

NO. 2013-0166

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 97683

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STATE OF OHIO

Plaintiff-Appellee,

-VS-

EVIN KING

Defendant-Appellant

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**APPELLEE'S BRIEF IN OPPOSITION TO MOTION FOR RECONSIDERATION**

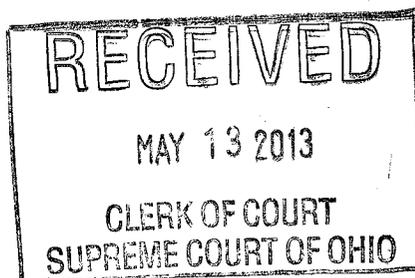
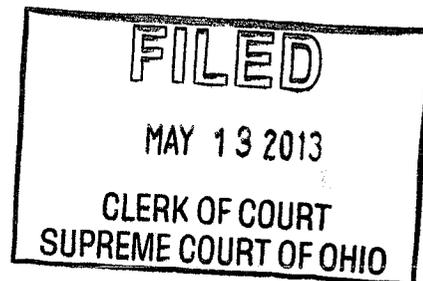
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## **1. Introduction and Summary.**

Defendant-Appellant Evin King has moved this Court to reconsider its decision to decline jurisdiction in this case. The State submits that this Court's decision was proper because King's argument is a purely fact-bound attempt to relitigate the unfavorable results King has consistently received from the trial court and from the Eight District. King provides no new legal argument that the lower courts did not consider and reject in his appeal of the denial of his post-conviction petition and this case presents this Court with no opportunity to write anything new regarding Ohio's post-conviction DNA testing scheme. King is simply dissatisfied that the lower courts do not believe his actual innocence claim. That dissatisfaction does not create a legal issue justifying any more of this Court's attention.

## **2. King has Failed to Establish his Actual Innocence.**

King's actual innocence claim is based on a speck of DNA that investigators found under a single fingernail of the victim, Crystal Hudson. That DNA was consistent with the DNA of an unknown male whose DNA was also found in Hudson's vagina. This evidence is irrelevant to this case for two reasons.

First, every expert who has testified in this case at any point has found that the DNA in Hudson's vagina was deposited a significant amount of time before her death. Both the forensic serologist and the coroner who testified at King's 1995 trial found that the semen that investigators recovered from the victim was "deposited anywhere from two days to seven days *prior* to her murder." *King II*, at ¶ 27 (Gallagher, J., concurring) (emphasis in original). Both experts based this conclusion on the fact that there were "very, very few intact sperm" present in Hudson's vagina, as there would be if Hudson had died

immediately afterwards. Kay May, a forensic serologist, likewise testified that she observed only a few sperm heads and had found “no intact sperm” in the samples from Hudson’s body.

In his motion for reconsideration, King again takes Dr. Challener’s testimony that it was “very difficult to give any reliable estimate” as to precisely when the sperm had been deposited out of context. Dr. Challener was clear that the sperm had been deposited somewhere between 2 days and 5 days before Hudson’s body was found. It was difficult to give a reliable estimate as to when it was deposited only to the extent that it was during that timeframe. Moreover, Dr. Challener immediately followed up by saying that it was “very unlikely” that any sperm cells were contemporaneous with anal penetration. Kay May, the State’s forensic serologist, likewise testified that the sperm was “deposited sometime before her death,” possibly as much as seven days beforehand. There is absolutely no expert testimony in the record to support King’s assertion that the sperm was deposited contemporaneously with Hudson’s death, and King has produced no expert opinion to support his argument in the more than 18 years since Crystal Hudson’s murder. King’s claim is not even junk-science; it has no science behind it at all.

Second, King’s entire argument glosses over the fact that evidence of sexual activity between the victim and an unknown male was presented to the jury in King’s 1995 trial. The jury knew that the victim had shallow injuries to her rectum and that there was sperm in her vagina. This is not new evidence and it renders any amount of DNA under the victim’s fingernails entirely cumulative. It is readily conceivable that in having sex with the unknown male, Crystal Hudson may have acquired a speck of that male’s DNA under a single one of her fingernails. That the DNA was exactly where it should be expected does

not change anything about what the jury knew about this case in 1995. King provides no answer to this argument. To have any chance of reversing King's conviction, King would have to persuade this Court that a speck of DNA under a victim's fingernail is sufficient to establish an actual innocence claim, even though the jury knew that the victim had engaged in intercourse with another male sometime prior to her death. Not only does this not cast any doubt on King's conviction, it is not even inconsistent with that verdict in any way.<sup>1</sup>

DNA testing "is not a magic bullet in post-conviction cases." *State ex rel. Richey v. Hill*, 216 W.Va. 155, 165, 603 S.E.2d 177 (2004), citing Jennifer Boemer, Note, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 Wm. Mitchell L. Rev. 1971, 1985 (2001), quoting Chris Asplen, Executive Director of the National Commission on the Future of DNA Evidence. It "is only as powerful as it is relevant in a given scenario." *Id.* King's theory of actual innocence is critically flawed because the DNA evidence that he relied on as a vehicle for his claim is the weakest part of his argument. King cannot explain why this DNA is relevant in this given scenario except to say that it is cumulative corroboration of a piece of the State's original case.

The DNA is especially irrelevant in this case because the State's evidence actually indicates that Hudson did not scratch at her attacker as King claims. First, the DNA is

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<sup>1</sup> See *Cunningham v. District Attorney's Office for Escambia County*, 592 F.3d 1237, 1256 (11th Cir.2010) ("Other combinations of test results are unlikely to prove innocence. \*\*\* A non-match from the fingernail scrapings might simply indicate that she had contact, sexual or otherwise, with someone else"); *Turner v. Thaler*, W.D. Texas No. A-08-CA-811-SS, 2009 WL 3838847, at \*3 (Nov. 13, 2009) (state's DNA expert testified that the presence of DNA underneath one of the victim's fingernails "was not unusual because 'your hands come in contact with so many different things'"); *Larue v. State*, Tex.App.-Beaumont No. No. 09-05-145 CR, 2007 WL 1501646, at \*7 (Oct. 3, 2007) ("Finding DNA samples under someone's fingernails would also not necessarily indicate whether it was deposited by a consensual or a non-consensual act").

present only in a small amount under the fingernail of Hudson's right ring finger. Second, the coroner's report noted that Hudson's nails "show no evidence of injury." Both of these facts are inconsistent with Hudson scratching at her attacker in the violent sexual encounter that King asks this Court to accept. And while the victim had injuries to her face and to her rectum, there is no evidence of any connection between those injuries and the sperm. Those injuries were also before the jury in King's 1995 trial and are consistent with the State's theory that King inflicted the injuries when he murdered Hudson. King is therefore not actually innocent and the trial court did not abuse its discretion when it denied his petition.

**3. King's First Proposition of Law is Without Merit Because the Trial Court Was Not Required to Grant His Petition After Approving Additional DNA Testing.**

King's first proposition of law is that the trial court abused its discretion by denying his post-conviction petition, after the court had granted its application for DNA testing. The decision to grant an application for DNA testing is based only on the court's finding that such testing would be "outcome determinative" under R.C. 2953.73. "Outcome determinative" means that "there is a strong probability that no reasonable factfinder would have found the offender guilty" had the results been presented at trial. R.C. 2953.71(L). The standard for granting the offender's petition, however, is higher. The results of the testing must "establish, by clear and convincing evidence, actual innocence of [the] felony offense[.]" R.C. 2953.21(A)(1)(a). Actual innocence means that "no reasonable factfinder would have found petitioner guilty of the offense" had the results been presented at trial. R.C. 2953.21(A)(1)(b). The standard thus shifts from probability to certainty. *King II*, at ¶ 13. A defendant might meet the first criteria but not the second.

King points to the fact that the trial court cited to the actual innocence standard when it granted his application for DNA testing in 2008: “This Court finds that no reasonable factfinder would have found King guilty had DNA exclusion results been presented.” Memorandum in Support, at p. 8. King claims that the trial court abused its discretion by later changing its mind and denying his petition. King’s argument ignores the fact that it was King who drafted these proposed findings of fact and relied on the actual innocence standard. To the extent that the trial court’s reliance upon “actual innocence” in its order granting DNA testing was erroneous, King thus invited any error that occurred. Under the doctrine of invited error, “[a] party cannot take advantage of an error he invited or induced.” *State v. Cassano*, 96 Ohio St.3d 94, 105, 2002-Ohio-3751, 772 N.E.2d 81, at ¶ 64.

“We have consistently frowned upon the practice of delegating the task of drafting important opinions to litigants, and [t]he cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion.” *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 at fn. 46 (11th Cir.1997), quoting *Colony Square Co. v. Prudential Ins. Co.*, 819 F.2d 272, 274-275 (11th Cir.1987). In this case, the party that drafted the proposed findings simply overreached. King drafted his proposed findings specifically to rely on the actual innocence standard. King’s drafting was in error because actual innocence is not the standard that trial courts are to apply to the decision to grant or deny an application for DNA testing. That decision is based only on the court’s finding that “there is a strong probability that no reasonable factfinder would have found the offender guilty” had the results been presented at trial. R.C. 2953.71(L). “Actual innocence” does not come into play until the trial court rules on the petition itself. R.C. 2953.21(A)(1)(a).

King therefore invited or induced any error in this regard and cannot take advantage of a purported inconsistency that he caused.

Second, even if the trial court had simply changed its mind, as King alleged, this is not error under any statute or rule of law. The trial court's 2008 decision to grant King's application for DNA testing was not a final, appealable order. Because interlocutory orders are subject to modification, there was nothing that prevented the trial court from simply revisiting some of its earlier language when it denied his petition in 2011. See *King*, at ¶ 29 (Gallagher, J., concurring), citing *Javidan-Nejad v. Navadeh*, 8th Dist. No. 95406, 2011-Ohio-2283, at ¶ 62 (interlocutory orders are subject to modification).

King goes to great lengths to convince this Court that there was no basis for the trial court to change its mind. His argument is incorrect because the legal standard for the granting of his post-conviction petition is higher than that of granting his application for DNA testing. But even if the standards were identical, there is no error in revisiting an interlocutory order. King cannot rely on the precise wording of that order to bind a trial court's determination of the ultimate issue, three years later, under a different legal standard. King's argument, if accepted, would require interlocutory orders to effectively determine the outcome of a case, even if the trial court is later convinced to the contrary when making its ruling. King's position would remove all discretion from a trial court that has previously granted an application for DNA testing, effectively requiring that court to find the defendant is actually innocent if it grants an application for testing and the defendant believes those results are favorable to him. This is explicitly contrary to R.C. 2953.71(L), which requires the trial court to consider the results of any DNA testing "in the

context of and upon consideration of all available admissible evidence related to the offender's case \* \* \*."

Finally, King asserts that the trial court failed to consider the DNA under Hudson's fingernail "in the context of and upon consideration of all available admissible evidence related to the person's case \* \* \*." R.C. 2953.21(A)(1). There is no support in the record for King's assertion. King's argument is false for several reasons. (1) The trial court's order denying King's petition stated that it considered "the evidence presented at trial" and noted that R.C. 2953.21 required it to consider the new DNA evidence in the context and consideration of all the other evidence in King's case. (2) The trial court also explicitly stated during a February 17, 2011 hearing on King's petition that "I'll review the pleadings for this portion of the case, as well as the trial transcript and what's been said here today \* \* \*." (3) The trial court was familiar with the facts of this case because it was the same court that presided over King's trial.

King claims that the trial court did not actually consider the full transcript of his case because, as late as October 5, 2011, the trial court indicated to King in a telephone status conference that it had not yet reviewed the transcripts. But the trial court did not deny King's petition until November 15, 2011 - more than a month later. There was easily time between those dates to review the evidence in King's case, particularly considering that the trial court that denied King's petition was the same court that had presided over King's trial. King is asking this Court to infer that the trial court did not mean what it said. This Court should decline his invitation to do so.

**4. The Court of Appeals' Application of the Law-of-the-Case Doctrine was Not Error Where the Prior Factual Findings Were Correct and King has Presented No Evidence that Would Undermine the Court's Prior Determinations.**

In King's second proposition of law, he claims that the Eighth District erred by applying the law-of-the-case doctrine to King's appeal of the denial of his post-conviction petition to make certain factual findings. The Eighth District's reliance on the law-of-the-case to cite to its prior findings, however, was limited, and King takes issue with only two of these findings. The record supports the court's findings on both issues. King cannot demonstrate any error from the appellate court's reliance on accurate factual findings.

King first claims that the Eighth District erred by finding that King was with Hudson the last time she was seen alive. *King II*, at ¶ 18. The evidence does not contradict this claim as King argues that it does. Brandi Hudson, the victim's daughter, did tell police that she saw King in Hudson's apartment when she last saw her mother alive. At trial, Brandi recanted that statement, although she had no explanation for why she had changed her mind. The State argued in closing that Brandi had changed her statement because she was scared of King. That claim was bolstered by the testimony of Brandi's sister Tiiya, who became afraid when she saw King in court and refused to speak. Whether the jury believed Brandi's statement to police or her trial testimony was therefore a question of fact for the jury to decide. That the jury convicted King indicates that it believed Brandi did see him in Hudson's apartment. It was not error for the Eighth District to rely on that finding when King has presented no evidence since his 1995 trial that would undermine the State's claim on that point.

King also takes issue with the Eighth District's finding that "Others noticed a foul odor, which defendant insisted resulted from cooking, but there was no evidence that anyone had cooked anything." King claims that "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." Memorandum in Support, at p. 7. In fact, the record does contain exactly that testimony. Hudson's friend, Jean Hester, testified that when she inquired as to the foul odor in the apartment, King told her that Hudson's daughter Tiiya had been cooking:

- Q. And was she watching television with him?  
A. Huh uh.  
Q. No, she doing her homework or --  
A. She -- Well, when I went over there, and Dutch said she just got through cooking.  
Q. She just got through what?  
A. Cooking, cooking food.

(Tr. 284).

The dispute on this point is a result of the fact that the Eighth District's original findings in King's direct appeal were made as part of a challenge to the sufficiency of the evidence. The Eighth District thus considered the evidence "in the light most favorable to the prosecution \* \* \*." *King I*, at \*6. That standard did not apply to King's post-conviction petition. Thus, King was free to present any new evidence to the trial court that may have contradicted those findings. He did not do so. King simply reiterated the same arguments he made at trial that the State's witnesses were liars, and that certain things said in his transcript never occurred. The state of the evidence on these two points is no different than it was when the jury found King guilty in 1995. There is thus no basis on which to challenge the lower courts' reliance on findings, supported by the record, when King has provided no evidence to the contrary other than his continued insistence that he is

innocent and his attempts to omit of certain parts of the record from this Court's consideration.<sup>2</sup>

Additionally, King has provided this Court with no rule of law to support his assertion that the law-of-the-case doctrine is somehow inapplicable to rulings on post-conviction petitions. What King truly seeks is a complete de novo review in the appellate court of everything related to his case, with no deference to factual findings made by the jury, the trial court, or the Eighth District at any point. Additionally, 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. There was therefore no possibility of prejudice to King.

Moreover, any reliance upon the law-of-the-case doctrine was essentially harmless error in light of the Eighth District's finding that "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." *King II*, at ¶ 15. The Eighth District cited to its prior opinion in *King I* as additional authority supporting the trial court's findings that King failed to prove his actual innocence, but the law-of-the-case doctrine did not compel that finding. The Eighth District and the trial court simply did not believe King's attempt to leverage the speck of DNA under Hudson's fingernail into an actual innocence claim. Any

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<sup>2</sup> King is correct that the testimony in his 1995 trial showed that the jacket on Hudson's body where it lay on the closet was not the jacket that King claimed he had placed in the closet the night before. The State incorrectly referred to this as "his jacket," and apologizes to this Court for the error. That mistake is not relevant to this case, however, because the Eighth District did not rely on that assertion in its opinion. King's other claim as to the number of people who noticed the smell of Hudson's body is false. Two people - Jean Hester and Brandi Hudson - both noticed the smell prior to Brandi discovering the body. Additionally, the smell was so strong that first responders had to wait outside while the body was removed. King, however, claimed he had never smelled a thing.

opinion this Court would render as to the applicability of the law-of-the-case doctrine in post-conviction proceedings would therefore be purely advisory.

**5. Conclusion.**

The State of Ohio respectfully submits that this Court properly declined jurisdiction in this case and that King's Motion for Reconsideration fails to provide this Court with any legal basis on which to find a substantial constitutional question or an issue of public or great general interest. The Eighth District properly rejected King's claims based on the particular facts of this case and reasoned application of established precedent. As such, this Honorable Court's discretionary jurisdiction is not warranted.

Respectfully submitted,

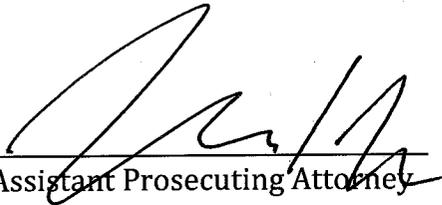
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Brief in Opposition to Motion for Reconsideration has been mailed by regular U.S. mail this 9<sup>th</sup> day of May, 2013, to Kristopher A. Haines, 250 East Broad Street, Suite 1400, Columbus, OH 43215, counsel for Defendant-Appellant.

  
Assistant Prosecuting Attorney