

ORIGINAL

IN THE SUPREME COURT OF OHIO

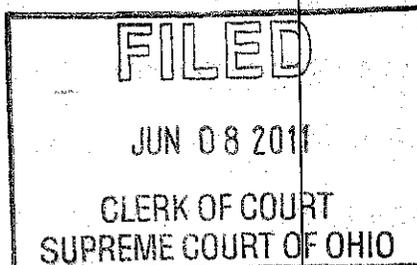
STATE OF OHIO

Appellee,

v.

TYRONE NOLING

Appellant.



Case No. 11-0778

On Appeal From the  
Court of Common Pleas,  
Portage County

Court of Common Pleas  
Case No. 95 CR 220

This is a Death Penalty Case

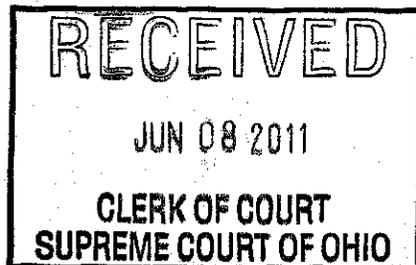
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STATE OF OHIO'S RESPONSE IN OPPOSITION TO  
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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**THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION WARRANTING JURISDICTION FROM THIS**

On April 5, 1990, Tyrone Noling entered the home of Bearnhardt and Cora Hartig, fired multiple shots from a .25 caliber gun, left the elderly couple dead on the kitchen floor and fled the scene of his crime. (Transcript of the docket, journal entries and original papers hereinafter "T.d." 173). In February of 1996, a Portage County jury found Noling guilty of two counts of aggravated murder and the accompanying death penalty specifications, two counts of aggravated robbery and aggravated burglary. (T.d. 173). This Court affirmed the conviction and capital sentence and has twice declined jurisdiction to review Noling's petitions for postconviction relief and recently declined jurisdiction to review his first application for additional DNA testing.

Rather than present this Court with an issue of great public interest or constitutional importance, Noling is now attempting to use the denial of his second application for postconviction DNA testing as a forum to re-litigate his case. Noling was without any statutory authority to ask the trial court to consider or accept a second application for DNA testing. R.C. 2953.72(A)(7). Although the trial court's rejection of Noling's second application to retest the DNA solely on statutory grounds was proper, the record reflects that additional DNA testing is not warranted as Noling is still unable to demonstrate that further DNA testing would be outcome determinative in his case.

In trial court proceedings, Noling relied on this Court's decision in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, to argue that the emergence of new DNA technology warranted a DNA retest in his case. Such reliance was misplaced. In *Prade*, this Court specifically limited its holding to avoid just this situation where an

inmate would attempt to use the decision as a basis to get a new test using the latest testing methods, “[w]e do not have before us the issue of whether to allow new DNA testing in cases in which a prior DNA test provided a match or otherwise provided meaningful information and the inmate is simply asking for a new test using the latest testing methods.” *Id.*, 2010-Ohio-1842, at ¶29.

Meaningful information was provided from the 1993 SERI DNA test in Noling's case, he was excluded as the smoker of the cigarette butt. A cigarette butt not found at the scene of the crime, the Hartig's kitchen, but rather collected from the driveway of the Hartig's house.

No additional DNA testing of the cigarette butt collected from the Hartig's driveway is required because Noling can not demonstrate that DNA retesting would be outcome determinative in his case. As the cigarette butt proves nothing and is not outcome determinative with regards to this case, it is disingenuous to suggest that learning the identity of an individual who smoked a cigarette that ended up on the Hartig's driveway at some unknown time prior to being collected by the police would have changed the outcome of Noling's trial or sentence. Accordingly, the 2010 S 77 amendments to R.C. 2953.71, effective July, 6, 2010, re-defining “outcome determinative” have no effect on Noling's case.

The statutes governing postconviction DNA testing do not provide for subsequent applications or the submission of alleged newly discovered evidence in support of subsequent applications. The trial court's recent decision overruling the Appellant's second application for additional DNA testing does not present an issue of public or great general interest or a substantial constitutional question. Noling failed to present any error with the trial court's decision rejecting his second application for

further DNA testing. Accordingly, nothing in his memorandum warrants jurisdiction from this Court.

## **STATEMENT OF THE CASE AND FACTS**

### **STATEMENT OF FACTS**

On April 5, 1990, while Butch Wolcott and Joseph Dalesandro waited outside in the get-away car, Noling and Gary St. Clair entered the home of Bearnhardt and Cora Hartig, fired multiple shots from a .25 caliber gun and fled the scene. (Jury Trial Proceedings hereinafter "T.p." 978-979). Several days later, a neighbor's son discovered the decomposing bodies of the elderly couple lying on the kitchen floor. As the type of weapon used in the murders only held five or six shells, the killer had to stop to reload the weapon in order to fire the eight bullets detected at the scene of the crime. (T.p. 808).

Prior to the Hartigs' murders, the foursome, Noling, Wolcott, Dalesandro and St. Clair, had devised a plan to rob elderly people. (T.p. 827). They agreed that the simplest approach would be to park their car outside of an elderly person's house feigning car trouble. Seeking assistance they would ask to use the phone to gain entry into the house and then rob the individual. (T.p. 827-828). Despite two previously successful robberies of elderly couples at the Hughes and Murphy residences, the plan failed at the Hartig's residence and the couple was murdered because they resisted, Noling explained, "the old man wouldn't stop, that he kept coming at him." (T.p. 851).

Following the murders, Wolcott confided in a friend. At trial, Jill Hall testified that Wolcott came to her house and implicated Noling in the murders. (T.p. 923). Wolcott

said Noling, "had a gun, he pulled the trigger" he continued, "everything went wrong \*  
\* we killed them." (T.p. 926).

### I. STATEMENT OF PROCEDURAL HISTORY

Following a jury trial in February 1996, Noling was convicted on two counts of aggravated murder and the accompanying death penalty specifications, two counts of aggravated robbery and aggravated burglary. (T.d. 173). This Court affirmed the Appellant's conviction and death sentence on direct appeal. *State v. Noling* (2002), 98 Ohio St.3d 44, certiorari denied *Noling v. Ohio* (2003), 539 U.S. 907, 123 S.Ct. 2256, 156 L.Ed.2d 118.

On July 23, 1997, Noling filed his first petition for postconviction relief with the trial court. In his petition, he raised four claims: actual innocence, prosecutorial misconduct, *Brady* violations, and the ineffective assistance of counsel. The trial court dismissed Noling's first petition for postconviction relief finding that, "there [were] no substantive grounds for relief." On September 2, 2003, the Eleventh District Court of Appeals affirmed the decision. *State v. Noling* (Sept. 2, 2003), Portage App. No. 98-P-0049, 2003-Ohio-5008, at ¶74. This Court denied jurisdiction. *State v. Noling* (2004), 101 Ohio St.3d 1424, 2004-Ohio-123.

Noling instituted a federal habeas action in the Northern District of Ohio, U.S. District Court, Case No. 5:04-cv-01232-DCN on June 30, 2004. On January 31, 2008, the Court found none of the claims asserted in Noling's petition for a writ of habeas corpus under 28 U.S.C. §2254 were well taken and denied his request for habeas corpus relief. He appealed the decision to the Sixth Circuit Court of Appeals on February 29, 2008. Case No. 2008-03258.

On November 3, 2006, Noling filed a second round of actions with the Portage County trial court including a successive postconviction petition, leave to file a motion for a new trial pursuant to R.C. 2945.79(B), (F) and Crim.R. 33, a motion for a new trial pursuant to R.C. 2945.79(B), (F) and Crim.R. 33, a motion for relief from judgment pursuant to Civ.R. 60(B), a motion for discovery and a motion for funds for an expert witness. (T.d. 258, 259, 260, 261, 264).

The trial court then dismissed Noling's successive petition and first motion for a new trial finding that his "new evidence presented does not meet the standards for granting a new trial or a successive petition for post conviction relief." (T.d. 287). The trial court further found that a Civ.R. 60(B) motion was an improper remedy for relief, (T.d. 287), and Noling's motion to appoint an expert witness and motion for additional discovery were rendered moot. (T.d. 288). On May 19, 2008, a unanimous panel of the Eleventh District affirmed the trial court's dismissal of Noling's successive petition for postconviction relief. *State v. Noling* (May 19, 2008), Portage App. No. 2007-P-0034, 2008-Ohio-2394, at ¶114. ("*Noling Successive PCR*"). On December 31, 2008, this Court declined jurisdiction to hear the case.

On September 25, 2008, Noling filed his first application for additional DNA testing pursuant to R.C. 2953.71 to 2953.81. (T.d. 296). Following the State's timely response, the trial court overruled the application on March 11, 2009; finding that Noling's previous 1993 DNA testing that excluded him and his co-defendants was a definitive DNA test. (T.d. 299). Thirty days later, Noling ignored the plain language of R.C. 2953.71(E)(1) and filed a notice of appeal with the Eleventh District Court of Appeals. (T.d. 300). And forty-five days after the trial court overruled his application for

additional DNA testing, Noling filed his notice of appeal and memorandum in support of jurisdiction with this Court. (T.d. 301).

After this Court had released its decision in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, on May 4, 2010, the Court denied Noling's leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (T.d. 318).

On June 21, 2010, more than thirteen years after his February 23, 1996, sentence, Noling sought to obtain leave from the trial court to seek a new trial by filing an application for leave to file a second motion for new trial. (T.d. 304). Noling's motion for a new trial was based upon alleged newly discovered evidence, Crim.R. 33(A)(6), and alleged prosecutorial misconduct, Crim.R. 33(A)(2). (T.d. 304). Following a hearing on Noling's application for leave to file his second motion for a new trial, the trial court denied leave and Noling filed a timely notice of appeal with the Eleventh District Court of Appeals. (T.d. 337, 341).

On December 28, 2010, Noling filed his second application for additional DNA testing. (T.d. 321). In support of his second application for DNA testing, Noling asserted three allegedly new grounds including: 1) the Supreme Court of Ohio's decision in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842; 2) 2010 S 77 amendments to R.C. 2953.71, effective July, 6, 2010 that added "definitive DNA test" to the definitions; and 3) alleged newly discovered evidence. On March 28, 2011, the trial court rejected Noling's application pursuant to R.C. 2953.72(A)(7). (T.d. 347).

This matter is now before the Supreme Court of Ohio on Noling's memorandum in support of jurisdiction.

## ARGUMENT OPPOSING JURISDICTION

**Response to Noling's Sole Proposition of Law:** A trial court that rejects an eligible offender's first application for DNA testing because the offender does not satisfy the R.C. 2953.71(A)(4) acceptance criteria, is without statutory authority to accept or consider subsequent applications.

Noling's sole proposition of law fails because: 1) there is no statutory authority to accept or consider subsequent applications pursuant to R.C. 2953.72(A)(7); 2) the doctrine of res judicata bars re-litigation of issues that were raised or could have been raised in the initial application; 3) Noling cannot demonstrate that DNA retesting would be outcome determinative in his case and 4) the 2010 S 77 amendments to R.C. 2953.71, effective July, 6, 2010, have no effect on Noling's case.

### 1) LACK OF STATUTORY AUTHORITY

R.C. 2953.72 governs the application for postconviction testing and does not provide for a subsequent application for postconviction testing. R.C. 2953.72(A)(7), states "[t]hat, if the court rejects an eligible offender's application for DNA testing because the offender does not satisfy the acceptance criteria described in division (A)(4) of this section, the court will not accept or consider subsequent applications[.]" R.C. 2953.72(A)(7). *State v. Madden* (June 3, 2008), Franklin App. No. 08AP-172, 2008-Ohio-2653, at ¶13; *State v. Hayden* (Aug. 20, 2010), Montgomery App. No. 23620, 2010-Ohio-3908, at ¶12-14.

In the present case, the record reflects that Noling, who met the definition of an eligible offender under R.C. 2953.72(C), submitted a properly filed application for postconviction testing and accompanying acknowledgement with this Court on September 25, 2008. (T.d. 296). The trial court properly overruled Noling's application for DNA testing on the basis of R.C. 2953.74(A), that a prior definitive DNA test had

been conducted regarding the same biological evidence Noling sought to be tested, finding "Tyrone Noling and all his co-defendants were excluded as not being the person who had smoked that cigarette, therefore, it was a definitive DNA test." (T.d. 299).

After this Court had released its decision in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, on May 4, 2010, the Court denied Noling's leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (T.d. 318). As the trial court was without statutory authority to accept or consider Noling's subsequent application, the trial court properly rejected Noling's second application for DNA testing. See, R.C. 2953.71(A)(7).

## **2) DOCTRINE OF RES JUDICATA**

The Eleventh District Court of Appeals has held that a subsequent "application for DNA extraction" was barred by the doctrine of res judicata, as the defendant had filed an identical motion, which was denied by the trial court. *State v. Hall* (Dec. 4, 2009), Trumbull App. No. 2008-T-0051, 2009-Ohio-6379, at ¶100. In *Hall*, the Eleventh District stated that that several of the defendant's arguments had been raised in prior motions to the trial court and/or appeals to the Eleventh District Court and therefore found many of his claims were without merit pursuant to the doctrine of res judicata. As stated by this Court:

[u]nder the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

*Hall*, 2009-Ohio-6379, at ¶32, quoting *State v. Szefcyk* (1996), 77 Ohio St.3d 93, syllabus.

On memorandum, Noling has relied on the Eighth District Court of Appeals holding that if an eligible offender's application made "a threshold showing that DNA testing could be outcome determinative \* \* \* res judicata will not bar testing even though an earlier application for DNA testing was denied." *State v. Ayers* (Nov. 19, 2009), 185 Ohio App.3d 168, 2009-Ohio-6096, at ¶26. However, even under this test Noling cannot satisfy the threshold requirement that a DNA re-test would be outcome determinative and therefore, res judicata would still bar his subsequent application.

### **3) FURTHER DNA TESTING NOT OUTCOME DETERMINATIVE**

Noling was unable to establish under his initial application and is still unable to demonstrate that further DNA testing would be outcome determinative in his case. R.C. 2953.74(B)(2) provides that a trial court can only accept a postconviction application for DNA retesting if, "the test was not a prior definitive DNA test that is subject to division (A) of this section [statutory rejection of the application], and the inmate shows that DNA exclusion when analyzed in the context of and upon consideration of all admissible evidence related to the subject inmate's case \* \* \* would have been outcome determinative at the trial stage in that case." R.C. 2953.74(B)(2).

Outcome determinative means:

that had the results of DNA testing of the subject offender been presented at the trial of the subject offender requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the offender is an eligible offender and is requesting the DNA testing, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the 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 offender guilty of that offense or, if the offender was sentenced to death relative to that offense, would have found the offender guilty of the aggravating circumstance or circumstances the offender was found guilty of committing and that is or are the basis of that sentence of death.

R.C. 2953.71(L).

In support of his subsequent application requesting a retesting of the cigarette butt for DNA material, Noling attached all of the same exhibits from his September 25, 2008 application and added these few new exhibits: 1) the trial court's March 11, 2009 Judgment Entry denying his September 29, 2008 application; 2) images of various DNA testing information and 3) alleged newly discovered evidence.<sup>1</sup>

Nothing in Noling's original or subsequent applications for DNA testing challenged SERI's 1993 DNA testing as inconclusive with respect to the scientific conclusion that Noling was not the smoker of the cigarette. The parties agree that Noling was excluded as the contributor of the biological material, DNA tested by SERI before Noling's trial. Although advancements in DNA testing have occurred since

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<sup>1</sup> Noling Exhibit I - Dale Laux's June 19, 1991 BCI Laboratory Report, results of blood analysis, (1 page); Noling Exhibit J - Hand written notes regarding Nathan Chesley, dated April 24, 1990, (1 page); Noling Exhibit K - Affidavit of Nathan Chesley, dated January 13, 2010, (3 pages); Noling Exhibit L - Affidavit of Kenneth Amick, dated January 13, 2010 (2 pages); Noling Exhibit M - Voluntary Statement of Marlene M. VanSteenberg, dated April 1, 1990 and Document titled "Transcript of Marlene M VanSteenberg [sic] Voluntary Statement 04-01-91 J.R." (3 pages).

1993, a DNA re-test result would still provide the same exclusion result with regards to Noling and the cigarette butt.

As Noling has already been excluded as the individual who smoked the cigarette that was collected from the Hartig's driveway, Noling's approach in his subsequent application was to rely on this Court's decision in *Prade* and new DNA testing procedures as a means of providing information regarding the true identity of the smoker of the cigarette. Noling argued that a new DNA profile from retesting could produce a "cold hit" to a felon whose DNA profile was in the FBI's CODIS database or be used to compare to DNA samples from alternative suspects or their male heirs. In essence, Noling is again attempting to use the DNA application process provided for under sections 2953.71 to 2953.81 of the Revised Code as a fishing expedition.

Even if a new DNA profile could produce a "cold hit" in CODIS or to an alternative suspect's DNA sample that would not render SERI's original DNA testing inconclusive with regards to Noling's exclusion as the contributor of the biological material.

Furthermore, Noling cannot establish that DNA retesting would be outcome determinative in his case. The fact that some person known or unknown to the Hartig's flicked a cigarette butt onto their driveway is irrelevant. There is no information indicating when the cigarette butt was left in the driveway or how long it had been there. If the cigarette butt was from a person known to the Hartig's it could have been left on a visit or if it was left by an unknown person, there was nothing preventing the public's access to their driveway. The cigarette butt proves nothing and is not outcome determinative with regards to this case.

Accordingly, Noling cannot demonstrate that DNA retesting would render a result that would be relevant or when analyzed in the context of and upon consideration of all available admissible evidence related to the his case would render a strong probability that no reasonable factfinder would have found him guilty of aggravated murder and the accompanying specifications. R.C. 2953.74(B)(2). In other words, a new DNA test result would not be outcome determinative.

#### **4) STATUTORY AMENDMENTS NO EFFECT ON NOLING'S CASE**

Noling seeks jurisdiction from this Court by relying on 2010 S 77 amendments to R.C. 2953.71, effective July, 6, 2010 that added the following definition for "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 offender. A prior DNA test is not definitive if the eligible offender 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.

R.C. 2953.71(U).

Also included in the statutory amendments to the definitional section was a change to the definition of "outcome determinative." R.C. 2953.71(L). Under the prior version of R.C. 2953.71(L), "outcome determinative" meant that had "the results of DNA testing been presented at the trial \* \* \* and been found relevant and admissible with respect to the felony offense for which the inmate \* \* \* is requesting the DNA testing \* \* \* no reasonable factfinder would have found the inmate guilty of that offense." Former version of R.C. 2953.71(L).

Under the amended statute, outcome determinative means, "that had the results of DNA testing of the subject inmate been presented at the trial \* \* \* and been found relevant and admissible with respect to the felony offense for which the inmate \* \* \* is requesting the DNA testing \* \* \*, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case \* \* \*, there is a strong probability that no reasonable factfinder would have found the inmate guilty of that offense." (Emphasis added.) R.C. 2953.71(L). The State notes that the amendments to R.C. 2953.71 did not contain a statement of legislative intent.

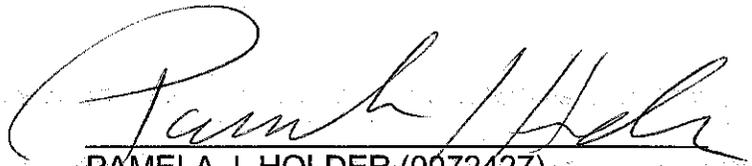
Noling asserted that these amendments to R.C. 2953.71, warranted a DNA retest in his case. As Noling is still not able to demonstrate how a DNA retest of a cigarette butt collected from the Hartig's driveway would be outcome determinative in his case, the amendments to the statute do not present grounds warranting a subsequent application or a DNA retest in his case.

### **CONCLUSION**

Noling has not presented any error with the trial court's decision rejecting his second application for additional DNA testing or any other grounds warranting jurisdiction from this Court. For the foregoing reasons, this State of Ohio respectfully moves this Court to refuse jurisdiction to hear this discretionary appeal.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response in Opposition to Memorandum in Support of Jurisdiction has been sent via regular U.S. mail to the following on this

7 day of June 2011:

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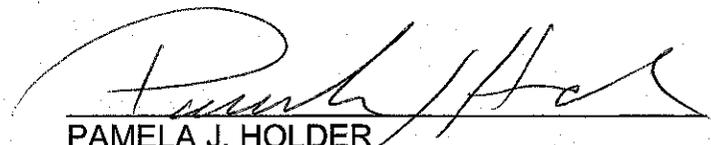
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