

IN THE SUPREME COURT OF OHIO

14-0338

STATE OF OHIO,	:	
Appellee,	:	On Appeal from the
vs.	:	Hamilton County Court
ROBERT HUNTER,	:	of Appeals, First
Appellant.	:	Appellate District
		Court of Appeals
		Case No. C-1300061

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ROBERT HUNTER

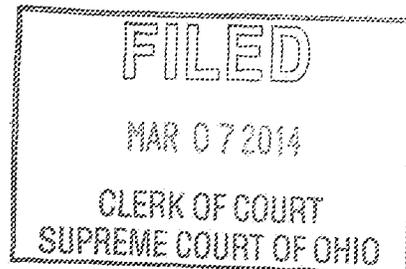
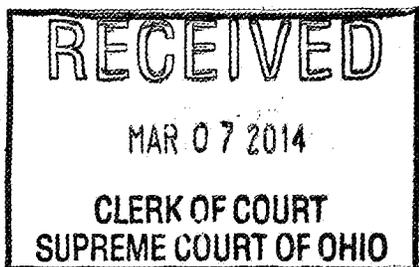
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## **EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS OF GREAT PUBLIC INTEREST**

Robert Hunter's case will allow this Court to finally decide a very similar Confrontation Clause scientific-testing issue it was unable to reach in both *State v. Estrada-Lopez*, 132 Ohio St.3d 1510, 2012-Ohio-4021, 974 N.E.2d 110, and *State v. Keck*, 137 Ohio St.3d 550, 2013-Ohio-5160. It will also allow this Court to analyze the recent trio of cases from The Supreme Court of the United States regarding scientific testing and the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011); *Williams v. Illinois*, 132 S.Ct. 2221, 183 L.Ed.2d. 89 (2012).

The relevant charges against Mr. Hunter were Having Weapons While Under Disability under R.C. 2923.13(A)(2) and Carrying Concealed Weapons under R.C. 2923.12(A)(2). The state collected a handgun it believed had been in Mr. Hunter's possession. To help prove at trial that he had, in fact, possessed the handgun, the state presented a witness who was a forensic DNA analyst and forensic serologist, and who had tested the handgun for DNA. The witness's test of the gun revealed a mixture of three DNA profiles, one of which was the "major contributor." The state had also collected a DNA sample from Mr. Hunter after his arrest. Nevertheless, the witness did not test the handgun DNA against the recent swab taken from Mr. Hunter. Instead, she tested it against a DNA profile she found in the Hamilton County Coroner's Office internal system. That profile was created three years prior and could only be matched to Mr. Hunter by the same name and birthday. The witness was not employed by the Hamilton County Coroner at the time the existing profile was created. The person who created the existing profile was no longer employed by the Hamilton County Coroner.

There are three issues in this case: (1) Mr. Hunter could not confront the creator of the existing DNA profile; (2) the DNA evidence was unfairly prejudicial to Mr. Hunter because it confused the issues and misled the jury; and (3) the existing DNA profile was hearsay not covered by any hearsay exception and was, therefore, inadmissible. There is also the matter of whether it is good policy to use a DNA profile that could not, with absolute certainty, be attributed to Mr. Hunter, when a sample existed that could be attributed to Mr. Hunter. These issues, in a felony case, raise a substantial constitutional question involving the Sixth Amendment right to Confrontation and are also of great public interest because of the nature and widespread use of DNA testing. Therefore, this Court should accept jurisdiction of Mr. Hunter's appeal.

#### **STATEMENT OF THE CASE AND PROCEDURAL POSTURE**

On April 5, 2012, Cincinnati Police Officer Brett Thomas and his partner, Officer Mark Schildmeyer were patrolling the Walnut Hills and Avondale areas in District Four in Cincinnati. Officer Schildmeyer was driving the police cruiser with Officer Thomas in the front seat. Around 12:15 p.m., the officers turned from Chapel Street on to Monfort Street, headed northbound. Soon after the officers turned on to Monfort, they observed a 1998 Oldsmobile Delta 88 sitting at the curb at approximately 2912 Monfort Street.

The officers observed five men standing around the parked car. Those men were Mr. Hunter, Christopher Love, Jarrell Barnett, Thomas Jones, and Michael Ridley. The officers saw Mr. Hunter near the rear of the passenger side of the car. Mr. Hunter turned and saw the police officers, then turned around and started walking away from them. Mr. Ridley, who was also near the car on the passenger side, halfway between the front and back seats, began to walk away from the officers at the same time Mr. Hunter started to walk.

Both officers saw Mr. Hunter move his left arm toward the vehicle. Only Officer Thomas, however, saw an object fall into the interior of the vehicle. He could not see or describe the object at that time. After seeing Mr. Hunter move, Officer Schildmeyer's attention shifted to Mr. Ridley, who moved to the front of the car and leaned down. Officer Schildmeyer moved to confront Mr. Ridley, while the three other men present did not move from their positions. Officer Schildmeyer discovered that Mr. Ridley had placed an open container of beer in front of the car.

Officer Thomas discovered a handgun on the back seat of the car. Officer Thomas removed the gun, an Argus 9 mm handgun, from the vehicle and secured it. The gun was photographed on the police cruiser. It was never photographed in the back seat of the car, nor were any photographs taken of the back seat of the car. Officer Schildmeyer never saw Mr. Hunter with the gun on, or touching, his person.

On April 13, 2012, the Hamilton County Grand Jury returned an indictment against Mr. Hunter, charging him with seven criminal counts:

- Count 1: Felonious Assault under R. C. 2903.11(A)(2), With Specifications
- Count 2: Felonious Assault under R.C. 2903.11(A)(2), With Specifications
- Count 3: Felonious Assault under R.C. 2903.11(A)(2), With Specifications
- Count 4: Felonious Assault under R.C. 2903.11(A)(2), With Specifications
- Count 5: Having Weapons While Under Disability under R.C. 2923.13(A)(2)
- Count 6: Having Weapons While Under Disability under R.C. 2923.13(A)(2)
- Count 7: Carrying Concealed Weapons under R.C. 2923.12(A)(2)

Officer Thomas took the gun to the Criminal Investigation Section and gave it to Criminalist Police Officer Kathy Newsom. Officer Newsom was asked to process the gun for latent fingerprints and DNA. She used the same swabs to swab the gun for DNA on the handle, the part of the slide where it is gripped, and a thin area on the trigger. After the swabs were taken, the gun, magazine, and bullets were processed in a cyanoacrylate (Super Glue) vacuum chamber for latent fingerprints, but none were found. Officer Newsom also took DNA swabs

from Mr. Hunter and Michael Ridley. In addition, she test-fired the gun to ensure it was functional, which it was.

Kelly Ashton-Hand, a forensic DNA analyst and forensic serologist for the Hamilton County Coroner's Office was in charge of processing the DNA in this case. When evidence is received by the laboratory at the Coroner's Office, it is assigned a unique case number that begins with "CL". Under the Combined DNA Indexing System ("CODIS"), all forensic DNA analysts examine the same 15 locations, or loci, on a person's DNA to create a DNA profile for comparison to other DNA profiles.

State's Exhibits 8, 9, 10, and 11 were DNA swabs taken for analysis in this case. Ms. Ashton-Hand never opened State's Exhibit 9, Mr. Hunter's buccal swab from 2012. In order to compare the DNA from the gun swab to Mr. Hunter's DNA, Ms. Ashton-Hand used a DNA profile from 2009 that was already within the Coroner's Offices data files, but the only method she used to confirm the DNA came from the same Robert Hunter was to note that the 2009 sample came from someone named "Robert L. Hunter" who had the same name and birthday as Mr. Hunter. There were spaces on the envelopes and evidence submission forms where Social Security numbers could have been matched, but a Social Security number was only provided in 2009, not 2012, so no comparison could be made. Ms. Ashton-Hand did not take the DNA swabs from 2009, nor did she create the DNA profile in 2009. She worked in Chicago, Illinois, not at the Hamilton County Coroner's Officer, in 2009.

The DNA from the gun contained a mixture of DNA from at least three individuals. The major DNA profile matched the DNA profile of the Robert Hunter sample from 2009. According to Ms. Ashton-Hand, such a match would be expected to occur in approximately 101 quintillion, 600 quadrillion individuals. The two other people swabbed for DNA, Michael Ridley, who was

at the scene, and Roy Jason, an alleged victim of another alleged incident who was not at the scene, were excluded as contributors. None of the other three people at the scene of the incident in this case were swabbed or compared to the mixed DNA profile.

Mr. Hunter filed a Motion to Dismiss on May 1, 2012. The Motion to Dismiss was denied on May 16, 2012. He then filed a Motion to Suppress on August 31, 2012, along with a Motion to Suppress In & Out of Court Identification and a Supplemental Motion to Suppress In & Out of Court Identification. The Motion and Supplemental Motion to Suppress In & Out of Court Identification were withdrawn on September 28, 2012. The Motion to Suppress was withdrawn on October 12, 2012. A Notice of Alibi was filed on December 27, 2012. However, no evidence was presented at trial by Mr. Hunter on an alibi defense.

Mr. Hunter proceeded to a jury trial on Counts 6 and 7 from January 10, 2013, until January 15. Counts 6 and 7 are the counts relevant to this appeal. Mr. Hunter was found guilty by the jury of both counts on January 15. Those counts merged for the purpose of sentencing, and Mr. Hunter was sentenced on January 16 to 36 months in the Department of Corrections, with 286 days credit for time served.

Regarding Counts 1 through 5, on January 16, Mr. Hunter withdrew his plea of not guilty and entered a plea of guilty to Count 4, Felonious Assault under R.C. 2903.11(A)(2), With Specifications. Counts 1, 2, 3, and their specifications, along with Count 5, were dismissed by the state. On Count 4, he was sentenced to two years' confinement on the underlying offense and one year of confinement on the specification, to run consecutively to each other for a total of three years' confinement. That sentence was to run consecutively to the sentence on Count 6, along with the one year of confinement in the Department of Corrections for his probation violation in Case No. B1103373, for an aggregate sentence of seven years confinement.

The state and Mr. Hunter stipulated that at the time of the offense, April 5, 2012, Mr. Hunter had been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence. In Mr. Hunter's case, the offense was burglary, Juvenile Court Case Number 09012410, committed on October 27, 2009.

An appeal was timely filed on January 29, 2013 in the First District Court of Appeals. A Judgment Entry affirming the judgment of the trial court was entered on January 22, 2014 by the First District Court of Appeals; it is from that Judgment Entry which Appellant appeals.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I: Admitting into evidence an existing DNA profile that was testimonial in nature, and about which the state failed to produce a witness capable of testifying, violated Appellant's Sixth Amendment right to confront the witnesses against him.**

The Sixth Amendment to the United States Constitution is made applicable to the states via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). It provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The United States Supreme Court has held that the Confrontation Clause guarantees a defendant's right to confront those "who 'bear testimony'" against him. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309, 129 S. Ct. 2527, 174 L. Ed. 2d. 314 (2009), citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d. 177 (2004). "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.*, citing *Crawford* at 54, 124 S. Ct. 1354, 158 L. Ed. 2d 177.

Here, the state did not produce the witness who prepared the 2009 DNA profile with the name "Robert L. Hunter." Mr. Hunter never had the opportunity to cross-examine the person

who prepared that 2009 profile. Therefore, because there was an unavailable witness, and Mr. Hunter could not cross-examine that witness prior to trial, the testimonial statement in the form of the 2009 profile and any statements about that 2009 profile should not have been admitted into evidence because they violated Mr. Hunter's right of confrontation.

In both *Melendez-Diaz* and *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 180 L. Ed. 26 610 (2011), the United States Supreme Court "ruled that scientific reports could not be used as substantive evidence against a defendant unless the analyst who prepared and certified the report was subject to confrontation." *Williams v. Illinois*, 132 S. Ct. 2221, syllabus of the court, 183 L. Ed. 2d 89 (2012). In *Melendez-Diaz*, at Melendez-Diaz's state court drug trial, the court admitted affidavits into evidence that contained forensic analysis showing that the material police seized from him was cocaine. *Melendez-Diaz* at 307. The analysts did not testify in person at the trial. *Id.* at 309. The United States Supreme Court held in that case that "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Id.* at 329.

In *Bullcoming*, Donald Bullcoming was arrested for driving while intoxicated. *Bullcoming* at 2709. The principle evidence against him was a forensic laboratory report certifying his blood-alcohol concentration level. *Id.* The prosecution at trial did not call as a witness the analyst who signed the certification – rather, it called an analyst who had not participated in or observed the test, but was familiar with the laboratory's testing procedures. *Id.* The United States Supreme Court said that "the analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'" *Id.* at 2715, citing *Melendez-Diaz* 557 U.S., at n. 6. The Court then held that the prosecution could not introduce a forensic laboratory report

containing a testimonial certification, which was made to prove a particular fact, through testimony at trial of a scientist who did not sign the certification or perform or observe the test in that certification. *Id.* at 2709.

The First District Court of Appeals relied on *Williams* in holding the 2009 DNA sample taken from Mr. Hunter was not taken in order to prosecute him for a specific crime and therefore, was not testimonial and did not violate his rights under the Confrontation Clause. Such reliance, however, was misguided. In *Williams*, during Williams' bench trial for rape, the prosecution called an expert to testify that a DNA profile produced by an outside laboratory matched a profile produced by the state police laboratory. *Williams* at 2227. The expert explained that the outside laboratory was accredited, but made no statements about the identity of the DNA sample or how the outside laboratory handled or tested the sample. *Id.* The expert also did not vouch for the accuracy of the profile produced by the outside laboratory. *Id.* The United States Supreme Court held this type of expert testimony does not violate the Confrontation Clause for two reasons: One, the defendant has the opportunity to cross-examine the expert on statements offered for their truth, and statements not offered for their truth are outside the scope of the Confrontation Clause. Two, the profile created in that case was not inherently inculpatory because it was made before a suspect was identified. *Williams* at 2228.

There are important distinctions to be made between this case and the *Williams* case. First, it is important to note that *Williams* is a plurality decision, which is not controlling because it failed to receive the support of the majority of the court. *State v. Reed*, 10<sup>th</sup> Dist. No. 08AP-20, 2008-Ohio 6082, citing *Hedrick v. Motorists Mut. Ins. Co.*, 22 Ohio St.3d 42, 44, 488 N.E.2d 840 (1986), overruled on other grounds.

Second, *Williams* was a bench trial, which is an important distinction. The U.S. Supreme Court pointed out that under the Illinois and Federal Rules of Evidence, an expert's opinion may be based on facts "made known to the expert at or before the hearing," but that reliance does not make the underlying information admissible. Ill. Rule. Evid. 703; Fed. Rule Evid. 703. *Williams* at 2234. Both Illinois and the Federal Rules, the Court continued, do not allow such evidence at jury trials, but place no such restriction on bench trials. *Id.* at 2234-2235. Ohio's Evid. R. 703 does not follow with Illinois and the Federal Rules, but rather limits the basis of opinion testimony by experts to "those perceived by the expert or admitted in evidence at the hearing." Unlike the *Williams* case, Ohio's Evid. R. 703 does not even provide for the option of the expert testifying to his or her opinion on tests from outside the trial. Therefore, the 2009 DNA profile should never have been available for Ms. Ashton-Hand to testify about.

Third, the 2009 report did not come from an outside laboratory and was not made contemporaneous to the alleged crime. The state, in this case, went beyond what happened in *Williams*, because Ms. Ashton-Hand did more than vouch for the 2009 laboratory. She testified about its processes and procedures without clarifying she had no knowledge of that information.

Admittedly, a 2009 DNA profile was made before Mr. Hunter was a suspect in this case. However, throughout the trial, the 2009 DNA was offered for the truth of the matter asserted – that it belonged to the Robert Hunter in question. The only reference points to compare the 2009 DNA profile to the Robert Hunter in this case were name and date of birth. If the person who made the 2009 DNA profile had been available to testify so that Mr. Hunter would have an opportunity to confront that person, perhaps more reliability could have been brought to the belief that the 2009 profile belonged to Mr. Hunter. But the opposite could also be true. It is just as likely that the person who created the 2009 DNA profile no longer worked for the Hamilton

County Coroner's Office because he or she was fired. That firing could have been for shoddy work or for any other slew of issues that might have led to an unreliable DNA profile. It cannot be known, based on this record, what the truth is regarding the 2009 DNA profile. This is especially troubling because this problem did not need to arise – the state had a known, recent sample of Mr. Hunter's DNA it could have profiled to compare to the gun. But it did not, and Mr. Hunter was left unable to confront the person who made the key piece of evidence used against him.

**Proposition of Law No. II: Testimony of a DNA “match” violates Evid.R. 403 where the “match” was with an existing DNA profile that, prior to testing, could only be compared with Appellant by name and date of birth.**

A trial court has broad discretion when considering evidence under Evid.R. 403. *State v. Hanna*, 95 Ohio St.3d 285, 290, 2002-Ohio-2221, 767 N.E.2d 678. Appellate courts review such decisions under an abuse-of-discretion standard. *Id.* (citations omitted). An abuse of discretion is more than an error of law or judgment. *State v. Adams*, 62 Ohio St. 2d 151, 157, 404 N.E.2d 144 (1980). The trial court abuses its discretion when its attitude is “unreasonable, arbitrary, or unconscionable.” *Id.*

Here, the state chose to use an existing DNA sample from 2009 to compare to the gun found in this case, rather than the known sample from Mr. Hunter that was taken after his arrest. The state tried to establish that Mr. Hunter was the donor of the known sample by means of a match of name and date of birth.

The likelihood of misidentification is significant when the existing profile cannot be matched to Mr. Hunter by more than name and date of birth. Nevertheless, the state compared a DNA profile belonging to someone with the same name and birthday as Mr. Hunter and compared it to DNA found on the gun. The result, then, only meant that the major DNA profile

on the gun matched the 2009 profile, not that the DNA on the gun matched Mr. Hunter.

Therefore, the theory of the state, and its use of the DNA evidence to claim that the DNA on the gun had a 101 quintillion, 600 quadrillion chance of belonging to someone other than Mr. Hunter, rather than the person from whom the 2009 profile came, was misleading.

The state's misuse of DNA evidence prejudiced Mr. Hunter by both confusing the issues and misleading the jury. During the direct examination of Kelly Ashton-Hand, the forensic DNA analyst and forensic serologist for the Hamilton County Coroner's Office, she testified she "was then able to take that major profile and compare that to the profile from Robert Hunter and say in this case that it did match." All Ms. Ashton-Hand could actually say, however, was that the major profile matched the existing 2009 DNA profile, not that it actually matched the defendant, Mr. Hunter.

Ms. Ashton-Hand repeated her opinion at the end of the direct examination: "The major DNA profile that I obtained from the mixture on the gun swabs matches the DNA profile obtained from Robert Hunter." Defense counsel objected, stating that the match was to the 2009 profile and not to Mr. Hunter's DNA. The trial court agreed, but overruled the objection. A similar question was also presented by the state during its cross-examination of Mr. Hunter: "And did you hear her (Ms. Ashton-Hand) say that the DNA from the firearm matched the profile of Robert Hunter?" That question, too, was allowed over defense objection.

During closing argument, the state continued to confuse the issues and mislead the jury when it said that "the DNA evidence came back to show, came back to prove that this was the defendant's DNA on this firearm. He was the major profile. He was the main person who had touched it." The same issues continued throughout the state's closing.

The issue here is whether the major DNA profile from the gun matched the existing DNA profile from 2009 of a Robert L. Hunter who was born on September 1, 1992. The issue should have been whether the DNA from the gun matched the DNA taken from Mr. Hunter after his arrest in this case – the DNA it can absolutely be said came from him. The state presented the issue as whether the DNA from the gun matched Robert Hunter’s DNA, and omitted the fact that it was referring to the 2009 profile. In doing so, the state confused the issue and misled the jury. To allow the state to do so was an abuse of discretion by the trial court.

**Proposition of Law No. III: Testimony offered to prove an existing DNA profile belonged to Appellant was inadmissible hearsay evidence under Evid.R. 802, and not subject to the business records exception under Evid.R. 803(6), where the state failed to present a witness who worked at the Hamilton County Coroner’s Office when the profile was created.**

The admission of hearsay evidence is not reviewed under an “abuse of discretion” standard because, as Evid. R. 802 provides that “hearsay is not admissible,” courts do not have discretion to admit hearsay evidence. *Bostic v. Connor*, 37 Ohio St.3d 144, 524 N.E.2d 881 (1988); *State v. Sage*, 31 Ohio ST.3d 173, 510 N.E.2d 343 (1987). The trial court’s decision to admit hearsay evidence is to be reviewed in light of Evid.R. 103(A) and the standard in Crim.R. 52(A) that errors are harmless unless the record shows a party’s substantial right has been affected. *State v. Sorrels*, 71 Ohio App.3d 162, 165, 593 N.E.2d 313, 314-315 (1991); *State v. Kidder*, 32 Ohio St.3d 279, 284, 513 N.E.2d 311, 317 (1987); *State v. Bayless*, 48 Ohio St.2d 73, 357 N.E.2d 1035, paragraph seven of the syllabus (1976).

Here, Mr. Hunter’s substantial right that was affected was his right to confrontation found in the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment. The hearsay evidence here is not subject to the business records exception under Evid.R. 803(6) because the state presented no witness who could verify that the DNA profile was created in the course of a regularly conducted business activity. Therefore, Mr.

Hunter's substantial right to confrontation was affected by the admission of State's Exhibits 13 and 14 and any statements about the 2009 DNA profile.

Ms. Ashton-Hand, the forensic DNA analyst and forensic serologist for the Hamilton County Coroner's Office, testified on January 14, 2013, that she had been so employed "for about two-and-a-half years." The DNA profile compared to the gun in this case was created in 2009. That means the DNA profile was created more than a year before Ms. Ashton-Hand was employed at the Hamilton County Coroner's Office. Therefore, Ms. Ashton-Hand's testimony about the out-of-court 2009 DNA profile and State's Exhibits 13 and 14 were undoubtedly hearsay under Evid.R. 802.

The First District held that the 2009 DNA profile was admissible as a business record under Evid.R. 803(6) because Ms. Ashton-Hand could testify about the record-keeping system. Under Evid.R. 803(6), the state needed to show, through a person with knowledge, that the document was kept in the course of a regularly conducted business activity. Ms. Ashton-Hand was not employed by the Hamilton County Coroner's Office in 2009, so she could not testify to the authenticity of State's Exhibit 14, nor could she testify to the regularly conducted business activities of the Coroner's Office. There was no witness at trial for Mr. Hunter to confront regarding State's Exhibit 14. Therefore, State's Exhibit 14 was hearsay not subject to any exception, and affected Mr. Hunter's substantial right of confrontation. The First District erred in its holding in this regard.

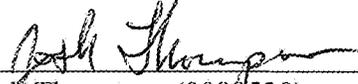
State's Exhibit 13, Ms. Ashton-Hand's Official Crime Laboratory Report, while hearsay, falls under the business records exception under Evid.R. 803(6). However, it too should not have been admitted into evidence because it contains hearsay within hearsay. Under Evid.R. 805, hearsay within hearsay should be excluded if each part of the combined hearsay does not

conform to an exception to the hearsay rule. Here, the second layer of hearsay, the 2009 DNA profile, was not admissible under any exception to the hearsay rule for the reasons just stated. To fail to exclude the exhibit was not harmless error because there was no witness for Mr. Hunter to confront about the 2009 DNA profile. Therefore, his substantial right to confrontation was affected.

### CONCLUSION

This felony case raises a substantial constitutional question and is of great public interest. For the foregoing reasons, Appellant respectfully requests that this Court take jurisdiction of this matter.

Respectfully submitted,

  
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### CERTIFICATE OF SERVICE

I certify that a copy of the Memorandum of Appellant in Support of Jurisdiction has been served on Scott Heenan, Attorney for Appellee, the State of Ohio, at 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 via hand delivery on this 6th day of March, 2014.

  
\_\_\_\_\_  
Josh Thompson

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

**ENTERED**  
JAN 22 2014

STATE OF OHIO,	:	APPEAL NO. C-130061
	:	TRIAL NO. B-1202377
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
ROBERT HUNTER,	:	
Defendant-Appellant.	:	



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

In one assignment of error, defendant-appellant Robert Hunter claims that the trial court abused its discretion when it allowed DNA testimony in his trial on charges of having a weapon while under a disability and carrying a concealed weapon. We disagree, and affirm the decision of the trial court.

Hunter was with a group of other individuals standing around a vehicle when Cincinnati police officers approached. The group began to move off in different directions. Only Hunter approached the vehicle before walking away. One of the officers saw Hunter drop something onto the rear passenger seat before he tried to leave. When the officer approached the vehicle, which he described as "surprisingly clean," the only item he saw on the back seat was a handgun. During Hunter's trial, a serologist from the Hamilton County Coroner's Office testified about a DNA sample that was taken from the handgun. She said that the sample was compared with a 2009 DNA sample given by "a Robert Hunter" with the same date of birth as Hunter. The two samples matched. In 2009, Hunter had been adjudicated delinquent, and it was this adjudication that formed the basis for his disability.

Hunter first argues that the probative value of the testimony was substantially outweighed by unfair prejudice to him, and therefore, the evidence should have been excluded pursuant to Evid.R. 403(A). He argues that the likelihood of him not being the same Robert Hunter that gave the DNA sample in 2009 was too great. We disagree. Generally, "unfairly prejudicial" evidence appeals to the jurors' emotions rather than to their intellect. *See State v. Crotts*, 104 Ohio St.3d 432, 437, 2004-Ohio-6550, 820 N.E.2d 302, ¶ 24. While it is theoretically possible that there was another Robert Hunter in Hamilton County with the same date of birth as Hunter, who happened to have also committed an offense in 2009 for which a DNA sample had been taken, and who also happened to have handled a handgun that was found in a car that Hunter had been seen dropping something into, the likelihood was not so great that the trial court should have excluded the evidence.

Hunter next argues that the 2009 profile was hearsay and that no hearsay exception applied to it. Hunter argues that the serologist could not qualify the 2009 sample as a "business record" as contemplated by Evid.R. 803(6) because she did not work at the coroner's office in 2009 when the sample was taken. But she need not have worked there at the time or prepared the document in order to establish that the sample was a business record. *See State v. Davis*, 62 Ohio St.3d 326, 342, 581 N.E.2d 1362 (1991) (witness need not have personal knowledge of the creation of the particular record in question, and need not have been in the employ of the company at the time the record was made). She need only "possess a working knowledge of the specific record-keeping system that produced the document." *Id.* Since the serologist was able to testify about the record-keeping system, she was able to establish that the 2009 profile was a business record.

Finally, Hunter argues that his right to confront the witnesses against him was violated by the admission of the testimony. The United States Supreme Court addressed a similar issue in *Williams v. Illinois*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). In that case, an expert testified that a DNA sample produced by

an outside lab matched a profile produced by the state police lab using a sample of a defendant's blood. The expert could not testify as to how the sample from the outside lab had been handled or processed, and could not vouch for its accuracy. The majority of the court nonetheless found that the defendant's right of confrontation was not violated. A plurality of the court concluded that the report was not testimonial because it was not made "for the primary purpose of accusing a targeted individual." *Id.* at 2243. The lead opinion reasoned that:

[i]f DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable.

*Id.* at 2228. The plurality also noted that the fact that the two samples matched was "striking confirmation" that the sample was what it purported to be. *Id.* at 2237-2238. As in this case, the court noted that the number of coincidences that would have to come into play in order for a false positive to have been achieved made such an outcome implausible. *Id.*

As in *Williams*, the 2009 DNA sample taken from Robert Hunter was not taken in order to prosecute him for a specific crime. It was taken as part of the identification database maintained by the Hamilton County Coroner's Office. Therefore, it was not testimonial and its use did not violate Hunter's rights under the Confrontation Clause.

The trial court did not abuse its discretion when it admitted the DNA testimony. Therefore, we overrule Hunter's sole assignment of error, and affirm the judgment of the trial court.

OHIO FIRST DISTRICT COURT OF APPEALS

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A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

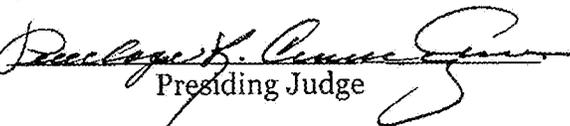
ENTERED  
JAN 22 2014

**HENDON, P.J., HILDEBRANDT and DINKELACKER, JJ.**

To the clerk:

Enter upon the journal of the court on January 22, 2014

per order of the court

  
Presiding Judge