

APPELLANT EVIN KING'S MOTION FOR RECONSIDERATION

I. Introduction.

Appellant Evin King requests that this Court reconsider its decision of April 24, 2013, in which this Court dismissed Mr. King's discretionary appeal under S.Ct.Prac.R. 7.08(B)(4). (Apr. 24, 2013, Entry (Pfeifer, Lanzinger, and O'Neill, JJ., dissenting)); *see also* S.Ct.Prac.R. 18.02. This Court should accept for review both of Mr. King's propositions of law, which will be discussed below.

Mr. King's case presents substantial constitutional questions and questions of great general or public interest. Mr. King has not merely asked this Court for error correction, or as the State has suggested, "a de novo review of all his factual claims." (Jan. 25, 2013, Response, at p. 1). Rather, Mr. King has asked this Court to accept his case not only because he is actually innocent of the murder for which he has served more than eighteen years in prison and because the lower courts failed to correct that injustice,¹ but also because the lower courts set bad

¹ Again, the dissenting judge below believed that Mr. King had proved his actual innocence by clear and convincing evidence. *See State v. King*, 8th Dist No. 97683, 2012-Ohio-4398, ¶ 56-65 (Stewart, J., dissenting) ("*King II*"). And four judges of the court of appeals, 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, 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, at p. 3).

precedent when they denied Mr. King's claims and unduly complicated Ohio law.

Moreover, in its memorandum in response to Mr. King's request for jurisdiction, the State of Ohio egregiously misrepresented at least one material "fact." And it otherwise did not present the history of Mr. King's case accurately. Thus, this Court rejected Mr. King's case without an accurate picture of what really happened during Mr. King's trial and in his postconviction proceedings. At a minimum, the State continued the trend of undue trivialization of Mr. King's claims of actual innocence. That trivialization is evinced by the trial court's decision to overrule Mr. King's actual-innocence claims, despite the trial court's earlier assertion that Mr. King would be exonerated if his DNA testing returned the results that were in fact returned, and the appellate court's troublesome holding that the trial court properly did so.

Simply, Ohio has a profound interest in assuring that actually innocent people have a vehicle for exoneration. And Ohio has a related interest in assuring that its courts do not unreasonably keep innocent people in prison after exonerative DNA testing results have been obtained. But those interests are only realized if Ohio's postconviction laws are followed. Here, they were not. Ohio's laudable goals were thwarted and dangerous precedent was set.

Further, the panel's majority below *created* erroneous "law-of-the-case" precedent that will continue to compromise Ohio's postconviction-DNA-testing scheme. Again, Mr. King demonstrated to the court of appeals that many of the inculpatory facts that were reported in his 1996 direct-appeal opinion were inaccurate. And the State, the trial court, and the court of appeals continued to rely on those erroneous factual assertions in the context of Mr. King's postconviction action. That new precedent can be summarized as follows:

- When a petitioner obtains DNA testing results that show his or her actual 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 DNA testing claim, even though the issues and standards of review are different from the direct-appeal issues and standards of review, and even when the petitioner has shown that the earlier "factual findings" were inaccurate.

For good reasons, that was never the law in Ohio. But it is now the law in one of Ohio's largest counties and appellate districts, and that law could spread to other districts. Because Ohio's postconviction-DNA-testing framework is important, this Court should intervene.

Pertinent facts will be presented in the propositions of law discussed below.

II. The State misrepresented at least one material "fact" in its memorandum in response to Mr. King's request for jurisdiction, and it otherwise did not present the history of Mr. King's case accurately. This Court should reconsider its decision to decline jurisdiction and accept Mr. King's case for review.

In its memorandum in response to Mr. King's request for this Court's review, the State made the following factual assertions:

- "Crystal Hudson's live-in boyfriend Evin King had been in the apartment overnight with the body but never claimed to have noticed the smell. His jacket was on top of Hudson's body where it lay in the closet." (Jan. 25, 2013, Response, at p. 2).
- "King first changed his story as to how his jacket came to be on Hudson's body." (Jan. 25, 2013, Response, at p. 2).

Thus, the State has represented that *Mr. King's jacket* was found on the victim's body. Those representations are patently false and are belied by the record. (Tr. 134, 140-141, 145-146, 165-

167, 169-171, 182-184, 313-315, 398-402, 554, 643-644). The record showed that Mr. King, who stayed off-and-on at the victim's apartment, had placed his jacket in the closet at some point in time. (Tr. 134, 140-141, 145-146, 165-167, 169-171, 182-184, 313-315, 398-402, 554, 643-644). But his jacket, which was a leather men's jacket, was located in the closet on a top shelf—it was not covering the victim's body. (Tr. 134, 140-141, 145-146, 165-167, 169-171, 182-184, 313-315, 398-402, 554, 643-644). Rather, the clothing that was found covering the victim was a women's fur coat. (Tr. 134, 140-141, 145-146, 165-167, 169-171, 182-184, 313-315, 398-402, 554, 643-644). So while the State has presented to this Court a rather inculpatory "fact," it was not a fact at all. This Court should reconsider its decision based on facts that are supported by the record.

The State has also asserted that when the victim's daughter found the victim's body, Mr. King "walked halfway towards the closet from where he sat but did not look in the closet, instead going back to the living room and pacing the floor." (Jan. 25, 2013, Response, at p. 2). That assertion is also defied by the record. The victim's daughter testified on direct examination that "[h]e just stood there, and I said the second time look at my mommy, *and then he went in there halfway, like to the beginning of the closet and looked in there.* He came back and started pacing the floor." (Emphasis added.) (Tr. 315-316). Mr. King looked in the closet.

The State has also asserted that there were no signs that a struggle occurred. (Jan. 25, 2013, Response, at p. 3). True, the apartment's furniture had not been disrupted. But the victim's bedding had disappeared, and again, the victim had been pummeled horrifically and was strangled from behind, with her body having been moved to the closet. (Tr. 166, 442-443, Tr. 448-458, 467-469). According to the Chief Deputy Coroner, there was trauma to the victim's rectum consistent with the time of her death and consistent with rape. (See Tr. 442-443, 448-

458, 467-469). And importantly, the DNA testing results eliminated Mr. King as a contributor to the DNA from an unknown man that was taken from the victim's fingernail scrapings, and which matched the DNA from the sperm of the same unknown man that was taken from the victim's vagina and rectum soon after her death.

Moreover, the State has noted that Mr. King did not notice the odor that emanated from the victim's body. (Jan. 25, 2013, Response, at p. 3). The State has asserted that "[s]everal people had noticed a foul odor in the apartment during the 24 hours prior to when Hudson's daughter found the body." (Jan. 25, 2013, Response, at p. 3). The record does not support that contention. *One* person, Ms. Jean Hester, who submitted her testimony at trial while she was drunk, noticed an odor before the victim's daughter noticed the odor and discovered the body. (Tr. 254-284, 1153, 1197). And the victim's mother did not notice a foul odor at all. (Tr. 377-379). Further, the victim's daughter testified that the smell grew stronger when she entered the bedroom closet. (Tr. 349-351). And the Chief Deputy Coroner explained that a person such as Mr. King, who had been on a crack cocaine binge, could have reasonably experienced olfactory fatigue and 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. (Tr. 469-471, 476).

This Court rejected Mr. King's claims without an accurate picture of what really happened below. The State has compounded the lower courts' undue treatment of Mr. King's claims of actual innocence and reliance on inaccurate factual findings. This Court should reconsider Mr. King's case upon an accurate depiction of the facts and accept his case for review. *See* S.Ct.Prac.R. 18.02.

III. Mr. King's propositions of law involve substantial constitutional questions and questions of great general or public interest. This Court should accept jurisdiction of Mr. King's case and guide Ohio's lower courts regarding the proper application of Ohio's postconviction-DNA-testing laws.

The State's case against Mr. King was entirely circumstantial, and little of that evidence connected Mr. King to the victim's murder. Indeed, many of the supposedly inculpatory "facts" were not inculpatory at all.

When the trial court granted Mr. King's application for DNA testing, 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 the DNA that was taken from the victim's fingernail scrapings, Mr. King would be exonerated:

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.)

* * *

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.

* * *

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. (Emphasis added.)

(Apr. 23, 2008, Findings and Conclusions, at pp. 3-4).

Thus, when the trial court granted Mr. King's DNA application, it applied the *actual innocence* standard, not merely the standard which must be met to obtain DNA testing: "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 and Conclusions, at p. 4); *see also* R.C. 2953.21(A)(1)(a)-(b).

Again, the results showed that the fingernail-scraping DNA matched the DNA from the sperm of an unknown man that was taken from the victim's vagina and rectum soon after her death. That is, the results showed that while Mr. King did not contribute to any of those DNA samples, the same unknown person contributed to all of those samples.

But simply, the trial court changed its mind for no appropriate reason and in contravention of R.C. 2953.21(A)(1), which required the trial court 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 Id.* And the panel's majority below upheld the trial court's unreasonable conclusion. *See King II* at ¶ 1-31. Moreover, the panel's majority created perilous precedent when it 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. It is against that backdrop that Mr. King requests that this Court reconsider its decision declining jurisdiction.

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. *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. Despite his innocence, Mr. King is not merely asking this Court for error correction. Rather, the lower courts set bad precedent when they denied Mr. King’s claims by giving insufficient attention to Ohio’s DNA-based-postconviction laws.

Importantly, the trial court admitted that it did not comply with the General Assembly’s mandates: “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.*” (Emphasis added.) (Nov. 15, 2011, Findings of Fact and Conclusions of Law). Thus, the trial court did not 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.*” (Emphasis added.) R.C. 2953.21(A)(1). And the court of appeals upheld that truncated approach.

The State previously submitted that the trial court “listened to all of King’s arguments, reviewed all the evidence from trial and the heaing [sic] in his case, and found he failed to prove

his innocence,” and that the trial court otherwise complied with its statutory duties. (Jan. 25, 2013, Response, at pp. 1, 7-15). The record defies that notion. The trial court arbitrarily changed its mind after Mr. King’s exonerative DNA testing results were realized.

Contrary to the State’s assertion, Mr. King argued in the court of appeals that the trial court failed to fulfill its statutory duties. (Mar. 23, 2012, Merit Brief, at pp. 11-24; *See* Jan. 25, 2013, Response, at p. 13). Those arguments were not waived. Further, the State’s assertion that the trial court clearly complied with its statutory duties is not supported by the record, as demonstrated herein. And in fact, the record on appeal was supplemented with the documents from Mr. King’s procedendo action against the trial court, which was filed when the trial court did not render a timely decision as to Mr. King’s actual-innocence claims.

Mr. King asserted the following in his verified complaint:

- Mr. King’s postconviction hearing occurred on February 17, 2011;
- Immediately after that hearing, undersigned counsel gave the trial court the transcripts of Mr. King’s original trial court proceedings so that the trial court could review those transcripts;
- On May 5, 2011, the transcript of the postconviction hearing was filed with the trial court;
- On October 5, 2011, a telephonic status conference took place regarding Mr. King’s postconviction petition; and
- The October 5, 2011, telephonic status conference lasted a few minutes, and the trial court expressed that it had not yet reviewed the transcripts.

(*See* Oct. 31, 2011, Petition for Writ of Procedendo).

Thus, as of October 5, 2011, more than seven months after Mr. King's postconviction hearing, the trial court had not yet even reviewed the transcripts of Mr. King's original trial court proceedings. On October 14, 2011, the court of appeals granted a joint motion to release the transcripts so that the trial court could finally review them (although the transcripts were handed directly to the trial court following Mr. King's hearing). Mr. King filed his writ action against the trial court on October 31, 2011. But on November 15, 2011, just over two weeks after Mr. King sued the trial court, the trial court filed its three-page entry overruling Mr. King's petition for postconviction relief and belying its earlier assertions. The record of Mr. King's case, and particularly the trial court's own assertion that it chose to look at the DNA testing results and the coroner's report, reflects that the trial court did not comply with R.C. 2953.21(A)(1).

Further, when the trial court granted Mr. King's DNA application, it applied the *actual innocence* standard. (See Apr. 23, 2008, Findings and Conclusions, at p. 4); see also R.C. 2953.21(A)(1)(a)-(b). Nothing changed between the time of the trial court's initial findings and the time of its inexplicable change of mind, except that clear and convincing evidence of Mr. King's actual innocence was obtained. 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.

The State has continued to argue that no evidence connected the DNA evidence 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). The Chief Deputy Coroner told the jury that the sperm deposited in the victim'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. Judge Stewart aptly explained why that evidence was not critical:

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 at ¶ 67 (Stewart, J., dissenting). And again, the trauma to the victim's rectum was consistent with rape at the time of death.

Further, it became clear through the testimony of the victim's daughter—the State's best witness—that Mr. King was not in the apartment when the victim's daughter left the apartment soon before the murder. In fact, she corroborated Mr. King's alibi and testified that Mr. King was not present in the apartment on the night of Monday, June 20, 1994, or on Tuesday, June 21, 1994, when she last saw her mother alive. (Tr. 297-299, 345-348). She was adamant in that regard. *See King II* at ¶ 61-62 (Stewart, J., dissenting).

The conviction and incarceration of an actually innocent person is repugnant to our system of justice. Fortunately, DNA analysis protects against such injustices and the General Assembly has provided for such analysis. *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 King* at ¶ 1-31. This Court should reconsider its decision and accept Mr. King's case for review.

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.

Again, the trial court did not comply with Ohio law when it summarily changed its mind and disposed of Mr. King's DNA-based-postconviction claims. And the record does not support the State's earlier assertion that the trial court "cured any error by examining directly the transcript of King's trial and reading exactly what each witness said to clear up any discrepancies." (See Jan. 25, 2013, Response, at p. 15). But worse, the panel's majority rendered erroneous "law-of-the-case" precedent that will continue to compromise Ohio's postconviction-DNA-testing scheme.

Again, Mr. King established that many of the inculpatory facts that were reported in his 1996 direct-appeal opinion were inaccurate, which was true, despite the State's contention that "[n]one of the alleged factual errors King pointed to in *King I* were errors at all and they did not cause any prejudice to Mr. King in this case." (See Jan. 25, 2013, Response, at p. 14). Mr. King has highlighted those inaccuracies.

That new, unsupportable law-of-the-case authority amounts to the following:

- When a petitioner obtains DNA testing results that show his or her actual 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 inaccurate.

See id.

That precedent cannot be sanctioned. As this Court has explained:

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.

Ohio Revised Code Section R.C. 2953.21(A)(1) *mandates* that a trial court review the results of DNA testing 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 necessitates the reviewing court’s consideration of that same evidence. Simply, the legal questions involved in a collateral attack under R.C. 2953.21 are different than those involved on direct appeal, as evidenced here. Moreover, Mr. King could not have litigated his actual innocence claims on direct appeal. See *Davis* at ¶ 30. But both the trial court and the appellate court had to review the *facts* of Mr. King’s case when they assessed his actual innocence claims. See also *King II* at ¶ 56-60 (Stewart, J., dissenting).

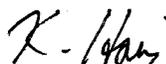
The court of appeals created untenable law-of-the-case jurisprudence in contravention of this Court’s own jurisprudence regarding that doctrine. Worse, it applied that new law unjustly. That unworthy precedent is now the law in one of Ohio’ largest appellate districts, and it is persuasive authority in other appellate districts. This Court should intervene.

IV. Conclusion.

Mr. King's case presents substantial constitutional questions and questions of great general or public interest. Mr. King respectfully requests that this Court reconsider its decision declining to accept jurisdiction of his case, adopt the propositions of law presented herein, and instruct Ohio's lower courts regarding the proper application of Ohio's postconviction-DNA-testing framework.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing APPELLANT EVIN KING'S MOTION FOR RECONSIDERATION was sent by U.S. Mail, on this 3rd day of May, 2013, to T. Allan Regas, Assistant Cuyahoga County Prosecuting Attorney, 8th Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.



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