ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	14-1377
PLAINTIFF-APPELLEE,	:	CASE NO.
V.	:	ON DISCRETIONARY APPEAL FROM THE PORTAGE COUNTY COURT OF COMMON PLEAS PURSUANT TO R.C. 2953.73(E)(1), CASE NO. 95-CR-220
TYRONE NOLING,	:	
DEFENDANT-APPELLANT.	:	**THIS IS A CAPITAL CASE.**

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT TYRONE NOLING

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FIRST PROPOSITION OF LAW:

Ohio Revised Code 2953.73(E)(1) violates both the Eighth and Fourteenth Amendments of the United States Constitution as it: (1) discriminates between capital and non-capital criminal defendants, (2) fails to provide appellate review, and (3) results in the arbitrary and capricious application of the death penalty. Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution. 10

SECOND PROPOSITION OF LAW:

When a trial court selects a testing authority pursuant to Ohio Revised Code 2953.78(A), it must articulate reasons for its selection of the testing authority, including but not limited to its validation on the appropriate DNA technology and its experience in testing the type of evidence at issue. 20

THIRD PROPOSITION OF LAW:

Ohio Revised Code 2953.74(C)(2) requires the testing authority to utilize scientific testing methods and review the chain of custody for the specific case in order to make the required statutory determinations in R.C. 2953.74(C)(2)(a), (b), and (c). 23

FOURTH PROPOSITION OF LAW:

In postconviction DNA testing, where the identity of the contributors to the DNA profile is at issue, Ohio Revised Code 2953.81(C) required disclosure of test results includes all documentation of the testing performed, including but not limited to the DNA profile(s) itself, and not solely the testing authority's conclusions. 31

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A trial court may provide access to postconviction forensic testing and databases in the absence of a statute. 38

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

Tyrone Noling prepared this Memorandum in Support of Jurisdiction to this Court without complete hearing transcripts and without an appellate opinion from an intermediate appellate court as a result of the truncated process for death row inmates under R.C. 2953.73(E)(1). While this Court has addressed whether R.C. 2953.73(E)(1) comported with *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, in *State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, the parties never briefed the question of whether R.C. 2953.73(E)(1) comported with the requirements of the federal constitution.

The Legislature has given those whose applications for postconviction DNA testing are denied the right to appellate review. As such that appellate review must comport with Due Process, Equal Protection, and the Eighth Amendment. Death row prisoners are treated differently from other prisoners seeking DNA testing; they faced a truncated process, including appealing without transcripts of expert testimony and a limited scope of appellate review, which simply does not comport with the Due Process and Equal Protection Clauses and the Eighth Amendment. Prior to an execution, this Court must ensure that the court process comports with such basic constitutional requirements.

The underlying questions in this appeal carry equally great weight and importance, and are issues of first impression in Ohio Courts. With the rapid advancements in DNA technology, the question of what lab, or testing authority, performs testing and makes determinations based on that testing is a crucial one. When there is but one chance to obtain DNA results in a case, the selection of the testing authority can be a life or death decision. The testing authority selected by the trial court lacked the appropriate technology and experience to perform the necessary testing, and, in fact, did not perform any testing before declining to test items clearly touched by the

perpetrator who killed the victims in this case. Instead, the testing authority decided *just by reviewing BCI protocol from the time of trial* that the evidence was not testable, and performed no actual testing in making its scientific determinations. The trial court's selection of this testing authority is even more troubling when the record supports the selection of a testing authority with the appropriate technology and experience where testing would have been performed at no cost to the State of Ohio. Additionally, the trial court denied Noling's request to run the shell casings through the NIBIN database – which assists in identifying murder weapons and the crimes with which they are associated – because no statute expressly authorized the trial court to do so. Linking the shell casings to the murder weapon is crucial in this case, as no murder weapon was ever recovered.

The trial court's selection of a testing authority without the advanced DNA technology appropriate for assessment and testing in this case wholly undermines Ohio's DNA testing statute. The trial court's failure to justify its decision is equally troubling. This Court should address these yet-to-be-interpreted sections of the statute that are becoming more and more crucial as the DNA technology grows and expands, so that trial and appellate courts can have guidance for the selection of a testing authority, and whether speculation regarding potential contamination is sufficient to bar postconviction DNA testing that could exonerate an eligible offender who has steadfastly maintained their innocence. Finally, this Court should address whether inmates, through appropriate legal mechanisms, can take advantage of advanced scientific technology and databases, used to solve cold cases, for purposes of demonstrating actual innocence.

STATEMENT OF THE CASE AND FACTS

Tyrone Noling first applied for DNA testing in 2008, under SB262. Tyrone Noling's Application for Post-Conviction DNA Testing, September 25, 2008 ("First Application") requested DNA testing of the cigarette butt collected from a location on the Hartigs's driveway, not far from the entrance to the Hartigs's kitchen – where the murders occurred. The Hartigs were not smokers and lived on a rural country road in Atwater, Ohio. Noling's First Application discussed potentially matching any DNA profile obtained from the cigarette butt to the alternate suspects known at the time. This First Application was denied solely on the basis of R.C. § 2953.74(A), which requires the court to reject an inmate's application for DNA testing if there was a prior "definitive DNA test" on the same material "the inmate now seeks to have tested." In December 2010, after the acceptance criteria had been changed through SB77, Noling reapplied for DNA testing (Second Application). Noling's decision to file a second application was based on (1) the existence of new acceptance criteria and (2) the emergence of new information as to the possible identity of another alternate suspect in the crime for which Noling was sentenced to death.

In denying Noling's Second Application, the trial court issued a one-page opinion concluding that, because the trial court had previously rejected Noling's First Application, R.C. § 2953.72(A)(7) barred the court from considering Noling's Second Application. Noling appealed, and this Court took jurisdiction. On March 7, 2012, this Court requested that the parties submit briefs on the following question: "In view of *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, whether R.C. 2953.73(E)(1), which confers jurisdiction upon this Court to consider Noling's appeal, is unconstitutional." On May 2, 2013, this Court reversed and remanded the case, stating:

> The trial court found that the earlier DNA testing was definitive because it had excluded Noling and his codefendants as smokers of the cigarette. Under R.C. 2953.71(U), however, a prior test is not definitive and Noling would be entitled to further testing of the DNA if he could show "by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover." Thus, the trial court could not reject without further inquiry Noling's second application solely because he and his codefendants were excluded as smokers of the cigarette. The DNA-testing statutes now permit testing to positively identify the DNA's source. R.C. 2953.74(E) allows the trial court to order biological material from the crime scene to be compared to the combined DNA index system maintained by the Federal Bureau of Investigation or compared to any identified person to determine whether that person is the DNA source.
>
> In support of his second application for DNA testing, Noling had submitted evidence that Wilson and other individuals were alternative suspects in the Hartig murders. But neither Wilson's DNA, **nor that of any of the other suspects**, was compared to the DNA on the cigarette. The trial court failed to consider Noling's application in the context of the new statutory requirements—whether there is a possibility of discovering new biological material that is potentially from the perpetrator that the prior DNA test may have failed to discover. Therefore, the court erred by failing to apply the definition set forth in R.C. 2953.71(U) before dismissing Noling's second application under R.C. 2953.72(A)(7).

Noling, 2013-Ohio-1764, ¶ 35 (Emphasis added.). The Court stated that the questions for the lower court were (a) whether there had been prior definitive DNA testing under the new statutory definition, and (b) whether, with advanced DNA testing, postconviction DNA testing would be outcome-determinative. *See Noling*, 2013-Ohio-1764 at ¶ 35, ¶ 44. Specifically, the Court held that this court must consider whether the evidence regarding Wilson or the other suspects coupled with the advancements in DNA technology can provide more information. *Noling*, 2013-Ohio-1764 at ¶ 42; R.C. 2953.71(U).

In addition, this Court addressed the Ohio Constitution's language outlining the jurisdiction of this Court, and whether R.C. 2953.73(E)(1)'s limiting this Court's jurisdiction to solely discretionary review rather than mandated review, as in direct appeals in death penalty cases, was constitutional in light of *Davis*. *Noling*, 2013-Ohio-1764 at ¶ 11-21, 25-28. This

Court held that R.C. 2953.73(E)(1)'s jurisdictional limits were permissible under Ohio's Constitution. *Id.* at ¶ 25-28.

On remand, the trial court immediately scheduled a hearing. During a status conference, the trial court indicated that the hearing would encompass both (a) whether there had been prior definitive DNA testing under the new statutory definition, and (b) whether, with advanced DNA testing, postconviction DNA testing would be outcome-determinative. The hearing was eventually scheduled to December 19, 2013. Journal Entries, May 29, 2013 and August 15, 2013.

After the case was returned to the trial court, Noling moved for leave to amend his Second Application to include (1) shell casings collected from the Hartigs' home, and (2) ring boxes collected from the Hartigs' home. Noling's Motion to Amend His Application for Postconviction DNA Testing, Oct. 4, 2013 ("Motion for Leave to Amend"). Noling's Amended Application was attached to the motion for leave to amend and included a request that the shell casings from the gun used to kill the Hartigs be run through the NIBIN database. Motion for Leave to Amend, pp. 2, 4-5, Ex. A. Noling asked that leave to amend be granted largely based on the advancements in DNA technology and testing since the filing of the Noling's Second Application. *Id.* at 6-7; Noling's Reply to State's Response to Noling's Motion to Amend His Application for Postconviction DNA Testing, Nov. 14, 2013, pp. 7-11, Ex. B ("Reply to State's Opposition to Amend"). The trial court granted Noling's Motion for Leave to Amend and also found that there had not been prior definitive DNA testing on the shell casings and the ring boxes. Judgment Entry, Nov. 25, 2013. However, the trial court denied Noling's request to have the shell casings run through NIBIN because "there is no Ohio statutory procedure." *Id.*

Pursuant to this order, Noling filed an Amended Application. Noling's Amended Application for Post-Conviction DNA Testing, Dec. 4, 2013 ("Amended Application").

During the status conferences prior to the hearing, the trial court made efforts to bring about a resolution so that DNA testing could proceed.[1] However, no agreement was reached. The trial court set disclosure deadlines for both Noling's and the State's experts prior to the December hearing. Journal Entries, Oct. 8, 2013 and Oct. 24, 2013. Noling disclosed materials related to four experts and the State did so with respect to one expert.

However, on the morning of the December 19, 2013 hearing, the trial court notified the parties of its intent to issue two judgment entries rather than hold the scheduled hearing. The trial court ordered that, since the State previously agreed to test the cigarette butt,[2] the cigarette butt would be tested by BCI. Judgment Entry, December 19, 2013. In a separate order related to the ring boxes and shell casings recovered at the crime scene, the trial court ordered BCI and the prosecuting attorney to "prepare findings regarding the quantity and quality of the parent sample of biological material, found at the crime scene in this case." Journal Entry, Dec. 19, 2013. This separate order further directed the testing authority to determine whether there is a "scientifically sufficient quantity of the parent sample to test, whether the parent sample is so minute or fragile that there is a substantial risk that the parent sample could be destroyed." *Id.* And finally, the trial court ordered the testing authority to determine whether the parent sample has degraded or been contaminated to the extent that it has become scientifically unsuitable for testing," and to file a report. *Id.*

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[1] Although requested, the transcripts of these hearings have not yet been prepared as of the deadline for filing this Memorandum in Support of Jurisdiction.

[2] Although the State had previously agreed to test the cigarette butt, this was contingent upon Noling agreeing to cease all efforts to obtain DNA testing on any other items of evidence.

Noling objected to the selection of BCI as the testing authority for the shell cashing and the ring boxes, as those items required advanced DNA testing methods not in use at BCI. The Ohio Innocence Project offered to pay for the advanced testing to be performed by Orchid Cellmark ("Cellmark"). However, the State objected to this offer. Noling requested to proffer the expert testimony of Dr. Staub, an expert in DNA and forensic testing, current CSI manager of the Plano, Texas Police Department, and former Forensic Laboratory Director of Orchid Cellmark, in order to make a record as to why Cellmark rather than BCI was the appropriate testing authority. However, the trial court denied Noling's request to proffer Dr. Staub's testimony.

Noling subsequently filed written objections to the selection of BCI as the testing authority for the shell casings and the ring boxes, which included an affidavit from Dr. Staub, and explained the reasons why Cellmark was the appropriate choice as the testing authority in this case. Noling's Motion for Hearing, Dec. 20, 2013; Noling's Motion for Cellmark to be Designated the Testing Authority for the Assessment of the Shell Casings and Ringboxes Ordered by This Court Pursuant to R.C. 2953.76 on December 19, 2013, Dec. 30, 2013. The State responded that Noling had no authority to make such a request. State of Ohio's Response to Noling's Request for Designation of An Additional Testing Authority, March 7, 2014. The court held a hearing on March 15, 2014. Journal Entry, Jan. 15, 2014. At the March hearing, Noling called Dr. Staub to explain why advanced DNA testing capabilities were necessary to make the Court's requested determinations on the shell casings and the ring boxes. In addition, Dr. Staub described the limitations with BCI as the testing authority. Specifically, Dr. Staub described the recent advancements in STR DNA technology, including studies which demonstrated that Identifiler Plus, a kit available at Cellmark but not BCI – provides

demonstrably better results than the Identifiler kit utilized by BCI. For example, studies show that Identifiler Plus produces peak heights 40-100% higher than Identifiler. The Identifiler Plus kit is also much better at blocking inhibitors from affecting the extraction and purification process than the Identifier kit, which produces higher peak height. Higher peak height is crucial to obtaining reportable results, and to ensure the quality of the results when there is only a very small amount of DNA to test. Dr. Staub further described other technology, protocols, and experience available at Cellmark, and their benefits over that of BCI to both (1) test the evidence at issue, and (2) to respond to the questions posed by the trial court in its December 19, 2013 Judgment Entry regarding the shell casings and the ring boxes.

Dr. Staub also testified that the only way to know whether there had been contamination was to perform DNA testing. In addition, even if contamination was detected or suspected, elimination samples were a standard practice to rule out the DNA profile of those that handled the evidence. Dr. Staub also noted that if a female analyst touched the evidence, Y-STR testing would not pick up her DNA, and would essentially eliminate any contamination by a female analyst handling the evidence. More importantly, Dr. Staub noted that the DNA profile from the shell casings and ring boxes could be compared to the profile from the cigarette butt, even if partial profiles were obtained from the shell casings and ring boxes. Finally, Dr. Staub testified that the evidence in the case of exoneree Raymond Towler had been touched by an analyst's bare hands as part of the testing done at the time of trial. Raymond Towler was subsequently exonerated based on postconviction DNA testing done by Cellmark while Dr. Staub was the

head of their forensic division. Notably, Cellmark became the testing authority in that case because of the limited technology for both extraction and testing at BCI.[3]

Prior to the start of the March hearing in this case, the trial court noted that, with BCI's testing procedures, they would have to perform DNA testing to accurately determine the quantity of DNA in the sample. Despite the compelling evidence offered by Noling, the trial court again appointed BCI as the testing authority when it amended its Journal Entry from December 19, 2013. Journal Entry, May 2, 2014. Over Noling's objections, the shell casings and the ring boxes were sent to BCI for testing and evaluation.

On March 11, 2014, BCI filed a report with the trial court indicating that it had completed DNA testing on the cigarette butt and had run the single profile through CODIS with no matches.[4] BCI Report, filed March 11, 2014 ("March BCI Report"). BCI confirmed that Dan Wilson was in CODIS, and that it had also generated a new DNA profile from Mr. Wilson's sample on file and compared it to the profile from the cigarette butt; Wilson was excluded as a source of the genetic material found on the cigarette butt. *Id.* BCI did not provide the DNA profile from the cigarette butt, or any of the underlying lab reports. *Id.* BCI also did not provide any information as to whether the other alternate suspects were in CODIS or whether their

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[3] Indeed, in the Towler case, BCI first attempted to test the evidence, but could not get a result. When the evidence was then sent to Cellmark, Cellmark was able to obtain results that exonerated Towler. In the Towler, case, fortunately, there was enough DNA on the evidence to allow for multiple tests. But that likely is not the case here, as there likely will only be one shot available to test the evidence at issue.

[4] Following the hearing, Noling filed a motion requesting a search for the missing shell casings and confirmation that the shell casings that were trial exhibits were the shell casings associated with the instant case. Noling raised concerns because the evidence bags were labeled with Canton-Stark County Crime Laboratory – the lab associated with Noling's Stark County cases but not with the instant case. There were shell casings collected and tested by BCI in Noling's Stark County cases. The trial court never ruled on this motion, nor did BCI indicate that it reviewed any chain of custody documents when it issued its report on the shell casings and the ring boxes submitted to through the trial court's May 2, 2014 Judgment Entry and Order. BCI Report, filed June 26, 2014 ("June BCI Report").

profiles were otherwise available for comparison. *Id.* BCI did state that there was enough of a sample remaining for independent analysis. *Id.* Noling filed a motion to the Court requesting the complete test results, which the trial court denied. Journal Entry, June 27, 2014.

On June 26, 2014, BCI issued a report stating that it had visually inspected the shell casing and ring boxes, and its finding was that the submitted items were contaminated to the extent that they were scientifically unsuitable for testing. June BCI Report. However, BCI did not perform any testing on the submitted items. *Id.* BCI's report spoke generally regarding BCI's protocols for handling evidence submitted for fingerprint and ballistics testing, but did not discuss how this specific evidence was handled. *Id.* The very next day, the trial court dismissed Noling's Amended Application. Journal Entry, June 27, 2014.

Noling filed a timely appeal in the trial court and requested transcripts of those hearings that had not yet been transcribed and filed, including the March hearing where Dr. Staub testified. As of the date of this filing, neither Noling nor the court is in possession of a complete record.[5] Noling now files this timely Memorandum in Support of Jurisdiction to this Court.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

FIRST PROPOSITION OF LAW

Ohio Revised Code 2953.73(E)(1) violates both the Eighth and Fourteenth Amendments of the United States Constitution as it: (1) discriminates between capital and non-capital criminal defendants, (2) fails to provide appellate review, and (3) results in the arbitrary and capricious application of the death penalty. Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

Noling acknowledges that this Court has addressed the question of whether R.C. 2953.73(E)(1) is constitutional in light of *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959

[5] Undersigned counsel has described the testimony from the March hearing as well as prior status conferences to the best of her recollection.

N.E.2d 516, holding that R.C. 2953.73(E)(1), which confers exclusive jurisdiction upon the Ohio Supreme Court to consider Noling's appeal. *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, ¶ 8, 992 N.E.2d 1095 (2013). This Court held that R.C. 2953.73(E)(1)'s limitation of a death row inmate's appellate process to a jurisdictional motion to the Ohio Supreme Court from a denial of postconviction DNA testing was permissible under the Ohio Constitution. *Id.* at ¶ 11-27.[6] However, the majority noted that the constitutional questions of whether R.C. 2953.73(E)(1) violates the Equal Protection and Due Process Clauses were not briefed by the parties. *Id.* at ¶ 28. The dissent noted its concerns regarding these additional, un-briefed constitutional questions:

> R.C. 2953.73(E) also raises significant concerns regarding due process and equal protection in that it divides offenders who are similarly situated into two different classes: offenders who have been sentenced to death may seek leave to appeal the denial of postconviction DNA testing directly to this court while all other offenders may appeal as of right to the court of appeals and then seek discretionary review in this court if the appellate court affirms denial of the testing. Thus, the General Assembly has denied offenders sentenced to death—and only those offenders—an appeal as of right from the denial of postconviction DNA testing.
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> As the Supreme Court observed in *California v. Ramos*, 463 U.S. 992, 998-999, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." Thus, I would assert that those sentenced to death should receive at least the same procedural protections afforded to all other offenders.
>
> The majority's citation of *State v. Smith*, 80 Ohio St.3d 89, 1997 Ohio 355, 684 N.E.2d 668 (1997), for the proposition that R.C. 2953.73(E)(1) does not violate either due process or equal protection requires little response; aside from the fact that this statute had not been enacted at the time we decided *Smith*, that case did not consider a situation in which a statute creates two classes of similarly situated offenders and gives one, but not the other, an appeal as of right from the denial of DNA testing. *Smith* simply has no application in this regard.

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[6] It should be noted that both Noling and the State argued that R.C. 2953.73(E)(1) was unconstitutional. Supplemental Brief of Appellant Tyrone Noling, *State v. Noling*, Case No. 2011-0778; State of Ohio's Supplemental Brief, *State v. Noling*, Case No. 2011-0778.

> After today's decision, every postconviction judgment entered in cases in which the death penalty is imposed is potentially subject to a direct appeal to this court, notwithstanding Davis. But we are not an error-correcting court; rather, our role as the court of last resort is to clarify confusing constitutional questions, resolve uncertainties in the law, and address issues of public or great general interest. The duty to review error allegedly occurring in postconviction proceedings in death-penalty cases, in my view, belongs in the first instance to the appellate courts of this state. Significantly, appellate courts consider assignments of error, while this court considers propositions of law. The two are materially and substantively different.

Id. at ¶ 60-63.

As both the State and Noling noted in the briefing to this Court, proper severance of R.C. 2953.73(E)(1), in order to salvage the statute and render it constitutional, would provide death row inmates with the same appellate process as all other inmates whose applications for postconviction DNA testing have been denied and would confer jurisdiction on the Eleventh District Court of Appeals, where a timely notice of appeal has been filed and where the record could be completed. Supplemental Brief of Appellant Tyrone Noling, *State v. Noling*, Case No. 2011-0778; State of Ohio's Supplemental Brief, *State v. Noling*, Case No. 2011-0778.

A. Revised Code 2953.73(E)(1) offends due process and equal protection in violation of the Fourteenth Amendment to the United States Constitution.

The United States Supreme Court generally analyzes the fairness of relations between the criminal defendant and the State under the Due Process Clause, and, while applying the Equal Protection Clause, examines whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L.Ed.2d 221 (1983). Both concerns are present in this case.

1. EQUAL PROTECTION

The equal protection of law requires that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without

discrimination. *Sexton v. Barry*, 233 F.2d 220, 224 (6th Cir. 1956). However, Revised Code 2953.73(E)(1) discriminates between capital and non-capital criminal defendants. Indeed, capital inmates are denied the right of appeal if the Ohio Supreme Court declines jurisdiction, while non-capital defendants are entitled to an appeal of right. Similarly-situated defendants, all challenging their conviction through the same mechanism, and all claiming their innocence, are not similarly-treated.

Non-capital defendants are entitled to a two-tiered level of appellate review. Revised Code 2953.73(E)(1)(a) provides an appeal of right to the court of appeals. This appeal of right is available to all Ohio inmates who filed a DNA application, *except those sentenced to death.* These same non-capital inmates also have a claimed appeal of right to the Supreme Court of Ohio to settle questions arising under the constitutions of the United States or the State of Ohio or questions of great general or public interest. Article IV, § 2(B)(2)(a)(ii), § 2(B)(2)(b) and § 2(B)(2)(e).

Conversely, R.C. 2953.73(E)(1) provides that capital defendants "may seek leave" of the Supreme Court to appeal the denial of their DNA applications. Any argument that capital defendants are treated more favorably than non-capital defendants because they have an appeal to this Court must fail.[7] This Court may deny jurisdiction to hear Noling's appeal, thus totally denying him any appeal of his DNA application.

The Supreme Court of the United States has stated, "[a]lthough the Federal Constitution guarantees no right to appellate review, once a State affords that right, the State may not 'bolt the

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[7] The Ohio Supreme Court so hypothesized in *dicta*, in *State v. Smith*, 80 Ohio St.3d 89 (1997), the first capital case decided after Issue One. Mr. Noling's case differs significantly. Issue One eliminated the capital offender's direct appeal of right to the court of appeals, but provided a **mandatory** appeal to the Ohio Supreme Court. Revised Code 2953.73(E)(1) eliminates the capital offender's direct appeal to the court of appeals, and provides a **discretionary** appeal to this Court.

door of equal justice[.]'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L.Ed.2d 473 (1996), *citing Griffin v. Illinois*, 351 U.S. 12 (1956).[8] The Court continued " . . . it is now fundamental that, once established, these avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Id.* at 111, *citing Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S. Ct. 1497, 16 L.Ed.2d 577 (1966).

"When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Id.* at 114, citing *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972). In holding that Mississippi could not deny M.L.B. a review of the sufficiency of the evidence on which the trial court based its parental termination decree because of her indigency, the Court was seemingly influenced by the loss M.L.B. would suffer (termination of parental rights) without review. In the case *sub judice*, Mr. Noling's stakes are even higher as he faces the loss of his life.

The Supreme Court has stated repeatedly that the States cannot deny indigent defendants the right to an appeal, when that same right is afforded to more affluent appellants. *See Burns v. Ohio*, 360 U.S. 252, 257, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) ("Once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty."); *see also Lane v. Brown*, 372 U.S. 477, 481, 83 S.Ct. 768, 9 L. Ed.2d 892 (1963) (The State cannot adopt procedures which leave an indigent defendant "entirely cut-off from any appeal at all."); *Douglas v. California*, 372 U.S. 353, 358, 83 S.Ct. 814, 9 L. Ed.2d 811 (1963) (The State may not extend to those indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful

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[8] In analyzing *Griffin*, the Court seemingly recognized that even in *Griffin* "death was different" so that indigent death row defendants were the only ones, pre-*Griffin* entitled to a transcript if they could not pay.

appeal."). Noling's situation is analogous to the aforementioned: he is denied his fundamental right to appeal, based entirely on the fact that he is sentenced to death. This is discriminatory, arbitrary, and a violation of Noling's constitutional right to equal protection of the laws. This is especially true when all non-capital defendants, who are likewise challenging their conviction though the exact same DNA statute, do have an appeal of right.

The disparate treatment of death-sentenced persons is based solely on the arbitrary difference in sentence. Some of the non-capital defendants challenging their convictions via an application for DNA testing were originally indicted with death penalty specifications. In addition, some were convicted of aggravated murder, similar to the defendants on death row, and Noling.[9] This is a denial of equal protection under the law, due process of law, right to appeal, and right of access to the courts in violation of the Fourteenth Amendment to the Constitution of the United States.

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[9] Some examples are: Paul Buehler, originally death indicted but convicted of aggravated murder and aggravated robbery, and given a life sentence after a jury trial; Devaughn Jackson, convicted of aggravated murder and aggravated robbery, and given a sentence of 40-life plus 3 for a gun specification; Phillip Gammalo, convicted of aggravated murder, attempted rape, and burglary, and given a sentence of 30-life; David Ayers, convicted by a jury of aggravated murder, aggravated robbery, and aggravated burglary, and sentenced to 20 years-life; William Martin, convicted of aggravated murder and felonious assault and given a life sentence; Timothy Combs, convicted of aggravated murder, kidnapping, rape, and felonious sexual penetration by a jury, and sentenced to life in prison; Donald Soke, convicted of aggravated murder, aggravated robbery, and aggravated burglary, and sentenced to life; Ben Brewer, originally indicted with aggravated murder, but convicted of murder and sentenced to 18-life; Rusty Mootispaw, indicted with aggravated murder, pled to murder and received a sentence of 15-life; George Henderson, convicted of aggravated murder, given 20-life; David Hill, convicted of aggravated murder, aggravated robbery, and felonious assault, received 29.5-life; Marvin Martin, convicted of aggravated murder and received LWOP; Willie Hightower, convicted in 1972 of rape, abduction, and murder in perpetration of rape, and given a life sentence by a jury trial; Fredrick Springer, convicted in 1973 (when Ohio did not have the death penalty) by a bench trial of a double murder, rape, incest, abduction for immoral purposes, rape under 12, and assault with intent to kill, rape, or rob and sentenced to 39 years-life; Robert Caulley, convicted of a double murder and originally indicted with death, but found guilty of murder and voluntary manslaughter and sentenced to 15-life; Mark Barclay, convicted of murder, kidnapping, and abuse or a corpse, and sentenced to 20-life.

While equal protection does not require that all persons be dealt with identically, it does require that the distinction made have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966). Nothing in the entirety of S.B. 11, or R.C. 2953.73(E)(1), meets this standard.[10] In *Dickerson v. Latessa*, 872 F.2d 1116 (1st Cir 1989), the court found that legislation can be overturned as violating equal protection if the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the legislature's actions were irrational. *Dickerson*, 872 F.2d at 1120. Here, it appears that the legislature's only reasoning for foregoing Noling's right to direct appeal of his DNA application was to follow in Issue One's footsteps. The State's rationale for the passage of Issue One concerned eliminating delay to execution; this rationale cannot overcome Noling's constitutional rights. In addition, if the General Assembly's rationale was not to follow Issue One, than it was solely to mirror the effect of Issue One (to pass over review by the intermediate court of appeal). And, this is absolutely no justification at all.

2. DUE PROCESS

In addition to the equal protection arguments already set forth, Ohio's DNA statute, specifically section 2953.73(E)(1) implicates due process concerns. "Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government." *Sexton*, 233 F.2d at 224. Revised Code 295373(E)(1)(a) grants non-

[10] This Court should engage in strict scrutiny in assessing the equal protection violation since the challenge implicates a fundamental right, the right of access to the court. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S. Ct. 2562, 49 L.Ed. 2d 520 (1976); *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 52 L.Ed.2d 72 (1977); *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L.Ed.2d 606 (1996); *Wolff v. McDonnell*, 418 U.S. 539, 577-80, 94 S. Ct. 2963, 41 L.Ed.2d 935 (1974) (The right of access is applicable to civil and criminal matters). However, the State cannot even meet the lowest level of scrutiny, rational basis, and that level will be used for the purpose of this argument.

capital defendants greater avenues for relief and review than that granted capital defendants. Therefore, non-capital defendants receive more due process, more reliable decisions, and more extensive review than capital defendants. As stated in *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976), more process is due in death penalty cases because of the severity of the punishment involved.

Judge Merritt, from the Sixth Circuit, described the purpose of appellate review in death penalty cases as follows:

> The process of deliberation, reflection, trial, review and the elimination of error and uncertainty takes time, including the time it takes to review new evidence when it becomes necessary. The traditional deliberative process must be fully complied with in order to insure that innocent life and the attributes of human dignity are preserved in the face of the biological passion and hostility in our species that lead us to kill each other without reason. If this traditional process of deliberation and reflection takes time, we must take the time. In light of the fallibility of human judgment, it is better that even the life of a guilty man be spared for a few years while we make sure that we are not making another fatal mistake.

O'Guinn v. Dutton, 88 F.3d 1409, 1414, fn. 1 (6th. Cir. 1996) (Merritt, J., concurring).

The Ohio General Assembly acknowledged that innocent people are sometimes wrongfully convicted when it enacted Senate Bill 11 ("SB11"), Senate Bill 262 ("SB262"), and Senate Bill 77 ("SB77") to offer an avenue of relief and provide an opportunity for exoneration.[11] Concerns of human fallibility in the legal process always linger, especially in

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[11] Indeed, three Ohioans have been exonerated as a result of DNA testing granted under Senate Bill 11. Donte Booker, Michael Green, and Clarence Elkins. Donte Booker was convicted of Rape, Kidnapping, Aggravated Robbery, and Gross Sexual Imposition in 1987. Paroled in 2002, he nonetheless availed himself of the opportunity to prove his innocence under S.B. 11. The DNA results verified he was not the rapist. His conviction was overturned February 9, 2005. *See State v. Booker*, Cuyahoga County C.P. Case No. CR-87-216213, Judgment Entry, February 10, 2005; http://www.innocenceproject.org/Content/Michael_Green.php (accessed July 29, 2014) (Michael Green was exonerated on October 18, 2001); *State v. Elkins*, Summit County C.P. Case No. CR-1998-06-1415, Judgment Entry, Dec. 15, 2005. Three Ohioans have been exonerated based on DNA testing granted under SB 262: Raymond Towler, Robert McClendon, and David Ayers. http://www.innocenceproject.org/Content/Raymond_Towler.php (accessed July 29, 2014) (Raymond Towler was exonerated on May 5, 2010);

older cases when DNA technology was not available. SB11, SB262, and SB77 were passed for these reasons -- to ensure that the wrongfully convicted would have a chance to establish their innocence through the advancements of DNA technology. "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." *Herrera v. Collins*, 506 U.S. 390, 430, 113 S.Ct. 853, 122 L.Ed.2d 203 (Blackmun, J., dissenting op.), *citing Ford v. Wainwright*, 477 U.S. 399, 406, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952)).

However, while the General Assembly passed SB11, SB262, and SB77 to ensure the integrity of criminal convictions, it also unconstitutionally blocked access to an appeal of right for capitally-convicted inmates. Noling sought testing in the county in which he was convicted and now, if this Court denies jurisdiction of his appeal, he has no redress. This State action constitutes a violation of Noling's constitutional rights under the due process clause of the Fourteenth Amendment of the United States Constitution.

B. Ohio Revised Code 2953.73 violates the Eighth Amendment to the United States Constitution

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. Although the death penalty has never been held to be *per se* cruel and unusual, it has been found to violate the Eighth Amendment in its application. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L.Ed.2d 231 (1985); *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); *Woodson*, 428 U.S. 280,

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http://www.innocenceproject.org/Content/Robert_McClendon.php (accessed July 29, 2014) (Robert McClendon was exonerated on August 26, 2008); *State v. Ayers*, Cuyahoga County C.P. Case No. CR-00-388738, Judgment Entry, September 12, 2011.

96 S.Ct. 2978, 49 L.Ed.2d 944; *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The litmus test for constitutionality is that the death penalty not be imposed arbitrarily or capriciously. *Furman*, 408 U.S. 238

The Supreme Court of the United States has repeatedly stressed that meaningful appellate review is essential to guaranteeing that the death penalty is not imposed arbitrarily, capriciously, or irrationally. *Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 749, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); *Gregg*, 428 U.S. 153. In reviewing statutes passed after *Furman*, the Court emphasized that an integral part of any analysis in determining the constitutionality of a capital statute is whether the state has provided an adequate and meaningful review of the case on appeal after the death sentence is imposed. *Gregg*, 428 U.S. at 153.

The Ohio General Assembly enacted SB11, SB262, and SB77 in recognition of the fact that there are innocent people wrongfully incarcerated who could be exonerated by advanced DNA technology. Even the most aggressive prosecutor and strictest judge would agree that an inmate, able to establish his innocence by exclusion DNA test results, should be granted relief.[12] This importance is amplified when the inmate at issue has been sentenced to death.

However, the General Assembly did not provide an appeal of right for capital inmates, such as Mr. Noling, after the denial of their DNA application in the common pleas court. Elimination of the courts of appeal from the review process of capital cases increases the risk of arbitrary and

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[12] Consider *State v. Elkins*, CR. 1998-06-1415, Summit County. Pursuant to R.C.2953.73(C), Ohio Attorney General Jim Petro filed a response in support of Mr. Elkins DNA application, arguing "in light of the newly available evidence, [DNA test results] no reasonable fact finder would find Elkins guilty beyond a reasonable doubt." *Attorney General Jim Petro's Response to Clarence Elkins Application for DNA testing*, at 12.

capricious imposition of the State's most extreme sanction. This increased risk is constitutionally impermissible. *Furman,* 408 U.S. 238.

Meaningful appellate review is critical. Appellate court review provides substantial protections to a person facing execution. First and foremost, the court of appeals' review provides a level of security and reliability not present when only a discretionary appeal is allowed. This Court may decide not to exercise jurisdiction, leaving the inmate with absolutely no appellate review. The very point of Senate Bill 11 is to provide innocent inmates the opportunity to prove their innocence through advanced DNA technology. Noling will be denied the opportunity to be heard on the merits of his DNA application if the Ohio Supreme Court declines jurisdiction to hear his appeal. Therefore, R.C. 2953.73(E)(1) violates his Eighth Amendment rights under the United States Constitution.

SECOND PROPOSITION OF LAW

When a trial court selects a testing authority pursuant to Ohio Revised Code 2953.78(A), it must articulate reasons for its selection of the testing authority, including but not limited to its validation on the appropriate DNA technology and its experience in testing the type of evidence at issue.

Postconviction DNA testing and scientific determinations made pursuant to Ohio's postconviction DNA testing statute are made by the testing authority, which is selected by the trial court from a variety of facilities that the Attorney General designates.[13] R.C. 2953.71(R); R.C. 2953.74(C)(2); R.C. 2953.76(A) and (B);R.C. 2953.78(C). Revised Code 2953.78(C) requires that the trial court rescind its prior acceptance of the application for DNA testing and

[13] Those approved or designated testing authorities are contained in a list provided to all courts of common pleas, R.C. 2953.78(C), and can also be found online, http://www.ohioattorneygeneral.gov/Law-Enforcement/Bureau-of-Criminal-Investigation/Laboratory-Division/ASCLD-LAB-Accredited-Forensic-DNA-Laboratories (accessed August 5, 2014).

deny the application if the eligible offender objects to the designation of the testing authority. Again, this section of the statute makes clear that the selection of the testing authority is not only the decision of the trial court, but is such an important part of the postconviction DNA testing process that a dispute over the testing authority is a final appealable order. R.C. 2953.78(C).

The DNA testing statute and Ohio courts have repeatedly acknowledged the evolvement of DNA testing over time. R.C. 2953.74(B)(2); *State v. Reynolds*, 186 Ohio App.3d 1, 2009-Ohio-5532, 926 N.E.2d 213 (2d Dist); *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654 (8th Dist.); R.C. 2953.71(U); *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764. As a result, the statute necessarily contemplates the consideration of the change in DNA technology and what additional information it can reveal. *Id.* It would be wholly inconsistent with the purpose and language of the statute to hold that the availability of such technology at the testing authority is not an appropriate consideration for the trial court in its selection of the testing authority to make determinations under the statute as to whether such advanced testing can be performed, and for actual performance of the advanced testing.

So, while the Attorney General creates a list of labs for the court to choose from, the court – using the priorities outlined in the statute – must select the appropriate testing authority. Simply because a testing authority is on the list, does not mean that it is right for a particular case. In many cases where prosecutors were not insisting that BCI perform the testing, even BCI referred cases to Cellmark as it does not have testing technologies as advanced as Cellmark. *Compare, State v. Rowley,* 8th Dist. Cuyahoga No. 88659, 2007-Ohio-4830, ¶ 54 (BCI forensic scientist recommended that Orchid Cellmark perform DNA testing) *with State v. Thornton*, 12th Dist. Clermont No. CA2012-09-063, ¶ 7, 23; *see also, State v. Jones*, 7th Dist. Jefferson No. 00 JE 18, 2002-Ohio-2791, ¶ 7, 20; *State v. Lane*, 1st Dist. Hamilton No. C-970776, 1998 Ohio

App. LEXIS 6417; *State v. Leggett*, 6th Dist. Williams No. WM-97-029, 1998 Ohio App. LEXIS 4078. In the wake of issues in the Franklin County Crime Lab, Cellmark was brought in to audit, consult, and make recommendations for improvement in the county crime lab.[14]

When the selection of the testing authority is contested, the trial court must articulate its reasons for the selection of the testing authority. As part of its decision making process, the trial court must – in order to comport with the intent of Ohio's postconviction DNA testing statute - look to the following factors: the technology available at the lab, the length of time the technology has been in use at the lab, whether the lab works on postconviction or cold cases, the lab's experience obtaining results from the particular type of evidence at issue, and the lab's experience with the use of a particular type of DNA technology. This is not the exclusive set of factors that a trial court can consider. However, these are factors that come directly from the plain language of Ohio's postconviction DNA testing statute – which makes its purpose clear – and they offer a guideline to the lower courts as DNA technology advances. Here, the trial court made no findings regarding its selection of BCI as the testing authority, despite the fact that the selection of the testing authority was the primary source of disagreement among the parties.

Here, Noling presented significant evidence that Cellmark – rather than BCI – is the appropriate testing authority for the shell casings and the ring boxes. This included Cellmark's: (1) experience working with the type of evidence at issue and obtaining results, (2) possessing more advanced technology in extraction which can more accurately measure small quantities of DNA, (3) using different techniques more successfully for optimum collection involving evidence that has previously been fingerprinted with "superglue," (4) more advanced DNA testing kit, which is capable of producing better results for small quantities of DNA, and (5) use

[14] http://www.dispatch.com/content/stories/local/2014/08/08/lab-error-might-affect-38-cases.html (accessed Aug. 11, 2014).

of different amplification procedures designed to get the best quality result from a small sample of DNA. BCI conceded that it does not have experience testing fired shell casings in order to obtain DNA deposited there before the casings were fired. June BCI Report; Exhibit 1 to State's Response to Noling's Oct. 4, 2013 Motion to Amend His Application for DNA Testing, Nov. 4, 2013; State's Expert's Report Filed Pursuant to Oct. 24, 2013 Order, Dec. 2, 2013. In addition, BCI does not use the more advanced and sensitive DNA kits, like Identifiler Plus, Promega Powerplex 16 H.S., or mini-filer. BCI, as it is utilized by many prosecutor's offices, understandably attempted to defend this lack of the most modern testing kits by stating that STR DNA testing kits have not changed markedly since their advent in the early 1990's. *Id.* Scientific studies, test results in individual cases, and Dr. Staub's testimony thoroughly refute this statement. Yet despite this record and the offer of the Ohio Innocence Project to fund the testing at Cellmark, the trial court selected BCI. The trial court made no findings or record to justify its decision. This is especially troubling given the trial court's expectation that BCI would perform DNA testing on the items. Even more troubling is the selection of BCI in this particular case, where the factors that guide selection of a testing authority clearly dictate the selection of Cellmark in this case.

THIRD PROPOSITION OF LAW

Ohio Revised Code 2953.74(C)(2) requires the testing authority to utilize scientific testing methods and review the chain of custody for the specific case in order to make the required statutory determinations in R.C. 2953.74(C)(2)(a), (b), and (c).

Ohio Revised Code 2953.74(C)(2)(a)-(c) asks the testing authority to make scientific determinations regarding the parent sample of the biological material. Courts have held that these determinations are for the testing authority, and not the trial court. *State v. Reynolds*, 2009-Ohio-5532, ¶ 22. This is necessary to (1) differentiate assertions or hypotheses regarding

potential contamination from the determination as to whether contamination exists, (2) determine whether the parent sample contains sufficient material to extract a test sample, and (3) determine whether the parent sample is so minute or fragile that destruction is likely upon extraction. R.C. 2953.74(C)(2). As a result, the testing authority must utilize scientific testing methods and a review of the chain of custody of the specific case in order to make the determination required under R.C. 2953.74(C)(2)(c).

More specifically, R.C. 2953.74(C) states that, if an eligible offender submits an application for DNA testing under section 2953.73 of the Revised Code, the court may accept the application only if all of the criteria in R.C. 2953.74(C)(1)-(6) apply. Ohio Revised Code 2953.74(C)(2)(c), the provision at issue in this case, requires that: "The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become **scientifically** unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing." (Emphasis added.). In other words, R.C. 2953.74(C)(2)(c) asks the testing authority for a scientific determination, and R.C. 2953.78(A) asks the trial court to select the appropriate testing authority to make such a determination.

Unlike chemical tests of breath to determine the blood/alcohol level, the postconviction DNA testing statute does not require the testing authority to perform specific tests and procedures to be performed in accordance with a particular agency's guidelines. *See*, R.C. 4511.19 (D)(1). The lack of specific statutory requirements is due, in part, to the continually advancing field of DNA technology. As a result, the statute requires a "scientific" determination to be made by the testing authority. "Scientific" is defined as of, relating to, or exhibiting the

methods or principles of science.[15] The scientific method is defined as "principles and procedures for the systematic pursuit of knowledge involving the recognition and formulation of a problem, the collection of data through observation and experiment, and the formulation and **testing** of hypotheses."[16] Thus a mere claim or hypothesis is not the basis of a scientific determination. It is science's requirement of both the formulation and testing of a hypothesis. For purposes of R.C. 2953.74(C)(2)(c), this means requiring testing to confirm a theory of contamination and requires rejection a claim of contamination on the basis of mere suspicions formed without testing but rather a mere "visual inspection" which cannot detect DNA, let alone contamination. *See State v. Collins*, 8th Dist. Cuyahoga No. 89668, 2008-Ohio-2363, ¶ 30 (Mere allegations are insufficient to establish a claim of contamination).

In *Collins*, the first trial occurred on October 4, 2005. *Id.* at ¶ 3. Collins was found not guilty on Counts Three through Five, Seven and Eight. *Id.* The jury could not reach a verdict on Counts One and Two, and a mistrial was declared. *Id.* The second trial occurred on February 26, 2007. *Id.* at ¶ 4. On October 25, 2005, after the conclusion of the first trial, the DNA section of the Bureau of Criminal Investigation ("BCI") was sent a red jacket, a skull cap, and a $1.00 bill for DNA testing. *Id.* at ¶ 5, 21. Trial counsel stated that the items of evidence had been handled by himself and the defendant during the first trial, and were thus likely contaminated. *Id.* at ¶ 5, 30. Police discovered these items after they searched the victim's abandoned vehicle. *Id.* at ¶ 18, 21. The skull cap was found when the police went through the jacket's pockets. *Id.* at ¶ 18. Despite this handling, BCI proceeded to test these items and the trial court admitted the results into evidence. *Id.* at ¶ 18, 21, 30.

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[15] http://www.merriam-webster.com/dictionary/scientific (accessed Aug, 7, 2014).
[16] http://www.merriam-webster.com/dictionary/scientific%20method (accessed Aug. 7, 2014) (Emphasis added.).

BCI has also performed DNA testing of items in postconviction DNA testing, despite claims of contamination. For example, in *State v. Meredith Hill*, Franklin County C.P. Number 88CR-500 ("*Hill*"), Mr. Hill requested testing on a number of items, including but not limited to gloves, jackets, a knife, and a fingerprint from the refrigerator. Hill's Application for DNA Testing, Feb. 3, 2011. In opposing Hill's request for DNA testing, the State argued that because the evidence was collected in 1988, the collection procedures were not mindful of the "touch DNA" for which Mr. Hill sought postconviction DNA testing. *Hill*, State's Response to Defendant's May 26, 2011 Reply, June 9, 2011, p. 2. The State also claimed that "anchoring" could not produce outcome determinative results because the evidence at issue – which was collected from both the victim's home (the crime scene) and Hills' residence – had been handled by numerous individuals, and had not been stored in a manner that would prevent cross contamination between items of evidence or exposure to other biological material. *Id.* at p. 3. Specifically, the State argued that that much of the physical evidence from Hill's residence was initially collected by Robert Kennedy, the other resident of the house that Hill shared, before being turned over to police officers. *Id.* at pp. 4-5. The State also argued that there were many others – including Hills' co-defendant - that were frequent visitors to Hill's home, and that at least five officers went into the residence to apprehend Hill, and that five additional officers processed the scene. *Id.* at p. 4.

The State cited similar concerns with evidence from the crime scene in the Hill case. For example, the State noted there was potential contamination from two women who entered the crime scene looking for their friend (the victim), and emergency responders and several crime scene investigators entered the crime scene to collect the evidence in the case. *Id.* The State also noted concerns with the collection procedures in place in 1988. *Id.* at p. 5. Additionally, the

State argued that the evidence had been handled by property clerks at the Sheriff's Office and the Prosecutor's Office, would have been handled or at least exposed to other sources of DNA in the laboratory when the items were submitted for testing prior to trial, and was handled by trial witnesses, defense attorneys, and prosecutors at the trial (with no indication in the transcript that gloves were worn). *Id.* Finally, the State noted that the evidence from the lab was submitted to the Prosecutor's Office in paper and plastic bags – none of the bags contained a seal. As a result, much of the evidence in this case was no longer in its original container. *Id.* at pp. 5-6. However, postconviction DNA testing moved forward and BCI performed the DNA testing. *Hill*, Entry Staying Post-Conviction Proceedings and Order for DNA Testing, Feb. 29, 2012. The DNA test results showed none of the potential contamination listed out in the State's briefs and affidavits. *Hill*, State's Report on Post-Conviction DNA Testing: Defendant's DNA Identified on Evidence, Feb. 28, 2013. In fact, the State concluded that the DNA test results conclusively barred any actual innocence claim from Mr. Hill. *Id.*

In other cases where the State has alleged contamination, testing went forward nonetheless and the inmate was exonerated as a result of the postconviction DNA testing. For example, Roy Brown was exonerated in 2007.[17] In that case, Mr. Brown was convicted in 1991 of the murder of a social service worker who was found beaten, strangled, and stabbed to death near the upstate New York farmhouse where she lived. The victim had been bitten numerous times all over her body. At the scene, police collected a bloody nightshirt and swabbed the bite marks for saliva. The victim's farmhouse had also been set on fire. The prosecution relied on the testimony of a bite mark analyst who stated that the seven bite marks on the victim's body were "entirely consistent" with Brown, and the saliva from the nightshirt and bite mark swabs were

[17] http://www.innocenceproject.org/Content/Roy_Brown.php (accessed Aug. 7, 2014).

analyzed with inconclusive results at the time of trial. In 2005, the Innocence Project took on Brown's case and discovered that there were six more saliva stains on the nightshirt that could be tested. The State opposed testing on the nightshirt. *People v. Roy Brown*, County of Cayuga, New York, Indictment No. 91-046, People's Supplemental Affirmation, C.P.L. Section 440.30(1-a) (DNA), Aug. 3, 2006. This opposition was based, in part, on its "legitimate concerns" that the nightshirt had been handled "repeatedly" without "evidentiary precautions." *Id.* The prosecutor recalled handling the item himself as well as trial witnesses. *Id.* The State also argued that the evidence had gone to the jury room, and that the jurors did not wear gloves at the time of the trial. *Id.* Finally, the State argued that the prosecutor's investigator also handled the evidence, and that it was currently in "***a tattered brown evidence bag that offer[ed] no protection from contamination." *Id.*

However, postconviction DNA testing proceeded and, in 2006, the DNA testing proved that the saliva on the shirt did not match Brown.[18] Prior to testing, Brown took it upon himself to try and find the victim's true killer. After a fire destroyed all of his court documents at his step-father's house, he asked for copies of his documents under the Freedom of Information Act. He found documents that had not been disclosed to the defense implicating another man, Barry Bench. Bench had acted oddly around the time of the murder and was upset at the victim because the farmhouse that she lived in belonged to the Bench family (she had dated Bench's brother up until two months before the murder). In 2003, Brown wrote to Bench, telling him that DNA would implicate him when Brown finally got testing. Bench committed suicide by stepping in front of an Amtrak train five days after the letter was mailed. After Brown's exclusion from the saliva stains in the nightshirt, the Innocence Project located Barry Bench's daughter, who

[18] http://www.innocenceproject.org/Content/Roy_Brown.php (accessed Aug. 7, 2014).

gave a sample of her DNA. Half of her DNA matched the saliva on the shirt: exactly what one would expect from Bench's daughter. Roy Brown was released from prison on January 23, 2007. The prosecution formally dropped all charges on March 5, 2007. Two years later, New York State paid Mr. Brown $2.6 million dollars for the 15 years he was incarcerated.[19]

Terry Chambers, Raymond Towler, and Clarence Elkins have also been exonerated by post-conviction DNA testing.[20] However, in all three cases, the State sought to bar DNA testing or release based on claims of contamination. *People v. Terry Chalmers*, County of Westchester, New York, Indictment No. 86-1094 (J. West), Chalmer's Reply to Affirmation in Opposition; *Raymond Towler, Freed After 29 Years in Prison, Wants a New Life and a Good Pizza (video),* Cleveland Plain Dealer, May 5, 2010;[21] *State v. Clarence Elkins*, Summit County C.P. No. CR 1998 06 1415, J. Hunter, Reply to SCPO's Post Hearing Brief, April 21, 2005. These exonerations, as well as the identification of the true perpetrators in these cases, demonstrate that speculation regarding contamination should not be a bar to postconviction DNA testing. If it were, innocent men like Roy Brown, Terry Chalmers, and Clarence Elkins would still be in prison – and the true perpetrators would never be held accountable for their crimes.

For all of these reasons, it is imperative to perform scientific testing before making a determination of contamination. A scientific test can confirm or disprove a theory of

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[19] http://www.syracuse.com/news/index.ssf/2011/04/roy_brown_a_free_man_now_back.html (Aug. 7, 2014).

[20] http://www.innocenceproject.org/Content/Terry_Chalmers.php (accessed Aug. 7, 2014); http://www.innocenceproject.org/Content/Clarence_Elkins.php (accessed Aug. 7, 2014).

[21] http://blog.cleveland.com/metro/2010/05/raymond_towler_freed_after_29.html (accessed Aug. 11, 2014). Undersigned counsel represented Mr. Towler during his request for postconviction DNA testing under SB262. As noted above, BCI performed testing but was not able to obtain results. The evidence then went to DNA Diagnostic Center ("DDC"). DDC was able to obtain results. Those results showed two profiles, both of which excluded Mr. Towler. The State then argued that both profiles were the result of contamination. The evidence was then sent to Cellmark, which was able - through advanced DNA technology - to perform DNA testing that conclusively demonstrated Mr. Towler's innocence.

contamination, and a testing authority can then make a determination about scientific suitability. The ability to test to confirm or disprove is what separates a testing authority from the trial court, and why the legislature assigned this determination to the testing authority. R.C. 2953.74(C)(2). Any other reading of the statutory language would eviscerate the meaning and the purpose of the statute, and bar the exoneration of the innocent or the conclusive determination of guilt.

Here, the trial court found that BCI filed a report indicating all of the items at issue are "contaminated to the extent that they are scientifically unsuitable for testing." Judgment Entry, June 27, 2014. As a result, the trial court rejected Noling's Amended Application for Postconviction DNA Testing pursuant to R.C. 2953.74(C)(2)(c). *Id.* The BCI report, which was filed with the trial court the day before the trial court issued its denial, shows that this finding was made based on a visual examination of the submitted items and BCI's protocols from the early 1990's. June BCI Report. The language of the report indicates that the protocols of the time were reviewed prior to the issuance of the report, but not the specific lab notes as to how the evidence was handled or the chain of custody for these particular items of evidence. *Id.* Noling previously requested production of these documents, and the trial court did not respond to this request. Noling's Motion to Include All Biological and Potentially Biological Materials in Judicial Order for Evaluation of Biological Material and Report Filed May 5, 2014, pp. 3-6, May 27, 2014. The statements in the 2014 BCI Report are largely identical to the two previously submitted affidavits from BCI, as well as the State's arguments. *Compare* June BCI Report *with* Exhibit 1 to State's Response to Noling's Oct. 4, 2013 Motion to Amend His Application for DNA Testing, Nov. 4, 2013; State's Expert's Report Filed Pursuant to Oct. 24, 2013 Order, Dec. 2, 2013. For example, BCI repeated that their policy is not to test fired shell casings unless the forensic question is related to handling after firing. *Id.* The report also repeated concerns that

BCI's procedures for handling of the evidence at issue in the 1990's may have contaminated the evidence at issue. *Id.* The only difference is that BCI noted that case information has been written on the shell casings "with a presumed non-sterile pen." *Id.*

Mere speculation or hypothesis of contamination is not sufficient to conclude contamination for purposes of rejecting an application for DNA testing pursuant to R.C. 2953.74(C)(2)(c). Dr. Staub's testimony at the hearing, along with his discussion of several case examples, proved this point. The testing authority, with its specialized technology, must perform scientific testing in order to confirm or disprove a hypothesis of contamination.

FOURTH PROPOSITION OF LAW

In postconviction DNA testing, where the identity of the contributors to the DNA profile is at issue, Ohio Revised Code 2953.81(C) required disclosure of test results includes all documentation of the testing performed, including but not limited to the DNA profile(s) itself, and not solely the testing authority's conclusions.

The complete DNA test results from BCI on the cigarette butt in this case are necessary to (1) fulfill the remand from this Court, and (2) to comply with R.C. 2953.81(C). Noling requested that he be provided with the complete DNA test results in this case. Noling's Motion for Copy of Complete DNA Test Results, March 26, 2014. Noling explained that he was statutorily entitled to the complete DNA test results. Noling, just like the State, is entitled to review the complete test results of a testing authority in postconviction cases. More importantly, the DNA test results are essential to complete Noling's original request: to compare the DNA profile on the cigarette butt to ***all*** of the alternate suspects in the Hartigs's murder that were never compared to the biological material on the cigarette butt.

This Court noted that, "[i]n support of his second application for DNA testing, Noling had submitted evidence that Wilson and other individuals were alternative suspects in the Hartig

murders. But neither Wilson's DNA, nor that of any of the other suspects, was compared to the DNA on the cigarette. The trial court failed to consider Noling's application in the context of the new statutory requirements—whether there is a possibility of discovering new biological material that is potentially from the perpetrator that the prior DNA test may have failed to discover." *Noling*, 2013-Ohio-1764, ¶ 36. Further, this Court dismissed the State's argument that the prior testing in this case provided "meaningful information" by excluding Noling and his co-defendants. *Id.* at ¶ 42. Again, this Court stated that "Noling's second application * * * sought to identify Wilson or other named suspects as the actual perpetrator. Therefore, the trial court must consider whether the evidence regarding Wilson or the other suspects and the advances in DNA testing submitted in support of Noling's second application show by a preponderance of the evidence that there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover." *Id.* Without the complete DNA test results requested by Noling, the DNA from the cigarette butt cannot be compared to the remaining alternate suspects. It is for all of the above reasons that the legislature required disclosure of the results of the testing in postconviction DNA testing without limitation or qualification. R.C. 2953.81(C).

Ohio Revised Code 2953.81(A) states that the court or a designee of the court shall require the State to maintain the results of the testing and to maintain and preserve both the parent sample of the biological material used and the offender sample of the biological material used. Ohio Revised Code 2953.81(C) states that the court or the testing authority shall provide a copy of the results of the testing to the prosecuting attorney, the Attorney General, and the subject offender. Unlike Crim. R. 16(B)(3), no showing of materiality is required as, given the focus on DNA testing and results, materiality is presumed.

Ohio Revised Code 2953.83 states that the rules of criminal procedure are applicable except where the terms of Ohio's postconviction DNA testing statute supersede those rules. While R.C. 2953.83 clearly states that results of the testing must be maintained by the State, and a copy shall be provided to the subject offender, Crim. P. R. 16 offers helpful guidance as to the meaning of "test results" in R.C. 2953.81. Crim. R. 16(K) describes an "expert report" as a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. Here, BCI has provided a report which includes its findings and conclusions. This is an expert report. An expert report is not test results. *See* Crim. R. 16(B)(3). Noling was provided with an expert report and not the test results required by the statute. While the trial court, again, provided no rationale for its denial, there is no rationale that would justify denying Noling the results of DNA testing.

A. Noling is statutorily entitled to the test results

Ohio Revised Code 2953.81(B) states that the results of DNA testing are a public record. In addition, R.C. 2953.81(C) states: "The court or the testing authority **shall** provide a copy of the results of the testing to the prosecuting attorney, the Attorney General, and the subject offender." (Emphasis added). Noling is the "subject offender." The language of the statute is clear that the test results must be disclosed to Noling.

B. "Test results" are not merely the testing authority's conclusions

The test results Noling sought are routinely disclosed in post-conviction DNA testing cases. Moreover, "test results" must necessarily include the actual results of the testing itself, not just the conclusions of the testing authority based on the test results.

i. The statute requires disclosure of test results, not simply the testing authority's conclusions

The statute does not define "test results." However, what is notable is the absence of qualifying or limiting words in the statute. The language of the statute does not require disclosure of the final conclusions of the testing authority, it requires disclosure of the test results. In addition, a reading of the text surrounding the words "test result" in the statute and the scope of how "test results" has been defined in other postconviction DNA testing proceedings is instructive. Consideration of all of these factors is required in defining the scope of "test results" in Ohio's postconviction DNA testing statute. *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

a. A narrow definition of "test results" would render portions of Ohio's postconviction DNA testing statute meaningless

Ohio Revised Code 2953.81(A) states: "The court or a designee of the court shall require the state to maintain the results of the testing and to maintain and preserve both the parent sample of the biological material used and the offender sample of the biological material used. The testing authority may be designated as the person to maintain the results of the testing or to maintain and preserve some or all of the samples, or both.***" A single page containing conclusions is meaningless without the results and data on which they are based. A testing authority would have no knowledge or basis to later defend or amend any results or conclusions without the underlying data. If R.C. 2953.81(A) required retention of only the one-page report containing only the conclusions of the testing authority based on the results of DNA testing, it would render the retention provision useless and, therefore, meaningless. "In enacting a statute,

it is presumed that . . . The entire statute is presumed to be effective." R.C. 1.47(B). The courts "must give full meaning to all of the express statutory language." *Estate of Stevic et. al. v. Bio-Medical Application of Ohio, Inc.*, 121 Ohio St.3d 488, 2009-Ohio-1525, 905 N.E.2d 635, ¶ 18 (emphasis added). A reading of the term "test results" to mean a report of the conclusions of the testing authority based on the test results violates this long standing rule of statutory construction. In addition, the generation of the DNA profile for a CODIS run necessarily involves a number of determinations in order for that profile to eligible. In a case where the profile's eligibility is a point of contention, or if the eligible offender wished to move for a keyboard search as opposed to the submission of the profile to CODIS, the underlying test results are important, and the underlying profile and data are necessary. A narrow interpretation of "DNA test results" to mean a one-page report of conclusions would preclude legitimate litigation – on behalf of either the State or the subject offender – as to the meaning or interpretation of the entirety of the "DNA test results." Additionally, as both the State and Noling's experts agree, the final determination and quality and quantity are determined by both the required in the lead up to testing as well as amplification and testing itself. Ex. A, Noling's Motion for Hearing, Dec. 20, 2013; Exhibit C, State's Response to Noling's Motion for Designation of an Additional Testing Authority, March 7, 2014. The testing authority will clearly retain all of these documents, not just the one-page report. That is because all of these materials encompass the DNA test results. The court should avoid that construction which renders a provision meaningless or inoperative. *State ex rel. Myers v. Board of Education*, 95 Ohio St. 367, 373 (1917). Therefore, Noling should be provided with a copy of all documents generated by BCI as a result of the testing performed in this case.

At bare minimum, Noling should be provided with the DNA profile – the result of the DNA testing. However, the data relied on to generate this result are also a part of this result and Noling is requesting these materials as well. These materials include but are not limited to: electropherograms, allelic charts, quantification charts, lab notes regarding chain of custody and condition of the evidence, lab notes that indicate what section of the evidence was excised and/or swabbed for DNA testing, etc.

b. Prior disclosure of "test results" under Ohio's postconviction DNA testing statute demonstrate a broad interpretation

Exhibit B to Noling's Motion for Copy of Complete DNA Test Results are the "DNA test results" BCI provided to undersigned counsel in another postconviction DNA testing case. This example of the disclosure of the complete test results support Noling's interpretation of the statute and demonstrate that the one-page report disclosed in this case is not the entirety of the "DNA test results," and is thus not in compliance with the mandate of R.C. 2953.81.

c. Postconviction DNA testing authorities – including BCI – have previously and routinely disclosed the test results Noling seeks

In postconviction DNA testing cases, prosecutors routinely request and are given all documents generated – including lab notes, allelic charts, electropherograms, quantification measurements, etc. – generated by a testing authority. *State v. Douglas Prade*, Summit C.P. CR-1998-02-0463; *State v. Dewey Jones*, Summit C.P. CR-1994-06-1409 C.[22] In addition, BCI has also provided to the prosecutor and counsel for the "subject offender" all the documents that it

[22] There is no entry on the docket for a court order to release these documents as the testing authorities in both of these cases provided this information to the prosecutor and to the subject offender's counsel pursuant to email and/or telephone requests from the parties. Undersigned counsel was counsel for the subject offender in both cases, and represents that the documents from the testing authorities were disclosed to her as well as the prosecutors.

has generated as the testing authority. *State v. Douglas Prade*, Summit C.P. CR-1998-02-0463.[23] Had the testing authority or authorities in these cases failed or refused to disclose the "test results," as requested here by Noling, there can be no doubt that the State and counsel for the subject offenders in those cases would have filed a motion similar to the one that Noling filed in the trial court.

ii. A narrow reading of "test results" to simply mean "conclusion" would bar any review by either the State or counsel for the subject offender of postconviction DNA test results

As described at length in Dr. Staub's Affidavit attached to Noling's December 20, 2013 Motion for Hearing, Noling's December 30, 2013 Motion for Cellmark to be Designated the Testing Authority, and Dr. Staub's testimony on March 12, 2014, DNA testing involves multiple stages (the three primary phases are extraction, quantification, and amplification). Therefore, at minimum, the results from each phase are the "testing results" as each phase is a part of DNA testing. In addition, the results from each stage of testing impacts and/or determines whether and how to proceed to the next phase of testing in order to get the best results in that phase, as well as the final phase of testing. The results from each phase of testing are critical to any conclusions reached based on the results of the final phase of testing (amplification). Neither the State nor the subject offender could ever critique or challenge results, if they are not first provided with all the information from each phase of testing – as no independent review could ever be conducted. The definition of test results for disclosure cannot be defined in the statute by just this case, it must be interpreted so that it is applied properly to all cases. And there can be differences of opinion, even within a testing authority, as to interpretation of the results. *State v. Crager*, 116

[23] Again, there is no entry on the docket for a court order to release these documents as the testing authorities (which included BCI in *Prade*) provided this information to the prosecutor and to the subject offender's counsel pursuant to email requests from the parties. Undersigned counsel was counsel for the subject offender and represents that the documents from the testing authorities were disclosed to her as well as the prosecutors.

Ohio St. 3d 369, 2007-Ohio-6840, ¶ 22 ("If there's a discrepancy between the technical reviewer and the analyst, then they can get together and meet and say, 'Okay, I think this' or 'I think this', and then if a consensus still isn't reached there then it can actually either go to -- what we have is a Forensic Science Coordinator, or another person that can be consulted, or it can actually go to the supervisor who will in turn say, 'Okay, yes, I believe that this person is correct or this interpretation is correct or you're both right' and you can come to a consensus that way."). Without disclosure of the entirety of the test results, and only disclosure of the final conclusion, the lack of consensus as to the interpretation of the results will remain unknown.

FIFTH PROPOSITION OF LAW

A trial court may provide access to postconviction forensic testing and databases in the absence of a statute.

Simply because a statute does not provide a clear path to pursue a postconviction testing and identification, does not mean that there is not a remedy at law. *State v. Biggs*, 5th Dist. Stark No. 2013CA00009, 2013-Ohio-3333, *jurisdiction declined.* Even Ohio's postconviction DNA testing statute is not the sole means by which an inmate may obtain postconviction DNA testing. R.C. 2953.84. Prior to July 11, 2006, the effective date of R.C. 2953.84, the Ohio Attorney General issued an opinion stating that SB 11 (the first iteration of Ohio's post-conviction DNA testing law) was not the sole means by which one could obtain postconviction DNA testing in Ohio. Then-Ohio Attorney General Jim Petro issued the State's official interpretation of the law in Attorney General Opinion 2005-009 dated March 1, 2005 (hereinafter "AG Opinion"). The AG Opinion primarily discusses utilizing mechanisms to access DNA testing outside of R.C. 2953.71-.81 and R.C. 2953.82 (Ohio's DNA testing statute). However, if other mechanisms permit DNA testing and access to the CODIS database to identify the source of a DNA profile but do not provide access to the NIBIN database to determine the identity (and potential user) of

the murder weapon in this case, this would wholly undercut the AG's opinion, as well as bar potentially innocent defendants from evidence that could exonerate them. The advancements in the use of databases to identify is not limited to the field of DNA. Indeed, the NIBIN database was not available at the time of Noling's trial. The AG Opinion makes clear that SB 11 and SB 262 are merely vehicles by which an inmate ***can force the State to pay*** for postconviction DNA testing in certain circumstances.[24] This law does not preempt the field and it does not divest a court of authority to order postconviction access to evidence for inmates outside the DNA testing statute where justice so requires.[25] *See also, State v. Ray Smith*, Jr., Lorain County C.P. No. 98CR051464, Judgment Entry, Order for Testing, Dec. 3, 2012 (ordering that fingerprints, prior to their delivery to the testing authority for DNA testing, be uploaded to AFIS[26] and a report provided as to the results of the AFIS search).

This same logic holds true for other types of forensic testing and evaluation. *State v. Biggs*, 2013-Ohio-3333. Postconviction forensic testing, such as ballistics testing and comparison, can be sought in the absence of a specific statute. *Biggs*, 2013-Ohio-3333. Ballistics testing and identification have been awarded under similar statutory requirements that are set forth under Ohio's DNA testing statute. *People v. Pursley*, 407 Ill. App. 3d 526, 943 N.E.2d 98, 347 Ill. Dec. 808 (Ill. App. Ct. 2d Dist. 2011) (a defendant may move for testing if either of two requirements is met: (1) the evidence was not subject to the testing now requested at the time of trial; or (2) the evidence although previously subjected to testing can be subjected to additional testing using a method that was not scientifically available at the time of trial and

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24 2005 Ohio Op. Atty. Gen. No. 9; 2005 Ohio AG LEXIS 14 at *29.

25 *Id.* at *32-40.

26 AFIS refers to the database of fingerprints and the corresponding criminal histories; mug shots; scars and tattoo photos; physical characteristics like height, weight, and hair and eye color; and aliases of those whose fingerprints are contained in the database.

that provides a reasonable likelihood of more probative results. Finally, two more conditions must be met for the court to order the testing: (1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to defendant's assertion of actual innocence even though the results might not completely exonerate him; and (2) the testing requested employs a scientific method generally accepted within the relevant scientific community).

One possible outcome of DNA testing is the discovery of a partial DNA profile on one or more items of evidence. A partial DNA profile may be both incomplete and ineligible for CODIS, and incapable of identifying the source of the unknown profile across multiple evidentiary items. Using a partial profile, however, examiners could still exclude possible contributors. For instance, if testing revealed a partial profile on, say, a shell casing, Noling would either be included or excluded as a possible contributor to the biological evidence. If those partial profiles were consistent with other, that would be further evidence of the same, singular perpetrator rather than contamination.

At the time of the Hartigs' murder and throughout subsequent investigation, police failed to locate the actual murder weapon. Examiners, however, concluded that the gun used in Noling's prior robbery was not the murder weapon. Hypothetically, in the case of an exclusionary, partial profile on the shell casing, in conjunction with the shell casing from the murder weapon used to kill the Hartigs linked to another crime (committed when Noling was incarcerated) or another perpetrator, these results of forensic testing would be outcome determinative. In other words, the shell casings and the NIBIN database[27] are akin to the cigarette butt and the CODIS database. The effect is such that, under close inspection of key items of evidence using two forensic technologies—DNA and ballistics—Noling has been

[27] *See* fn. 28 *infra*.

excluded as having contributed to significant remains of both biological material on critical items of evidence and the ballistics are linked to another crime and another perpetrator.

With the advent of the FBI's National Integrated Ballistic Information Network (NIBIN) in 2006,[28] the shell casings and missiles from the crime scene could be submitted to the NIBIN for a possible match to the murder weapon. In addition to DNA testing, Noling seeks to have the shell casings and missiles recovered from the crime scene uploaded to NIBIN to search for a match to the murder weapon, and the crime in which it was subsequently used. If a NIBIN search produces a match, the perpetrator from that crime could potentially be linked to the Hartigs' murder. A link between the murder weapon, its user, and DNA evidence could have the same or similar effect as a CODIS match: placing a known felon or suspect at the scene while excluding Noling.

These scenarios exemplify further ways in which the results of a NIBIN search in conjunction with the results of DNA testing would yield an outcome determinative result in this case. In other words, these scenarios describe just a few ways DNA results along with NIBIN results could raise reasonable doubt as to Noling's guilt. *State v. Siller*, 8th Dist. Cuyahoga No. 90865, 2009-Ohio-2874, ¶ 53; *State v. Jones*, 9th Dist. Summit No. 26568, 2013-Ohio-2986.

In addition, R.C. 2953.74(D) and R.C. 2953.71(L) require that the trial court consider all available admissible evidence. Should the shell casings match to a weapon from another crime, this would be evidence that the trial court should consider in granting postconviction DNA testing, as well as any subsequent relief based on the results of that testing. Finally, if the shell

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[28] See http://www.atf.gov/content/Firearms/firearms-enforcement/NIBIN (accessed August 11, 2014). After consulting with an expert, the NIBIN database did not come online until 2006, which was many years after Noling's conviction.

casings are linked to a specific individual, this would be crucial for comparing any DNA testing results in this case.

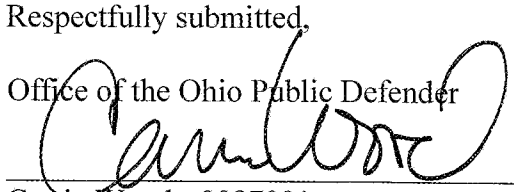
Here, the trial court rejected Noling's request for postconviction access to the NIBIN database solely because there was no specific statute permitting the trial court to do so. Ohio law has never barred Ohio inmates from seeking DNA testing and access to the CODIS database because of the lack of specific statute as long as the inmate made the request through another appropriate mechanism. Recent advancements in DNA technology permitted Noling to apply for postconviction DNA testing of the shell casings collected in this case. The shell casings are from the murder weapon used to kill the Hartigs. The murder weapon was never found. As such, this DNA application is an appropriate mechanism through which to seek use of the NIBIN database to identify the murder weapon, and potentially who has used it. The absence of a specific statute does not bar the trial court from considering this request, or ordering the shell casings uploaded to NIBIN.

CONCLUSION

This case involves substantial constitutional questions, as well as questions of public or great general interest. This Court should grant jurisdiction.

Respectfully submitted,

Office of the Ohio Public Defender



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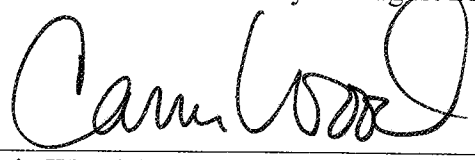
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by forwarded by first class U.S. mail to Pamela J. Holder, Assistant Prosecuting Attorney, 241 South Chestnut Street, Ravenna, Ohio 44266, and to Mike DeWine, Ohio Attorney General, DNA Testing Unit, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215 on this the 11th day of August 2014.



Carrie Wood (0087091)
Assistant Public Defender

Counsel for Tyrone Noling

#424183

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
PLAINTIFF-APPELLEE,	:	CASE NO.
	:	
V.	:	ON DISCRETIONARY APPEAL FROM THE
	:	PORTAGE COUNTY COURT OF COMMON
TYRONE NOLING,	:	PLEAS PURSUANT TO R.C. 2953.73(E)(1),
	:	CASE NO. 95-CR-220
DEFENDANT-APPELLANT.	:	**THIS IS A CAPITAL CASE.**

APPENDIX TO

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT TYRONE NOLING

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO,	)	CASE NO.: 1995 CR 00220
Plaintiff,	)	
vs.	)	JUDGE JOHN A. ENLOW
TYRONE LEE NOLING,	)	JUDGMENT ORDER
Defendant.	)	

FILED
COURT OF COMMON PLEAS
JUN 27 2014
LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

***

This matter is before the Court on remand from the Supreme Court to determine whether or not the cigarette butt was to be tested. The Court did allow the Defendant to amend his request to include State's Exhibits 2, 3, 4, 5, 6, 7, 13, 14, 16 and 17. The Court then ordered the Ohio Bureau of Criminal Identification, pursuant to Ohio Revised Code section 2953.73, to determine the quantity and quality of the parent sample of biological material found at the crime scene in this case; whether there is a scientifically sufficient quantity of the parent sample to test; whether the parent sample is so minute or fragile that there's a substantial risk that the parent sample could be destroyed; and whether the parent sample has been degraded or contaminated to the extent that it has become scientifically unsuitable for testing.

The Court finds that B.C.I. has filed a report indicating that all of these items are contaminated to the extent that they are scientifically unsuitable for testing; therefore, the Court would find that those exhibits do not comply with Ohio Revised Code section 2953.74(C)(2)(c); therefore, the amended application cannot be accepted and is therefore dismissed.

A copy of the report is attached and marked as Exhibit A.

IT IS SO ORDERED.

JOHN A. ENLOW,
COURT OF COMMON PLEAS

cc: File
Prosecutor Victor Vigluicci
Attorney Carrie Wood
BCI Richfield
Mike DeWine, Ohio Attorney General
PCSO

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO,	)	**CASE NO.: 1995 CR 00220**
Plaintiff,	)	
	)	
vs.	)	**JUDGE JOHN A. ENLOW**
TYRONE LEE NOLING,	)	**JUDGMENT ORDER**
	)	
Defendant.	)	

FILED
COURT OF COMMON PLEAS
JUN 27 2014
LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

***

This matter came on for hearing on Defendant's motion for a copy of complete DNA test results, and the State's response to said motion.

The Court, upon considering briefs, finds the motion is not well taken and is, therefore, overruled.

IT IS SO ORDERED.

JOHN A. ENLOW,
COURT OF COMMON PLEAS

cc: File
Prosecutor Victor Vigluicci
Attorney Carrie Wood
BCI Richfield
Mike DeWine, Ohio Attorney General
PCSO

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO,	)	CASE NO.: 1995 CR 00220
Plaintiff,	)	
vs.	)	JUDGE JOHN A. ENLOW
TYRONE LEE NOLING,	)	JUDGMENT ORDER
Defendant.	)	

FILED
COURT OF COMMON PLEAS
NOV 25 2013
LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

On December 28, 2010, Defendant filed a second application for DNA testing on a cigarette butt. The Court denied the petition, and Defendant appealed to the Supreme Court. The Supreme Court reversed and remanded to this trial Court "to consider whether prior definitive DNA testing precludes appellant Tyrone Noling's second application for post-conviction DNA testing. If not, the trial Court should consider whether new DNA testing would be 'outcome determinative'."

The Defendant has filed a motion for leave to amend his application for DNA testing to include shell casings and ring boxes found at the scene of the homicide.

The Court, upon considering the Defendant's motion to amend his application for DNA testing pursuant to Revised Code 2953.71 to 2953.81, finds those statutes indicate that the rules of criminal procedure apply unless the statutes provide a different procedure or that they would be clearly inapplicable. The criminal rules of procedure do not allow for amendments.

The Court would find the criminal rules of procedure further state, in Rule 57(B), "If no procedure is specifically prescribed by rule, the Court may proceed in any lawful manner not inconsistent with these rules of criminal procedure and shall look to the rules of civil procedure."

The Court would further find that Civil Rule 15(A) Amendments states that, "Leave of Court shall be freely given when justice so requires."

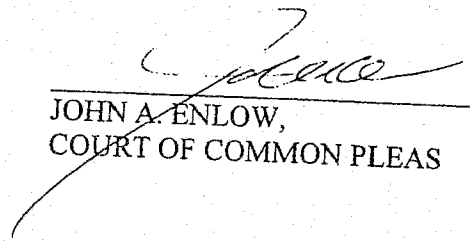
The Court would further find that, for judicial economy, and in the interest of justice, it is

to everyone's benefit to grant the motion for leave to amend; therefore, Defendant's application for DNA testing is amended to include the shell casings in State's Exhibits 2, 3, 4, 5, 6, 7, 13, 14 and 17, and the ring boxes in State's Exhibit 16, as described in their motion.

The Court would further find that there has been no definitive DNA testing on either the shell casings or the ring boxes

The Court would further find that there is no Ohio statutory procedure to submit the shell casings to NIBIN for comparison; therefore, the Defendant's motion is overruled.

IT IS SO ORDERED.



JOHN A. ENLOW,
COURT OF COMMON PLEAS

cc: File
Prosecutor Victor Vigluicci
Attorney Carrie Wood