

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2011-1882
	:	
Plaintiff-Appellee,	:	On Appeal from the Guernsey
	:	County Court of Appeals,
vs.	:	Fifth Appellate District
	:	
CLARENCE D. ROBERTS,	:	Court of Appeals
	:	Case No. 10CA47
Defendant-Appellant.	:	

REPLY BRIEF OF APPELLANT CLARENCE D. ROBERTS

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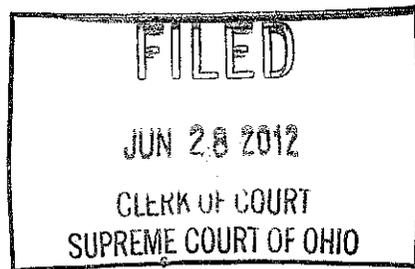
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## STATEMENT OF THE CASE AND FACTS

Mr. Roberts adheres to the statement of the case and facts contained in his previously filed merit brief. (Apr. 23, 2012, Merit Brief).

### ARGUMENT

**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.**

#### **I. Reply to the State of Ohio's arguments.**

The State of Ohio has urged this Court to adopt the lower court's improper use of statutory-retrospectivity analysis in addressing the preservation, retention, and cataloging obligations of R.C. 2933.82. (See June 12, 2012, Brief of Appellee, at pp. 1-4). This Court should not accept the State's invitation to muddle important Ohio legislation. This case is not about statutory retrospectivity. See R.C. 1.48; *Kiser v. Coleman*, 28 Ohio St.3d 259, 261-62, 503 N.E.2d 753 (1986).

Mr. Roberts agrees that “[i]t would be unfair to expect the state to have collected evidence in 1997 in accordance with procedures adopted in 2010.” (June 12, 2012, Brief of Appellee, at p. 3). But the General Assembly did not tell government entities to go back in time and apply the mandates of R.C. 2933.82 *on* dates prior to the statute's enactment. Rather, through R.C. 2933.82, the legislature told certain government entities that if they already possessed defined biological evidence as of July 6, 2010, that evidence had to be preserved and retained in accordance with its mandates. The statute is that simple. Yet, both the court of appeals and the State have injected confusion by erroneously asserting that general prohibitions against statutory retrospectivity are applicable.

The State has submitted that Mr. Roberts “relies on the single word ‘was’ in R.C. 2933.82(B)(2), which [Mr. Roberts] claims shows a ‘specific intent’ to apply the statute retroactively.” (June 12, 2012, Brief of Appellee, at p. 2). The State’s assertion is false. First, nowhere in Mr. Roberts’s merit brief was “specific intent” mentioned (although the legislature used plain language to express that R.C. 2933.82’s preservation mandates apply to evidence which was already possessed before the statute’s enactment). Second, Mr. Roberts has not relied on the retroactive application of the statute—such analysis is inappropriate and unnecessary. Third, Mr. Roberts did not merely rely on “the single word ‘was’” when he highlighted the General Assembly’s intent. But Mr. Roberts did direct this Court’s attention to the following evidence of that intent:

- R.C. 2933.82(C)(1)(b) (mandating that the Preservation of Biological Evidence Task Force “[r]ecommend practices, protocols, models, and resources for cataloging and accessibility of preserved biological evidence *already in the possession of* governmental evidence-retention entities.”) (Emphasis added.);
- R.C. 2933.82(A)(1)(a)(ii) (defining biological evidence as “[a]ny 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.”) (Emphasis added.);
- R.C. 2933.82(B)(2) (referring to “evidence likely to contain biological material that *was in the possession*” of government agencies during the investigation and prosecution of certain offenses) (emphasis added.);

- R.C. 2933.82(B)(3), (B)(5), (B)(7) (all of which apply R.C. 2933.82 to any governmental-evidence retention entity “*that possesses biological evidence*”) (Emphasis added.); and
- R.C. 2933.82(B)(4) (providing that when a defendant requests that a government entity “*that possesses biological evidence*” prepare an inventory of that evidence, the government entity shall do so) (Emphasis added.).

(Apr. 23, 2012, Merit Brief, at pp. 4-7). Indeed, the General Assembly’s repeated, plain language evinced its intent that R.C. 2933.82 applied to evidence that was *still possessed* by government agencies at the time of enactment.

The State has noted that R.C. 2933.82 is positioned in the Ohio Revised Code near R.C. 2933.81 (requiring electronic recording during certain custodial interrogations), and R.C. 2933.83 (addressing procedures to be used during photographic or live identifications of suspects). The State has implied that because R.C. 2933.82 is positioned near those other statutes, and because those other statutes pertain to procedures “to be followed in investigating current cases,” the General Assembly did not intend for R.C. 2933.82 to apply to biological evidence which was already possessed by July 6, 2010. The State’s proximity-based argument, and reliance on the decision of the court of appeals in *State v. Humberto*, 196 Ohio App.3d 230, 2011-Ohio-3080, 963 N.E.2d 162 (10th Dist.), is inapposite. For practical, procedural, and constitutional reasons, pretrial custodial interrogations and pretrial eyewitness identifications cannot be redone. Similarly, government agencies cannot “redo” pre-enactment evidence collections. But what they can do, and what R.C. 2933.82 instructed them to do, is apply the preservation and retention mandates to evidence that had been collected, and which still existed, before the date of enactment.

Moreover, R.C. 2933.81 affords no relief for a defendant who was subjected to electronically-unrecorded interrogation before that statute's enactment. Further, R.C. 2933.83 provides no relief for a defendant who was identified through a non-compliant identification procedure before that statute's enactment. Likewise, R.C. 2933.82 did not provide defendants a remedy if the government agency had already compromised or destroyed effected biological evidence. Indeed, it contains no "penalty" provision at all. But the legislature did state that if such evidence *still existed* at the time of the statute's enactment, its directives for preserving that evidence must be followed.

The spatial positioning of R.C. 2933.82 is inconsequential. In essence, the State has failed to acknowledge the General Assembly's noted reasons for promulgating R.C. 2933.82. That is, because DNA analysis is a uniquely powerful truth-seeking mechanism, the legislature created an extensive statutory scheme for postconviction review of cases which might involve exculpatory DNA evidence. But that scheme will only work if biological evidence which might exonerate the innocent, and convict the guilty, is properly preserved. That is why the General Assembly added R.C. 2933.82 to its postconviction framework. And it meant for the statute's protections to apply to biological evidence which remained in existence at the time of its enactment.

Both Mr. Roberts and Amicus Curiae The Innocence Network provided multiple, authentic examples of statements of government officials regarding why R.C. 2933.82 was created. (*See* Apr. 23, 2012, Merit Brief, at pp. 8-14; Apr. 23, 2012, Brief of Amicus Curiae The Innocence Network, at pp. 8-12). Those examples showed that the statute was, in part, a reaction to multiple wrongful convictions throughout the state. The State has taken issue with those examples. (June 12, 2012, Brief of Appellee, at pp. 3-4). Again, the *plain language* of R.C. 2933.82 anticipated its application to new *and* pre-existing biological evidence. But if additional

indications of the General Assembly's reasons for enacting its biological-evidence preservation and retention mandates are desired or necessary, they are abundant and shatter the contentions of the court of appeals and the State. *See* R.C. 1.49.

Finally, the State has noted that “[t]he procedures on DNA testing under the postconviction petition statutes apply to those already convicted and have already resulted in some persons being released.” (June 12, 2012, Brief of Appellee, at p. 3). The State is correct, but it has missed the point. The General Assembly created R.C. 2933.82 to add additional integrity to Ohio's postconviction DNA testing scheme. Innocent inmates who were released based on biological evidence that did not have the benefit of the statute's protections, quite simply, were lucky. The legislature enacted R.C. 2933.82 to eliminate arbitrary evidence-preservation-and-retention policies and replace them with scientifically sound mandates. If those instructions are not applied to biological evidence which existed and remained before the statute's enactment, innocent Ohio inmates are much more likely to remain unjustly imprisoned, and the people who committed the crimes for which those inmates will remain imprisoned are much more likely to go undetected. The General Assembly employed plain language throughout R.C. 2933.82 to prevent such injustices.

## **II. Reply to the arguments of Amicus Curiae Ohio Prosecuting Attorneys Association.**

With limited exception, Amicus Curiae Ohio Prosecuting Attorneys Association (“OPAA”) has reiterated the arguments submitted by the State. But noteworthy is the fact that, in great part, the OPAA's argument rests on its miscomprehension of the General Assembly's use of the word “secure.” (*See, e.g.*, June 12, 2012, Brief of Amicus Curiae OPAA, at pp. 4, 6, 8). That is, the OPAA seems to believe that the General Assembly used “secure” as an analog for “collect.” The OPAA is mistaken. In R.C. 2933.82, the legislature used “secure” in the context of describing a government entity's *ongoing* possession of evidence. *See* R.C. 2933.82(B)(1).

That is, to “secure” biological evidence is a continuing process, and it does not refer only to the initial collection of such evidence.

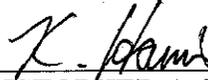
In its brief in support of Mr. Roberts, Amicus Curiae The Innocence Network described well the statutory-interpretation absurdity which would manifest if the OPAA’s contention was correct: “The most common meaning of the verb ‘secure’—and the only meaning that could reasonably apply to both instances of the word in R.C. 2933.82(B)(1) and thus avoid raising the ‘ridiculous’ inference that the Ohio legislature intended for one word to have two meanings in the same statutory sentence, *Buckeye Power, Inc. v. Kosydar* (1973), 35 Ohio St.2d 137, 140, 298 N.E.2d 610—is to ‘guard from danger or risk of loss.’ *Am. Heritage Coll. Dictionary* 1254.” (Apr. 23, 2012, Brief of Amicus Curiae The Innocence Network, at p. 5). And again, to the extent that the OPAA believes that because the biological evidence at issue in Mr. Roberts’s case was collected prior to the effective date of R.C. 2933.82, the state has no duty to preserve that evidence, the OPAA is wrong.

### **III. Conclusion.**

This case is not about statutory retrospectivity. The plain language of R.C. 2933.82 imposed obligations on certain government entities to retain, preserve, and upon request, catalog criminal offense-related biological evidence. The General Assembly applied those obligations to evidence which was already in the possession of those entities when the statute took effect. For the reasons discussed in Mr. Roberts’s previously filed merit brief, the brief of Amicus Curiae The Innocence Network, and herein, the lower court’s decision must be reversed.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



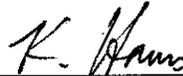
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing REPLY BRIEF OF APPELLANT CLARENCE D. ROBERTS was sent by regular U.S. mail to Daniel G. Padden, Guernsey County Prosecutor, 139 West 8th Street, Cambridge, Ohio 43725; David E. Romaker, Jr., Counsel for Amicus Curiae Ohio Prosecuting Attorneys Association, One Courthouse Square, Bowling Green, Ohio 43402; and Sharon Katz, Counsel for Amicus Curiae The Innocence Network, 450 Lexington Avenue, New York, NY 10017, on this 28th day of June, 2012.



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