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

Evin King is actually innocent of the murder for which he has served more than seventeen years in prison. In 2008, in an effort to prove his actual innocence of the murder of Crystal Hudson, Mr. King filed an application for DNA testing under R.C. 2953.72. And when the trial court *granted* that application, it told Mr. King that if the DNA testing results were as Mr. King believed that they would be, and eliminated Mr. King as a contributor to DNA that was taken from Ms. Hudson's fingernail scrapings, Mr. King would be cleared as a suspect:

- DNA procedures have advanced dramatically since the time of this trial. The debris from the nails examined today may yield testable biological material. This is a circumstantial evidence case. If biological material is available, it should be tested. DNA belonging to '*an unknown party*' found under the fingernails of the victim, for example, would prove the identity of the real killer if the fingernail debris is testable and matches the DNA from the semen. King's theory of defense was a third party killed and raped the victim while he was away from the apartment. (Emphasis sic.) (Apr. 23, 2008, Findings of Fact and Conclusions of Law, at pp. 3-4).
- DNA testing results would be outcome determinative. . . . *DNA testing of the samples of the DNA collected from the victim with King's DNA samples may definitely prove that King did not murder Ms. Hudson. If Hudson scratched her assailant, the crime scene evidence technician may have scraped the real assailant's biological material from her fingernails. If the results of the DNA testing establish that someone other than King was the assailant, a reasonable fact finder may not find him guilty of the murder of Ms. Hudson.* (Emphasis added.) (Apr. 23, 2008, Findings of Fact and Conclusions of Law, at p. 4).
- At his trial, King presented an alibi. He left the apartment on June 20th, before Ms. Hudson was killed by an unidentified assailant and did not return to the apartment until approximately 3:30 p.m. of June 21, 1994. *No physical evidence was presented at trial which implicated the defendant. The coroner's report indicated that the semen recovered from Ms. Hudson's body did not match the defendant's blood antigen profile. If a DNA profile of the scrapings matched the semen profile, a strong argument could be made that Ms. Hudson scratched her assailant as he raped and murdered her.* (Emphasis added.) (Apr. 23, 2008, Findings of Fact and Conclusions of Law, at p. 4).
- *DNA exclusion results would eliminate King as a suspect. This Court finds that no reasonable factfinder would have found King guilty had DNA*

exclusion results been presented. Thus, DNA exclusion results would have been outcome determinative. (Emphasis added.) (Apr. 23, 2008, Findings of Fact and Conclusions of Law, at p. 4).

The DNA testing results eliminated Mr. King as a contributor to the DNA that was taken from Ms. Hudson's fingernail scrapings. And the results showed that the fingernail-scraping DNA matched the DNA from the sperm of an unknown man that was taken from Ms. Hudson's vagina and rectum soon after her death. That is, *the results of the DNA testing showed that while Mr. King did not contribute to any of those DNA samples, the same unknown person contributed to all of those samples.* And that new evidence came in a case in which there was ample evidence that Ms. Hudson had been beaten and raped before she was strangled from behind.

Mr. King properly asserted his actual innocence through a petition for postconviction relief under R.C. 2953.21. But the trial court inexplicably took back its earlier, considered assertions, and denied Mr. King's postconviction claims in a three-page decision. (See Nov. 15, 2011, Findings of Fact and Conclusions of Law). Simply, the trial court reneged. But worse yet, the trial court admitted that it did not comply with the General Assembly's mandates regarding the review of a petitioner's claim of actual innocence following DNA testing: "A broader recapitulation of the facts in this case can be found in the Defendant's Motions, State's Responses and the decision of the Eighth District Court of Appeals. This Court has chosen to look at the new DNA results and the coroner's report." (Nov. 15, 2011, Findings of Fact and Conclusions of Law). The trial court failed to fulfill its statutory duty to review the new DNA evidence "in the context of and upon consideration of all available admissible evidence related to the person's case." See R.C. 2953.21(A)(1).

There can be no doubt that the conviction and incarceration of an actually innocent person is among the greatest evils in our criminal justice system. Fortunately, DNA analysis is a

uniquely powerful truth-seeking tool. That is why the General Assembly created a robust statutory scheme for postconviction review of cases involving exculpatory DNA evidence. See R.C. 2953.21; R.C. 2953.71 through 2953.81. But in Mr. King's case, the trial court gave short shrift to its statutory duty and violated Mr. King's rights to due process. And unfortunately, the panel's majority below upheld the trial court's unreasonable conclusion. See *State v. King*, 8th Dist No. 97683, 2012-Ohio-4398, ¶ 1-31 ("*King II*").

Indeed, the citizens and government of Ohio have a profound interest in assuring that actually innocent people do not remain in prison. And they have a related interest in assuring that Ohio's trial courts do not arbitrarily keep actually innocent people in prison after exonerative DNA testing results have been obtained through Ohio's truth-seeking mechanisms. This Court should accept jurisdiction of Mr. King's case and give meaning to those interests.

Moreover, the panel's majority below created erroneous "law-of-the-case" precedent that compromised Ohio's postconviction DNA testing scheme. That precedent should be reversed before additional injustices occur. According to the panel's majority:

In addition, we are bound by the law of the case set forth in *King I*. The law of the case doctrine provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 11 Ohio B. 1, 462 N.E.2d 410 (1984). Thus, "the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred." *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 1996-Ohio-174, 659 N.E.2d 781.

Although we recognize that the doctrine of the law of the case is considered a rule of practice rather than a binding rule of substantive law, we view its application here achieves just results. The rule is "necessary to avoid endless litigation by settling the issues." *Hubbard* at 404, citing *State ex rel. Potain v. Mathews*, 59 Ohio St.3d 29, 32, 391 N.E.2d 343 (1979).

King II at ¶ 16-17. The panel's majority then highlighted several "facts" that were found by the court of appeals during Mr. King's 1996 direct appeal of his conviction and sentence and then used those "facts" when it overruled Mr. King's postconviction DNA claims. *Id.* at ¶ 18.

The panel's majority was wrong. Mr. King pointed out to the court of appeals that many of the supposedly inculpatory facts that were reported in 1996 were inaccurate. That is, the record simply did not support the appellate court's earlier characterization of the facts. Yet, the State and the court of appeals have continued to rely on those erroneous factual assertions in the context of Mr. King's postconviction action. *See id.* at ¶ 18.

Simply, the law-of-the-case doctrine was used by the court of appeals to work an injustice. The trial court was *required* to review Mr. King's DNA testing results "in the context of and upon consideration of all available admissible evidence related to the person's case." *See* R.C. 2953.21(A)(1). Further, the task of applying the abuse-of-discretion standard on appeal *necessitates* an appellate court's review of the admissible evidence so that it can determine whether the trial court erred below. In essence, the panel's majority created now-binding precedent that can be summarized as follows:

- When a petitioner obtains DNA testing results that tend to show his or her innocence, neither the trial court nor the court of appeals is required to review the full record of the petitioner's case, even though Ohio's postconviction statutes mandate such review.
- And if the petitioner filed an earlier direct appeal, the court of appeals is bound by the "law-of-the-case" when reviewing a subsequent postconviction DNA testing claim, even though the issues and standards of review are wholly different from the direct-appeal issues and standards of review, and even when the petitioner has shown that the earlier "factual findings" were erroneous.

Surely that cannot be the law in Ohio. But unless this Court corrects the majority's erroneous overexpansion of law-of-the-case doctrine, it will remain viable law in one of Ohio's largest counties, remain persuasive law throughout Ohio, and will continue to complicate Ohio's laudable postconviction DNA testing scheme. *See King II* at ¶ 56-65 (Stewart, J., dissenting).

The dissenting judge below believed that Mr. King had proved his actual innocence by clear and convincing evidence. *Id.* at ¶ 56-65 (Stewart, J., dissenting). The dissenting opinion was comprehensive and accorded with Ohio's postconviction DNA testing law. At least three judges of the Eighth District Court of Appeals wanted to consider Mr. King's case en banc. And four judges, including Judge Stewart, expressed the following: "We disagree with the panel majority's analysis and decision on the merits of King's appeal." (Dec. 12, 2012, Judgment Entry Overruling Application for En Banc Consideration, at p. 2). They further stated:

"By declining to rehear a case [en banc], 'we do not sit in judgment on the panel; we do not sanction the result it reached.' We decide merely that . . . review by the full court is not justified." "[T]here is nothing wrong with letting the [Ohio] Supreme Court decide whether a decision is correct and, if not, whether it is worth of correction." Therefore, we reluctantly concur in the decision to deny appellant's application for en banc consideration.

(Citations omitted.) (Dec. 12, 2012, Judgment Entry Overruling Application for En Banc Consideration, at p. 3).

STATEMENT OF THE CASE AND THE FACTS

Many of the pertinent procedural and substantive facts were presented in the preceding section. But again, when the trial court granted Mr. King's application for DNA testing in 2008, it plainly indicated that if DNA was found in Ms. Hudson's fingernail scrapings, and if that DNA was consistent with the DNA of the unknown man that was taken from Ms. Hudson's vagina and rectum soon after her death, Mr. King would be exonerated. (*See* Apr. 23, 2008, Findings of Fact and Conclusions of Law, at pp. 3-4). In fact, the trial court originally went beyond finding

that such results would be outcome determinative. When the trial court granted Mr. King's DNA application, it applied the *actual innocence* standard to the potential DNA evidence: "DNA exclusion results would eliminate King as a suspect. *This Court finds that no reasonable factfinder would have found King guilty had DNA exclusion results been presented.* Thus, DNA exclusion results would have been outcome determinative." (Emphasis added.) (See Apr. 23, 2008, Findings of Fact and Conclusions of Law, at p. 4); *see also* R.C. 2953.21(A)(1)(a)-(b).

Mr. King's sought-after DNA testing results were realized. The results showed that while Mr. King was not a contributor to any of the biological evidence taken from Ms. Hudson's body, the same unknown person contributed to all of those samples. And there was a significant amount of evidence that indicated that Ms. Hudson had been pummeled horrifically and raped before she was strangled from behind. According to the State of Ohio's own witness, there was trauma to Ms. Hudson's rectum consistent with the time of her death.

But the trial court took back its earlier assertions despite the fact that nothing changed between the time of those initial findings and the time of the trial court's about-face. Further, the trial court admitted that it did not comply with the General Assembly's directives. (See Nov. 15, 2011, Findings of Fact and Conclusions of Law); *see also* R.C. 2953.21(A)(1).

The evidence that was presented to the jury in 1995 was wholly circumstantial. *See generally State v. King*, 8th Dist. No. 68726, 1996 Ohio App. LEXIS 4945 (Nov. 14, 1996) ("*King I*"). And throughout Mr. King's postconviction proceedings, the State's arguments against Mr. King can best be characterized as follows: "[Mr. King] now asks that he be given a new trial based upon this unremarkable evidence, evidence that is neither new nor contradictory of the scientific evidence presented at trial that there was no evidence of rape, no evidence of a struggle by [the victim] with her murdered [sic], and no evidence that correlated the sexual

relations and the deposit of sperm with the homicide.” (Dec. 28, 2010, State’s Response, at pp. 1-2). But again, there was ample evidence that Ms. Hudson was raped by her attacker before that man strangled her from behind. *See King II* at ¶ 32-72 (Stewart, J., dissenting). Of course, there was also the sperm DNA evidence (which was recovered from Ms. Hudson’s vagina and rectum and which was not Mr. King’s). That is, there was no physical evidence that suggested that Mr. King committed *any* violent act against Ms. Hudson. And there is new DNA evidence that shows not only that Mr. King did not deposit the sperm, he did not contribute any biological evidence whatsoever.

On appeal of the trial court’s decision to overrule Mr. King’s actual innocence claims, Mr. King noted that much of the supposedly inculpatory evidence that was brought forth at trial was not supported by the record. For instance, much emphasis below was placed on Mr. King’s supposed statement that a foul odor was present in the apartment because he had been “cooking something.” And the State even went so far as to suggest that there was “no evidence that anyone had cooked anything.” But the record actually does not support those assertions. The witness testified that Mr. King told her that “he didn’t know” what might have caused an odor. And the witness said that Ms. Hudson’s younger daughter, T.H., was present with Mr. King at that time and that Mr. King said that T.H. had just finished cooking something. And Ms. Hudson’s mother, who also stopped by the apartment on the night before the body was discovered, did not notice a foul odor at all. The record provides no indication that Mr. King made an amorphous statement about cooking to somehow mask any knowledge that Ms. Hudson’s body was in the bedroom closet. In any event, as the State submitted during its closing argument, the State’s “foul-odor” witness, Jean Hester, was a “not so illustrious alcoholic” who apparently submitted her testimony while drunk.

The State also relied on Mr. King's supposedly curious behavior upon learning that he had spent time in the apartment with his dead girlfriend. The State and the court of appeals in 1996 characterized that behavior as "curiously detached," and the State questioned the fact that Mr. King did not notice the foul odor caused by Ms. Hudson's decomposing body. But Mr. King had known Ms. Hudson for a matter of weeks, and realized that he appeared to be in a very compromising situation. Moreover, the first responding police officer testified that Mr. King was tearful. Mr. King did not flee from the apartment, and he spoke with the police and provided evidence of his whereabouts during the time of the crimes. And Ms. Hudson's own mother did not notice a foul odor on the night before the body was discovered.

Ms. Hudson's daughter, B.H., who discovered the body, testified that the smell grew stronger when she entered the bedroom closet. And the Chief Deputy Coroner indicated that a person such as Mr. King, who had been on a crack cocaine binge, could have been used to the smell of the corpse (which was under a jacket in the bedroom closet, and had been deceased for less than twenty-four hours), by the time that he awoke on the day that the body was discovered.

Finally, the assertions by the State and the court of appeals in 1996 that Mr. King did not deny murdering Ms. Hudson when he was accused of doing so by B.H. was contradicted by B.H.'s own testimony: "I was like, you was the only one who was in here with my mother, you so and so, and he like, I ain't do it I ain't do it." B.H. affirmed that testimony on cross-examination. Moreover, as noted by Judge Stewart in her dissent:

Since King's conviction, the pleadings and judicial opinions regarding this case have been rife with misstatements and mischaracterizations of the evidence, and unfortunately, the concurring opinion continues to perpetuate these mistakes. For example, the pleadings and judicial opinions indicate that the victim's older daughter observed King with the victim the night before, and the morning of, her murder. Yet the transcript is replete with the daughter's testimony that King was not with her mother on those occasions: that her mother was alone, that King "wasn't there." Also, it is alleged that King did not deny killing the victim when

the daughter accused him. Yet her testimony reveals that he consistently and repeatedly did so.

The victim's daughter was the best witness the state presented at trial. She was the last person, other than the killer, to see the victim alive. She discovered her mother's body, and she was the only person to observe King's demeanor and response when the body was discovered. What is more, the daughter let it be known that she did not like King. She testified, "when I first saw him, I just didn't like him, just something—just I don't like him. . . . The way he looked, the way he dressed, because he dressed like he was a bum or came off the streets." Therefore, her testimony would appear to be the most credible of anyone's offered during trial. Her strong aversion to King shows that, any favorable testimony would not have been made for his benefit.

King II at ¶ 61-62 (Stewart, J., dissenting). But again, the panel's majority below adhered to many of its inaccurate 1996 factual determinations because it believed that it was bound by the "law-of-the-case." *King II* at ¶ 16-18.

The State's main argument against Mr. King's actual innocence claims has always been that, in its opinion, no evidence correlated the sexual relations and the deposit of sperm with the homicide. Under the State's theory, the fact that the same man who left his DNA in Ms. Hudson's vagina and rectum also left his DNA under Ms. Hudson's fingernails is inconsequential. The panel's majority agreed. *King II* at ¶ 1-21; *id.* at ¶ 22-31 (Gallagher, J. Concurring); *but see id.* at ¶ 32-72 (Stewart, J., dissenting). That evidence was presented through the Chief Deputy Coroner and a forensic serologist. The Chief Deputy Coroner testified that the sperm deposited in Ms. Hudson's vagina and rectum was *unlikely* to have been placed at the time of death. But he also said that "[i]t's very difficult to give any reliable estimate, except to repeat to you again that if they had just been recently deposited, you would expect many of them to be intact." Some of the sperm cells were intact. Further, the State's forensic serologist merely said that the sperm *could have* been up to seven days old (which the Chief Deputy

Coroner found questionable), but that it was anywhere from sixteen hours to seven days old.

And as noted by Judge Stewart in her dissenting opinion:

Likewise, the serologist's testimony does not indicate that sperm was deposited at least 16 hours prior to the murder. Her testimony was that the particular protein that was not found in the swabs only lasts "between 8 and 16 hours," that it "[n]ever lasts beyond 16 hours after having been deposited." Because the biological material was collected 24 hours or more after the victim had been murdered, this testimony is not "crucial."

King II at ¶ 67 (Stewart, J., dissenting).

Again, Judge Stewart believed that Mr. King had proved his actual innocence by clear and convincing evidence. *Id.* at ¶ 56-65 (Stewart, J., dissenting). And four judges, including Judge Stewart, expressed the following when Mr. King's application for en banc consideration was denied: "We disagree with the panel's majority's analysis and decision on the merits of King's appeal." (Dec. 12, 2012, Judgment Entry Overruling Application for En Banc Consideration, at p. 2). They further held: "[T]here is nothing wrong with letting the [Ohio] Supreme Court decide whether a decision is correct and, if not, whether it is worth of correction." (Citations omitted.) (Dec. 12, 2012, Judgment Entry Overruling Application for En Banc Consideration, at p. 3). Mr. King now requests that this Court accept jurisdiction of his case and reverse the decision of the court of appeals.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I

Ohio Revised Code Section R.C. 2953.21(A)(1) requires a trial court to review the results of DNA testing conducted under R.C. 2953.71 through R.C. 2953.81 in the context of and upon consideration of all available admissible evidence related to the petitioner's case. When a petitioner has demonstrated by clear and convincing evidence his or her actual innocence under R.C. 2953.21(A)(1)(a)-(b), a trial court abuses its discretion and denies the petitioner due process when it fails to adhere to its statutory duties and arbitrarily determines that relief is unwarranted.

Mr. King is actually innocent of Ms. Hudson's murder. *See generally Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006); *see also* R.C. 2953.21. The results of Mr. King's DNA testing results, when reviewed in the context of all available admissible evidence related to his case, prove Mr. King's actual innocence by clear and convincing evidence.

As discussed above, when the trial court granted Mr. King's DNA application, it told Mr. King that if the DNA testing results eliminated Mr. King as a contributor to the DNA that was taken from Ms. Hudson's fingernail scrapings, Mr. King would be exonerated: "DNA exclusion results would eliminate King as a suspect. This Court finds that no reasonable factfinder would have found King guilty had DNA exclusion results been presented. Thus, DNA exclusion results would have been outcome determinative." (Apr. 23, 2008, Findings of Fact and Conclusions of Law, at pp. 3-4). Indeed, the DNA testing results were outcome determinative. But moreover, when the trial court granted Mr. King's DNA application, it applied the *actual innocence* standard to the potential DNA evidence. (*See* Apr. 23, 2008, Findings of Fact and Conclusions of Law, at p. 4); *see also* R.C. 2953.21(A)(1)(a)-(b). And again, nothing changed between the time of the trial court's initial findings and the time of its inexplicable change of mind. Further, the trial court admitted that it did not comply with the General Assembly's DNA testing mandates. (*See* Nov. 15, 2011, Findings of Fact and Conclusions of Law); *see also* R.C. 2953.21(A)(1). The trial court's decision was unreasonable, arbitrary, and came in violation of Mr. King's rights to due process under the United States and Ohio Constitutions.

Again, the State's case against Mr. King was wholly circumstantial and demonstratively weak. And while the DNA testing results showed that Mr. King was not a contributor to *any* of

the biological evidence taken from Ms. Hudson's body, the same unknown person contributed to *all* of those samples. There was considerable evidence that Ms. Hudson had been pummeled and raped before she was strangled from behind. And according to the State's own witness, there was trauma to Ms. Hudson's rectum (where the unknown man's semen was found) consistent with the time of her death.

Further, the State's best argument against Mr. King's postconviction claims has always been that, in its opinion, no evidence connected the sexual activity with the homicide. *See also King II* at ¶ 1-21; *id.* at ¶ 22-31 (Gallagher, J. Concurring); *but see id.* at ¶ 32-72 (Stewart, J., dissenting). That position is disingenuous. The Chief Deputy Coroner told the jury that the sperm deposited in Ms. Hudson's vagina and rectum was *unlikely* to have been placed at the time of death. But he also said that “[i]t's very difficult to give any reliable estimate, except to repeat to you again that if they had just been recently deposited, you would expect many of them to be intact.” Some of the sperm cells were intact. Further, the State's forensic serologist merely said that the sperm *could have* been up to seven days old, but that it was anywhere from sixteen hours to seven days old. The State's forensic testimony pales in comparison to the more reliable, acquittal-inducing nature of the new DNA evidence. And as noted by Judge Stewart:

Likewise, the serologist's testimony does not indicate that sperm was deposited at least 16 hours prior to the murder. Her testimony was that the particular protein that was not found in the swabs only lasts “between 8 and 16 hours,” that it “[n]ever lasts beyond 16 hours after having been deposited.” Because the biological material was collected 24 hours or more after the victim had been murdered, this testimony is not “crucial.”

See State v. King, 8th Dist. No. 97683, 2012-Ohio-4398, ¶ 67 (Stewart, J., dissenting). Indeed, Mr. King has exceeded the showings necessary to compel relief under R.C. 2953.21.

Judge Stewart carefully explained her reasons for believing that Mr. King proved his actual innocence by clear and convincing evidence. *See King II* at ¶ 32-72 (Stewart, J.,

dissenting). Because Mr. King's actual innocence is apparent, that is not surprising. The panel's majority decision, however, trivialized the impact that the DNA testing results would have had on Mr. King's jury. Those results provided what had been missing from Mr. King's case for over fifteen years—concrete physical evidence of the identity of Ms. Hudson's murderer that cannot not be influenced by passion, emotional trauma, the effects of alcohol, the effects of crack cocaine, and human tendency to force an answer when no reliable answer can be had. Ms. Hudson took her killer's biological markers with her. The evidence refuted the State's theories of the case, and supports Mr. King's claims of actual innocence to a level beyond that of "clear and convincing evidence." See R.C. 2953.21(A)(1)(a)-(b). Indeed, no reasonable factfinder would have found King guilty had the DNA testing results been presented at Mr. King's trial. See *id.* The decisions of the trial court and the panel's majority below should be reversed.

PROPOSITION OF LAW II

An appellate court's review of a trial court's compliance with the mandates of R.C. 2953.21(A)(1) under the abuse-of-discretion standard necessitates the appellate court's careful consideration of that same evidence. The law-of-the-case doctrine cannot be used to insulate from review an appellate court's previous, erroneous factual determinations made on direct appeal.

As discussed above, the panel's majority created erroneous "law-of-the-case" precedent that compromised Ohio's postconviction DNA testing scheme. According to the panel's majority:

In addition, we are bound by the law of the case set forth in *King I*. The law of the case doctrine provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 11 Ohio B. 1, 462 N.E.2d 410 (1984). Thus, "the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred." *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 1996-Ohio-174, 659 N.E.2d 781.

Although we recognize that the doctrine of the law of the case is considered a rule of practice rather than a binding rule of substantive law, we view its application here achieves just results. The rule is “necessary to avoid endless litigation by settling the issues.” *Hubbard* at 404, citing *State ex rel. Potain v. Mathews*, 59 Ohio St.3d 29, 32, 391 N.E.2d 343 (1979).

King II at ¶ 16-17. The panel’s majority then highlighted several “facts” that were found by the court of appeals when it considered Mr. King’s 1996 direct appeal of his conviction and sentence and used those “facts” to overrule Mr. King’s postconviction DNA claims. *Id.* at ¶ 18. As noted above, many of those factual determinations were inaccurate.

As determined by this Court:

The law-of-the-case doctrine holds that “the decision of a reviewing court in a case remains the law of that case *on the legal questions involved* for all subsequent proceedings in the case at both the trial and reviewing levels.” (Emphasis added.) *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 11 OBR 1, 462 N.E.2d 410. This doctrine prevents a litigant from relying on arguments at retrial that were fully litigated, or could have been fully litigated, in a first appeal. See *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402, 404-405, 1996 Ohio 174, 659 N.E.2d 781.

State v. Davis, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 30.

The panel’s majority created untenable precedent regarding the law-of-the-case doctrine. Ohio Revised Code Section R.C. 2953.21(A)(1) requires a trial court to review the results of DNA testing conducted under R.C. 2953.71 through R.C. 2953.81 upon consideration of all available admissible evidence related to the petitioner’s case. Further, An appellate court’s review of a trial court’s compliance with those mandates under the abuse-of-discretion standard requires the appellate court’s consideration of that same evidence. Simply, the legal questions involved in a collateral attack under R.C. 2953.21 are markedly different than those involved on direct appeal, as evidenced by Mr. King’s case. Moreover, Mr. King could not have litigated his postconviction actual innocence claims on direct appeal. See *Davis* at ¶ 30. But both the trial

court and the appellate court needed to review the *facts* of Mr. King's case when they assessed Mr. King's actual innocence claims. *See also King II* at ¶ 56-60 (Stewart, J., dissenting). And certainly, it would be profoundly unjust for a court of appeals to invoke the doctrine when, as here, it has been demonstrated that the prior factual determinations were inaccurate.

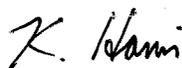
Unless this Court corrects the majority's overextension of the law-of-the-case doctrine, the majority's holding will continue to complicate Ohio's laudable postconviction DNA testing scheme. *See King II* at ¶ 56-65 (Stewart, J., dissenting). The decision of the court of appeals should be reversed and Mr. King should be granted relief from his unjust conviction and sentence.

CONCLUSION

Mr. King's case involves substantial constitutional questions and issues of public or great general interest. Mr. King respectfully requests that this Court accept jurisdiction of his case, adopt the propositions of law presented herein, and reverse the decision of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT EVIN KING was sent by U.S. Mail, on this 28th day of January, 2013, to T. Allan Regas, Assistant Cuyahoga County Prosecuting Attorney, 8th Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.



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#385560

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. _____
Plaintiff-Appellee,	:	
	:	On Appeal from the Cuyahoga
vs.	:	County Court of Appeals,
	:	Eighth Appellate District
EVIN KING,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 97683

**APPENDIX TO
MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT EVIN KING**

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97683

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EVIN KING

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-312576

BEFORE: Cooney, J., Stewart, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: September 27, 2012

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FILED AND JOURNALIZED
PER APP.R. 22(C)

SEP 27 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

COLLEEN CONWAY COONEY, J.:

{¶1} Defendant-appellant, Evin King ("King"), appeals the trial court's denial of his motion for postconviction relief. Finding no merit to the appeal, we affirm.

{¶2} In July 1994, King was indicted for the murder of his girlfriend Crystal Hudson ("Hudson"). The State presented circumstantial evidence to the jury on the theory that King strangled Hudson in the apartment they shared. DNA testing was performed on semen recovered from the victim, but King was not a match. King argued that the person who deposited the semen had killed Hudson. The forensic serologist testified that the semen was anywhere from 16 hours to seven days old at the time of death. When asked whether the semen was deposited contemporaneously with the victim's death, the coroner, Dr. Robert Challener, testified that it was "[v]ery unlikely to be placed at the time of death." Although fingernail scrapings were also recovered from the victim, there were no means by which to test them for DNA material in 1994. In February 1995, a jury convicted King of murder, and this court affirmed his conviction in *State v. King*, 8th Dist. No. 68726, 1996 WL 661033 (Nov. 14, 1996) ("*King I*").¹

¹Key facts stated in *King I* include that the victim was strangled, her partially decomposed body was discovered by her daughter while King was inside the apartment, and there were no signs of a struggle.

{¶3} In October 2004, due to advancements in DNA testing, King filed an application for DNA testing of the fingernail scrapings recovered from the victim, pursuant to R.C. 2953.72. In April 2008, the trial court granted King's application and DNA testing was performed. The scrapings matched the DNA material recovered from the vaginal swabs and excluded King as a match. Based on what King felt were "exonerative DNA testing results," he filed a motion for postconviction relief in October 2010.

{¶4} A hearing on the motion was held in February 2011. In November 2011, the trial court denied King's motion, finding that when considered in the context of all available admissible evidence related to the case, the new DNA evidence did not prove by clear and convincing evidence that King was actually innocent.

{¶5} King now appeals, arguing in his sole assignment of error that the trial court abused its discretion when it denied his motion for postconviction relief.

{¶6} A postconviction relief proceeding is a collateral civil attack on a judgment, therefore, the judgment of the trial court is reviewed under the abuse of discretion standard. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77. An abuse of discretion is more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶7} This court, in *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096,

923 N.E.2d 654, at ¶ 19-20 (8th Dist.), explained that:

[i]n 2006, the General Assembly amended Ohio's DNA testing statutes. The amendments, among other things, made postconviction DNA testing more available to inmates and lowered the outcome-determinative standard for establishing entitlement to DNA testing. 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."

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).

{¶8} As mentioned, the trial court approved King's application for DNA testing based on this standard. In the court's April 2008 findings of facts and conclusions of law allowing the DNA testing, the court made statements such as "DNA exclusion results would eliminate King as a suspect," as the statute required. However, once the DNA results were presented to the court, the court found that the results, when reviewed with all the evidence, did not prove King's actual innocence, and therefore the court denied the postconviction relief petition.

{¶9} King argues that the court's denial of his motion for postconviction relief was an abuse of discretion based on the statements made in the April 2008 entry granting DNA testing. However, none of the court's statements in this interlocutory ruling² were binding, nor is the standard for DNA testing applications the same as the standard to be applied to postconviction petitions after the DNA results are received.

{¶10} Under R.C. 2953.23(A), a trial court may entertain a petition for postconviction relief only in limited circumstances; i.e., if a petitioner establishes one of the two following conditions:

(1) The petitioner was either "unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief," or "the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation," and "[t]he petitioner shows by clear and convincing evidence that, but for the constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted."

(2) The petitioner was convicted of a felony * * * and upon consideration of all available evidence related to the inmate's case * * *, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense * * *."

{¶11} After a review of the record, we find that King did not establish either of the conditions set forth in R.C. 2953.23(A).

{¶12} "Actual innocence," under R.C. 2953.21(A)(1)(b),

²We recognize that the denial of such an application is a final appealable order that the petitioner could appeal under R.C. 2953.73(E)(2).

means that, had the results of the DNA testing * * * 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 case * * * *no reasonable factfinder would have found the petitioner guilty of the offense* of which the petitioner was convicted * * *. (Emphasis added.)

{¶13} R.C. 2953.21(A)(1)(b) and 2953.71(L) do resemble each other, with one vital distinction. R.C. 2953.71(L) requires only a "strong probability" that no reasonable factfinder would have found the inmate guilty, where as R.C. 2953.21(A)(1)(b) requires that no reasonable factfinder would have found the petitioner guilty, without exception. Thus, the trial court's statements in the findings of fact and conclusions of law for the application for DNA testing are not binding on the court's later determination regarding the petition for postconviction relief.

{¶14} Furthermore, in denying King's petition, the trial court reviewed all of the admissible evidence before concluding that King did not establish "actual innocence." First, it reviewed the evidence submitted at trial, which this court summarized in *King I*. It then reviewed the DNA results. The court found that the DNA from the vaginal swab was consistent with the DNA from the fingernail scrapings, and that King was excluded from both specimens. However, the trial court concluded that the addition of new evidence matching the DNA from the vaginal material to the fingernail scrapings did not establish King's actual innocence.

{¶15} King argues that the sample from the victim's fingernail is evidence of a rape-murder scenario. He contends that the DNA evidence of both the fingernail scrapings and semen, as well as the coroner's testimony that there was evidence of trauma to the victim's rectum contemporaneous to the injuries caused to her neck by strangulation, illustrates that whomever deposited the semen was the killer. King's theory ignores the serologist and coroner's testimony that although there was evidence of rectal trauma at the time of the strangulation, the semen was not deposited at the time of the murder. Thus, the fingernail scrapings support the State's theory that the victim engaged in sexual intercourse with someone other than King in the days preceding the murder. Furthermore, the evidence of rectal trauma at the time of the murder in no way exonerates King.

{¶16} In addition, we are bound by the law of the case set forth in *King I*. The law of the case doctrine provides that the decision of a reviewing court in a case remains the law of the case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). Thus, "the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred." *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 1996-Ohio-174, 659 N.E.2d 781.

{¶17} Although we recognize that the doctrine of the law of the case is considered a rule of practice rather than a binding rule of substantive law, we view its application here achieves just results. The rule is "necessary to avoid endless litigation by settling the issues." *Hubbard* at 404, citing *State ex rel. Potain v. Mathews*, 59 Ohio St.3d 29, 32, 391 N.E.2d 343 (1979).

{¶18} In *King I*, this court came to the following legal conclusions: there was sufficient evidence for the jury to find King guilty of murder, and the evidence did not weight heavily against his conviction. In reaching these legal conclusions, we stated:

When viewed in the light most favorable to the prosecution, the evidence showed that defendant was with his girlfriend, the victim, the last time she was seen alive and when her strangled decomposing corpse was discovered by her daughter. The circumstances of her death indicate she was killed from behind by someone she knew, because there were no signs of a struggle. According to the victim's friend Jean Hester, defendant and the victim had a history of fighting about cocaine and money. The victim told Hester before her death that defendant "jump on her."

Defendant's behavior in the apartment before the decomposing body was discovered was curiously detached. Others noticed a foul odor, which defendant insisted resulted from cooking, but there was no evidence that anyone had cooked anything. Defendant's conduct after the victim's body was first discovered continued to be suspicious. According to Brandi, defendant began pacing and did not originally go to the closet when she told him she had discovered his missing girlfriend's body. Defendant also did not try to determine whether he could help or even whether his girlfriend was dead.

King I at 15-16.

{¶19} Therefore, we agree that the new DNA results do not clearly and convincingly establish King's actual innocence under R.C. 2953.23(A)(2). This evidence alone did not refute the evidence presented at trial, and therefore, King failed to establish that "no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted." R.C. 2953.23(A)(1)(b). Therefore, the trial court did not abuse its discretion when it denied King's petition for postconviction relief.

{¶20} Accordingly, the sole assignment of error is overruled.

{¶21} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


COLLEEN CONWAY COONEY, JUDGE

SEAN C. GALLAGHER, J., CONCURS (WITH SEPARATE CONCURRING OPINION ATTACHED);
MELODY J. STEWART, P.J., DISSENTS (WITH SEPARATE DISSENTING OPINION ATTACHED)

SEAN C. GALLAGHER, J., CONCURRING:

{¶22} I concur fully with the judgment and analysis of the majority opinion. The dissent offers a comprehensive and thoughtful analysis of the facts in the case, and I write separately to more specifically address some of the concerns raised in the dissent.

{¶23} Every judge wants to see justice done. No judge wants to see an innocent person in prison. Where possible, judges will engage in a search for the truth. At times, those searches, as here, do not change the outcome.

{¶24} There is no question that the ability to identify the origin of the fingernail scrapings through enhanced DNA testing casts new light on this case. Nevertheless, this most recent DNA test was not "outcome determinative." Upon a review of the entire record, it cannot be said that had the DNA results been analyzed in the context of and upon consideration of all available

admissible evidence related to the case, there is a strong probability that no reasonable factfinder would have found King guilty. R.C. 2953.71(L).

{¶25} The victim, Chrystal Hudson, was found murdered in the closet of her sixth-floor apartment at approximately 10:30 a.m. on Wednesday, July 22, 1994. She was found by her daughter Brandi who spent the previous night with her younger sister in their grandmother's apartment on the 8th floor of the same building. The last person to see Chrystal alive, other than the killer, was her daughter Brandi, who saw her mother in the bedroom of the apartment at 11:00 a.m. on Tuesday, June 21, 1994. The only person in the apartment when Brandi and her sister arrived and discovered the body was Evin King.

{¶26} The dissent analyzes the language of the various statutes, but regardless of the definitions applied to the terms "outcome determinative" or "strong probability" under R.C. 2953.71(L) or the terms "clear and convincing" or "actual innocence" as used in R.C. 2953.21(A)(1)(a) and 2953.23(A)(2), the appellant does not establish he is entitled to relief. The DNA results do not necessarily negate the state's claim and vindicate King, nor do they establish his "actual innocence."

{¶27} The crucial evidence in this case has not changed or been refuted by this new DNA test. The critical evidence that remains uncontroverted is the testimony of the coroner, Dr. Robert Challener, and the coroner's serologist, Kay May. Both testified that the sperm found in the victim that did not match King

was deposited anywhere from two days to seven days *prior* to her murder. Specifically, May testified that no F-30 enzymes were present in the sperm recovered, indicating that the sperm was deposited at least 16 hours *prior to the murder*. The fact that the fingernail scrapings are now shown to match the sperm originally recovered does not change those facts.

{¶28} The dissent presumes that by authorizing a test under R.C. 2953.71(L), results consistent with the defendant's theory must be read to exonerate the defendant as "outcome determinative." This approach would require us to ignore the other facts previously established and not refuted.

{¶29} Further, there is nothing in the statutory scheme that would preclude the trial court from reconsidering its decision after the results are obtained. A decision to grant an application for postconviction DNA testing brought pursuant to R.C. 2953.71 et seq. is not a final, appealable order because there is no provision for an appeal by the state. *See State v. Montgomery*, 8th Dist. No. 97143, 2012-Ohio-1640, ¶ 11-12. Instead, only a defendant whose application for DNA testing has been rejected is permitted to appeal. *Id.* at ¶ 13; R.C. 2953.73(E). It necessarily follows that a determination to allow DNA testing is not binding as to the defendant's ultimate fate.

{¶30} The trial court may have erroneously drafted its order to suggest that if the new test revealed King's DNA was not in the scrapings, the defendant would be granted the relief requested. The trial court was attempting to utilize

new testing techniques to clear up the unidentified origin of the fingernail scrapings. While R.C. 2953.74(B) and (C) indicate the test should be approved only if it will be outcome determinative, one cannot fault the trial court for attempting to clear up an undefined factor in the case. The trial court's heart was in the right place. Regardless of the language in the trial court's order and the mandates of R.C. 2953.74, this test result changes nothing.

{¶31} Unless King can offer some explanation or testimony that refutes or casts doubt on the testimony of Dr. Challener and serologist Kay May, the trial court was right in denying the request for relief. Specifically, it would take a hearing with an expert or a report that can reasonably question or refute both Challener's and May's claims that the sperm was deposited *prior* to the murder, to make a more compelling argument that the origin of the fingernail scrapings is "outcome determinative" in this case.

MELODY J. STEWART, P.J., DISSENTING:

{¶32} Evin King theorized at trial that the person whose semen was found in the victim was also the person who killed her by ligature strangulation. He might have proved that contention at trial if then-existing testing protocols were able to test the genetic material recovered from beneath the victim's fingernails. If the DNA from the victim's fingernails matched the semen found in her, King's

theory would be supported, showing that the victim would have been killed as she clawed at the murderer's hands while being strangled.

{¶33} Testing techniques have now been refined to the point where DNA evidence is deemed by many to be the most reliable form of evidence. Recognizing the strength of King's theory of the murder, the court granted additional DNA testing by finding that if testing showed that the genetic material recovered from the victim's fingernails did not belong to King, that result would be "outcome determinative." Yet when the DNA from the fingernails did not match King but matched the semen found in the victim, the court inexplicably denied postconviction relief, concluding that the DNA evidence "does not by clear and convincing evidence establish in the Court's mind [the] actual innocence of the Defendant."

{¶34} This conclusion was reached in error. The majority's decision to affirm the court requires it to engage in a flawed analysis that makes immaterial and vague distinctions between the "outcome determinative" standard for granting DNA testing under R.C. 2953.71(L) and the standard for granting postconviction relief under R.C. 2953.21(A)(1). Those standards are cut from the same cloth and, when properly applied, compel the conclusion that the court erred by refusing to grant postconviction relief. The decision of the trial court should be reversed, and Evin King should be released from prison.

{¶35} To obtain additional DNA testing, King had to demonstrate that the DNA evidence would be “outcome determinative.” R.C. 2953.71(L) states that the results of DNA testing are outcome determinative when, “in the context of and upon consideration of all available admissible evidence related to the offender’s case * * * there is a strong probability that no reasonable factfinder would have found the offender guilty” of the offense.

{¶36} R.C. 2953.23(A)(2) provides the vehicle for vacating convictions under the outcome determinative standard employed for DNA testing:

The petitioner was convicted of a felony, the petitioner is an 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.

{¶37} As used in R.C. 2953.21(A)(1)(a), the phrase “actual innocence” means that “no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted[.]” R.C. 2953.21(A)(1)(b).

{¶38} It is true that R.C. 2953.71(L) differs from R.C. 2953.21(A)(1)(b) because it requires a “strong probability” whereas R.C. 2953.21(A)(1)(b) does not use that language. But it is important to note that R.C. 2953.21(A)(1)(a)

requires “clear and convincing” evidence of actual innocence, so it is proper to say that a petitioner is entitled to relief if he can show by clear and convincing evidence that no reasonable factfinder would have found him guilty. This standard is virtually identical to the outcome determinative standard in R.C. 2953.71(L) which requires “a strong probability that no reasonable factfinder would have found the offender guilty” of the offense. We held as much in *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, ¶ 21 (8th Dist.), when we noted that “[t]he addition of the words ‘strong probability,’ among others, in the current version of R.C. 2953.71(L) in essence lowers the definition of ‘outcome determinative’ from a showing of innocence beyond a reasonable doubt to one of clear and convincing evidence.”

{¶39} Although the majority cites *Ayers*, it does not cite it for the proposition that the “strong probability” and “clear and convincing evidence” standards are the same in meaning. The clear and convincing evidence standard of proof is “intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.” *State v. Eppinger*, 91 Ohio St.3d 158, 164, 743 N.E.2d 881 (2001); *see also Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Something is probable when it is more likely than not. A “probability” of something occurring is likelier than something happening by a mere preponderance of the evidence. When there is a “strong” probability of

something occurring, it means it is far more likely than the preponderance of the evidence standard but something less than the kind of certitude expressed in the beyond a reasonable doubt standard. A strong probability is thus more than a preponderance of the evidence and less than beyond a reasonable doubt — in other words, functionally equivalent to the clear and convincing evidence standard. See, e.g., Natalini, *Comment: Preventive Detention and Presuming Dangerousness Under The Bail Reform Act of 1984*, 134 U. Pa. L. Rev. 225 (1985), fn. 88, citing to McBaine, *Burden of Proof: Degrees of Belief*, 32 Calif. L. Rev. 242, 246-247 (1944).

{¶40} Once the trial court declared that the results of DNA testing would be “outcome determinative” under R.C. 2953.71(L), and those results were in fact favorable to King, the court was obligated to find that King showed “actual innocence” and should have ordered his release from prison.

{¶41} The “actual innocence” standard set forth in R.C. 2953.21(A)(1)(b) does not require King to show that he is actually innocent — that he did not commit the crime (although King has always maintained that he is indeed actually innocent) — he only needed to show that, had the fingernail DNA evidence been presented at trial and analyzed in the context of all admissible evidence related to his case, “no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted[.]” In other words, with the DNA results from the fingernail scrapings, a reasonable factfinder would, more likely

than not, find that the state did not prove beyond a reasonable doubt that he committed the murder. The court engaged in this same analysis of the impact of the DNA evidence when granting the motion for DNA testing under R.C. 2953.71(L), which required the court to consider the possible results of DNA testing “in the context of and upon consideration of all available admissible evidence related to the offender’s case[.]”

{¶42} King theorized that the person whose semen was found in the victim was also her murderer. In an answer on the application form that petitioners for DNA testing must complete, King was asked to state: “What defense was presented in your case at the time of your plea or trial?” King responded: “Defendant maintained that he left the victim’s apartment before she was killed by an unidentified assailant. Defendant presented an alibi that he spent time with other people during the time of the killing.”

{¶43} The application for DNA testing also asked King to “[e]xplain why a DNA test would have changed the outcome of your case. (Be specific)[.]” King explained that “[i]f the fingernail scrapings match a third party, not defendant, the indication is that victim got assailant’s skin cells under fingernails during death struggle, and killer is third party perpetrator. There is no other physical evidence implicating defendant in this killing.” As King stated in his memorandum in support of his application for DNA testing, “[i]f a DNA profile of the scrapings matched the semen profile, this would implicate a third party

perpetrator, as an argument can be made that in the struggle with her assailant, the victim got some of her assailant's skin cells under her fingernails."

{¶44} In granting DNA testing, the court accepted King's stated rationale. In the findings of fact and conclusions of law issued by the court, it stated in pertinent part:

C. Determination whether DNA exclusion would have been outcome determinative at Trial. R.C. § 2953.74(B) and R.C. §2953.71(L).

DNA procedures have advanced dramatically since the time of this trial. The debris from the nails examined today may yield testable biological material. This is a circumstantial evidence case. If biological material is available, it should be tested. DNA belonging to "an unknown party" found under the fingernails of the victim, for example *would prove the identity of the real killer if the fingernail debris is testable and matches the DNA from the semen*. King's theory of defense was a third party killed and raped the victim while he was away from the apartment.

DNA testing results would be outcome determinative.

* * *

DNA testing of the samples of the DNA collected from the victim with King's DNA samples may definitely prove that King did not murder Ms. Hudson. If Hudson scratched her assailant, the crime scene evidence technician may have scraped the real assailant's biological material from her fingernails. If the results of the DNA testing establish that someone other than King was the assailant, a reasonable factfinder may not find him guilty of the murder of Ms. Hudson.

* * *

If a DNA profile of the scrapings matched the semen profile, a strong argument could be made that Ms. Hudson scratched her assailant as he raped and murdered her.

DNA exclusion results would eliminate King as a suspect. This Court finds that no reasonable factfinder would have found King guilty had DNA exclusion results been presented. Thus DNA exclusion results would have been outcome determinative.

* * *

H. Determination whether one or more of the defense theories asserted at the trial stage was of such nature that, if DNA Testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative. R.C. §2953.74(C)(4).

A trial court may accept an application for DNA testing if an exclusion result will be consistent with a defense theory presented at the trial of the case. * * * This Court adopts its reasoning in part C and finds an exclusion result will be consistent with King's alibi defense and general denial which he asserted at trial.

I. Determination whether, if DNA Testing is conducted and an exclusion Result is obtained, the results of the testing will be outcome determinative regarding the inmate. R.C. §2953.74(C)(5).

As discussed in part C of its Finding[s] of Facts and Conclusions of Law, this Court found that DNA exclusion results would have been outcome determinative. *Evidence that King was not the donor of biological evidence recovered from the fingernails of the victim would provide strong evidence of King's innocence. This Court finds that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding King.* (Emphasis added.)

{¶45} The results of the DNA testing conclusively showed that the genetic material recovered from the victim's fingernails did not belong to King, but

instead matched the DNA from the semen found in the victim. This evidence is crucial because it is the exact evidence that King argued, and the court found, "will be consistent with King's alibi defense and general denial which he asserted at trial," "would provide strong evidence of King's innocence," "would eliminate King as a suspect," "would prove the identity of the real killer," and "would be outcome determinative."

{¶46} The DNA test results support King's contention that the male who deposited the semen in the victim is the killer, regardless of whether the semen was deposited during a rape or consensual intercourse. Evidence showed that the victim had been strangled from behind after being brutally beaten. Under those circumstances, the obvious close contact with her assailant makes debris found under her fingernails significant in and of itself, the timing of the semen deposit notwithstanding. See Matte, Williams, Frappier, & Newman, *Prevalence and Persistence of Foreign DNA Beneath Fingernails*, *Forensic Science International: Genetics* 6, (2012) 236-243. With the state admittedly building its case for murder solely on circumstantial evidence, this DNA evidence would have been compelling.

{¶47} The state argued that King and the victim knew each other, thus accounting for the lack of evidence in the apartment showing a struggle. The state thus understood at trial that it could rebut King's theory that the person who deposited the semen was also the murderer if there was no DNA evidence

found beneath the victim's fingernails. It offered the testimony of a forensic scientist who testified that there was "no blood or tissue or any material significance" found under the victim's fingernails. The expert also reiterated on both direct and cross-examination that the scrapings resulted in nothing of evidentiary value.

{¶48} King's theory of who committed the crime evaporated with the expert's testimony. He had no other way to tie the person who left the semen in the victim to the murder. This meant that the state could plausibly argue that the semen and murder were unrelated happenings.

{¶49} Although the forensic evidence did not demonstrate with any certainty when the semen had been deposited, the state maintained that the semen was deposited during a remote time prior to the murder. In fact, the state went to great lengths to demonstrate that the semen was deposited as far away in time from the murder as possible. Testimony from a scientist that no biological material or that nothing of evidentiary value was found beneath the fingernails supported this strategy. Evidence that biological material was indeed located beneath the fingernails, and that the material matched the person whose semen was found in the victim certainly runs counter to the strategy. At a minimum, the factfinder would have to determine how, and when, the material got lodged beneath the fingernails.

{¶50} The DNA result excluding King as the originator of the genetic material found beneath the victim's fingernails was a crucial break in the case. It negates the forensic scientist's testimony that no biological material was found under the victim's fingernails and weakens the state's entire case of circumstantial evidence. King's contention that an unknown person's DNA material found under the victim's fingernails "would prove the identity of the real killer if the fingernail debris * * * matches the DNA from the semen because King's theory of defense, i.e. a third party killed and raped the victim while he was away from the apartment * * *," is made all the more probable with the test results than without them. The court had to have understood all of this when it granted King's application for DNA testing.

{¶51} Despite making the findings that "[i]f a DNA profile of the scrapings matched the semen profile, a strong argument could be made that Ms. Hudson scratched her assailant as he raped and murdered her," that an exclusion result "would eliminate King as a suspect," and that "no reasonable factfinder would have found King guilty had DNA exclusion results been presented [at trial]," the court ultimately held that the DNA evidence did not prove King's innocence. In its findings of fact and conclusions of law, the court stated that "[t]he only new evidence is that the DNA material under the fingernail was not the Defendants and that it was consistent with the vaginal DNA material." The court made no mention of its prior ruling that the DNA evidence would be outcome

determinative. Instead, it justified the reversal of its prior statements concerning the impact of the DNA evidence by saying:

The Court concludes that this particular additional information does not by clear and convincing evidence establish in the Court's mind actual innocence of the Defendant. Further, since the evidence presented at trial already excluded Defendant as the donor with respect to the vaginal swabs, the Court finds that this one additional fact would not be outcome determinative.

{¶52} Nothing about the case changed from the time when the court found that DNA testing would be outcome determinative to the time when the court denied postconviction relief. The court's statement that "[t]he only new evidence is that the DNA material under the fingernail was not the Defendants and that it was consistent with the vaginal DNA material" is perplexing. This was the exact evidence, and indeed the "only new evidence," King sought in his petition for testing. Even more, this was precisely the evidence the court had previously ruled "will be consistent with King's alibi defense and general denial which he asserted at trial," "would provide strong evidence of King's innocence," "would eliminate King as a suspect," "would prove the identity of the real killer," and "would be outcome determinative."

{¶53} The court's refusal to grant postconviction relief is a clear abuse of the court's discretion because the court specifically found that DNA testing *would* be outcome determinative. The court's initial outcome determinative finding was made "in the context of and upon consideration of all available

admissible evidence" related to King's case. R.C. 2953.21(A)(1)(b) required the court to consider the DNA evidence presented in a petition for postconviction relief "in the context of and upon consideration of all available admissible evidence" related to King's case. In other words, the court had to view the DNA evidence in the petition for postconviction relief and the evidence at trial in the same light in which it viewed it when deciding whether DNA testing would be outcome determinative. The court concluded that King's DNA evidence did not show actual innocence, even though it found the very same evidence would be outcome determinative. Because the standards employed in R.C. 2953.71(L) and R.C. 2953.21(A)(1)(a) are functionally identical, the court's opposite conclusion on the same evidence is arbitrary, unreasonable, and capricious — the very definition of an abuse of discretion. *State v. Adams* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶54} The state opposed the petition for postconviction relief on grounds that King was asking for a new trial based upon "unremarkable" evidence — evidence that was neither new nor contradicted by the scientific evidence presented at trial that there was no evidence of rape, no evidence of a struggle between the victim and her murderer, and no evidence that correlated the sexual relations and the deposit of sperm with the homicide. The state went on to strenuously argue that King's petition and the results of the DNA testing do nothing to alter the evidence presented at trial regarding the age of the semen

found inside the victim: that evidence, the state argued, shows that there was no rape-murder. Now, the new evidence does correlate the "sexual relations" with the homicide, arguably by time, but certainly by identity. The new DNA evidence is the best, if not the sole, piece of physical evidence that ties the perpetrator to the crime.

{¶55} Additionally, the best that can be said of the state's arguments in opposing the petition for postconviction relief is that they had been rejected when offered in opposition to the motion for DNA testing. The state opposed DNA testing on grounds that DNA evidence was available and introduced at the time of trial. It also argued that additional DNA did not exist, and even if it did and could be tested, the DNA results would not be outcome determinative because they would not likely convince a reasonable juror that King did not commit the crimes for which he was convicted, "let alone create doubt where the biological material found on the victim's body in the form of spermatozoa that was tested excluded Defendant as the source." These were essentially the same arguments the state made when opposing the petition for postconviction relief and nothing changed between the time the court granted testing and then denied postconviction relief. The majority concedes the inconsistency of the trial court's decision, but nonetheless affirms the court's decision, asserting that the outcome determinative finding was not binding on the court because it was "interlocutory."

{¶56} Also, the majority's conclusion appears to be at odds with its application of the law of the case doctrine — the majority essentially finds that this court's affirmance of King's conviction on direct appeal established that there was sufficient evidence to sustain the conviction and that the new DNA evidence does nothing to contradict this. That conclusion is obviously at odds with the court's finding that the DNA evidence, if not matched to King, "would eliminate King as a suspect." There would be no point in postconviction testing for DNA if the reviewing court could waive away the results of that testing simply by pointing to the same evidence used to convict. Again, R.C. 2953.71(L) specifically requires the trial court to determine whether DNA testing will be outcome determinative by analyzing the DNA evidence "in the context of and upon consideration of all available admissible evidence related to the offender's case[.]" So to the extent the court found that the results of DNA testing would be outcome determinative, it had to view those results in the context of the evidence presented in King's case. It could not make an outcome determinative finding based on the results King set forth in his petition, and then turn around and say that those exact results would not support a finding of actual innocence. The concurring opinion attempts to explain the inconsistency merely by implying that the trial court, although well intentioned, erred in granting the petition for testing because the results were not "outcome determinative."

{¶57} To the extent that the court's consideration of the impact of the DNA evidence changed or differed from the testing stage to the results stage, that consideration cannot be based on a less comprehensive review of the evidence once the actual results were submitted. In this case, the trial court did not conduct a comprehensive review of the evidence. So the court abused its discretion also because it is clear that the court did not consider the new DNA evidence "in the context of and upon consideration of *all* available admissible evidence" as the statute requires. (Emphasis added.)

{¶58} In its findings of fact, the court gave a brief summary of the case and referenced a "broader recapitulation of the facts" that could be found in the pleadings and this court's opinion in King's direct appeal. This does not demonstrate the type of review and consideration of the evidence contemplated by the statute. Furthermore, before its conclusions of law, the court plainly states that it "has chosen to look at the new DNA results and the coroner's report." This language clearly demonstrates that the court's analysis, as does the analysis of the concurring opinion, considered the new DNA evidence only in context to the blood antigen and vaginal swab evidence presented at trial — and not even all of that evidence.

{¶59} Tellingly, the court states in its conclusions of law that "the findings in the coroner's report excluded the Defendant as the donor on a blood antigen basis. The new DNA report confirms that." The court goes on to say that "since

the evidence presented at trial already excluded Defendant as the donor with respect to the vaginal swabs, the Court finds that this one additional fact would not be outcome determinative." This analysis implies that King petitioned the court for DNA testing simply to accumulate evidence to support the fact that the sperm deposits were not his. This was clearly not the reason for King's petition.

{¶60} Finally, the concurring opinion attempts to buttress the decision reached in this case by referencing a judicial desire to "search for the truth" "where possible," but concludes that the "search" here "does not change the outcome." I can only respond by saying that there is no "change" in the outcome because the "search" was extremely limited.

{¶61} Since King's conviction, the pleadings and judicial opinions regarding this case have been rife with misstatements and mischaracterizations of the evidence, and unfortunately, the concurring opinion continues to perpetuate these mistakes. For example, the pleadings and judicial opinions indicate that the victim's older daughter observed King with the victim the night before, and the morning of, her murder. Yet the transcript is replete with the daughter's testimony that King was not with her mother on those occasions: that her mother was alone, that King "wasn't there." Also, it is alleged that King did not deny killing the victim when the daughter accused him. Yet her testimony reveals that he consistently and repeatedly did so.

{¶62} The victim's daughter was the best witness the state presented at trial. She was the last person, other than the killer, to see the victim alive. She discovered her mother's body, and she was the only person to observe King's demeanor and response when the body was discovered. What is more, the daughter let it be known that she did not like King. She testified, "when I first saw him, I just didn't like him, just something — just I don't like him. * * * The way he looked, the way he dressed, because he dressed like he was a bum or came off the streets." Therefore, her testimony would appear to be the most credible of anyone's offered during trial. Her strong aversion to King shows that, any favorable testimony would not have been made for his benefit.

{¶63} The state insists that King's rape-murder theory is "speculation and fantasy" because the coroner testified that one would expect to see more intact sperm "if they had just been recently deposited" and he thought it was "very unlikely" that the sperm heads found were contemporaneous with the anal penetration. However, the coroner also testified that "[i]t is very difficult to give any reliable estimate," with regard to the age of the sperm heads. He further testified that the injury to the victim's rectum was a "common association of some form of sexual assault" and that the injury was done in conjunction with her neck injuries.

{¶64} As previously noted, the concurring opinion, like the trial court, analyzed the new DNA results solely in the context of the sperm evidence. The

concurrency asserts that the "crucial evidence in this case," the testimony of the chief deputy coroner and that of the serologist, is the evidence that the new DNA results would have to refute, presumably in order for the results to be "outcome determinative." Not only is this analysis limited, it is just plain wrong.

{¶65} First off, it defies logic that one would not consider the identity of the person whose biological material was found under the fingernails of a strangulation victim, crucial: as if, the fact that the material matched the depositor of the semen is irrelevant because that person has, in effect, been ruled out as the killer with the finding of guilt against King. Secondly, the testimony of the deputy coroner and the serologist is not quite what the concurrency says it is.

{¶66} Dr. Challener did not testify that the sperm was deposited anywhere from two days to seven days prior to death. As a matter of fact, when asked was it possible that the sperm cells could have been deposited up to seven days prior to death, the doctor replied, "that would be stretching it a bit."

{¶67} Likewise, the serologist's testimony does not indicate that sperm was deposited at least 16 hours prior to the murder. Her testimony was that the particular protein that was not found in the swabs only lasts "between 8 and 16 hours," that it "[n]ever lasts beyond 16 hours after having been deposited." Because the biological material was collected 24 hours or more after the victim had been murdered, this testimony is not "crucial."

{¶68} The point the concurrence seems to want to underscore is that the testimony regarding the timing of the semen deposit contradicts King's theory that the crime was a rape-murder: that the semen was deposited at the same time the victim was killed. Without question, some of the testimony does indeed contradict King's theory. And some does not. In some instances, the evidence supports his theory or is conflicting. For instance, the victim's autopsy report indicates: "Few intact sperm and many sperm in vaginal and rectal smears." But neither King's theory nor the state's theory should be the sole focus in determining this case. A consideration of the DNA results in the context of and upon consideration of *all available admissible evidence* related to King's case is the analysis required by law.

{¶69} Last but not least, the concurring opinion also emphasizes the fact that King was the only person in the apartment (the linchpin of the state's case) when the victim's daughter discovered her body — the day after the murder. This fact is important. But again, it cannot be considered in isolation. Presence at a crime scene when a body is discovered does not automatically equate to having committed murder. King was watching television in the living room of the apartment when the body was discovered stuffed in a bedroom closet. King was also in the apartment entertaining the victim's mother and a neighbor the evening before the body was discovered, but clearly after Ms. Hudson had been murdered.

{¶70} The trial testimony in this case is critical, especially the daughter's testimony. Not only does she establish the time frame for her mother's death, her testimony also includes the fact that her mother always left her door open with a block, thus showing one way that someone else would have access to the apartment. All told, this evidence and more should have been considered in light of the DNA results. It was not.

{¶71} King was sentenced to 15 years to life in prison for a crime he has always maintained he did not commit. In consideration of the fact that no physical evidence connects him to this brutal murder, and no direct testimony credibly implicates him, the circumstantial evidence presented at trial cannot overcome a finding of actual innocence in light of the new DNA test results. The trial court recognized this when it granted the petition for DNA testing, but abused its discretion when it subsequently denied King postconviction relief.

{¶72} I am well aware that "a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *State v. Gondor*, 112 Ohio St.3d 377, 390, 2006-Ohio-6679, 860 N.E.2d 77. However, the trial court's finding in this matter is not. I therefore dissent from the decision to affirm.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
97883

LOWER COURT NO.
CP CR-312576

COMMON PLEAS COURT

-vs-

EVIN KING

Appellant

MOTION NO. 459203

Date 11/02/12

Journal Entry

Motion by Appellant for reconsideration is denied.

COPIES MAILED TO COUNSEL FOR ALL PARTIES - COSTS TAKEN

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NOV 02 2012
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

Presiding Judge MELODY J. STEWART,
DISSENTS

Judge SEAN C. GALLAGHER, Concurs

[Signature]
Judge COLLEEN CONWAY COONEY

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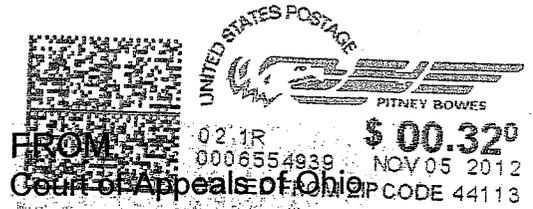
VOL 762 PG 969

Case No: 97683

**STATE OF OHIO VS. EVIN
KING**

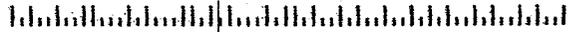
**Motion by Appellant for
reconsideration is denied.**

**GALLAGHER, S., J., CONCUR
CONWAY COONEY, C., P.J.
STEWART, M., J., DISSENTS**



Court of Appeals of Ohio
Eighth Appellate District
One Lakeside Ave.
Cleveland, Ohio 44113
Date: 11/02/2012

TO:
KRISTOPHER A. HAINES
ASSISTANT PUBLIC DEFENDER
OHIO PUBLIC DEFENDER'S
OFFICE
250 EAST BROAD ST., STE 1400
COLUMBUS, OH 43215



Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
97683

LOWER COURT NO.
CP CR-312576

COMMON PLEAS COURT

-vs-

EVIN KING

Appellant

MOTION NO. 459204

Date 12/12/12

Journal Entry

Motion by Appellant for en banc consideration is denied. See separate journal entry of this same date.

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DEC 12 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY *[Signature]* DER.

Judge MELODY J. STEWART, Concur

[Signature]
Administrative Judge
PATRICIA A. BLACKMON

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
97683

LOWER COURT NO.
CP CR-312576

COMMON PLEAS COURT

-vs-

EVIN KING

Appellant

MOTION NO. 459204

Date 12/12/2012

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

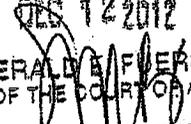
We find no conflict between the panel's decision in this case and the decisions in *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654 and *State v. Harris*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654. Therefore, appellant's application is denied.


PATRICIA A. BLACKMON, ADMINISTRATIVE JUDGE

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Concurring:

FRANK D. CELEBREZZE, JR., J.,
COLLEEN CONWAY COONEY, J.,
LARRY A. JONES, J., and
KENNETH A. ROCCO, J.

DEC 12 2012
GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DER.

MELODY J. STEWART, J., Concur with separate concurring opinion in which the following judges concur:

MARY J. BOYLE, J.,
EILEEN A. GALLAGHER, J., and
JAMES J. SWEENEY, J.

Dissenting:

SEAN C. GALLAGHER, J.,
KATHLEEN ANN KEOUGH, J., and
MARY EILEEN KILBANE, J.

MELODY J. STEWART, J., CONCURRING:

We disagree with the panel majority's analysis and decision on the merits of King's appeal. However, since the majority of the panel has determined that it will not reconsider its decision, we must review the case through the narrow lens of an application for en banc consideration.

A majority of the en banc court may order that an appeal be considered en banc only "[u]pon a determination that two or more decisions of the court on which they sit are in conflict." "Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed." App.R. 26(A)(2)(a).

"The decision to grant en banc consideration is unquestionably among the most serious non-merits determinations an appellate court can make * *

*. Such a determination should be made only in the most compelling circumstances." *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1242 (D.C.Cir.1987) (Edwards, J., concurring in the denial of rehearing en banc).

Although we have strong feelings about the decision reached in this case, our case law does not reveal a clear conflict between the panel majority's decision and a previous panel decision. Appellant cites two of our decisions as potential sources of conflict, *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654 and *State v. Harris*, 8th Dist. No. 89156, 2008-Ohio-934; 2008 Ohio App. LEXIS 796. *Ayers* addressed an issue different from that addressed by the panel in King's case. Specifically, *Ayers* addressed whether the trial court abused its discretion by denying the appellant's application for DNA testing. *Harris* did address the same issue as that involved here, but the panel in that case, like the majority of the panel in this case, determined that the evidence did not clearly and convincingly establish Harris's actual innocence. We perceive no conflict between the panel decision in this case and *Harris*. Because we cannot conclude that the decisions in two or more cases in this district are in conflict, we cannot order en banc consideration of this appeal.

"By declining to rehear a case [en banc], 'we do not sit in judgment on the panel; we do not sanction the result it reached.' *Jolly v. Listerman*, 675 F.2d 1308, 1311 (D.C.Cir.1982) (Robinson, C.J., concurring in denial of rehearing en banc) (footnote omitted), *cert. denied*, 459 U.S. 1037, 74 L.Ed.2d 604, 103 S.Ct. 450 (1982). We decide merely that * * * review by the full court is not justified." *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d at 1244. "[T]here is nothing wrong with letting the [Ohio] Supreme Court decide whether a decision is correct and, if not, whether it is worthy of correction." *Mitts v. Bagley*, 6th Cir. No. 05-4420, 2010 U.S. App. LEXIS 25036, at *15 (Dec. 3, 2010). Therefore, we reluctantly concur in the decision to deny appellant's application for en banc consideration.



STATE OF OHIO)

CUYAHOGA COUNTY)

) -SS: ED
)
)

IN THE COURT OF COMMON PLEAS

CASE NUMBER: CR 312576

2008 APR 23 P 3: 35

STATE OF OHIO)

Plaintiff WILLOU E. FUERT
CLERK OF COURTS
CUYAHOGA COUNTY)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

vs)

EVIN KING)

Defendant)

BRIAN J. CORRIGAN, JUDGE

Evin King filed an Application for DNA Testing pursuant to R.C. §2953.72 on October 25, 2004. The State filed Prosecuting Attorney's Brief in Opposition to Inmate's Application for DNA Testing on March 24, 2005. King filed Defendant King's Response to Plaintiff's Brief in Opposition to Inmate's Application for DNA Testing on April 13, 2005.

LAW AND ANALYSIS

**A. Determination of Eligibility to File Application for DNA Testing.
R.C. §2953.72(C)(1).**

As a preliminary matter, the Court must determine whether Defendant King is an inmate eligible to file an Application for DNA Testing. King is eligible if he 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." R.C. §2953.71(F). King is eligible if he meets three conditions:

1. He was convicted by a judge or jury for a felony offense committed prior to the effective date of R.C. §2953.71 et seq.;

2. he was sentenced to a prison term for that felony offense and was serving the prison term on the effective date of R.C. §2953.71 *et seq.*; and
3. he had at least one year remaining on his prison term on the date on which the application was filed. R.C. §2953.72(C)(a).

King meets all three conditions:

1. He was convicted by a jury for Aggravated Murder, a felony offense committed on a date that precedes October 28, 2003, the effective date of R.C. §2953.71 *et seq.*;
2. he was sentenced to 15 years to life on February 28, 1995, and was serving that sentence on October 28, 2003; and
3. he had at least one year remaining on his prison term on October 29, 2004, the date on which his application was filed. This Court finds that King is an "inmate eligible" to file an Application for DNA Testing.

B. Determination whether a Prior Definitive DNA Test Exists. R.C. §2953.74(A).

If 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. Mr. King seeks DNA testing on the victim's fingernail scrapings. A DNA test has not been conducted on victim's fingernail scrapings. This Court finds that no prior definitive DNA test was conducted on the fingernail scrapings.

C. Determination whether DNA exclusion would have been outcome determinative at Trial. R.C. §2953.74(B) and R.C. §2953.71(L).

DNA procedures have advanced dramatically since the time of this trial. The debris from the nails examined today may yield testable biological material. This is a circumstantial evidence case. If biological material is available, it should be tested. DNA belonging to "an unknown party" found

under the fingernails of the victim, for example, would prove the identity of the real killer if the fingernail debris is testable and matches the DNA from the semen. King's theory of defense was a third party killed and raped the victim while he was away from the apartment.

DNA testing results would be outcome determinative. R.C. §2953.71(L) defines "outcome determinative" as:

Had the results of DNA testing 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 * * *, no reasonable factfinder would have found the inmate guilty of that offense * * *.

DNA testing of the samples of the DNA collected from the victim with King's DNA samples may definitely prove that King did not murder Ms. Hudson. If Hudson scratched her assailant, the crime scene evidence technician may have scraped the real assailant's biological material from her fingernails. If the results of the DNA testing establish that someone other than King was the assailant, a reasonable factfinder may not find him guilty of the murder of Ms. Hudson.

At his trial, King presented an alibi. He left the apartment on June 20th, before Ms. Hudson was killed by an unidentified assailant and did not return to the apartment until approximately 3:30 p.m. of June 21, 1994. No physical evidence was presented at trial which implicated the defendant. The coroner's report indicated that the semen recovered from Ms. Hudson's body did not match the defendant's blood antigen profile. If a DNA profile of the scrapings matched the semen profile, a strong argument could be made that Ms. Hudson scratched her assailant as he raped and murdered her.

DNA exclusion results would eliminate King as a suspect. This Court finds that no reasonable factfinder would have found King guilty had DNA exclusion results been presented. Thus, DNA exclusion results would have been outcome determinative.

D. Determination that DNA Testing was not generally accepted, admissible, or available at the time of trial. R.C. §2953.74(B).

King was convicted of murder following a jury trial on February 28, 1995. The victim, Ms. Hudson, was murdered in Cleveland, Ohio, in June, 1994. Although commentators concur that DNA testing has been generally accepted and admissible since the Ohio Supreme Court's decision in *State v. Pierce* (1992), 64 Ohio St.3d 490, the commentators have not undertaken a study of its general availability to the indigent defendant. This Court is reluctant to bar an indigent defendant from obtaining DNA testing solely because DNA testing was theoretically available at the time of his trial. As this Court determined above, exclusion DNA results would be outcome determinative. Therefore, this Court finds that, while DNA testing was generally accepted and admissible at the time of King's trial, it was not generally available.

E. Determination whether Biological Material and Parent Sample still exists. R.C. §2953.74(C).

A trial court may accept an application for DNA testing when biological material and the parent sample still exists. To make this determination, the Court considers the State's report regarding the existence of biological material and parent sample filed pursuant to R.C. §2953.75. Upon consideration of the pleadings thus far filed, this Court finds that the prosecuting attorney has not fulfilled its duties imposed by R.C. §2953.75. R.C. §2953.75(A) requires "*the prosecutor to determine whether biological material was collected from the crime scene or victim of the offense * * * and whether the parent sample of that biological material still exists.*" Upon completing the

inquiry, the prosecuting attorney must prepare a report of his findings and provide a copy of the report to the Court, Mr. King, through his counsel, and the Attorney General. With no written report from the prosecuting attorney to the contrary, this Court finds that biological material was collected from the crime scene or the victim of the offense and the parent sample of that biological material against which a sample from King can be compared still exists.

**F. Determination whether Parent Sample of the Biological Material contains scientifically sufficient material to extract a Test Sample.
R.C. §2953.74(C)(2).**

Pursuant to R.C. §2953.76, the State is required to consult with the testing authority and prepare findings regarding the quantity and quality of the parent sample, the chain of custody, and reliability. Specifically, the testing authority is required to:

1. 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; and
2. 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.

The testing authority is required to:

Prepare a written report document that contains its determination and the reasoning and rationale for that determination and shall provide a copy to the court, the eligible inmate, the prosecuting attorney, and the attorney general. R.C. §2953.76 (A) and (B).

With no written report from the testing authority to the contrary, this Court finds:

1. The parent sample of the biological material contains scientifically sufficient material to extract a test sample;

2. the parent sample is not so minute or fragile as to risk destruction of the parent sample by the extraction; and
 3. the parent sample has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing; and
 4. the parent sample has been preserved in a condition that is scientifically suitable for testing.
- G. Determination whether the identity of the person who committed the offense was at issue. R.C. §2953.74(C)(3).**

A trial court may accept an application for DNA testing if the court determines that the identity of the person who committed the offense was an issue. There was no question that Crystal Hudson was murdered in June, 1994. The identity of the assailant was at issue in King's trial. The entire trial turned on whether he was correctly identified as the offender. At his trial, King presented an alibi. He left the apartment on June 20th, before Ms. Hudson was killed by an unidentified assailant and did not return to the apartment until approximately 3:30 p.m. of June 21, 1994. No physical evidence was presented at trial which implicated the defendant. The coroner's report indicated that the semen recovered from Ms. Hudson's body did not match the defendant's blood antigen profile. This Court finds that the identity of the person who committed the offense was at issue.

- H. Determination whether one or more of the defense theories asserted at the trial stage was of such nature that, if DNA Testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative. R.C. §2953.74(C)(4).**

A trial court may accept an application for DNA testing if an exclusion result will be consistent with a defense theory presented at the trial of the case. At his trial, King presented an alibi. He left the apartment on June 20th, before Ms. Hudson was killed by an unidentified assailant

and did not return to the apartment until approximately 3:30 p.m. of June 21, 1994. In part C of its Findings of Fact and Conclusions of Law, this Court found that DNA exclusion results would have been outcome determinative. This Court adopts its reasoning in part C and finds an exclusion result will be consistent with King's alibi defense and general denial which he asserted at trial.

- I. Determination whether, if DNA Testing is conducted and an Exclusion Result is obtained, the results of the testing will be outcome determinative regarding the inmate. R.C. §2953.74(C)(5).**

As discussed in part C of its Finding of Facts and Conclusions of Law, this Court found that DNA exclusion results would have been outcome determinative. Evidence that King was not the donor of biological evidence recovered from the fingernails of the victim would provide strong evidence of King's innocence. This Court finds that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding King.

- J. Determination whether the parent sample and the extracted sample are the same 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. R.C. §2953.74(C)(6).**

With no written report from the testing authority to the contrary, this Court finds that the parent sample is the same as collected and there is no reason to believe the parent sample has been out of state custody, tampered with, or contaminated since the parent sample was collected.

Upon due consideration, this Court accepts King's Application for DNA Testing and hereby grants it. This Court directs counsel to agree on a testing facility approved by the Ohio Attorney General and to arrange for a sample to be drawn from King and to fully comply with all the provisions of R.C. §2953.77 through §2953.81 inclusive. Should counsel need further Court orders

to effect the test that the Court has ordered, counsel is directed to contact the Court's bailiff for a conference call to work out any details.

IT IS SO ORDERED.



BRIAN J. CORRIGAN, JUDGE

Date: April 23, 2008

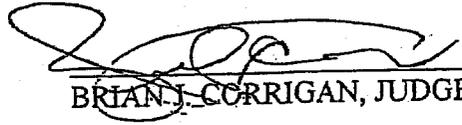
CERTIFICATE OF SERVICE

A copy of the foregoing **Findings of Fact and Conclusions of Law** was sent by ordinary

U.S. Mail this 23rd day of April, 2008 to:

T. Allan Regas, Esq.
Cuyahoga County Assistant Prosecuting Attorney
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Attorney for the State of Ohio

John A. Bay, Esq.
Office of the Ohio Public Defender
8 East Long Street - 11th Floor
Columbus, Ohio 43215
Attorney for Evin King



BRIAN J. CORRIGAN, JUDGE



STATE OF OHIO
CUYAHOGA COUNTY

FILED
2011 NOV 15 A 11:00

IN THE COURT OF COMMON PLEAS
CASE NO. CR 312576

STATE OF OHIO

GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

Plaintiff

vs

EVIN KING

Defendant

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

I. FINDINGS OF FACT

On February 28, 1995, Defendant Evin King was found guilty of murder in violation of Revised Code §2903.02. The case was based upon circumstantial evidence as no one observed the actual murder.

Due to technological improvements, DNA testing of material that was heretofore untestable became testable. As a result of said testing, the Court now knows that the DNA material recovered from the fingernail scrapings is consistent with the DNA material recovered from the vaginal swabs. Further, and more importantly, it excludes the Defendant as the donor.

The theory of the defense that some unknown third party was the perpetrator and the defense offered alibi in its presentation.

The alibi defense started in the morning and followed him through his day. He started to go to a plasma bank but never made it. Instead he meandered through various parks and met up with various people ingesting alcohol and/or drugs. He returned to the apartment at about 3:30 P.M. on June 21, 1994. The body of Crystal Hudson was discovered the next day with

Defendant King still in the apartment. The victim's daughters, Brandi and Tiiya, came to the apartment and noticing the smell discovered the body while the Defendant was watching television.

Presented in the original trial was the coroner's report which indicated that the semen did not match the Defendant's blood antigen profile. The scrapings were not, at that time, tested.

A broader recapitulation of the facts in this case can be found in the Defendant's Motions, State's Responses and the decision of the Eighth District Court of Appeals. This Court has chosen to look at the new DNA results and the coroner's report.

II. CONCLUSIONS OF LAW

For the Defendant to be successful in his motion for post-conviction relief pursuant to Ohio Revised Code §2953.21, it must be shown that the results of the DNA testing under Ohio Revised Code §§2953.71 through 2953.81 prove by clear and convincing evidence actual innocence.

“Actual innocence’ means that had the results of the DNA testing conducted under Sections 2953.71 through 2953.81 . . . been presented at trial, and had those results been analyzed in the context of and upon consideration of all admissible evidence . . . no responsible fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted . . .” In the instant case, Defendant King is asking for exoneration or at least a new trial.

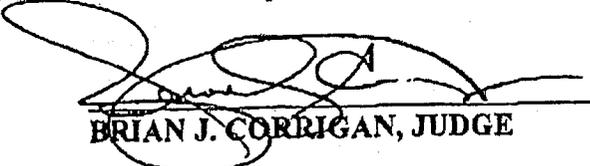
The DNA testing reported two findings. First that the Y-STR DNA from the vaginal swab was consistent with Y-STR DNA from the fingernail scrapings. Second, that Evin King is excluded from both.

From the original trial the evidence presented, specifically the findings in the coroner's report excluded the Defendant as the donor on a blood antigen basis. The new DNA report confirms that. The only new evidence is that the DNA material under the fingernail was not the Defendants and that it was consistent with the vaginal DNA material.

The Court concludes that this particular additional information does not by clear and convincing evidence establish in the Court's mind actual innocence of the Defendant. Further, since the evidence presented at trial already excluded Defendant as the donor with respect to the vaginal swabs, the Court finds that this one additional fact would not be outcome determinative.

Therefore, the Court hereby denies the Defendant's petition for post-conviction relief.

November 15, 2011


BRIAN J. CORRIGAN, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Findings of Fact and Conclusions of Law was sent by ordinary U.S. Mail, postage prepaid, to Allan Regas, Assistant County Prosecutor, 9th Floor, Justice Center, 1200 Ontario St., Cleveland, OH 44113 and to Christopher Hanes, Assistant State Public Defender, Office of the Ohio Public Defender, 250 East Broad St., Suite 1400, Columbus, OH 43215, this 15th day of November, 2011.


BRIAN J. CORRIGAN, JUDGE