ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 11-1882
Plaintiff-Appellee,	:	On Appeal from the Guernsey County Court of Appeals Fifth Appellate District
v.	:	
CLARENCE D. ROBERTS,	:	
Defendant-Appellant.	:	Court of Appeals Case No. 10CA47

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, CLARENCE D. ROBERTS

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SUPREME COURT OF OHIO

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Opinion and Entry, Guernsey App. No. 10CA47 (Sept. 22, 2011) A-1

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

In rejecting Clarence Roberts's pro se appeal, the Fifth District Court of Appeals incorrectly construed R.C. 2933.82, the new biological evidence preservation statute. Further, the court did so in a manner that will serve as a windfall to innumerable perpetrators of unsolved cold cases, and to those who committed offenses that resulted in wrongful convictions of other, innocent individuals.

This conclusion flows immediately and logically from the appellate court's ruling that the obligations to catalog and preserve evidence, imposed on certain government entities by R.C. 2933.82, only apply to evidence collected after July 6, 2010. Because the plain language of R.C. 2933.82 anticipates its application to new *and* pre-existing biological evidence in possession of government entities, and because the appellate court's ruling would eviscerate Ohio's statutory provisions concerning DNA-based postconviction petitions by inmates asserting that they are factually innocent, this Court should accept this case and overrule the lower court's decision.

STATEMENT OF THE CASE AND FACTS

In connection with the May 1997 robbery and stabbing death of Leo Sinnett, in June 1997 the Guernsey County Grand Jury indicted Clarence Roberts for aggravated robbery and capital aggravated murder. Mr. Roberts pleaded not guilty, and the case proceeded to a jury trial in September 1997. The jury found Mr. Roberts guilty of both offenses, but did not recommend the death penalty. The trial court sentenced Mr. Roberts to life imprisonment without parole.

Through counsel, Mr. Roberts filed a timely appeal, raising three assignments of error. Mr. Roberts's convictions and sentence were affirmed on direct appeal. *State v. Roberts*, Guernsey App. No. 97CA29, 1998 Ohio App. LEXIS 6506.

On September 30, 2010, Mr. Roberts filed a pro se trial-court motion under R.C. 2933.82, seeking an order for the preservation and cataloging of biological evidence from his case. Through an entry filed November 30, 2010, the trial court denied the motion. Still acting pro se, Mr. Roberts timely appealed that ruling. The Fifth District Court of Appeals denied that appeal, determining that the provisions of R.C. 2933.82 do not apply to biological evidence collected before July 6, 2010. *State v. Roberts*, Guernsey App. No. 10CA47, 2011-Ohio-4969.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

The obligations to preserve and catalog criminal offense-related biological evidence, imposed upon certain government entities by R.C. 2933.82, apply to evidence in the possession of those entities at the time of the statute's effective date.

As this Court is quite aware, since 2003 Ohio has had a comprehensive statutory framework for postconviction DNA testing, which testing may be initiated upon the successful application therefor by an eligible offender. R.C. 2953.71 - 2953.81. And the Court has seen firsthand how DNA analysis can lead to exoneration of the wrongly convicted, and the bringing to justice of perpetrators who had for years escaped detection. *See, e.g., State v. Steffen*, 126 Ohio St. 3d 405, 2010-Ohio-2430 (through DNA testing performed 20 years after conviction, defendant was shown to have been wrongfully convicted of sexual assault, which had actually been committed by a morgue employee).

Because DNA analysis is a uniquely powerful tool, capable of providing conclusive proof of an offender's guilt or innocence, many years after a trial in which biological evidence could not have been properly tested, and because Ohio has a robust statutory scheme for the postconviction review of cases involving potentially exculpatory DNA evidence, the General Assembly recently enacted R.C. 2933.82, requiring certain government entities to preserve and catalog biological evidence relevant to several enumerated criminal offenses. That statute, which took effect July 6, 2010, recognized that another new, simultaneously enacted statute created a multi-constituent entity under the auspices of the Bureau of Criminal Identification

and Investigation. R.C. 109.561; R.C. 2933.82(C)(1). The legislature gave that entity a descriptive name: the "Preservation of Biological Evidence Task Force." R.C. 109.561.

The sole charge of the Task Force is to "establish a system regarding the proper preservation of biological evidence in this state." R.C. 2933.82(C)(1). Critically—for purposes of this appeal—within that general charge the Task Force is specifically required to "[r]ecommend practices, protocols, models, and resources for cataloging and accessibility of preserved biological evidence *already in the possession of* governmental evidence-retention entities." R.C. 2933.82(C)(1)(b) (emphasis added).

Despite this plain language, leaving no doubt that the requirements of R.C. 2933.82 apply to biological evidence "already in the possession of" government entities as of July 6, 2010, the Fifth District Court of Appeals has mistakenly concluded that the statute applies only to new evidence "preserved pursuant to the practices and protocols under the new task force." *State v. Roberts*, 2011-Ohio-4969, ¶ 18. This conclusion, that biological evidence that existed before the Task Force issued its "practices and protocols"[1] is exempt from the requirements of R.C. 2933.82, is not only demonstrably incorrect in light of the explicit statutory reference to evidence "already in the possession of" the government, but would also set the stage for the evisceration of the entire statutory scheme authorizing postconviction DNA testing for offenders claiming actual innocence.

[1] The Task Force issued its Guidelines for Preservation and Retention of Biological Evidence on November 29, 2010.

By way of example, the lower court's ruling would mean that no evidence comparable to that which exonerated Donte Booker of rape and several violent offenses in Cuyahoga County in 2005, would have to be preserved under R.C. 2933.82. *See* http://www.innocenceproject.org/Content/Donte_Booker.php. Mr. Booker, who had steadfastly maintained his innocence since he was indicted, was able to file a successful application under R.C. 2953.71 - 2953.81 for DNA analysis of biological evidence collected during the investigation of offenses occurring in 1986, which application led to the reversal of all of Mr. Booker's convictions. And not only was Mr. Booker wholly exonerated, it must be noted that the biological evidence in that case also led directly to the apprehension and incarceration of the actual perpetrator, an ex-convict who subsequently pleaded guilty to the rape. Wagner and Dutton, *Out of Time*, Columbus Dispatch (Sept. 9, 2011), http://www.dispatch.com/content/stories/local/2008/01/28/dna2.html. If the evidence with respect to which Mr. Booker sought testing had not been preserved, not only would he have never been exonerated, but the identity of the real perpetrator would never have been ascertained.

Although exonerating the innocent is universally acknowledged to be a salutary goal, the detection of actual perpetrators is arguably an even higher goal from a societal perspective. And it is not difficult to see how the latter aim will become much less likely to be achieved if the appellate court's ruling is not overturned. This is in large part because if a factually innocent offender, convicted of a crime occurring before July 6, 2010, is not protected by the biological-evidence preservation provisions of R.C. 2933.82, it is foreseeable that he or she will be

unable to meaningfully use the statutory postconviction DNA testing application procedure. And as Donte Booker's case illustrates, it is precisely such testing—and, as a practical matter, *only* such testing—that might lead to the apprehension of a previously undetected perpetrator of a crime previously thought to have been "solved." Because the lower court's approach would allow any number of such perpetrators to permanently escape detection and prosecution, it must be rejected.

Significantly, R.C. 2933.82 also explicitly refers to the retention of biological evidence of "*unsolved*" crimes. R.C. 2933.82(B)(1)(a) & (b) (emphasis added). Thus, the appellate court's ruling would wholly eliminate the explicit statutory duty of government entities to preserve evidence with respect to any unsolved rape or murder occurring before July 6, 2010.[2] Such a result is not merely undesirable; it is unacceptable.

Further, although the plain language of R.C. 2933.82 demonstrates that the ruling below is incorrect, it is worth noting that at the same time R.C. 2933.82 was enacted, a significant addition to R.C. 2953.71 was also enacted. That addition is as follows:

> "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

[2] Ohio's Attorney General, not content with mere preservation of existing biological evidence, favors the creation of a statewide policy requiring the actual *testing* of all extant, unprocessed rape kits, the bulk of which date back several years. Dissell, *Ohio Attorney General Mike DeWine Calls for Statewide Policy for Testing Rape Kits*, The Plain Dealer (May 20, 2011), http://blog.cleveland.com/metro/2011/05/attorney_general_calls_for_sta.html.

> 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). This provision, establishing for the first time a statutory definition of "definitive DNA test," and explicitly referencing "prior DNA tests," inarguably anticipates that *all* eligible offenders will be allowed to benefit from advancements in DNA-testing technology, regardless of the date of the offense. By enacting R.C. 2953.71(U) in 2010, the General Assembly reaffirmed that Ohio's statutory postconviction DNA-testing scheme is available to all eligible offenders, regardless of the date of offense. The lower court's ruling, in addition to failing to give effect to the plain language of R.C. 2933.82, is also squarely at odds with the purposes and goals of Ohio's DNA-testing laws.

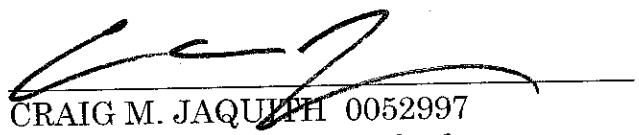
The ever-evolving ability to test and analyze biological evidence for the presence of identifiable DNA profiles has become vital to the most important function of the criminal justice system: "to convict the guilty and free the innocent." *Herrera v. Collins* (1993), 506 U.S. 390, 398. Further, Ohio's collaborative and concentrated focus on postconviction DNA testing—with procedures triggered by the application of an eligible offender—reflects the "concern about the injustice that results from the conviction of an innocent person [that] has long been at the core of our criminal justice system." *Schlup v. Delo* (1995), 513 U.S. 298, 325. Because the ruling below stands in derogation of the laudable, common-sense purposes and objectives of Ohio's postconviction DNA-testing and evidence-preservation statutes, that ruling must be reversed.

CONCLUSION

This case involves questions of public or great general interest. For all the above reasons, Mr. Roberts respectfully requests the Court to accept jurisdiction and reverse the decision of the court of appeals.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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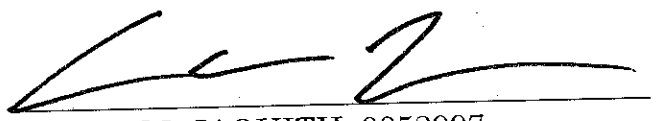
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Clarence D. Roberts was sent by regular U.S. mail, postage prepaid to the office of Daniel G. Padden, Guernsey County Prosecutor, 139 West 8th Street, Cambridge, Ohio 43725, and Sharon Katz, Counsel for *Amicus Curiae* the Innocence Network, 450 Lexington Avenue, New York, NY 10017, on this 7th day of November, 2011.



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355443

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. _____
	:	
Plaintiff-Appellee,	:	On Appeal from the Guernsey County Court of Appeals Fifth Appellate District
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v.	:	
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CLARENCE D. ROBERTS,	:	
	:	Court of Appeals Case No. 10CA47
Defendant-Appellant.	:	

APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, CLARENCE D. ROBERTS

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Teresa A. Dankovic, Clerk of Court

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

CLARENCE D. ROBERTS

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. Julie A. Edwards, J.

Case No. 10CA000047

OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 97CR63

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

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Farmer, J.

{¶1} On June 30, 1997, the Guernsey County Grand Jury indicted appellant, Clarence Roberts, on one count of aggravated robbery in violation of R.C. 2911.01 and one count of aggravated murder in violation of R.C. 2903.01 with a death penalty specification. Said charges arose from the robbery and stabbing death of Leo Sinnett on May 17, 1997.

{¶2} A jury trial commenced on September 15, 1997. The jury found appellant guilty as charged, but did not recommend the death penalty. The trial court sentenced appellant to life imprisonment without parole. Appellant's convictions and sentence were affirmed on appeal. See, *State v. Roberts* (November 24, 1998), Guernsey App. No. 97CA29.

{¶3} On September 30, 2010, appellant filed a motion to order preservation and listing of evidence regarding both physical and biological evidence from his case. By entry filed November 30, 2010, the trial court denied the motion.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶5} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING ROBERTS' MOTION TO ORDER PRESERVATION OF EVIDENCE AND LISTING OF EVIDENCE IN VIOLATION OF THE MANDATES OF SB 77 AND O.R.C. §2933.82."

I

{¶6} Appellant claims the trial court erred in denying his request pursuant to R.C. 2933.82 for an inventory and preservation of evidence from his case. We disagree.

{¶7} R.C. 2933.82 governs preservation of biological evidence. Subsections (B)(1)(c), (B)(2), (B)(3), and (B)(4) state the following:

{¶8} "(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, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907. 03 or division (A)(4) or (B) of section 2907.05 of the Revised Code, or 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:

{¶9} "(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 earlier of the following: (i) the expiration of the latest of the following periods of time that apply to the person: the period of time that the person is incarcerated, is in a department of youth services institution or other juvenile facility, is under a community control sanction for that offense, is under any order of disposition for that act, is on probation or parole for that offense, is under judicial release or supervised release for that act, is under post-release control for that offense, is involved in civil litigation in connection with that offense or act, or is 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 (ii) thirty years. 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.

{¶10} "(2) This section applies to evidence likely to contain biological material 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, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or of division (A)(4) or (B) of section 2907.05 of the Revised Code, or an attempt to commit a violation of section 2907.02 of the Revised Code.

{¶11} "(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.

{¶12} "(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, or 2903.03, a violation of section 2903.04 or 2903. 06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or of division (A)(4) or (B) of section 2907.05 of the Revised Code, or 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." (Emphasis added.)

{¶13} R.C. 2933.82 became effective on July 6, 2010. Appellant was charged, tried, and convicted in 1997. In order for the statute to apply in appellant's case, it must be applied retrospectively. Pursuant to R.C. 1.48, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." "If there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment." *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262. We note there is no express, clear provision in the statute for retrospective application.

{¶14} Appellant argues the use of the verb "was" in subsection (B)(2) implies retroactive application. We disagree that the use of the past tense "was" expressly makes the statute retroactive. Because the statute sets forth requirements involving the preservation of evidence after conviction, the "was" refers to evidence in possession of any governmental evidence-retention entity during the investigation and prosecution of a criminal case after July 6, 2010. The state cannot do what it did not know it had to do i.e., meet R.C. 2933.82 standards in cases prior to its effective date.

{¶15} The statute creates new rights and duties upon the state to preserve biological evidence or to notify certain individuals in the event the evidence is to be destroyed. As stated in the Ohio Legislative Service Commission Final Bill Analysis of S.B. No. 77 as passed by the 128th General Assembly, effective July 6, 2010, R.C. 2933.82 "establishes within the Bureau of Criminal Identification and Investigation of the AG's Office a Preservation of Biological Evidence Task Force." The analysis states in relevant part:

{¶16} "The act requires the Task Force to establish a system regarding the proper preservation of biological evidence in Ohio and specifies that, in establishing the system, the Task Force must do all of the following: (1) devise standards regarding the proper collection, retention, and cataloguing of biological evidence for ongoing investigations and prosecutions, and (2) recommend practices, protocols, models, and resources for the cataloguing and accessibility of preserved biological evidence already in the possession of governmental evidence-retention entities.

{¶17} "The act provides that, in consultation with the Task Force, the Division of Criminal Justice Services of the Department of Public Safety must 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 the act's provisions described above that require or relate to the preservation of biological evidence. (R.C. 109.561 and 2933.82(C).)."

{¶18} In his September 30, 2010 motion, appellant requested "the preservation of all physical evidence in the above styled cause, including and specifically the clothing of the victim herein." Appellant argues "recent advances in DNA technology known as 'touch DNA' which can conclusively establish the presence of epithelial cell matter on objects touched by a person" could exonerate him. Appellant argues this technology could prove that it was another individual who removed the victim's wallet from his pocket and killed him. Because this item has not been preserved pursuant to the practices and protocols under the new task force, appellant cannot now benefit from retrospective application of the statute.

{¶19} Upon review, we find the provisions of R.C. 2933.82 are to be applied prospective only.

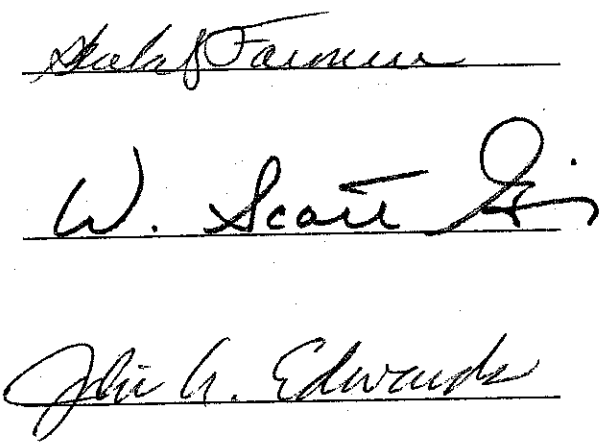
{¶20} The sole assignment of error is denied.

{¶21} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Edwards, J. concur.



JUDGES

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IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
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GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CLARENCE D. ROBERTS	:	
Defendant-Appellant	:	Case No. 10CA000047

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Guernsey County, Ohio is affirmed. Costs to appellant.

JUDGES