.

(3) "Blinded administrator" means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness. "Blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.

(4) "Eyewitness" means a person who observes another person at or near the scene of an offense.

(5) "Filler" means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure.

(6) "Folder system" means a system for conducting a photo lineup that satisfies all of the following:

(a) The investigating officer uses one "suspect photograph" that resembles the description of the suspected perpetrator of the offense provided by the witness, five "filler photographs" of persons not suspected of the offense that match the description of the suspected perpetrator but do not cause the suspect photograph to unduly stand out, four "blank photographs" that contain no images of any person, and ten empty folders.

(b) The investigating officer places one "filler photograph" into one of the empty folders and numbers it as folder 1.

(c) The administrator places the "suspect photograph" and the other four "filler photographs" into five other empty folders, shuffles the five folders so that the administrator is unaware of which folder contains the "suspect photograph," and numbers the five shuffled folders as folders 2 through 6.

(d) The administrator places the four "blank photographs" in the four remaining empty folders and numbers these folders as folders 7 through 10, and these folders serve as "dummy folders."

(e) The administrator provides instructions to the witness as to the lineup procedure and informs the witness that a photograph of the alleged perpetrator of the offense may or may not be included in the photographs the witness is about to see and that the administrator does not know which, if any, of the folders contains the photograph of the alleged perpetrator. The administrator also shall instruct the witness that the administrator does not want to view any of the photographs and will not view any of the photographs and that the witness may not show the administrator any of the photographs. The administrator shall inform the witness that if the witness identifies a photograph as being the person the witness saw the witness shall identify the photograph only by the number of the photograph's corresponding folder.

(f) The administrator hands each of the ten folders to the witness individually without looking at the photograph in the folder. Each time the witness has viewed a folder, the witness indicates whether the photograph is of the person the witness saw, indicates the degree of the witness' confidence in this identification, and returns the folder and the photograph it contains to the administrator.

(g) The administrator follows the procedures specified in this division for a second viewing if the witness requests to view each of the folders a second time, handing them to the witness in the same order as during the first viewing; the witness is not permitted to have more than two viewings of the folders; and the administrator preserves the order of the folders and the photographs they contain in a face-down position in order to document the steps specified in division (A)(6)(h) of this section.

(h) The administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (f) of this section before the witness views each of the folders a second time and before the administrator views any photograph that the witness identifies as being of the person the witness saw. The documentation and record includes the date, time, and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photographs shown to the witness; copies of each photograph shown to the witness; the order in which the folders were presented to the witness; the source of each photograph that was used in the procedure; a statement of the witness' confidence in the witness' own words as to the certainty of the witness' identification of the photographs as being of the person the witness saw that is taken immediately upon the reaction of the witness to viewing the photograph; and any additional information the administrator considers pertinent to the lineup procedure. If the witness views each of the folders a second time, the administrator shall document and record the statement of the witness's confidence in the witness's own words as to the certainty of the witness's identification of a photograph as being of the person the witness saw and document that the identification was made during a second viewing of each of the folders by the witness.

(i) The administrator shall not say anything to the witness or give any oral or nonverbal cues as to whether or not the witness identified the "suspect photograph" until the administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (g) of this section and the photo lineup has concluded.

(7) "Live lineup" means an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an

eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator of the offense.

(8) "Photo lineup" means an identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator of the offense.

(9) "Perpetrator" means the person who committed the offense.

(10) "Suspect" means the person believed by law enforcement to be the possible perpetrator of the offense.

(B) Prior to conducting any live lineup or photo lineup on or after the effective date of this section, any law enforcement agency or criminal justice entity in this state that conducts live lineups or photo lineups shall adopt specific procedures for conducting the lineups. The procedures, at a minimum, shall impose the following requirements:

(1) Unless impracticable, a blind or blinded administrator shall conduct the live lineup or photo lineup.

(2) When it is impracticable for a blind administrator to conduct the live lineup or photo lineup, the administrator shall state in writing the reason for that impracticability.

(3) When it is impracticable for either a blind or blinded administrator to conduct the live lineup or photo lineup, the administrator shall state in writing the reason for that impracticability.

(4) The administrator conducting the lineup shall make a written record that includes all of the following information:

(a) All identification and nonidentification results obtained during the lineup, signed by the eyewitnesses, including the eyewitnesses' confidence statements made immediately at the time of the identification;

(b) The names of all persons present at the lineup;

(c) The date and time of the lineup;

(d) Any eyewitness identification of one or more fillers in the lineup;

(e) The names of the lineup members and other relevant identifying information, and the sources of all photographs or persons used in the lineup.

(5) If a blind administrator is conducting the live lineup or the photo lineup, the administrator shall inform the witness that the suspect may or may not be in the lineup and that the administrator does not know who the suspect is.

(C) For any photo lineup or live lineup that is administered on or after the effective date of this section, all of the following apply:

(1) Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section shall be considered by trial courts in adjudicating motions to suppress eyewitness identification resulting from or related to the lineup.

(2) Evidence of a failure to comply with any of the provisions of this section or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section shall be admissible in support of any claim of eyewitness misidentification resulting from or related to the lineup as long as that evidence otherwise is admissible.

(3) When evidence of a failure to comply with any of the provisions of this section, or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to division (B) of this section and that conforms to any provision of divisions (B)(1) to (5) of this section, is presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.

Sec. 2953.21. (A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony; and who is an inmate, and offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's person's case as described in division (D) of section 2953.74 of the Revised Code provided

results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to the effective date of this amendment.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, 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. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resententence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I)(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

Sec. 2953.23. (A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an *inmate* offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and 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, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, "actual innocence" has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code, and "former section 2953.82 of the Revised Code" has the same

meaning as in division (A)(1)(c) of section 2953.21 of the Revised Code.

(B) An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

Sec. 2953.56. (A) A court that enters a judgment that vacates and sets aside the conviction of a person because of DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code shall issue ninety days after the court vacates and sets aside the conviction an order directing that all official records pertaining to the case involving the vacated conviction be sealed and that the proceedings in the case shall be deemed not to have occurred.

(B) As used in sections 2953.56 to 2953.59 of the Revised Code, "official records" has the same meaning as in section 2953.51 of the Revised Code.

Sec. 2953.57. (A) The court shall send notice of an order to seal official records issued pursuant to section 2953.56 of the Revised Code to any public office or agency that the court knows or has reason to believe may have any record of the case, whether or not it is an official record, that is the subject of the order. The notice shall be sent by certified mail, return receipt requested.

(B) A person whose official records have been sealed pursuant to an order issued pursuant to section 2953.56 of the Revised Code may present a copy of that order and a written request to comply with it, to a public office or agency that has a record of the case that is the subject of the order.

(C) An order to seal official records issued pursuant to section 2953.56 of the Revised Code applies to every public office or agency that has a record of the case that is the subject of the order, regardless of whether it receives a copy of the order to seal the official records pursuant to division (A) or (B) of this section.

(D) Upon receiving a copy of an order to seal official records pursuant to division (A) or (B) of this section or upon otherwise becoming aware of an applicable order to seal official records issued pursuant to section 2953.56 of the Revised Code, a public office or agency shall comply with the order and, if applicable, with the provisions of section 2953.58 of the Revised Code, except that it may maintain a record of the case that is the subject of the order if the record is maintained for the purpose of compiling statistical data only and does not contain any reference to the person who is the subject of the case and the order.

A public office or agency also may maintain an index of sealed official records, in a form similar to that for sealed records of conviction as set forth in division (F) of section 2953.32 of the Revised Code, access to which may not be afforded to any person other than the person who has custody of the sealed official records. The sealed official records to which such an index pertains shall not be available to any person, except that the official records of a case that have been sealed may be made available to the following persons for the following purposes:

(1) To the person who is the subject of the records upon written application, and to any other person named in the application, for any purpose;

(2) To a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case.

Sec. 2953.58. (A) Except as otherwise provided in Chapter 2950. of the Revised Code, upon the issuance of an order by a court under section 2953.56 of the Revised Code directing that all official records pertaining to a case be sealed and that the proceedings in the case be deemed not to have occurred:

(1) Every law enforcement officer possessing records or reports pertaining to the case that are the officer's specific investigatory work product and that are excepted from the definition of "official records" contained in section 2953.51 of the Revised Code shall immediately deliver the records and reports to the officer's employing law enforcement agency. Except as provided in division (A)(3) of this section, no such officer shall knowingly release, disseminate, or otherwise make the records and reports or any information contained in them available to, or discuss any information contained in them with, any person not employed by the officer's employing law enforcement agency.

(2) Every law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of "official records" contained in section 2953.51 of the Revised Code, or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under division (A)(1) of this section shall, except as provided in division (A)(3) of this section, close the records and reports to all persons who are not directly employed by the law enforcement agency and shall, except as provided in division (A)(3) of this section, treat the records and reports, in relation to all persons other than those who are directly employed by the law enforcement agency, as if they did not exist and had never existed. Except as provided in division (A)(3) of this section, no person who is employed by the law enforcement agency shall knowingly release, disseminate, or otherwise make the records and reports in the possession of the employing law enforcement agency or any information contained in them available to, or discuss any information contained in them with, any person not employed by the employing law enforcement agency.

(3) A law enforcement agency that possesses records or reports pertaining to the case that are

its specific investigatory work product and that are excepted from the definition of "official records" contained in division (D) of section 2953.51 of the Revised Code, or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under division (A)(1) of this section may permit another law enforcement agency to use the records or reports in the investigation of another offense, if the facts incident to the offense being investigated by the other law enforcement agency and the facts incident to an offense that is the subject of the case are reasonably similar and if all references to the name or identifying information of the person whose records were sealed are redacted from the records or reports. The agency that provides the records and reports may not provide the other agency with the name of the person who is the subject of the case the records of which were sealed.

(B) Whoever violates division (A)(1), (2), or (3) of this section is guilty of divulging confidential information, a misdemeanor of the fourth degree.

Sec. 2953.59. (A) In any application for employment, license, or any other right or privilege, any appearance as a witness, or any other inquiry, a person may not be questioned with respect to any record that has been sealed pursuant to section 2953.56 of the Revised Code. If an inquiry is made in violation of this section, the person whose official record was sealed may respond as if the arrest underlying the case to which the sealed official records pertain and all other proceedings in that case did not occur, and the person whose official record was sealed shall not be subject to any adverse action because of the arrest, the proceedings, or the person's response.

(B) An officer or employee of the state or any of its political subdivisions who knowingly releases, disseminates, or makes available for any purpose involving employment, bonding, licensing, or education to any person or to any department, agency, or other instrumentality of the state, or of any of its political subdivisions, any information or other data concerning any arrest, complaint, indictment, information, trial, adjudication, or correctional supervision, the records of which have been sealed pursuant to section 2953.56 of the Revised Code, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

Sec. 2953.71. 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 offender was convicted of the offense for which the inmate is an eligible inmate offender 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 offender, 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 offender" means an inmate offender 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 offender as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the inmate offender is an eligible inmate offender 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 offender.~~

(H) "Extracting personnel" means medically approved personnel who are employed to physically obtain an inmate offender's 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 offender as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the inmate offender is an eligible inmate offender 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 offender.~~

(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 Offender~~" means ~~an inmate in a prison~~ a criminal offender 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 offender~~ been presented at the trial of the subject ~~inmate offender~~ requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the ~~inmate offender~~ is an eligible ~~inmate offender~~ 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 offender'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 offender~~ guilty of that offense or, if the ~~inmate offender~~ was sentenced to death relative to that offense, would have found the ~~inmate offender~~ guilty of the aggravating circumstance or circumstances the ~~inmate offender~~ 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 offender~~ is an eligible ~~inmate or for which the inmate is requesting the DNA testing under section 2953.82 of the Revised Code~~ offender, and from which a sample will be presently taken to do a DNA comparison to the DNA of the subject ~~inmate offender~~ under sections 2953.71 to 2953.81 ~~or section 2953.82~~ of the Revised Code.

(N) "Prison" ~~has~~ and "community control sanction" have the same ~~meaning~~ meanings 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 offender~~ was convicted of the offense for which the ~~inmate offender~~ is an eligible ~~inmate offender~~ 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.

(S) "Parole" and "post-release control" have the same meanings as in section 2967.01 of the Revised Code.

(T) "Sexually oriented offense" and "child-victim oriented offense" have the same meanings as in section 2950.01 of the Revised Code.

(U) "Definitive DNA test" means a DNA test that clearly establishes that biological material from the perpetrator of the crime was recovered from the crime scene and also clearly establishes whether or not the biological material is that of the eligible inmate. A prior DNA test is not definitive if the eligible inmate proves by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover. Prior testing may have been a prior "definitive DNA test" as to some biological evidence but may not have been a prior "definitive DNA test" as to other biological evidence.

Sec. 2953.72. (A) Any eligible ~~inmate~~ offender 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~~ offender shall submit the application in accordance with the procedures set forth in section 2953.73 of the Revised Code. The eligible ~~inmate~~ offender shall specify on the application the offense or offenses for which the ~~inmate~~ offender is an eligible ~~inmate~~ offender and is requesting the DNA testing. Along with the application, the eligible ~~inmate~~ offender shall submit an acknowledgment that is on a form prescribed by the attorney general for this purpose and that is signed by the ~~inmate~~ offender. 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 an eligible ~~inmates~~ offender at a stage of a prosecution or case after the ~~inmate~~ offender 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~~ offender under sections 2953.71 to 2953.81 of the Revised Code begins when the ~~inmate~~ offender submits an

application under section 2953.73 of the Revised Code and the acknowledgment described in this section;

(3) That the eligible inmate offender must submit the application and acknowledgment to the court of common pleas that heard the case in which the inmate offender was convicted of the offense for which the inmate offender 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 offender 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 offender under sections 2953.71 to 2953.81 of the Revised Code, the state will not offer the inmate offender 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 offender's application for DNA testing because the inmate offender 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 offenders, that those provisions do not give any inmate offender any additional constitutional right that the inmate offender did not already have, that the court has no duty or obligation to provide postconviction DNA testing to inmates offenders, that the court of common pleas has the sole discretion subject to an appeal as described in this division to determine whether an inmate offender is an eligible inmate offender and whether an eligible inmate's offender'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 offender's application, the inmate offender may seek leave of the supreme court to appeal the rejection to that court if the inmate offender was sentenced to death for the offense for which the inmate offender is requesting the DNA testing and, if the inmate offender 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 offender 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 offenders are carried out does not confer any constitutional right upon any inmate offender, 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 offender 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 offender sample against which other evidence may be compared, that, if an eligible inmate's offender's application is accepted but the inmate offender subsequently refuses to submit to the collection of the sample of biological material from the inmate offender or hinders the state from obtaining a sample of biological material from the inmate offender, the goal of those provisions will be frustrated, and that an inmate's offender's refusal or hindrance shall cause the court to rescind its prior acceptance of the application for DNA testing for the inmate offender 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 offender to insert all information necessary to complete the forms, including, but not limited to, specifying the offense or offenses for which the inmate offender is an eligible inmate offender 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~~ offenders 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~~ offender who requests them.

(C)(1) An ~~inmate~~ offender 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~~ offender claims to be an eligible ~~inmate~~ offender is a felony, and the ~~inmate~~ offender was convicted by a judge or jury of that offense.

(b) One of the following applies:

(i) The ~~inmate~~ offender was sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, and the ~~offender~~ is in prison serving that prison term or under that sentence of death, ~~has been paroled or is on probation regarding that felony, is under post-release control regarding that felony, or has been released from that prison term and is under a community control sanction regarding that felony.~~

(ii) The offender was not sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, but was sentenced to a community control sanction for that felony and is under that community control sanction.

(iii) The felony described in division (C)(1)(a) of this section was a sexually oriented offense or child-victim oriented offense, and the offender has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code relative to that felony.

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

(3) An offender is not an eligible offender under division (C)(1) of this section regarding any offense if the offender dies prior to submitting an application for DNA testing related to that offense under section 2953.73 of the Revised Code.

Sec. 2953.73. (A) An eligible ~~inmate~~ offender 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~~ offender for the offense for which the ~~inmate~~ offender is an eligible ~~inmate~~ offender and is requesting DNA testing.

(B) If an eligible ~~inmate~~ offender 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~~ offender 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~~ offender was convicted of the offense for which the ~~inmate~~ offender 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~~ offender submits an application for DNA testing under division (A) of this section, regardless of whether the ~~inmate~~ offender has commenced any federal habeas corpus proceeding relative to the case in which the ~~inmate~~ offender was convicted of the offense for which the ~~inmate~~ offender is an eligible ~~inmate~~ offender 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~~ offender 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~~ offender.

(D) If an eligible ~~inmate~~ offender 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~~ offender 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~~ offender 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~~ offender was sentenced to death for the offense for which the ~~inmate~~ offender claims to be an eligible ~~inmate~~ offender and is requesting DNA testing, the ~~inmate~~ offender 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~~ offender was sentenced to death for the offense for which the ~~inmate~~ offender claims to be an eligible ~~inmate~~ offender and is requesting DNA testing.

(2) If the ~~inmate~~ offender was not sentenced to death for the offense for which the ~~inmate~~ offender claims to be an eligible ~~inmate~~ offender and is requesting DNA testing, the rejection is a final appealable order, and the ~~inmate~~ offender 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~~ offender'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~~ offender.

Sec. 2953.74. (A) If an eligible ~~inmate~~ offender 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~~ offender seeks to have tested, the court shall reject the ~~inmate's~~ offender's application. If an eligible ~~inmate~~ offender files an application for DNA testing and a prior inconclusive DNA test has been conducted regarding the same biological evidence that the ~~inmate~~ offender 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~~ offender 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~~ offender did not have a DNA test taken at the trial stage in the case in which the ~~inmate~~ offender was convicted of the offense for which the ~~inmate~~ offender is an eligible ~~inmate~~ offender and is requesting the DNA testing regarding the same biological evidence that the ~~inmate~~ offender seeks to have tested, the ~~inmate~~ offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject ~~inmate's~~ offender'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~~ offender had a DNA test taken at the trial stage in the case in which the ~~inmate~~ offender was convicted of the offense for which the ~~inmate~~ offender is an eligible ~~inmate~~ offender and is requesting the DNA testing regarding the same biological evidence that the ~~inmate~~ offender 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~~ offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject ~~inmate's~~ offender'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~~ offender 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~~ offender is an eligible ~~inmate~~ offender and is requesting the DNA testing and that the parent sample of that biological material against which a sample from the ~~inmate~~ offender 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 offender was convicted of the offense for which the inmate offender is an eligible inmate offender 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 offender 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 offender.

(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 offender 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 offender's case.

(E) If an eligible inmate offender submits an application for DNA testing under section 2953.73 of the Revised Code and the court accepts the application, the eligible inmate offender 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 offender that was obtained from the crime scene or from a victim of the offense for which the inmate offender 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 offender, and the prosecuting attorney. The inmate offender 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 offender. 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 offender, and the prosecuting attorney. The inmate offender or the state may use the information for any lawful purpose.

Sec. 2953.75. (A) If an eligible inmate offender 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 offender is an eligible inmate offender and is requesting the DNA testing against which a sample from the inmate offender 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 offender was convicted of the offense for which the inmate offender is an eligible inmate offender 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 offender 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 offender and the attorney general.

Sec. 2953.76. If an eligible inmate offender 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 offender is an eligible inmate offender 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 offender, 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 offender, 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.

Sec. 2953.77. (A) If an eligible inmate offender 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 offender is an eligible inmate offender 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.

Sec. 2953.78. (A) If an eligible ~~inmate~~ offender 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~~ offender 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 offender~~ 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~~ offender 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~~ offender any right to subsequently challenge the approval, designation, selection, or use, and an ~~inmate~~ offender may not appeal to any court the approval, designation, selection, or use of a testing authority.

Sec. 2953.79. (A) If an eligible ~~inmate~~ offender 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~~ offender 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~~ offender is an eligible ~~inmate~~ offender and requested the DNA testing. The ~~inmate's~~ offender's filing of the application constitutes the ~~inmate's~~ offender's consent to the obtaining of the sample of biological material from the ~~inmate~~ offender. The testing authority shall obtain the sample of biological material from the ~~inmate~~ offender in accordance with medically accepted procedures.

(B) If DNA testing is to be performed for an ~~inmate~~ offender as described in division (A) of this section, the court shall require the state to coordinate with the department of rehabilitation and correction or the other state agency or entity of local government with custody of the offender, whichever is applicable, as to the time and place at which the sample of biological material will be obtained from the ~~inmate~~ offender. ~~The~~ If the offender is in prison or is in custody in another facility at the time the DNA testing is to be performed, the sample of biological material shall be obtained from the ~~inmate~~ offender at the facility in which the ~~inmate~~ offender is housed, and the department of rehabilitation and correction or the other state agency or entity of local government with custody of the offender, whichever is applicable, shall make the ~~inmate~~ offender available at the specified time. The court shall require the state to provide notice to the ~~inmate~~ offender and to the ~~inmate's~~ offender'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~~ offender.

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

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

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

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

(D) The extracting personnel shall make the determination as to whether an eligible ~~inmate~~ offender for whom DNA testing is to be performed is refusing to submit to the collection of a sample of biological material from the ~~inmate~~ offender or is hindering the state from obtaining a sample of biological material from the ~~inmate~~ offender at the time and date of the scheduled collection of the

sample. If the extracting personnel determine that an inmate offender 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 offender's refusal or hindrance.

Sec. 2953.81. If an eligible offender 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 offender 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 offender is imprisoned or confined 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, is on parole or probation relative to that sentence, is under post-release control or a community control sanction relative to that sentence, or has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code relative to that sentence. Additionally, if the prison term or confinement under the sentence in question expires, if the sentence in question is a sentence of death and the offender is executed, or if the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code under the sentence in question ends, the samples shall be preserved for a reasonable period of time of not less than twenty-four months after the term or confinement expires or, the inmate offender is executed, or the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code ends, whichever is applicable. 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 or confinement expires or, the inmate offender is executed, or the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code ends, whichever is applicable.

(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 offender.

(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 offender or the state may enter the results of the testing into any proceeding.

Sec. 2953.83. In any court proceeding under sections 2953.71 to ~~2953.82~~ 2953.81 of the Revised Code, the Rules of Criminal Procedure apply, except to the extent that sections 2953.71 to ~~2953.82~~ 2953.81 of the Revised Code provide a different procedure or to the extent that the Rules would by their nature be clearly inapplicable.

Sec. 2953.84. The provisions of sections 2953.71 to ~~2953.82~~ 2953.81 of the Revised Code by which an inmate offender may obtain postconviction DNA testing are not the exclusive means by which an inmate offender may obtain postconviction DNA testing, and the provisions of those sections do not limit or affect any other means by which an inmate offender may obtain postconviction DNA testing.

Section 2. That existing sections 109.573, 2901.07, 2953.21, 2953.23, 2953.71, 2953.72, 2953.73, 2953.74, 2953.75, 2953.76, 2953.77, 2953.78, 2953.79, 2953.81, 2953.83, and 2953.84 and section 2953.82 of the Revised Code are hereby repealed.

Section 3. (A) The General Assembly acknowledges the Supreme Court's authority in prescribing rules governing practice and procedure in the courts of this state as provided in Section 5 of Article IV of the Ohio Constitution.

(B) The General Assembly hereby requests the Supreme Court to adopt rules prescribing specific procedures to be followed for the administration by law enforcement agencies and criminal justice entities in this state of photo lineups, live lineups, and showups. The General Assembly also requests that any rules adopted by the Supreme Court be consistent with the requirements of divisions (B) and (C) of section 2933.83 of the Revised Code. If the Supreme Court adopts rules of the type described in this division, on and after the date on which the rules take effect, law enforcement agencies and criminal justice entities in this state shall comply with the rules in conducting live lineups, photo lineups, and showups.

(C) The General Assembly hereby requests the Supreme Court to adopt rules prescribing a cautionary jury charge about eyewitness identification procedures and the accuracy of eyewitness

identification. If the Supreme Court adopts rules of the type described in this division, on and after the effective date on which the rules take effect, the jury charge shall be used in the courts of this state in the manner specified by the Supreme Court in the rules.

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