

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

v.

TYRONE NOLING

Appellant.

Case No. 14-1377

On Appeal From the
Court of Common Pleas,
Portage County

Court of Common Pleas
Case No. 95 CR 220

This is a Death Penalty Case

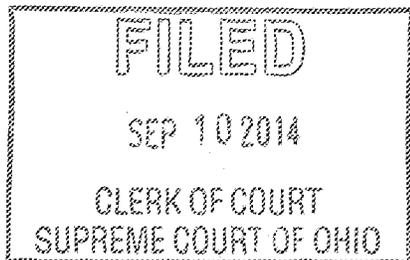
APPELLEE'S RESPONSE IN OPPOSITION TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION WARRANTING JURISDICTION FROM THIS

On April 5, 1990, Tyrone Noling entered the home of Bearnhardt and Cora Hartig, fired multiple shots from a .25 caliber gun, left the elderly couple dead on the kitchen floor and fled the scene of his crime. (Transcript of the docket, journal entries and original papers hereinafter "T.d." 173). In February of 1996, a Portage County jury found Noling guilty of two counts of aggravated murder and the accompanying death penalty specifications, two counts of aggravated robbery and aggravated burglary. (T.d. 173). This Court affirmed the conviction and capital sentence and has twice declined jurisdiction to review Noling's petitions for postconviction relief.

After this Court declined jurisdiction to review Noling's first application for additional DNA testing, the Court accepted review of his second application and remanded the matter for the trial court, "[T]o consider whether prior definitive DNA testing precludes appellant Tyrone Noling's second application for postconviction DNA testing. If not, the trial court should consider whether new DNA testing would be outcome-determinative, consistent with the opinion rendered herein." (T.d. 361).

On remand, the trial court determined a hearing pursuant to the remand order from this Court was moot, "[B]ecause the State has agreed to test the cigarette butt at BCI and run the results against CODIS." (T.d. 415). On February 10, 2014, BCI provided a laboratory report with the results of the testing. The report indicated DNA profiling was performed on the cigarette butt and the, "DNA profile from the cutting from the cigarette butt (Item 1.1.1.) is from an unknown male." (T.d. 436). The DNA profile was entered into the CODIS database and, "No investigative information has been

obtained as of this date.” (T.d. 436). Contrary to Noling’s previous assertions, the DNA profile of the unknown male from the cutting of the cigarette butt did not match that of anyone in the CODIS database which included the DNA profile of Daniel Wilson.

As the DNA testing of the cigarette butt failed to deliver the results Noling sought, his focus shifted to challenging the testing authority. He was unable to secure BCI’s data to use as the basis for a collateral attack of the cigarette butt’s DNA testing (T.d. 438, 453). Noling filed various motions targeting the lab’s ability to conduct DNA testing on the remaining items contained in his amended DNA application. (T.d. 437, 447, 448) It is the trial court’s selection of BCI as the testing authority in this case and Noling’s direct challenge to that selection that Noling wants to raise in an appeal to this Court.

This is not an issue of public or great general interest or a substantial constitutional question. The provisions of R.C. 2953.71 to 2953.81, establish guidelines and procedures for postconviction DNA applications. Noling’s amended postconviction application included the requisite R.C. 2953.72(A), acknowledgment that his participation in provisions of R.C. 2953.71 to 2953.81, provided no, “[R]ight to any review or appeal of, the manner in which those provisions are carried out,” R.C. 2953.72(A)(9). Rather, the acknowledgment provided that if the trial court rejects his application, he may seek leave of this Court, “[T]o appeal the rejection.” R.C. 2953.72(A)(8), (9).

On memorandum, Noling raised five propositions of law. The statutes provide he may seek leave to appeal the rejection of his application to this Court and only his third proposition of law appears to address the trial court’s rejection of his amended application. A review of that proposition of law fails to establish grounds warranting review from this court. As Noling has not presented any error with the trial court’s

decision rejecting his amended application for postconviction DNA testing, this Court should decline jurisdiction to review his case.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF FACTS

On April 5, 1990, while Butch Wolcott and Joseph Dalesandro waited outside in the get-away-car, Noling and Gary St. Clair entered the home of Bearnhardt and Cora Hartig, fired multiple shots from a .25 caliber gun and fled the scene. (Jury Trial Proceedings hereinafter "T.p." 978-979). Several days later, a neighbor's son discovered the decomposing bodies of the elderly couple lying on the kitchen floor. As the type of weapon used in the murders only held five or six shells, the killer had to stop to reload another ammunition clip into the weapon in order to fire the eight bullets detected at the scene of the crime. (T.p. 808).

Prior to the Hartigs' murders, Noling, Wolcott, Dalesandro and St. Clair, had devised a plan to rob elderly people. (T.p. 827). They agreed that the simplest approach would be to park their car outside of an elderly person's house and feign car trouble. Seeking assistance they would ask to use the phone to gain entry into the house and then rob the individual. (T.p. 827-828). Despite two previously successful robberies of elderly couples at the Hughes and Murphy residences, the plan failed with the Hartigs and the couple was murdered because they resisted. Noling explained, "[T]he old man wouldn't stop, that he kept coming at him." (T.p. 851). At trial, Wolcott testified Noling, "[H]ad a gun, he pulled the trigger" he continued, "[E]verything went wrong * * * we killed them." (T.p. 926).

II. STATEMENT OF PROCEDURAL HISTORY

On June 29, 2011, a unanimous panel of the Sixth Circuit Court of Appeals affirmed the decision of the District Court finding that no constitutional error occurred as to warrant habeas relief. *In re Noling*, 651 F.3d 573, 577 (6th Cir.2011). The Sixth Circuit assumed for purposes of its analysis that Noling had established a *Brady* violation and that he could not have discovered his alleged newly discovered facts through due diligence and then held, "Nevertheless, the newly discovered facts and all the other evidence do not establish clearly and convincingly that a reasonable factfinder could not have found Noling guilty." *Id.*

With regards to Dan Wilson and Raymond VanSteenberg, the Court found:

A man with a troubled past may have smoked a cigarette left in the Hartigs' yard, and another man owned the same type of gun used in the murder and could not account for its whereabouts at an inopportune time. This newly discovered evidence, even when viewed with the other evidence, does not prove that one of the other suspects committed the murders. It merely opens the possibility, a very slight one we might add, that one of them did. *Id.*

The Sixth Circuit held, "More importantly, it does not prove that Noling did not commit the murders, or clearly and convincingly nullify the evidence at trial supporting his conviction." *Id.*

Noling's case has had a very long procedural history. Following a jury trial in February 1996, Noling was convicted on two counts of aggravated murder and the accompanying death penalty specifications, two counts of aggravated robbery and aggravated burglary. (T.d. 173). This Court affirmed Noling's conviction and death sentence on direct appeal, *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, certiorari denied *Noling v. Ohio*, 539 U.S. 907, 123 S.Ct. 2256, 156 L.Ed.2d 118 (2003), and twice declined jurisdiction to review Noling's petitions for postconviction

relief. *State v. Noling*, 101 Ohio St.3d 1424, 2004-Ohio-123, 802 N.E.2d 154; *State v. Noling*, 120 Ohio St.3d 1453, 2008-Ohio-6813, 898 N.E.2d 967.

Under a recent remand order of this Court, *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 44, the state agreed to the DNA testing of a cigarette butt recovered from the Hartigs' driveway and uploading of the test results into CODIS. The results indicated a DNA profile of an unknown male from the cutting of the cigarette butt did not match anyone in the CODIS database which included the DNA profile of Daniel Wilson. (T.d. 436). A copy of the test results was filed with the clerk of the trial court. (T.d. 436).

On remand from this Court, the trial court granted Noling's motion for leave to amend his postconviction application for DNA testing to include shell casings and ring boxes (T.d. 391), identified by Noling as, "Nine spent shell casings, State's Exhibits 2, 3, 4, 5, 6, 7, 13, 14, and 17" and "Seven ring boxes, State Exhibit 16." (T.d. 377). In that same order, the trial court overruled Noling's request to submit the shell casings to NIBIN for comparison. (T.d. 391).

The trial court scheduled a hearing. In advance of the hearing, Noling filed multiple motions including motions in limine to allow testimony from multiple witnesses, a motion to allow reverse Evid.R. 404(B) testimony, and a 250-page motion seeking judicial notice of previously filed exhibits that was then withdrawn the day before the hearing. (T.d. 398, 400, 401, 402, 403, 405, 414). The state responded and filed a post-remand memorandum of law. (T.d. 409, 410, 411). On December 13, 2013, the trial court identified BCI as the testing authority and ordered State's Exhibits 2, 3, 4, 5, 6, 7, 13, 14, 16 and 17 to be delivered to BCI for a determination whether they were scientifically suitable for testing. (T.d. 416). Noling objected, sought a stay of the

proceeding an additional hearing and moved the court to reconsider its decision by requesting an alternative lab as the testing authority. (T.d. 417, 420, 423). When the trial court scheduled Noling's requested hearing, he asked and received a two-month continuance. (T.d. 429).

Following the second hearing, Noling filed another objection to the trial court's selection of BCI as the testing authority and sought a copy of "complete DNA test results" from BCI regarding the DNA testing performed on the cigarette butt. (T.d. 437, 438). On May 2, 2014, the trial court vacated its previous December 19, 2013, order (T.d. 416), and ordered the items be conveyed to BCI for a quality and quantity determination according to R.C. 2953.76. (T.d. 442). BCI filed a laboratory report on June 26, 2014, finding the ring boxes, shell casings and one projectile were, "[C]ontaminated to the extent that they have become scientifically unsuitable for testing." (T.d. 450). On June 27, 2014, the trial court then rejected Noling's amended application for DNA testing regarding these items. (T.d. 451). The trial court also overruled Noling's motion for a complete copy of DNA test results. (T.d. 452).

This matter is now before the Supreme Court of Ohio on Noling's memorandum in support of jurisdiction.

ARGUMENT OPPOSING JURISDICTION

Response to Noling's Proposition of Law No. 1: R.C. 2953.73(E)(1), confers exclusive jurisdiction on this Court consistent with the Fourteenth and Eighth Amendments to the U.S. Constitution.

Noling's first proposition of law challenged the constitutionality of R.C. 2953.73(E)(1), under the federal constitution. Specifically asserting that conferring exclusive jurisdiction on this Court violated his equal protection and due process rights

guaranteed in the Fourteenth Amendment and his right to be free from cruel and unusual punishment guaranteed in the Eighth Amendment.

The postconviction DNA statutes expressly provide that the provisions do not confer any constitutional right upon an offender, that the state established guidelines and procedures for the provisions, “[T]o ensure that they are carried out with both justice and efficiency in mind.” R.C. 2953.72(A)(9). The statutes also provide, an offender who files an application for DNA testing that is rejected or one that is accepted and produces unfavorable test results, “[D]oes not gain as a result of the participation any constitutional right to challenge, or, except [may seek leave to the Supreme Court to appeal the rejection], any right to any review or appeal of, the manner in which those provisions are carried out.” R.C. 2953.72(A)(9). Despite the express language in the statute, Noling is attempting to pursue a, “[C]onstitutional right to challenge * * * the manner in which these provisions are carried out.” *Id.* As sections 2953.71 to 2953.81, expressly prohibit this type of challenge, Noling’s proposition of law is without merit.

FOURTEENTH AMENDMENT CONSTITUTIONAL CHALLENGES FAIL

Assuming arguendo this Court reaches the merits of his proposition of law, the state submits the following response. The Fourteenth Amendment to the United States Constitution provides, “No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.” Fourteenth Amendment to the U.S. Constitution. Absent a classification interfering with the exercise of a fundamental right or operating to the peculiar disadvantage of a suspect class, see *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976), a state’s conduct only needs to bear a reasonable relationship to a proper object. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.E.2d 989 (1925).

The right to a direct appeal in state courts is not a fundamental right. *Mckane v. Durston*, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894) (“Whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.”) cited as still good law in *Lopez v. Wilson*, 426 F.3d 339, 355 (6th Cir.2005). “Due process does not require a State to provide appellate process at all.” *Goeke v. Branch*, 514 U.S. 115, 120, 115 S.Ct. 1275, 131 L.E.2d 152 (1995). “There can hardly be, therefore, a fundamental right to appellate review of a trial court’s post-conviction rulings.” *Dickerson v. Latessa*, 872 F.2d 1116, 1119 (1st Cir.1989).

The United States Courts of Appeals for the First, Fourth, Fifth and Sixth Circuits have held that capital defendants are not a suspect class for equal protection purposes. *Dickerson v. Latessa*, 872 F.2d at 1119 (“We conclude that the ‘rational basis test’ is the appropriate standard of review in this case. Dickerson does not and could not successfully contend that, as a person convicted of first degree murder, he is a member of a suspect class.”); *Evans v. Thompson*, 881 F.2d 117, 121 (4th Cir.1989) (capital defendants not a suspect class for equal protection purposes), cert. denied, 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990); *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir.1987), cert denied, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987); and *Smith v. Mitchell*, 567 F.3d 246, 262 (6th Cir.2009).

“Legislation is presumed to be valid.” *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Additionally, the legislation will not be overturned, “[U]nless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes

that we can only conclude that the legislature's actions were irrational." *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 859, 99 L.E.2d 1 (1988).

In applying a rational basis test here, the statutory distinction made between capital and noncapital defendants regarding the appellate process of a rejected postconviction application for DNA testing is rationally related to state objectives of justice and efficiency. The constitutional amendments granting this Court jurisdiction over the direct appeals from the trial court in cases where the death penalty was imposed was, "[T]he solution adopted by Ohio voters to eliminate ['long delays that pervaded the death-penalty system']." *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 19.

Like the arguments raised and rejected in *State v. Smith*, 80 Ohio St.3d 89, 100, 684 N.E.2d 668 (1997), Noling is asserting because "death is different," a capital defendant should be provided more process than noncapital defendants regarding the appellate review of a rejected postconviction application for DNA testing. However, under Ohio law, capital defendants are already being treated differently from those convicted of noncapital offenses. "Only two or three percent of all noncapital defendants who seek review by this court even have their cases heard." *Id.* This Court has conducted a review of every capital defendant's case. That review included all of the capital defendant's issues: capital, noncapital, statutory and constitutional as well as an independent review of the evidence in the case. This level of familiarity with the capital defendant's entire record, is lacking in a noncapital defendant's case. Accordingly, a noncapital defendant's rejected application must be routed to the appellate court level while this Court can decide whether to grant leave to review a rejected application for a capital defendant. Justice is applied not denied, the best example being the present

case. Noling's first rejected application was denied by the Court while his second rejected application was accepted for review.

A facial constitutional challenge to R.C. 2953.73(E), fails as this Court does not deny jurisdiction to review every capital defendant's appeal from a rejected postconviction application for DNA testing. Noling lacks standing to raise an as applied constitutional challenge to the statute because this Court has neither declined nor accepted jurisdiction in his present case.

EIGHTH AMENDMENT CONSTITUTIONAL CHALLENGE FAILS

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Capital punishment is constitutional. *Gregg v. Georgia*, 428 U.S. 153, 177, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (citing to two centuries of case law upholding the constitutionality of capital punishment). Noling asserted that the statute's distinction between capital and noncapital defendants violated his right to a meaningful appellate review.

Again, the federal constitution does not require a state to provide appellate review or an appellate court system. There is no constitutional right to appellate review. *Estelle v. Dorough*, 420 U.S. 534, 536, 95 S.Ct. 1173, 43 L.E.2d 377 (1975). However, a state that provides procedures for a direct appeal from a criminal conviction must adhere to the Due Process and Equal Protection Clauses of the federal constitution. *Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S.Ct. 585, 100 L.Ed.2d 891 (1956). Assuming a meaningful appellate review extends to the rejection of a postconviction application for DNA testing, having found R.C. 2953.73(E), neither violates Noling's due process nor equal protection rights, his Eighth Amendment claim also fails. Noling's proposition of

law no.1 is without merit and presents no grounds warranting jurisdiction from this Court.

Response to Noling's Proposition of Law No. 2: Requesting the trial court reconsider its testing authority selection, was in direct conflict with R.C. 2953.72(A)(9).

Aside from a discretionary appeal to this Court following a rejected application, Noling's participation in any phase of postconviction DNA provisions, R.C. 2953.71 to 2953.81, did not provide a constitutional right to challenge or, "[A]ny right to any review or appeal of, the manner in which those provisions are carried out." R.C. 2953.72(A)(9). Despite the plain language of the statute, Noling asked the trial court to review its own decision on the manner in which R.C. 2953.76, would be carried out in his case.

In the lower court proceedings, the trial court identified BCI as the testing authority and then mirrored the language of R.C. 2953.76, in its December 19, 2013, order that "[t]he testing authority shall 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." (T.d. 416). Upset with the trial court's decision, Noling wanted the trial court to review its own order and consider Orchard Cellmark instead of BCI as the testing authority. (T.d. 417). Noling persisted in asking the trial to use Orchard Cellmark based on the opinions of his paid expert, Rick Staub, the former Director of Operations and Laboratory Director of that lab. (T.d. 437). Noling's request was not only without statutory authority but in direct conflict with R.C. 2953.72(A)(9).

Staub submitted affidavits and testified on behalf of Noling's position. Although counsel characterized Staub's hearing testimony as, "[S]ignificant evidence" that Cellmark was the appropriate testing authority, Staub's testimony failed to deliver.

Noling proposed experimental recovery methods to reach, “protected cells” on the shell casings and rings boxes, but provided no peer reviewed publications supporting such methods. (Lack of publications or validations demonstrating the proof of concept for the acetone of “preserved” DNA beneath superglue). Further criticisms raised by Noling regarding the quantification technology utilized by BCI were without merit. (Cross-examination of Staub).

On memorandum, Noling directed this Court to R.C. 2953.78(C), for the proposition that both the trial court and offender play a part in the decision of selecting a testing authority stating, “[T]he trial court rescind its prior acceptance of the application for DNA testing and deny the application if the eligible offender objects to the designation of the testing authority.” (Noling Memo, pp. 20-21). As section (C), of R.C. 2953.78, deals only with the attorney general’s approved or designated testing authorities, the correct citation is to section (B) of the statute:

If a court selects a testing authority pursuant to division (A) of this section and the eligible offender for whom the test is to be performed objects to the use of the selected testing authority, the court shall rescind its *prior acceptance of the application for DNA testing* for the offender and deny the application. An objection as described in this division, and the resulting rescission and denial, do not preclude a court from accepting in the court’s discretion, a subsequent application by the same eligible offender requesting DNA testing. (Emphasis added). R.C. 2953.78(B).

This section of the statute refers to the offender’s option of exercising an objection to the testing authority after the application for DNA testing had been accepted. Before the court can, “[R]escind its prior acceptance of the application for DNA testing for the offender and deny the application” R.C. 2953.78(B), there must first be an acceptance of that application. Here, the trial court never docketed an order or entry accepting Noling’s amended application for postconviction DNA testing. Therefore, the objection

option provided in R.C. 2953.78(B), was not an option available to Noling during the trial proceedings. Noling's reliance on R.C. 2953.78(B), is misplaced.

Noling is asking this Court to ignore the plain language of R.C. 2953.72(A)(9), and allow an offender the right to review the manner in which the trial court carries out the postconviction DNA provisions, R.C. 2953.71 to 2953.81. Noling sought relief under the statutory scheme and is bound by those statutes. No other provision of these statutes provides authority for his challenge to the trial court's selection of BCI as the testing authority. The trial court properly denied the challenge to its selection of BCI as the testing authority in this case. Noling's proposition of law no. 2 is without merit and provides no grounds for this Court to accept jurisdiction.

Response to Noling's Proposition of Law No. 3: As the testing authority determined the samples were not scientifically suitable for testing, the trial court properly rejected the application for failing to satisfy R.C. 2953.74(C)(2)(c).

R.C. 2953.74(C)(1) REPORT IS NOT AUTOMATIC

On remand, Noling requested the trial court order the state to file a R.C. 2953.75, report under 2953.74(C)(1). (T.d. 377). In response, the state noted that this portion of Noling's memorandum contained requests on behalf of someone named "Hill" regarding, "[A] list of evidence by the Franklin County Prosecutor's Office" with a reference to attached, "Exhibit E." (T.d. 377, pp. 36). Moreover, there was an entire paragraph discussing, "The most glaring omission from the list being the white gloves, which the State argued were worn by the perpetrator." (T.d. 377, pp. 37). As Noling's case had nothing to do with the Franklin County Prosecutor, white gloves or an individual named Hill, this entire discussion appeared to be a cut and paste from some

defense database of DNA seeking litigants. Such a discussion was irrelevant and demonstrated that Noling's motion was nothing more than a delay tactic.

This Court has held, "[A] trial court should exercise its discretion based upon the facts and circumstances presented in the case whether it will first determine whether the eligible inmate has demonstrated that the DNA testing would be outcome-determinative, or whether it should order the prosecuting attorney to prepare and file a DNA evidence report." *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124, paragraph one of the syllabus. Here, the trial court decided to first determine whether Noling had demonstrated that DNA testing of the driveway cigarette butt would be outcome-determinative. This is a proper exercise of the trial court's discretion, *Id.*, and in line with this Court's remand order. (T.d. 361).

QUALITY AND QUANTITY OF SAMPLES PROPERLY DETERMINED

After the December 19, 2013, hearing, the trial court ordered BCI to, "[D]etermine whether there is a scientific 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." (T.d. 416). Noling objected and filed multiple motions prompting another hearing on March 12, 2014. On May 2, 2014, the trial court vacated its earlier December 19, 2013, order (T.d. 416) and issued the following order:

In order to determine whether to accept the Defendant's amended application for DNA testing, the Court must determine the six criteria set forth in Revised Code section 2953.74(C). To determine these items it's, therefore, ordered, pursuant to Revised Code section 2953.76, that the Prosecuting Attorney and Bureau of Criminal Identification shall prepare findings regarding:

1. The quantity and quality of the parent sample of biological material found at the crime scene in this case;

2. Whether there is a scientifically sufficient quantity of the parent sample to test;

3. Whether the parent sample is so minute or fragile that there's a substantial risk that the parent sample could be destroyed;

4. Whether the parent sample has been degraded or contaminated to the extent that it has become scientifically unsuitable for testing.

It is further ordered that no DNA sample is to be consumed. (T.d. 442).

The trial court sought information to assist in making its determination whether to accept or reject Noling's amended application for DNA testing. Among the information sought was the testing authority's determination regarding the quality and quantity of the sample at issue, the ring boxes, shell casings and projectile. R.C. 2953.76 provides:

If an eligible offender submits an application for DNA testing under section 2953.73 of the Revised Code, the court shall require the prosecuting attorney to consult with the testing authority and to prepare findings regarding the quantity and quality of the parent sample of the biological material collected from the crime scene or victim of the offense for which the offender is an eligible offender and is requesting the DNA testing and that is to be tested, and of the chain of custody and reliability regarding that parent sample, as follows:

(A) The testing authority shall determine whether there is a scientifically sufficient quantity of the parent sample to test and whether the parent sample is so minute or fragile that there is a substantial risk that the parent sample could be destroyed in testing. The testing authority may determine that there is not a sufficient quantity to test in order to preserve the state's ability to present in the future the original evidence presented at trial, if another trial is required. Upon making its determination under this division, the testing authority shall prepare a written document that contains its determination and the reasoning and rationale for that determination and shall provide a copy to the court, the eligible offender, the prosecuting attorney, and the attorney general. The court may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(B) The testing authority shall determine whether the parent sample has degraded or been contaminated to the extent that it has become scientifically unsuitable for testing and whether the parent sample otherwise has been preserved, and remains, in a condition that is suitable for testing. Upon making its determination under this division, the testing authority shall prepare a written document that contains its determination and the reasoning and rationale for that determination and shall provide a copy to the court, the eligible offender, the prosecuting attorney, and the attorney general.

(C) The court shall determine, from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample and from the totality of circumstances involved, whether the parent sample and the extracted test sample are the same sample as collected and whether there is any reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected. Upon making its determination under this division, the court shall prepare and retain a written document that contains its determination and the reasoning and rationale for that determination.

Pursuant to R.C. 2953.76, BCI, “[D]etermined that the samples listed above [ring boxes, shell casings and projectile] are contaminated to the extent that they have become scientifically unsuitable for testing.” (T.d. 450). Under BCI Biological Testing Protocol, the items would not be accepted for DNA testing due to the protocols used by the investigators and analysts when the lab first handled the items in 1990. (T.d. 450). In 1990 they, “[D]id not anticipate the extreme sensitivity of today’s DNA tests and did not follow current sterile technique procedures to minimize low level contamination.” (T.d. 450).

In 1990, the latent prints section at BCI was the first section to handle the items and that section processed the items while wearing non-sterile cotton gloves. *Id.* Therefore, gloves that had been worn while handling items from other cases, “[W]ould have been used to place the casings and ring boxes into the chamber prior to superglue adhesion.” *Id.* The superglue fuming itself is another source of potential contamination,

"[T]hat would have been 'preserved across samples' along with the latent prints section's use of non-sterile powder and brushes that were used while dusting the items for prints." *Id.*

In 1990, "Standard firearms protocol did not require use of gloves to handle items." (T.d. 450). After the latent prints section, an analyst from the firearms section would have handled the casings, "[W]ithout wearing gloves," and the item would have been, "[H]eld in place on a microscope with non-sterile clay used across many cases." *Id.* A visual inspection of the casings revealed, "[C]ase information had been written on the small surface area of the individual casings with a presumed non-sterile pen resulting in a potential source of common DNA contamination on multiple casings." *Id.* The visual inspection also revealed the ring boxes were packaged in a single sealed plastic bag, "[I]n contact with each other." *Id.*

After receiving BCI's determination that the items were scientifically unsuitable for DNA testing, the trial court held the exhibits do not comply with R.C. 2953.74(C)(2)(c). (T.d. 451). As a trial court may only accept an application for DNA testing if all the six criteria listed in R.C. 2953.74(C), apply, the trial court found Noling's "[A]mended application cannot be accepted and is therefore dismissed." (T.d. 451).

The trial court followed the statutes and sought information regarding the quality and quantity of the samples from the testing authority before making a determination whether to accept or reject Noling's amended application. BCI's determination that the items were not scientifically suitable for testing was based on the handling of the items by the lab in 1990 by the latent prints and firearms sections. Multiple exposures to non-sterile contacts including, the writing instrument used on the shell casings, gloved hands for placement into superglue chamber, the super glue chamber itself, finger print

brushes and powder, bare hands, placement clay on instruments and common storage packaging provided the basis for BCI's determination. Contrary to Noling's assertions on memorandum, the plain language of the statutes do not require extraction, amplification or a failed attempt to produce a DNA profile from a sample to determine an item is scientifically unsuitable for testing. Moreover, an alternative lab's willingness to perform DNA tests on the item without a cost to the state does not nullify the testing authority's determination that an item is scientifically unsuitable for DNA testing due to contamination from the manner in which the item was handled by BCI in 1990.

Noling has failed to demonstrate error with the trial court's rejection of his amended application for DNA testing in proposition of law no. 3. No grounds have been presented warranting jurisdiction from this Court.

Response to Noling's Proposition of Law No. 4: As an offender is not permitted to scrutinize, review, or analyze BCI's data for purposes of challenge or independent analysis, the trial court properly denied Noling's for complete test results.

Noling's fourth proposition of law fails because his March 26, 2014, motion for a copy of complete DNA test results regarding the cigarette butt was without statutory authority. With regards to the cigarette butt, the state agreed to the DNA testing of the cigarette butt and uploading to CODIS. (T.d. 415). The trial court selected BCI as the testing authority, the test was performed by BCI and on February 10, 2014, a one page laboratory report was issued providing the results of the testing. (T.d. 436). BCI provided, "[A] copy of the results of the testing to" this Court, the state and offender pursuant to R.C. 2953.81(E) and (C). A copy of the test results was also filed with the clerk of this Court on March 11, 2014. (T.d. 436).

Upon completion of the statutory testing of the cigarette butt, "The results of the testing remain state's evidence." R.C. 2953.81(A). The state is required to maintain the results of the testing, and maintain and preserve the parent sample of the biological material used and the offender sample of the biological sample used. R.C. 2953.81(A).

The cigarette butt testing occurred pursuant to a statutory proceeding and agreement from the state. The trial court selected BCI as the testing authority from the list of approved/designated laboratories provided by the attorney general pursuant to R.C. 2953.78(A). Once the attorney general approves/designates a lab for placement on the list and the trial court selects the lab as the testing authority those actions, "[D]o not afford an offender any right to subsequently challenge the approval, designation, selection, or use, and an offender may not appeal to any court the approval, designation, selection, or use of a testing authority." R.C. 2953.78(D).

The DNA statutes do contemplate Noling's current situation of, "[H]aving DNA testing conducted and receiving unfavorable results." R.C. 2953.72(A)(9). The statute continues that the offender, "[D]oes not gain as a result of the participation any constitutional right to challenge, or, except as provided in division (A)(8) of this section [discretion to seek leave to appeal the trial court's rejection of a DNA application to the Supreme Court], any right to any review or appeal of, the manner in which those provisions are carried out." R.C. 2953.72(A)(9). Accordingly, no collateral attack of the test results is permitted. The offender is not permitted to scrutinize, review, or analyze BCI's data for purposes of challenge or independent analysis.

BCI provided, "[A] copy of the results of the testing to" the trial court, the state and offender in the present case. Noling is entitled to nothing more under the statute. Contrary to Noling's assertions on memorandum, voluntary disclosure of additional

material in unrelated proceedings does not establish a basis for compelling the testing authority to provide more than what is required under the statute in these proceedings. As the test results have been provided as required by statute and Noling's request for further material was without statutory authority, the trial court properly denied his request. Noling has failed to demonstrate any error with this decision of the trial court warranting jurisdiction from this Court. His proposition of law no. 4 is without merit.

Response to Noling's Proposition of Law No. 5: As Noling's ballistics comparison request was not timely or proper in a motion and memorandum related to a DNA application, the trial court properly denied the request.

Noling's fifth proposition of law is without merit. On remand, Noling sought to expand the scope of this Court's remand order by requesting the trial court order the recovered shell casings and projectiles be uploaded to the FBI's National Integrated Ballistic Information Network (NIBIN). (T.d. 377). As this database went online in 2006, the state argued that Noling could not show that his October 4, 2013, request was made in good faith or was timely. (T.d. 385). As support for his October 2013 request, Noling proposed an extension of *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654.

In *Ayers*, the defendant was convicted of the aggravated murder, robbery and burglary of an elderly woman that lived in his building. The victim was found in her apartment, nude from the waist down with pubic hairs in her mouth. Her body showed signs that she had tried to defend herself but fingernail scrapings did not produce any biological material. At trial in 2000, the jury heard that Ayers and the Victim were excluded as the source of the hairs found in the Victim's mouth.

Ayers involved a second application for DNA testing. *Ayers* argued that technological advancements would produce results that would be outcome determinative under the statute's new definition of outcome determinative. The trial court denied the application stating it was barred by res judicata and that a parent sample from the fingernail scrapings did not exist. *Id.* at ¶¶ 7-8. The Eighth District held that res judicata did not apply due to the 2006 amendments to the statute. *Id.* at ¶ 12.

Ayers analyzed the effect of the 2006 amendments and said they lowered the standard for determining whether a reasonable fact-finder would have found guilt. *Id.* at ¶¶ 33-34. The court also said that in addition to considering an exclusion result in determining whether a DNA test would be outcome determinative or not, a court should also consider advancements in DNA testing and providing inmates access to CODIS. *Id.* at ¶ 34. The court found that DNA testing could identify the source of DNA and perhaps establish proof that another person had been in the victim's apartment at the time of the murder. *Id.* at ¶ 42. If the new testing methods, "Could show the existence of biological material under the victim's fingernails * * * Given evidence that the victim had wounds that indicated she tried to defend herself, a positive identification of such material would likely point to the murderer." *Id.*

Noling read *Ayers*'s reference to the 2006 statutory amendments that expressly provided for a CODIS DNA comparison by BCI as a gateway for seeking any database comparison, but that extension of the DNA statute is not supported by *Ayers*. As NIBIN came online in 2006, Noling's ballistics comparison request was not timely or proper in a motion and memorandum related to a DNA application. Such a request can neither stand on its own nor should a court allow Noling to bootstrap that type of request onto a motion seeking leave to amend a subsequent DNA application on remand from this

Court. Here, the trial court properly denied Noling's request for access to the NIBIN database, a ruling that does not present grounds warranting jurisdiction from this Court. His proposition of law no. 5 is without merit.

CONCLUSION

While the application of any number of methods of DNA testing would most likely produce data from the evidence in this 1990 double homicide, the true concern is that DNA found on those items would not date from the time of the offense. As determined by the testing authority, these items are scientifically unsuitable for testing because they have been handled in ways that would be unthinkable in a current DNA laboratory resulting in multiple levels of contamination. (T.d. 450). Accordingly, the trial court properly rejected Noling's amended postconviction application for DNA testing. (T.d. 451).

At issue in the previous appeal to this Court, was DNA testing of the cigarette butt recovered from the Hartigs' driveway. Although Noling's amended application was rejected by the trial court, the rejection did not effect the DNA testing of the cigarette butt. BCI performed DNA profiling on the cigarette butt and the test results indicated, "DNA profile from the cutting from the cigarette butt (Item 1.1.1.) is from an unknown male." (T.d. 436). The DNA profile was entered into the CODIS database and, "No investigative information has been obtained as of this date." (T.d. 436). Contrary to Noling's previous assertions, the DNA profile of the unknown male from the cutting of the cigarette butt did not match that of anyone in the CODIS database which included the DNA profile of Daniel Wilson.

In this present memorandum of law, Noling has not presented any error with the trial court's decision rejecting his amended postconviction application for DNA testing

warranting jurisdiction from this Court. For the foregoing reasons, this State of Ohio respectfully moves this Court to refuse jurisdiction to hear this discretionary appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition to Memorandum in Support of Jurisdiction has been sent via regular U.S. mail to the following on this 10th day of September 2014:

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