

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 :  
 : PLAINTIFF-APPELLEE, : CASE NO. 2014-1377  
 :  
 :  
 : V. : ON DISCRETIONARY APPEAL FROM THE  
 : PORTAGE COUNTY COURT OF COMMON  
 : PLEAS PURSUANT TO R.C. 2953.73(E)(1),  
 TYRONE NOLING, : CASE NO. 95-CR-220  
 :  
 : DEFENDANT-APPELLANT. : **THIS IS A CAPITAL CASE.**

---

**Appellant Tyrone Noling's Notice of Filings in the  
Portage County Court of Appeals and Scheduled Oral Argument**

---

Victor V. Vigluicci (0012579)  
Portage County Prosecutor  
Pamela Holder (0042727)  
Assistant Prosecuting Attorney  
Counsel of Record  
466 South Chestnut Street  
Ravenna, OH 44266  
(330) 297-3850  
(330) 297-4595 (Fax)

COUNSEL FOR APPELLANT  
STATE OF OHIO

Professor Mark Godsey (00744840)  
**Counsel of Record**  
Ohio Innocence Project  
University of Cincinnati  
College of Law  
P.O. Box 210040  
Cincinnati, Ohio 45221-0040  
(513) 556-0752  
(513) 556-0702 (Fax)

Office of the Ohio Public Defender  
Carrie Wood (0087091)  
Assistant State Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 644-0708 (Fax)

COUNSEL FOR APPELLANT  
TYRONE NOLING

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	:
	:
PLAINTIFF-APPELLEE,	: CASE NO. 2014-1377
	:
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.	: <b>THIS IS A CAPITAL CASE.</b>

---

**Appellant Tyrone Noling’s Notice Of Filings in the  
Portage County Court of Appeals and Scheduled Oral Argument**

---

Appellant Tyrone Noling hereby gives notice to this Court that a notice of appeal was filed with the Portage County Court of Appeals on July 24, 2014 from the same judgment entry before this Court in the instant case. This resulted in Portage County Court of Appeals No. 2014 PA 00045. On July 31, 2014, Mr. Noling filed a Motion to Determine the Constitutionality of R.C. 2953.73(E)(1) (Exhibit A). On December 24, 2014, the Portage County Court of Appeals entered an order, sua sponte, that Mr. Noling’s motion be held in abeyance pending the court’s review of the merits of the appeal (Exhibit B). Subsequently, Mr. Noling filed his merit brief (Exhibit C), the State filed their merit brief (Exhibit D), and Mr. Noling filed a reply brief (Exhibit E). The Portage County Court of Appeals scheduled oral argument on this matter for July 8, 2015 (Exhibit F).

Respectfully submitted,

Office of the Ohio Public Defender

*/s/: Carrie Wood*

Carrie Wood (0087091)

Assistant State Public Defender

250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215  
Voice: (614) 466-5394  
Facsimile: (614) 752-5167  
Email: carrie.wood@opd.ohio.gov  
Co-counsel for Tyrone Noling

Mark Godsey (0074484)  
Ohio Innocence Project  
University of Cincinnati College of Law  
Clifton Ave. at Calhoun St.  
PO Box 210040  
Cincinnati, OH 45221 – 0040  
(513) 556-0752  
(513) 556-1236 – fax  
Counsel for Tyrone Noling

### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was 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, 16<sup>th</sup> Floor, Columbus, Ohio 43215 on this the 27th day of May, 2015.

/s/ Carrie Wood  
Carrie Wood (0087091)  
Assistant Public Defender

Co-Counsel for Tyrone Noling

#442968

**FILED  
COURT OF APPEALS**

**JUL 31 2014**

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

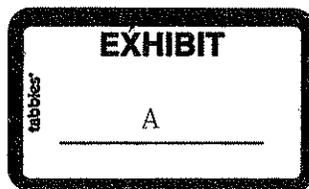
State of Ohio, : Case No. 2014 PA 00045  
Plaintiff-Appellee, : Trial Court Case No. 95 CR 220  
vs. :  
Tyrone Noling, : Regular calendar  
Defendant-Appellant. : **This is a death penalty case.**

**MOTION TO DETERMINE THE CONSTITUTIONALITY OF R.C. 2953.73(E)(1)**

Tyrone Noling, through undersigned counsel, moves this Court to determine the constitutionality of R.C. 2953.73(E)(1). Mr. Noling asserts R.C. 2953.73(E)(1) is unconstitutional and therefore void and cannot be applied either to bar Mr. Noling's appeal to this Court, or this Court's jurisdiction to review the appeal.<sup>1</sup> Mr. Noling asserts that *State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, ¶¶ 11-27, 992 N.E.2d 1095 (2013), while answering whether R.C. 2953.73(E)(1) was constitutional under *State v. Davis*, 131 Ohio St.3d 1, 2011 Ohio 5028, 959 N.E.2d 516 (2011), left unanswered the constitutionality of R.C. 2953.73(E)(1) under the Due Process and Equal Protection Clauses of the United States Constitution. Further support for this motion is set forth in the attached memorandum.

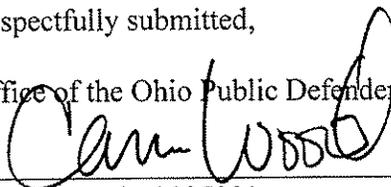
---

<sup>1</sup> Although Noling asserts that R.C. 2953.73(E)(1) is unconstitutional, and files this Motion in support of such proposition, Noling will also file a Memorandum in Support of Jurisdiction in the Ohio Supreme Court in satisfaction of the current requirements of R.C. 2953.73(E)(1).



Respectfully submitted,

Office of the Ohio Public Defender



Carrie Wood - 0087091  
Assistant State Public Defender

250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215  
Voice: (614) 466-5394  
Facsimile: (614) 752-5167  
Email: carrie.wood@opd.ohio.gov

Co-counsel for Tyrone Noling

Mark Godsey (0074484)  
Ohio Innocence Project  
University of Cincinnati College of Law  
Clifton Ave. at Calhoun St.  
PO Box 210040  
Cincinnati, OH 45221 – 0040  
(513) 556-0752  
(513) 556-1236 – fax

Counsel for Tyrone Noling

## MEMORANDUM IN SUPPORT

### I. Introduction

Noling acknowledges that the Ohio Supreme 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 N.E.2d 516 (2011), 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). The Ohio Supreme 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.<sup>2</sup> 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 constitutional questions un-addressed by the majority:

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.

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.

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

---

<sup>2</sup> 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.

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 the Ohio Supreme Court, proper severance of R.C. 2953.73(E)(1), in order to salvage the statute and render it constitutional, would confer jurisdiction on this Court. 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.

In light of this issue, Noling has filed a timely appeal with this Court so that, should the Ohio Supreme Court address this issue, Noling has preserved a timely appeal to this Court should the Ohio Supreme Court return jurisdiction to this Court. In addition, Noling requests that this Court hear his appeal on the merits of the denial of his DNA Application, or set full briefing on the Constitutional questions raised herein.

**II. 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, while applying the Equal Protection Clause when examining 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.

**A. EQUAL PROTECTION**

The equal protection of law implies 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 the Ohio Supreme Court must fail.<sup>3</sup> The Ohio Supreme Court may deny jurisdiction to hear Mr. Noling’s appeal, thus totally denying him any appeal of his DNA application.

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

---

<sup>3</sup> 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 3953.73(E)(1) eliminates the capital offender’s direct appeal to the court of appeals, and provides a **discretionary** appeal to the Ohio Supreme 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).<sup>4</sup> 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 other 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

---

<sup>4</sup> 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.”). Mr. 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 Mr. 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 Mr. Noling.<sup>5</sup> 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.

---

<sup>5</sup> 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, plead 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 of 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.<sup>6</sup> 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 Mr. 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 Mr. 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.

## **B. 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-

---

<sup>6</sup> 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: o’

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 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.<sup>7</sup> Concerns

---

<sup>7</sup> 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](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](http://www.innocenceproject.org/Content/Raymond_Towler.php) (accessed July 29, 2014) (Raymond Towler was exonerated on May 5, 2010); [http://www.innocenceproject.org/Content/Robert\\_McClendon.php](http://www.innocenceproject.org/Content/Robert_McClendon.php) (accessed July 29, 2014)

of human fallibility in the legal process always linger, especially in 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. Mr. Noling sought testing in the county in which he was convicted and now, if the Ohio Supreme Court denies jurisdiction of his appeal, he has no redress. This State action constitutes a violation of Mr. Noling's constitutional rights under the due process clause of the Fourteenth Amendment of the United States Constitution.

### **III. 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, (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. 153.

The Ohio General Assembly enacted SB11, SB262, and SB77 in recognition of that 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.<sup>8</sup> 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

---

<sup>8</sup> 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.

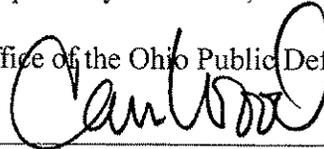
Meaningful appellate review is critical. Appellate court review provides substantial protections to a person facing execution. First and foremost, the court of appeals' review provides a level of security and reliability not present when only a discretionary appeal is allowed. The Ohio Supreme Court may not exercise jurisdiction, leaving the inmate with absolutely no appellate review. The very point of Senate Bill 11 is to prove the innocence of convicted criminals through advanced DNA technology. Mr. 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.

#### **IV. Conclusion**

Mr. Noling has demonstrated that R.C. 2953.73(E)(1) is facially unconstitutional. Therefore, this Court should proceed as if the "offending subsection of the statute were excised therefrom," *State v. Sterling*, 2005-Ohio-6081, and set a briefing schedule in order for Mr. Noling to further advance the merits in support of his Application for DNA testing. In the alternative, this Court should schedule a hearing at which Mr. Noling can more fully advance the arguments contained herein.

Respectfully submitted,

Office of the Ohio Public Defender



---

Carrie Wood - 0087091  
Assistant State Public Defender

250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215

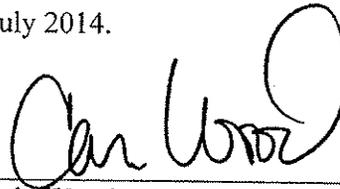
Voice: (614) 466-5394  
Facsimile: (614) 752-5167  
Email: carrie.wood@opd.ohio.gov

Co-counsel for Tyrone Noling

Mark Godsey (0074484)  
Ohio Innocence Project  
University of Cincinnati College of Law  
Clifton Ave. at Calhoun St.  
PO Box 210040  
Cincinnati, OH 45221 – 0040  
(513) 556-0752  
(513) 556-1236 – fax

**Certificate of Service**

I hereby certify that a true copy of the foregoing *MOTION TO DETERMINE THE CONSTITUTIONALITY OF R.C. 2953.73(E)(1)* was 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, 16<sup>th</sup> Floor, Columbus, Ohio 43215 on this the 30th day of July 2014.



---

Carrie Wood – 0087091  
Assistant State Public Defender

Counsel for Tyrone Noling

STATE OF OHIO )  
 ) SS.  
COUNTY OF PORTAGE )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

STATE OF OHIO,  
Plaintiff-Appellee,

JUDGMENT ENTRY

-vs-

CASE NO. 2014-P-0045

TYRONE LEE NOLING,  
Defendant-Appellant.

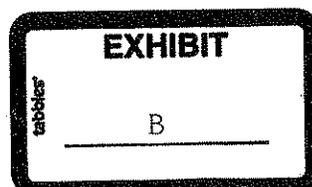
It is hereby ordered, sua sponte, that appellant's July 31, 2014 "Motion to Determine the Constitutionality of R.C. 2953.73(E)(1)" is held in abeyance pending this court's review of the merits of the appeal.

FILED  
COURT OF APPEALS

DEC 24 2014

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

  
\_\_\_\_\_  
JUDGE CYNTHIA WESTCOTT RICE



**FILED  
COURT OF APPEALS**

**DEC 23 2014**

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

State of Ohio, : Case No. 2014-PA-045  
Plaintiff-Appellee, : Trial Court Case No. 95 CR 220  
vs. :  
Tyrone Noling, : Regular calendar  
Defendant-Appellant. : **This is a death penalty case.**

---

**ON APPEAL FROM THE COURT OF COMMON PLEAS  
PORTAGE COUNTY, OHIO**

---

**MERIT BRIEF OF TYRONE NOLING**

---

**ORAL ARGUMENT REQUESTED**

---

Portage County Prosecutor's Office  
Victor Vigluicci  
Pamela J. Holder  
241 South Chestnut Street  
Ravenna, Ohio 44266  
330-297-3850

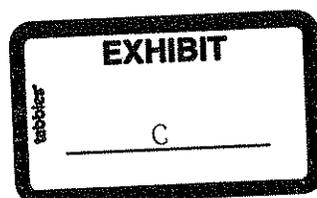
COUNSEL FOR STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER

CARRIE WOOD (0087091)  
Assistant State Public Defender  
(COUNSEL OF RECORD)

250 East Broad Street – Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 – Fax  
carrie.wood@opd.ohio.gov

and



Mark Godsey (0074484)  
Ohio Innocence Project  
University of Cincinnati College of Law  
Clifton Ave. at Calhoun St.  
PO Box 210040  
Cincinnati, OH 45221 – 0040  
(513) 556-0752  
(513) 556-1236 – fax

COUNSEL FOR TYRONE NOLING

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

Page No.

STATEMENT OF THE CASE.....1

**Authorities:**

R.C. 2953.71 .....1  
R.C. 2953.73 .....1

STATEMENT OF THE FACTS .....2

**Authorities:**

*State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095.....3,4  
R.C. 2953.71 .....3  
R.C. 2953.72 .....2  
R.C. 2953.73 .....2,3,4  
R.C. 2953.74 .....2  
R.C. 2953.76 .....6,7  
Senate Bill 77 .....2  
Senate Bill 262 .....2

ARGUMENT.....10

**ASSIGNMENT OF ERROR I**

**The trial court erred in its selection of a testing authority pursuant to Ohio Revised Code 2953.78(A) when it failed to 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, and the record fails to provide support for the trial court's selection of that testing authority. R.C. 2953.71(R), 2953.74(C)(2), 2953.76(A) and (B), 2953.78(A) and (C). Journal Entry, May 2, 2014.....10**

**Issues Presented for Review:**

*If there is an objection to the trial court's selection of the testing authority under R.C. 2953.78(A), does the trial court err when it fails to articulate the reasons for its selection of a particular testing authority? .....10*

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

Page No.

**Issues Presented for Review: (cont'd)**

*In a case where the limited quantity of DNA requires specialized and advanced DNA testing capabilities not available at all DNA testing facilities, does the trial court err when it designates a testing authority incapable of performing the necessary specialized and advanced DNA testing when a testing authority with such capacity is available at no cost to the state of Ohio?* .....10

**Authorities:**

*State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654 (8th Dist.).....11  
*State v. Jones*, 7th Dist. Jefferson No. 00 JE 18, 0220-Ohio-2791 .....12  
*State v. Lane*, 1st Dist. Hamilton No. C-970776, 1998 Ohio App. LEXIS 6417 .....12  
*State v. Leggett*, 6th Dist. Williams No. WM-97-029, 1998 Ohio App. LEXIS 4078.....12  
*State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095.....11  
*State v. Rowley*, 8th Dist. Cuyahoga No. 88659, 2007-Ohio-4830 .....12  
*State v. Reynolds*, 186 Ohio App.3d 1, 2009-Ohio-5532, 926 N.E.2d 213 (2d Dist).....11  
*State v. Thornton*, 12th Dist. Clermont No. CA2012-09-063 .....12  
R.C. 2953.71 .....10,11  
R.C. 2953.74 .....10,11  
R.C. 2953.76 .....10,11  
R.C. 2953.78 .....10,11

**ASSIGNMENT OF ERROR II**

**The trial court erred when it relied a report from the testing authority where the testing authority purported “scientific analysis” was based solely on a visual inspection of the evidence, when 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). 2953.74(C)(2).Journal Entry, May 2, 2014; Journal Entry, June 27, 2014** .....14

**Issue Presented for Review:**

*When determinations of quality and quantity of biological material under R.C. 2953.74(C)(2)(a), (b), and (c) requires DNA testing, does the trial court err when it relies on determinations based solely on a “visual inspection” of the evidence and conclusory allegations about evidence handling?* .....14

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

Page No.

**Authorities:**

*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.....18,19

*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 .....20

*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.....20

*State v. Collins*, 8th Dist. Cuyahoga No. 89668, 2008-Ohio-2363.....16

*State v. Meredith Hill*, Franklin County C.P. Number 88CR-500.....16,17,18

*State v. Reynolds*, 186 Ohio App.3d 1, 2009-Ohio-5532, 926 N.E.2d 213 (2d Dist).....14

R.C. 2953.73 .....15

R.C. 2953.74 .....14,15,21,22

R.C. 2953.78 .....15

**ASSIGNMENT OF ERROR III**

**When the identity of the contributors to the DNA profile is at issue in postconviction DNA testing, the trial court errs in denying disclosure of test results, including but not limited to the DNA profile(s) itself and the data that supports any conclusions in the report of the testing authority. R.C. 2953.81; 2953.83; Crim. R. 16; *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006); *State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095; *Noling’s Motion for Complete Copy of DNA Test Results*, March 26, 2014; *Journal Entry*, June 27, 2014. ....22**

**Issues Presented for Review:**

*When the eligible offender requests postconviction DNA testing, and that testing is granted, does the trial court err when it only permits the offender to have a copy of the testing authorities conclusions while preventing his review of the complete test results? .....22*

*When the identity of the contributors to the DNA profile is at issue, does the trial court err in denying the eligible offender petitioning for DNA testing, the resulting DNA profile and the data that demonstrates how the testing authority generated that profile .....22*

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

Page No.

**Authorities:**

*Dolan v. United States Postal Serv.*, 546 U.S. 481, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006).....22,24

*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.....25

*State v. Crager*, 116 Ohio St. 3d 369, 2007-Ohio-6840 .....28

*State v. Dewey Jones*, Summit C.P. CR-1994-06-1409 C .....27

*State v. Douglas Prade*, Summit C.P. CR-1998-02-0463.....27

*State ex rel. Myers v. Board of Education*, 95 Ohio St. 367 (1917) .....26

*State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095.....22,23

R.C. 2953.81 .....22,23,24,27

R.C. 2953.83 .....22,25

Crim.R. 16.....22,25

R.C. 1.47 .....25

Section 4.2.1, National DNA Index System (NDIS) Operational Manual .....25

**ASSIGNMENT OF ERROR III**

**The trial court erred when it held that it did not have authority to grant access to non-DNA, postconviction forensic testing of shell casings and access to the related database. R.C. 2953.84; *State v. Biggs*, 5th Dist. Stark No. 2013CA00009, 2013-Ohio-3333; Noling’s Motion to Amend His Application for Postconviction DNA Testing, Oct. 4, 2013; Noling’s Reply to State’s Response to Noling’s Motion to Amend His Application for Postconviction DNA Testing, Nov. 14, 2013; Journal Entry, Nov. 25, 2013; Noling’s Amended Application for DNA Testing, Dec. 4, 2013. ....29**

**Issue Presented for Review:**

*When ballistics comparison and access the ballistics database (NIBIN) would contribute to an outcome determinative result, does the trial court err in denying a subject offender’s? request when case law supports access to such testing but there is not a statute directly permitting the trial court to order such testing and database access? .....29*

**Authorities:**

*People v. Pursley*, 407 Ill. App. 3d 526, 943 N.E.2d 98, 347 Ill. Dec. 808 (Ill. App. Ct. 2d Dist. 2011).....31

*State v. Biggs*, 5th Dist. Stark No. 2013CA00009, 2013-Ohio-3333 .....29,30

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

Page No.

**Authorities:**

*State v. Hayden*, 2d Dist. Montgomery No. 24992, 2012-Ohio-6183 .....30  
*State v. Jones*, 9<sup>th</sup> Dist. Summit No. 26568, 2013-Ohio-2986.....12  
*State v. Ray Smith, Jr.*, Lorain County C.P. No. 98CR051464 .....30  
*State v. Siller*, 8<sup>th</sup> Dist. Cuyahoga No. 90865, 2009-Ohio-2874.....32  
R.C. 2953.71 .....30,33  
R.C. 2953.72 .....30  
R.C. 2953.73 .....30  
R.C. 2953.74 .....30,33  
R.C. 2953.75 .....30  
R.C. 2953.76 .....30  
R.C. 2953.77 .....30  
R.C. 2953.78 .....30  
R.C. 2953.79 .....30  
R.C. 2953.80 .....30  
R.C. 2953.81 .....30  
R.C. 2953.82 .....30  
R.C. 2953.84 .....29  
Senate Bill 11 .....29,30  
Senate Bill 262 .....30

**CONCLUSION** .....33

**CERTIFICATE OF SERVICE** .....35

**APPENDIX:**

*State of Ohio v. Tyrone Lee Noling*, Case No. 1994 CR 00220, Portage County  
Common Pleas Court, Judgment Order (June 27, 2014) ..... A-1  
  
*State of Ohio v. Tyrone Lee Noling*, Case No. 1994 CR 00220, Portage County  
Common Pleas Court, Judgment Order (June 27, 2014) ..... A-3  
  
*State of Ohio v. Tyrone Lee Noling*, Case No. 1994 CR 00220, Portage County  
Common Pleas Court, Judgment Order (November 25, 2013)..... A-4

## STATEMENT OF THE CASE

This is an appeal from the denial of DNA testing on specific items touched by the perpetrator who killed Bearnhardt and Cora Hartig – namely shell casings from the gun fired by the perpetrator and ring boxes – items which the State tested in the initial investigation in hopes of obtaining information as to the identity of the perpetrator.

In 2013, the Ohio Supreme Court remanded Mr. Noling's case back to the trial court and the trial court determined that it would hold a hearing on the questions of whether there was a prior definitive DNA testing under the R.C. 2953.71(U), and whether postconviction DNA testing would be outcome determinative. Prior to the hearing, Mr. Noling filed a motion to amend his DNA application to include the shell casings and the ring boxes, in addition to the cigarette butt.<sup>1</sup> A hearing was initially scheduled on December 19, 2013, where both Tyrone Noling and the State intended to call expert witnesses. On that date, the trial court declined to hold a hearing and, instead, granted DNA testing of the cigarette butt. The trial court also ordered the Bureau of Criminal Identification ("BCI") to "assess" the shell casings and the ring boxes to determine whether there was sufficient biological material to undertake DNA testing. Despite BCI's lack of experience with testing fired shell casings, and over Noling's objection, BCI performed a visual assessment of the shell casings and ring boxes and filed a report with the trial court recommending against DNA testing. The next day, the trial court denied Noling's Amended Application for DNA testing. Noling filed a timely appeal to this Court and the Ohio Supreme Court.<sup>2</sup>

---

<sup>1</sup> Noling also requested that the shell casings be submitted for search and comparison to the national database, called the National Integrated Ballistics Information Network (NIBIN), which is administered by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

<sup>2</sup> This Court has jurisdiction to hear this appeal. As explained in Noling's Motion to Determine the Constitutionality of R.C. 2953.73(E)(1), which Noling fully incorporates into this merit brief,

## STATEMENT OF THE FACTS

Tyrone Noling first applied for DNA testing in 2008, under Senate Bill 262 (“SB262”). Tyrone Noling’s Application for Post-Conviction DNA Testing (“First Application”) requested DNA testing of the cigarette butt collected from 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. The trial court denied this First Application 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 Senate Bill 77 (“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) new information 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 the Ohio Supreme Court took jurisdiction. That 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

---

R.C. 2953.73(E)(1) violates the equal protection and due process clauses of the Ohio and United States Constitution. Noling’s Motion to Determine the Constitutionality of R.C. 2953.73(E)(1), July 31, 2014. After severing the offending statutory language from R.C. 2953.73 (E)(1), this Court retains jurisdiction to hear Noling’s appeal. *Id.*

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).

*State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 35 (emphasis added.).

The Court stated that the questions left to 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 Id.* at ¶ 35, ¶ 44. Specifically, the Court held that the trial court must consider whether the evidence regarding Wilson and the other suspects coupled with the advancements in DNA technology show that there is a possibility of discovering new information regarding the identity of the perpetrator by obtaining more information from the biological material left behind at the scene. *Id.* at ¶ 42; R.C. 2953.71(U).

In addition, the Ohio Supreme 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. The 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. Status Conference, Oct. 8, 2013 ("Oct. Status Conf."), T.p. 10-11. 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. Oct. Status Conf. T.p. 8-9, 26-29, 30. However, no agreement was reached. *Id.* 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. Hearing, Dec. 19, 2013 ("Dec. Hrg."), T.p. 2-3. The trial court ordered that, since the State previously agreed to test the cigarette butt,<sup>3</sup> 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.*

---

<sup>3</sup> 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 casing and the ring boxes, as those items required advanced DNA testing methods not in use at BCI. Dec. Hrg., T.p. 4-18. The Ohio Innocence Project offered to pay for the advanced testing that was only available at Orchid Cellmark ("Cellmark") to alleviate any concern about the increased expense for the State. *Id.* at 5. However, the State objected to this offer. *Id.* at 6; *see also*, March 12, 2014 Hearing, ("March Hrg."), T.p. 23. 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. Dec. Hrg., T.p. 12-14. However, the trial court denied Noling's request to proffer Dr. Staub's testimony. *Id.*

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. March Hrg., T.p. 36-67, 104-22. In addition, Dr. Staub described the limitations with BCI as the testing

authority. *Id.* at 36-39, 40-42, 44-51, 55-59, 64. 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. *Id.* at 51-64. For example, studies show that Identifiler Plus produces peak heights 40-100% higher than Identifiler. *Id.* at 58-61; Exhibit B to 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 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. *Id.* 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. *Id.* 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. March Hrg., T.p. 53-56, 119-120, 128-129. The trial court appeared to agree with this conclusion as well. *Id.* at 10. 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. *Id.* at 54-55. 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. *Id.* at 53-54. 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. *Id.* at 62-63. 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. *Id.* at 106-108. Raymond Towler was subsequently exonerated based on postconviction DNA testing done by Cellmark while Dr. Staub was the head of their forensic division. *Id.* Notably, Cellmark became the testing authority in that case because of the limited technology for both extraction and testing at BCI.<sup>4</sup> *Id.* In addition, Dr. Staub noted that touch DNA had been involved in the exoneration of Clarence Elkins. *Id.* at 87-88, 104-106. Despite the fact that the State had argued that the underwear had been handled during the trial, the testing showed the profile from the skin cells of the perpetrator when he grabbed the underwear. *Id.* The State did not call any witnesses to refute the deficiencies of BCI outlined by Dr. Staub.

Prior to the start of the March hearing in this case, the trial court noted that, with BCI's testing procedures, it would have to perform DNA testing to accurately determine the quantity of DNA in the sample. *Id.* at 5-6, 8-9, 132. 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<sup>5</sup> and evaluation.

---

<sup>4</sup> 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 is not the case here, as there likely will only be one shot available to test the evidence at issue because of the likely small amount of DNA on the shell casings and ring boxes. March Hrg. T.p. 60, 64-5, 75. In other words, a single swab of the item and the resulting testing process, including DNA testing, will likely consume all the biological left on the items at issue. As a result, there will be only a single opportunity to obtain any information from the biological material on the item.

<sup>5</sup> Although the trial court noted that DNA testing was expected for a full evaluation and determination as to the presence of contamination, Noling learned that BCI did not intend to

On March 11, 2014 – just one day prior to the scheduled hearing – 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.<sup>6</sup> 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 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 10, 2014, BCI wrote 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. BCI Lab Report, docketed June 26, 2014, (“June BCI Report”). However, BCI did not perform any testing on the submitted items.

---

perform any type of testing on the shell casings and ring boxes as part of its evaluation. March Hrg., T.p. 5-6, 8-10. As a result, the perpetrator’s DNA left behind on these items would not be consumed. Therefore, there was not a final appealable order in this case until the trial court denied Mr. Noling’s Amended DNA Application.

<sup>6</sup> 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 this 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”).

*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.* BCI filed this report on June 26, 2014 and did not provide a copy to Noling or his counsel. June BCI Report. The very next day, the trial court dismissed Noling's Amended Application. Journal Entry, June 27, 2014. Noling filed a timely appeal.

## ARGUMENT

### ASSIGNMENT OF ERROR I

**The trial court erred in its selection of a testing authority pursuant to Ohio Revised Code 2953.78(A) when it failed to 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, and the record fails to provide support for the trial court's selection of that testing authority. R.C. 2953.71(R), 2953.74(C)(2), 2953.76(A) and (B), 2953.78(A) and (C). Journal Entry, May 2, 2014.**

#### Issues Presented for Review

*If there is an objection to the trial court's selection of the testing authority under R.C. 2953.78(A), does the trial court err when it fails to articulate the reasons for its selection of a particular testing authority?*

*In a case where the limited quantity of DNA requires specialized and advanced DNA testing capabilities not available at all DNA testing facilities, does the trial court err when it designates a testing authority incapable of performing the necessary specialized and advanced DNA testing when a testing authority with such capacity is available at no cost to the state of Ohio?*

Postconviction DNA testing and scientific determinations made under Ohio's postconviction DNA testing statute are made by the testing authority, which the trial court selects from a variety of facilities that the Attorney General designates.<sup>7</sup> R.C. 2953.71(R); R.C.

---

<sup>7</sup> 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).

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 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 that the statute contemplates the advancement 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.* As such, the trial court must consider whether such advanced testing and technology necessary for the case before it is available at any particular testing authority under consideration. 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. In fact, the availability of advanced DNA technology, which is necessary to obtain result and information from the item and biological material in a particular case, is one of the singularly most important decisions that the trial court makes in a postconviction DNA testing case. The failure to consider the availability or lack of availability of this technology at a testing authority is plain error.

So, while the Attorney General creates a list of labs for the court to choose from when designating the testing facility, 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 BCI recognized it did 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.<sup>8</sup>

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 these factors offer a guideline to the lower courts, based on the plain statutory language, as DNA technology advances. Here, the trial court made no findings regarding its selection of BCI

---

<sup>8</sup> 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. <http://www.dispatch.com/content/stories/local/2014/08/08/lab-error-might-affect-38-cases.html> (accessed Aug. 11, 2014).

as the testing authority, despite the fact that the selection of the testing authority was the primary source of disagreement among the parties.

As a result of the small quantity of DNA, the designated testing authority has one chance to perform testing on these items in this case. March Hrg. T.p. 60. 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 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 attempted to defend its failure to use 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 to send evidence touched by the perpetrator of these murders to a DNA testing

facility that was incapable of producing results. Given the trial court's expectation that BCI would perform DNA testing on the items, the trial court's failure to consider its limitations was in error. More importantly, the selection of BCI in this particular case, where the factors that guide selection of a testing authority clearly dictate the selection of Cellmark, demonstrate the clear error of the trial court.

## ASSIGNMENT OF ERROR II

**The trial court erred when it relied a report from the testing authority where the testing authority purported "scientific analysis" was based solely on a visual inspection of the evidence, when 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). 2953.74(C)(2).Journal Entry, May 2, 2014; Journal Entry, June 27, 2014.**

### Issue Presented for Review

*When determinations of quality and quantity of biological material under R.C. 2953.74(C)(2)(a), (b), and (c) requires DNA testing, does the trial court err when it relies on determinations based solely on a "visual inspection" of the evidence and conclusory allegations about evidence handling?*

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 to be made by the testing authority, and not the trial court. *State v. Reynolds*, 2009-Ohio-5532, ¶ 22. This is necessary to (1) 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.

The postconviction DNA testing statute does not require the testing authority to perform specific types of DNA tests. 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.<sup>9</sup> 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.”<sup>10</sup> Thus a mere claim or hypothesis is not the basis of a scientific determination. Science requires both the formulation and testing of a hypothesis. For purposes of R.C. 2953.74(C)(2)(c), this means testing must confirm a theory of contamination and requires rejection a claim of contamination on the basis of mere suspicions formed without

---

<sup>9</sup> <http://www.merriam-webster.com/dictionary/scientific> (accessed Aug, 7, 2014).

<sup>10</sup> <http://www.merriam-webster.com/dictionary/scientific%20method> (accessed Aug. 7, 2014) (Emphasis added.).

testing but rather a mere “visual inspection;” visual inspection 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. *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. In addition, 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. Despite this handling, BCI proceeded to test these items and the trial court admitted the results into evidence. *Id.* at ¶ 18, 21, 30. The Court of Appeals held that the mere allegations of contamination are insufficient to establish contamination. *Id.* at ¶ 30. This is consistent with Dr. Staub’s testimony – that DNA testing is also required to make that determination. March Hrg. T.p. 53.

BCI also has performed DNA testing of items in postconviction DNA testing, despite claims of contamination, which renders their determination in this matter even more explicable. 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 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”<sup>11</sup> 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.

In *Hill*, the State also cited contamination concerns with the collection of evidence from the crime scene. 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

---

<sup>11</sup> Anchoring means that the same DNA profile, which is not the defendant, is found on or “anchored” across multiple items, which the perpetrator likely or definitely came into contact. Stated another way, although someone besides the perpetrator could have come into contact with one of the items, only the perpetrator could have come into contact with all the items. Therefore, if the same DNA profile is located across multiple items, that profile belongs to the perpetrator. If the defendant is excluded from the DNA profile altogether, that shows or tends to show that the defendant is not the perpetrator. The more items on which the profile is located and the closer the link between the perpetrator and the item(s) tested, the stronger the anchor.

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 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 identified 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.<sup>12</sup> 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's farmhouse had also been set on fire. 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 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 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.

---

<sup>12</sup> [http://www.innocenceproject.org/Content/Roy\\_Brown.php](http://www.innocenceproject.org/Content/Roy_Brown.php) (accessed Aug. 7, 2014).

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.<sup>13</sup> 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. 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 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

---

<sup>13</sup>[http://www.innocenceproject.org/Content/Roy\\_Brown.php](http://www.innocenceproject.org/Content/Roy_Brown.php) (accessed Aug. 7, 2014).

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.<sup>14</sup>

Terry Chambers, Raymond Towler, and Clarence Elkins have also been exonerated by postconviction DNA testing.<sup>15</sup> 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;<sup>16</sup> *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 not have been 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 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.

---

<sup>14</sup> [http://www.syracuse.com/news/index.ssf/2011/04/roy\\_brown\\_a\\_free\\_man\\_now\\_back.html](http://www.syracuse.com/news/index.ssf/2011/04/roy_brown_a_free_man_now_back.html) (Aug. 7, 2014).

<sup>15</sup> [http://www.innocenceproject.org/Content/Terry\\_Chalmers.php](http://www.innocenceproject.org/Content/Terry_Chalmers.php) (accessed Aug. 7, 2014); [http://www.innocenceproject.org/Content/Clarence\\_Elkins.php](http://www.innocenceproject.org/Content/Clarence_Elkins.php) (accessed Aug. 7, 2014).

<sup>16</sup> [http://blog.cleveland.com/metro/2010/05/raymond\\_towler\\_freed\\_after\\_29.html](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.

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, filed the day before the trial court issued its denial, shows that BCI’s 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.<sup>17</sup> *Id.* 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 its 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.*

---

<sup>17</sup> 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.

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.

### ASSIGNMENT OF ERROR III

**When the identity of the contributors to the DNA profile is at issue in postconviction DNA testing, the trial court errs in denying disclosure of test results, including but not limited to the DNA profile(s) itself and the data that supports any conclusions in the report of the testing authority. R.C. 2953.81; 2953.83; Crim. R. 16; *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006); *State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095; Noling's Motion for Complete Copy of DNA Test Results, March 26, 2014; Journal Entry, June 27, 2014.**

#### Issues Presented for Review

*When the eligible offender requests postconviction DNA testing, and that testing is granted, does the trial court err when it only permits the offender to have a copy of the testing authorities conclusions while preventing his review of the complete test results?*

*When the identity of the contributors to the DNA profile is at issue, does the trial court err in denying the eligible offender petitioning for DNA testing, the resulting DNA profile and the data that demonstrates how the testing authority generated that profile?*

The complete DNA test results from resulting from BCI's testing of the cigarette butt in this case are necessary to (1) fulfill the remand from the Ohio Supreme Court, and (2) to comply with R.C. 2953.81(C). Noling requested a 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 who were never compared to the biological material on the cigarette butt.

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. *Noling*, 2013-Ohio-1764, ¶ 36, 42. Although BCI compared the undisclosed profile that they generated to Wilson, without the complete DNA test results, Noling cannot compare the DNA from the cigarette butt 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). The trial court, again, provided no rationale for its denial.

**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 postconviction 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, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (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 the testing authority’s conclusions is meaningless without the results and data on which those conclusions 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 simply the conclusions of the testing authority based on the results of DNA testing, it would render the retention provision meaningless. In

addition, unlike Crim. R. 16(B)(3), no showing of materiality is required to obtain these results as, given the focus on DNA testing and results, materiality is presumed.

“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). 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. As R.C. 2953.83 does not define “test results,” Crim. R. P. 16 offers helpful guidance as to the meaning of “test results.” Criminal Rule 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. 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 eligibility of a DNA profile for CODIS requires the complete underlying documentation of the testing – and the profile cannot be submitted to CODIS for search or upload solely based on the one page report submitted to the trial court in this case.<sup>18</sup> Section 4.2.1 of the National DNA Index System (NDIS) Operational Manual requires the CODIS administrator to review the complete results of the testing – so the underlying profile and data are necessary. A narrow interpretation of “DNA test results” to mean a one-page report of

---

<sup>18</sup> <http://static.fbi.gov/docs/NDIS-Procedures-Manual-Final-1-31-2013-1.pdf> (accessed Dec. 17, 2014).

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.”

Finally, both the State and Noling’s experts agree, extraction, quantification, amplification, and testing are part of the final determination of quality and quantity of a sample. March Hrg. T.p. 6-7; 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 has been provided to Noling. That is because all of these materials encompass the DNA test results. This Court should avoid that construction that 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 because the Ohio Supreme Court stated that any new information discovered from the biological material should be considered in conjunction with Wilson and the other alternate suspects. Given that the results of the testing were only compared to Wilson, the test results should disclose the new information uncovered by the testing – the DNA profile(s) – to Mr. Noling. However, the data relied on to generate this result is also a part of this result and Noling requested 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 to Noling 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 by the testing authority – 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.<sup>19</sup> In addition, BCI has also provided to the prosecutor and counsel for the "subject offender" all the documents that it has generated as the testing authority. *State v. Douglas Prade*, Summit C.P. CR-1998-02-0463.<sup>20</sup> Had the testing authorities in these cases failed or refused to disclose the "test results," as requested here by Noling, 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.

---

<sup>19</sup> 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.

<sup>20</sup> 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.

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 of the testing authorities methods? 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 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.

Denying Mr. Noling the complete test results is contrary to the statute and the remand from the Ohio Supreme Court. Therefore, the trial court's denial of Mr. Noling's request for the DNA profile generated by BCI and the data on which that profile is based was in error.

#### ASSIGNMENT OF ERROR IV

**The trial court erred when it held that it did not have authority to grant access to non-DNA, postconviction forensic testing of shell casings and access to the related database. R.C. 2953.84; *State v. Biggs*, 5th Dist. Stark No. 2013CA00009, 2013-Ohio-3333; Noling's Motion to Amend His Application for Postconviction DNA Testing, Oct. 4, 2013; Noling's Reply to State's Response to Noling's Motion to Amend His Application for Postconviction DNA Testing, Nov. 14, 2013; Journal Entry, Nov. 25, 2013; Noling's Amended Application for DNA Testing, Dec. 4, 2013.**

#### Issue Presented for Review

*When ballistics comparison and access the ballistics database (NIBIN) would contribute to an outcome determinative result, does the trial court err in denying a subject offender's request when case law supports access to such testing but there is not a statute directly permitting the trial court to order such testing and database access?*

Simply because a statute does not provide a clear path to pursue postconviction testing and identification does not mean that there is not a remedy at law. *State v. Biggs*, 5<sup>th</sup> 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 postconviction DNA testing law) was not the sole means by which an offender 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).<sup>21</sup> 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 National Integrated Ballistic Information Network (“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 access to 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.<sup>22</sup> 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.<sup>23</sup> See *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<sup>24</sup> 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.

---

<sup>21</sup> E.g. In the absence of a DNA testing statute, Robert Hayden obtained postconviction DNA testing in approximately 1998. *State v. Hayden*, 2d Dist. Montgomery No. 24992, 2012-Ohio-6183, ¶5-6.

<sup>22</sup> 2005 Ohio Op. Atty. Gen. No. 9; 2005 Ohio AG LEXIS 14 at \*29.

<sup>23</sup> *Id.* at \*32-40.

<sup>24</sup> 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.

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 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, for example, 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 the subsequent investigation, police failed to locate the 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<sup>25</sup> 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 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 NIBIN in 2006,<sup>26</sup> 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 any 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*, 8<sup>th</sup> Dist. Cuyahoga No. 90865, 2009-Ohio-2874, ¶ 53; *State v. Jones*, 9<sup>th</sup> Dist. Summit No. 26568, 2013-Ohio-2986.

---

<sup>25</sup> See n.28 *infra*.

<sup>26</sup> See <http://www.atf.gov/content/Firearms/firearms-enforcement/NIBIN> (accessed August 11, 2014). Undersigned counsel consulting with an expert, and avows that the NIBIN database did not come online until 2006, years after Noling's conviction and death sentence.

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 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. Journal Entry, Nov. 25, 2013. 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. Noling's Motion to Amend His Application for Postconviction DNA Testing, Oct. 4, 2013. 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. *See* Noling's Amended Application for Postconviction DNA Testing, Dec. 4, 2013. 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**

The trial court's decision to select BCI as the testing authority in this case is unsupported by the record and contrary to the spirit and language of the DNA testing statute. The trial court abused its discretion in its selection of BCI over Cellmark (or any other lab with DNA

technology akin to Cellmark's technology) when BCI was incapable of conducting the necessary testing.

Moreover, BCI's "evaluation" of the evidence involved solely a visual inspection of the evidence – there was no scientific testing (which the court contemplated in its order) and there is no indication that BCI reviewed the chain of custody in this particular case. BCI's visual inspection reveals nothing about the quantity and quality of the DNA evidence, and therefore the trial court erred in relying on this report to deny Noling's DNA Application.

Additionally, despite the fact that testing was a result of Noling's application and the Ohio Supreme Court remanded the case for consideration of the multiple alternate suspects, the testing authority and the trial court have made that comparison impossible by refusing to provide Noling with even the profile obtained from the cigarette butt. Denial of the profile and the data generated to produce that profile was in error.

Finally, while there is no dispute that the shell casings are linked to the perpetrator of this crime, the trial court refused to consider the shell casings and what additional information a run through the national ballistics database would provide in conjunction with the DNA test results. The trial court's wholesale failure to consider the shell casings simply because a statute did not explicitly permit the trial court to do so is in direct conflict with Ohio case law.

This Court should reverse the decision of the trial court, and remand for appropriate findings and selection of the testing authority for this case, direction that the testing authority utilize both testing and chain of custody to properly evaluate quantity and quality of the biological material on the shell casings and ring boxes, direct the trial court to order BCI to provide Noling with complete results of all testing and evaluation, and, finally, direct the trial

court to consider the impact of submission of the shell casings to the ballistics database and issue any appropriate order for submission of the shell casings to NIBIN.

Respectfully submitted,

Office of the Ohio Public Defender

*Carrie Wood - per e-authors KAS 0076729*

Carrie Wood - 0087091  
Assistant State Public Defender

250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215  
Voice: (614) 466-5394  
Facsimile: (614) 752-5167  
Email: carrie.wood@opd.ohio.gov  
Co-counsel for Tyrone Noling

Mark Godsey (0074484)  
Ohio Innocence Project  
University of Cincinnati College of Law  
Clifton Ave. at Calhoun St.  
PO Box 210040  
Cincinnati, OH 45221 - 0040  
(513) 556-0752  
(513) 556-1236 - fax  
Counsel for Tyrone Noling

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was 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, 16<sup>th</sup> Floor, Columbus, Ohio 43215 on this the 22nd day of December 2014..

*Carrie Wood - per e-authors KAS 0076729*

Carrie Wood (0087091)  
Assistant Public Defender

Counsel for Tyrone Noling

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO

State of Ohio, : Case No. 2014-PA-045  
Plaintiff-Appellee, : Trial Court Case No. 95 CR 220  
vs. :  
Tyrone Noling, : Regular calendar  
Defendant-Appellant. : **This is a death penalty case.**

---

ON APPEAL FROM THE COURT OF COMMON PLEAS  
PORTAGE COUNTY, OHIO

---

APPENDIX TO  
MERIT BRIEF OF TYRONE NOLING

---

IN THE COURT OF COMMON PLEAS  
PORTAGE COUNTY, OHIO

STATE OF OHIO,

CASE NO.: 1995 CR 00220

FILED )  
Plaintiff, COURT OF COMMON PLEAS

vs.

JUN 27 2014

JUDGE JOHN A. ENLOW

TYRONE LEE NOLING,

LINDA K. FANKHAUSER, CLERK,  
PORTAGE COUNTY, OHIO

JUDGMENT ORDER

Defendant.

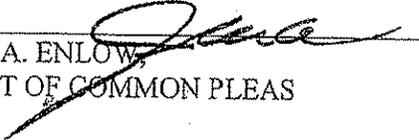
\*\*\*

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 Viglucci  
Attorney Carrie Wood  
BCI Richfield  
Mike DeWine, Ohio Attorney General  
PCSO

IN THE COURT OF COMMON PLEAS  
PORTAGE COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

TYRONE LEE NOLING,

Defendant.

FILED )  
COURT OF COMMON PLEAS

JUN 27 2014

LINDA K. FANKHAUSER, CLERK,  
PORTAGE COUNTY, OHIO

\*\*\*

CASE NO.: 1995 CR 00220

JUDGE JOHN A. ENLOW

JUDGMENT ORDER

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,

Plaintiff, **FILED** )  
COURT OF COMMON PLEAS

CASE NO.: 1995 CR 00220

vs.

NOV 25 2013

JUDGE JOHN A. ENLOW

TYRONE LEE NOLING,

LINDA K. FANKHAUSER, CLERK,  
PORTAGE COUNTY, OHIO

JUDGMENT ORDER

Defendant. )

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."

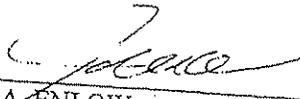
The Court would further find that, for judicial economy, and in the interest of justice, it is

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 Viglucci  
Attorney Carrie Wood

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO

CASE NO. 2014-P-45

STATE OF OHIO,

Plaintiff-Appellee

vs.

TYRONE NOLING

Defendant-Appellant.

**FILED**  
**COURT OF APPEALS**

MAR 03 2015

LINDA K. FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

---

**BRIEF OF THE STATE OF OHIO**

---

ORAL ARGUMENT REQUESTED

---

VICTOR V. VIGLIUCCI (0012579)  
Portage County Prosecuting Attorney  
PAMELA J. HOLDER (0072427)  
Assistant Prosecuting Attorney  
241 South Chestnut Street  
Ravenna, Ohio 44266  
(330) 297-3850  
(330) 297-3856 (fax)  
[pholder@portageco.com](mailto:pholder@portageco.com)

CARRIE WOOD (0087091)  
250 East Broad Street  
Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (fax)  
[carriewood@opd.ohio.gov](mailto:carriewood@opd.ohio.gov)

ATTORNEYS FOR STATE OF OHIO

ATTORNEY FOR APPELLANT

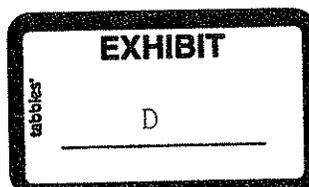


TABLE OF CONTENTS  
AND  
TABLE OF AUTHORITIES

STATEMENT OF THE CASE .....	1
PROCEDURAL HISTORY.....	1
STATEMENT OF THE FACTS.....	1
LAW AND ARGUMENT .....	8
Standard of Review and Statutory Limits on Appealable Issues.....	8
<b>Authorities</b>	
<i>D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health</i> , 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536.....	9
<i>In re Hinton's Estate</i> , 64 Ohio St. 485, 60 N.E. 621 (1901).....	9
<i>Rubin v. United States</i> , 449 U.S. 424, 101 S.Ct. 698, 66 L.E.2d 633 (1981).....	9
<i>R.W. Sidley, Inc. v. Limbach</i> , 66 Ohio St.3d 256,611 N.E.2d 815 (1993).....	9
<i>State v. Buehler</i> , 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124.....	9, 10
<i>State ex rel. Steele v. Morrissey</i> , 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107.....	9
<i>State ex rel. Rose v. Lorain Cty Bd. of Elections</i> , 90 Ohio St.3d 229, 736 N.E.2d 886 (2000).....	9
<i>Wingate v. Hordge</i> , 60 Ohio St.2d 55, 396 N.E.2d 770 (1979).....	8
R.C. 2953.72.....	10, 11, 12
R.C. 2953.74.....	11

RESPONSE TO NOLING'S SECOND ASSIGNMENT OF ERROR.....	13
--	----

**The trial court's decision to not accept Noling's amended application for failure to satisfy R.C. 2953.74(C)(2)(c), was proper because it was based on the testing authority's determination that the items were contaminated to the extent that they had become scientifically unsuitable for testing.**

ISSUE PRESENTED FOR REVIEW AND ARGUMENT .....	13
---	----

Does the clear and unambiguous language of R.C. 2953.74(C)(2)(c), direct the testing authority to make a determination regarding the condition of the sample rather than how to make that determination?

**Authorities**

<i>State v. Buehler</i> , 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124.....	14
R.C. 2953.72.....	17
R.C. 2953.74.....	15, 16, 17

RESPONSE TO NOLING'S FIRST ASSIGNMENT OF ERROR.....	17
---	----

**The plain language of the Revised Code sections governing applications for postconviction DNA testing prohibit the subsequent challenge to or appeal of the approval, designation, selection or use of a testing authority.**

ISSUES PRESENTED FOR REVIEW AND ARGUMENT .....	17
--	----

First Issue: Did Noling lack statutory authority to challenge the trial court's December 19, 2013, selection of BCI as the testing authority?

Second Issue: Without a journal entry accepting Noling's amended application for postconviction DNA testing, did he ever possess statutory authority to challenge the trial court's selection of BCI as the testing authority?

Third Issue: Does the plain language of the Revised Code prohibit Noling's subsequent challenge to and present appeal

of the trial court's December 19, 2013, selection of BCI as the testing authority?

**Authorities**

*Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953).... 20

*R.W. Sidley, Inc. v. Limbach*, 66 Ohio St.3d 256,611 N.E.2d 815 (1993)..... 22

*Wingate v. Hordge*, 60 Ohio St.2d 55, 396 N.E.2d 770 (1979)... 22

R.C. 2953.71..... 18

R.C. 2953.72..... 19, 22

R.C. 2953.74..... 18

R.C. 2953.78..... 18, 19, 21, 22

RESPONSE TO NOLING'S THIRD ASSIGNMENT OF ERROR..... 22

**An error regarding a request for additional data from the testing authority is a determination otherwise made by the trial court in the exercise of its discretion regarding postconviction DNA testing under R.C. 2953.71 to 2953.81, that is not, "[R]eviewable by or appealable to any court." R.C. 2953.72(A)(8).**

**Authorities**

*State v. Dorso*, 4 Ohio St.3d 60, 446 N.E.2d 449 (1983)..... 24

R.C. 2953.72..... 25, 26

R.C. 2953.81..... 23

Webster's Encyclopedic Unabridged Dictionary (2 Ed. 1996)..... 24

RESPONSE TO NOLING'S FOURTH ASSIGNMENT OF ERROR..... 26

**An error regarding the submission of evidence to the NIBIN database is a determination otherwise made by the trial court in the exercise of its discretion regarding postconviction DNA testing under R.C. 2953.71 to 2953.81, that is not, "[R]eviewable by or appealable to any court." R.C. 2953.72(A)(8).**

<b>Authorities</b>	
<i>State v. Biggs</i> , 5th Dist. No. 2013CA00009, 2013-Ohio-3333.....	28
R.C. 2953.72.....	27, 29
CONCLUSION.....	29
CERTIFICATE OF SERVICE .....	29

TABLE OF REFERENCES TO THE RECORD

Transcript of the Docket, Journal Entries, and Original Papers .....	"T.d."
Transcript of Proceedings Of the October 8, 2013 Hearing.....	"October T.p."
Transcript of Proceedings Of the November 8, 2013 Hearing .....	"November T.p."
Transcript of Proceedings Of the December 19, 2013 Hearing .....	"December T.p."
Transcript of Proceedings Of the March 12, 2014 Hearing.....	"March T.p."

## STATEMENT OF THE CASE

This case originated from a remand order of the Supreme Court of Ohio to determine, “[W]hether prior definitive DNA testing, as defined in R.C. 2953.71(U), precludes Noling’s second application. If not, the trial court should consider whether new DNA testing would be outcome determinative.” *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 44. On remand, Noling moved to amend his application to include the following additional items for DNA testing, “[T]he 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.” (T.d. 377). Over the state’s objections, the trial court granted Noling’s motion. (T.d. 391).

The matter proceeded to a December 19, 2013, hearing. Following the hearing, the trial court issued two journal entries dated December 19, 2013. (T.d. 415, 416). The first journal entry addressed the remand issue and found, “[T]hat the State of Ohio has agreed to test the cigarette butt at BCI and run the results against CODIS. The Court would find because the State is testing the cigarette butt evidence that this hearing is moot.” (T.d. 415). The second December 19, 2013, journal entry provided:

The Court upon its own motion finds that pursuant to Revised Code Section 2953.76, the Prosecuting Attorney and the Bureau of Criminal Investigation shall prepare findings regarding the quantity and quality of the parent sample of biological material, found at the crime scene in this case.

The 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.

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 shall file a written report with the Court after examining State's Exhibits 2, 3, 4, 5, 6, 7, 13, 14, 16 and 17.

IT IS SO ORDERED. (T.d. 416).

Noling immediately sought a stay of the second December 19, 2013, entry and requested a hearing on the court's entry. (T.d. 417, 420). He also moved the trial court to designate Orchid Cellmark as the testing authority for the shell casings and ring boxes. (T.d. 423). The state responded, questioning Noling's authority to challenge the trial court's selection of Ohio Bureau of Criminal Identification and Investigation (BCI) as the testing authority. (T.d. 435).

The matter proceeded to a hearing on March 12, 2014, to allow Noling to present testimony from his expert witness, Dr. Staub. At the hearing, the state questioned Noling's authority to challenge the testing authority selection. (March T.p. 2-3). Counsel for Noling relied on R.C. 2953.78(B). (March T.p. 27). Despite the state directing the trial court to the prohibition against Noling's challenge contained in section (D) of the same statute, (March T.d. 28), the trial court allowed Noling to make a record with testimony from its expert witness. (March T.d. 31-123).

The state stipulated to the witness's CV and the fact that he was an expert in the field of DNA and the court recognized him as an expert in that field. (March T.p. 31-32). On direct-examination, Dr. Staub described the three steps involved in DNA testing: extraction, quantification and amplification. Extraction consists of collecting a sample from a piece of evidence. (March T.p. 36). He described both a manual and automated method to accomplish this task. (March T.p. 36-39). In his opinion, the

automated method was the better method and not available at BCI. (March T.p. 39-44).

Quantification assesses how much DNA is in the sample. (March T.p. 44). Laboratories utilize kits to accomplish this step and Dr. Staub described the differences in the kits a commercial lab like Cellmark uses and the kits used at BCI. (March T.p. 45-51). In his opinion, the kits used by Cellmark had a better chance of getting results with evidence possibly containing low levels of DNA. *Id.* Dr. Staub also provided testimony regarding the amplification step of the testing. In his opinion, there can be no determination made whether an item has been contaminated until the amplification step of the DNA testing process has been completed. (March T.p. 53).

On cross-examination, he explained the importance of collecting evidence wearing gloves and masks to prevent exposing evidence to any other sources of DNA before placing them in evidence containers. (March T.p. 71). For example, an officer's cough could result in a mixture of DNA profiles from the officer and the perpetrator even with sensitive DNA testing methods. (March T.p. 72-73). Dr. Staub explained the importance of trying to maintain evidence in the most pristine condition as possible, "[S]o you get meaningful results from it." (March T.p. 72).

Although he believed evidence collection had not changed much since 1990, Dr. Staub admitted that he was unaware how the evidence was collected in Noling's case. (March T.p. 76-92). He did not know that no one familiar with DNA procedures was involved in the collection of the crime scene evidence. (March T.p. 77). He did not know that the shell casings were written on at the crime scene with a red felt tip marker. (March T.p. 80-81). He never saw the photograph of the individual who was

not wearing gloves and handling evidence at the crime scene. (March T.p. 84). Dr. Staub admitted, "If I knew for a fact that an item had been touched by multiple individuals with bare hands, I would be very reluctant to want to test it, yes." (March T.p. 85). Although he was asked to render an opinion about DNA testing of ring boxes, Dr. Staub was also unaware that no evidence was ever presented that Noling was in the back bedroom, where the ring boxes were collected. (March T.p. 123).

In evidence before the trial court was an affidavit of Lewis Maddox, PhD. (T.d. 393). As the state's expert, Maddox stated that he was currently the DNA Technical Leader working at the Ohio Attorney General's Office in the Bureau of Criminal Investigation and had seven years experience with BCI. *Id.* He discussed the methods for testing DNA, specifically addressing the testing protocol for touch DNA testing. *Id.* Maddox averred that while the application of these methods on evidence collected from a 1990 homicide would produce data, "[T]here is good reason to be concerned that any DNA found on these items does not date from the offense date." *Id.* Procedures that were acceptable in the BCI latent print and firearms sections when the items were first processed by BCI in 1990, "[W]ould be unconscionable in today's laboratory." *Id.* "Latent print analysts wore the same cotton gloves and used non-sterile brushes and powder while processing multiple cases." *Id.* Further, "[L]ab surfaces and equipment were not cleaned to the degree as would be used for processing samples for processing touch DNA," today. (T.d. 393).

Maddox's affidavit also addressed the "anchor theory" proposed by Noling throughout his amended application for postconviction DNA testing:

[t]he use of current-or-future-DNA tests on evidence which has been clearly subject to contamination, followed by the assertion that the presence of unattributable partial results are evidence of alternative subjects does not shed light on who may have touched the casings or jewelry box during the crime in 1990. *Id.*

Regarding the reports of progress with DNA testing of fired shell casings, Maddox averred, "Unexplained DNA profiles and non-expected DNA types have been reported," and he cited two reported studies. *Id.* In a controlled environment, the DNA testing of fired shell casings showed mainly partial and incomplete results on a low percentage of samples. *Id.*

At the March 12, 2014, hearing, Dr. Staub spoke about the viability of DNA testing of spent shell casings. Dr. Staub admitted knowing only two examples where partial DNA profiles resulted from this type of testing. (March T.p. 74). In those two examples, multiple tests were performed before partial DNA profiles were found, "It's a very rare event that you would get results." (March T.p. 75). Moreover, those samples were pristine, collected by gloved individuals and handled by only lab technicians. *Id.* Here, the spent shell casings are not pristine. Furthermore, his prior experience with DNA testing of spent shell casings identified only the individual who handled the bullets not the individual who actually fired the weapon, the issue in Noling's case. (March T.p. 91).

As the hearing concluded, the trial court stated that it was prepared to send the shell casings and ring boxes to BCI but wanted Noling to file written objections and the state to respond:

THE COURT: I'm ready to order 2, 3, 4, 5, 6, 7, 13, 14, 16 and 17 to B.C.I., but if the statute requires that, if you object

to B.C.I. doing it, I then have to dismiss this case. Is that correct?

MS. WOOD: I believe it word is dismiss the application. I think - - Isn't that - - Is it dismiss the application?

MS. HOLDER: Dismiss - -

MS. WOOD: Or reject the application.

THE COURT: And, so you're - - I would request that you - -

MS. HOLDER: Now rescind - - It's - -

CT REPORTER: Could you, again, please speak one at a time.

MS. WOOD: To reject the application.

MS. HOLDER: Rescind.

MS. WOOD: Oh, rescind. I'm sorry.

THE COURT: I would request that you formally file a written - -

Ms. WOOD: Absolutely. I will do that.

THE COURT: So that we have everything on the record. And then you respond to it. And then, I'm not going to order the sheriff to take anything to B.C.I.

PROSECUTOR: Until that process is done.

THE COURT: Until that process is done.

PROSECUTOR: Okay.

THE COURT: If she's formally objecting to B.C.I. doing the testing, or just the determination of whether there's anything to test, - -

MS. WOOD: Yeah.

THE COURT: - - then I think you need to formally file a written objection to that, because I believe I have designated them as the official testing authority already in the December order.

MS. WOOD: Yeah, that's how I read that order.

THE COURT: So, I think you need to file a written objection so we have the record clear for appeal.

MS. WOOD: I will do that, Your, Honor. Absolutely.

THE COURT: I'm just trying to get everything cleared up for appeal.

MS. WOOD: Yep.

THE COURT: And I would say that, you know, I have no problem ordering those tested at B.C.I. (March T.p. 129-131).

Noling filed written objections to the trial court's selection of BCI as the testing authority relying on the court's oral pronouncement at the March 12, 2013, hearing as an acceptance of his application for DNA testing of the ring boxes and shell casings.

(T.d. 437). The state responded that a court speaks through the record and not an oral pronouncement rendering Noling's R.C. 2953.78(B), objection premature. (T.d. 440).

On May 2, 2014, the trial court vacated its December 19, 2013, order (T.d. 416), and ordered the Sheriff to convey the evidence to BCI for testing purposes, "[S]o the Court can determine whether to accept the Defendant's amended application for DNA testing." (T.d. 442). The May 2, 2014, order specifically sought findings regarding the quantity and quality of the parent sample of biological material found at the crime scene, 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." *Id.* The court ordered that no DNA sample was to be consumed. *Id.*

On June 26, 2014, BCI's findings were filed with the trial court. (T.d. 450). BCI found that the submitted shell casings and ring boxes, "[A]re contaminated to the extent that they have become scientifically unsuitable for testing." *Id.* A visual examination of the submitted items revealed, "[C]ase information had been written on the small surface area on the individual casings with a presumed non-sterile pen resulting in a potential source of common DNA contamination on multiple casings." *Id.* "The ring boxes are packaged in a sealed plastic bag in contact with each other." *Id.* The findings detailed the manner the touch DNA samples were previously handled by BCI's latent print and firearm disciplines that did not minimize contamination. *Id.* BCI further reported that it does not perform DNA testing of spent shell casings. *Id.*

The trial court denied Noling's amended application finding, "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." (T.d. 451). Noling filed a memorandum in support of jurisdiction with the Supreme Court of Ohio, an appeal with this Court and a motion challenging the constitutionality of R.C. 2953.73(E)(1).

### **LAW AND ARGUMENT**

Before addressing Noling's assignments of error individually, the state will begin with two issues common among his assigned errors: (1) the standard of review and (2) statutory limits on appealable issues.

#### **Standard of Review**

This is an appeal from Noling's amended application for DNA testing under the statutory scheme provided for in R.C. 2953.71 to 2953.81. As this appeal arises from a specific statutory scheme, the resolution of any error presented will require a reviewing court to engage in statutory construction.

It is a cardinal rule of statutory construction that where the terms of a statute are clear and unambiguous, the statute should be applied without interpretation. *Wingate v. Hordge*, 60 Ohio St.2d 55, 58, 396 N.E.2d 770 (1979). Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no reason to use the rules of statutory interpretation. It is impermissible to make an interpretation contrary to the plain and express words of the statute, the meaning of

which the General Assembly must be credited with understanding. *In re Hinton's Estate*, 64 Ohio St. 485, 492, 60 N.E. 621 (1901). When the terms of the statute are unambiguous, the judicial inquiry is complete. *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.E.2d 633 (1981). The court's obligation is to apply the statute as written. *R.W. Sidley, Inc. v. Limbach*, 66 Ohio St.3d 256, 257, 611 N.E.2d 815 (1993).

In *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124, the Supreme Court reviewed the obligations imposed for considering an application for DNA testing and directed, "[R]elated sections of the Revised Code must be construed together, and that in cases of statutory construction 'our paramount concern is the legislative intent in enacting the statute.'" *Id.* ¶ 29, citing *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 28-29; quoting *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21. "In determining this intent, we first review the statutory language, reading words and phrases in context and construing them according to the rules of grammar and common usage." *Buehler* at ¶ 29, quoting *State ex rel. Rose v. Lorain Cty Bd. of Elections*, 90 Ohio St.3d 229, 231, 736 N.E.2d 886 (2000).

Case law would further indicate that the Supreme Court has found statutes contained in this statutory scheme that are not ambiguous and not in conflict can in some circumstances, "[V]est considerable discretion and wide latitude with the judiciary upon the filing of such an application." *Buehler* at ¶ 31. "[A] trial court should exercise its discretion in determining its best course of action when considering an

application for DNA testing in an effort to best utilize judicial resources. The decision on how to proceed is left to the court's discretion." *Id.*

#### Statutory Limits on Appealable Issues

Noling's amended application for postconviction DNA testing contained the requisite R.C. 2953.72(A), Acknowledgment. (T.d. 394). Within Noling's statutory acknowledgment was his rights regarding, "[A]ny review or appeal of, the manner in which those provisions are carried out." R.C. 2953.72(A)(9). The acknowledgment stated in relevant part:

(4) That the state has established a set of criteria set forth in section 2953.74 of the Revised Code by which eligible offender applications for DNA testing will be screened and that a judge of a court of common pleas upon receipt of a properly filed application and accompanying acknowledgment will apply those criteria to determine whether to accept or reject the application;

\* \* \*

(7) That, if the court rejects an eligible offender's application for DNA testing because the offender does not satisfy the acceptance criteria described in division (A)(4) of this section, the court will not accept or consider subsequent applications;

(8) That the acknowledgment memorializes the provisions of sections 2953.71 to 2953.71 of the Revised Code with respect to the application of postconviction DNA testing to offenders, that those provisions do not give any offender any additional constitutional right that the offender did not already have, that the court has no duty or obligation to provide postconviction DNA testing to offenders, that the court of common pleas has the sole discretion subject to an appeal as described in this division to determine whether an offender is an eligible offender and whether an eligible offender's application for DNA testing satisfies the acceptance criteria described in division (A)(4) of this section and whether the application should be accepted or rejected, that if the court of common pleas rejects an eligible offender's application, the offender may seek leave of the supreme court to appeal the rejection to that court if the offender was sentenced to death for the offense for which the offender is requesting the DNA testing and, if the offender was not sentenced to death for that offense, may appeal the rejection to the court of appeals,

and that no determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an offender or regarding postconviction DNA testing under those provisions is reviewable by or appealable to any court;

(9) That the manner in which sections 2953.71 to 2953.81 of the Revised Code with respect to the offering of postconviction DNA testing to offenders are carried out does not confer any constitutional right upon any offender, that the state has established guidelines and procedures relative to those provisions to ensure that they are carried out with both justice and efficiency in mind, and that an offender who participates in any phase of the mechanism contained in those provisions, including, but not limited to, applying for DNA testing and being rejected, having an application for DNA testing accepted and not receiving the test, or having DNA testing conducted and receiving unfavorable results, does not gain as a result of the participation any constitutional right to challenge, or, except as provided in division (A)(8) of this section, any right to any review or appeal of, the manner in which those provisions are carried out. R.C. 2953.72(A)(4), (7), (8) and (9).

Noling acknowledged that he had no additional constitutional right and, "[T]he court had no duty or obligation to provide postconviction DNA testing to" him. R.C. 2953.72(A)(8). The court of common pleas had sole discretion in determining whether: 1) Noling was an eligible offender, 2) Noling's application satisfied the acceptance criteria of R.C. 2953.74(C)(1)-(6) and 3) Noling's application should be accepted or rejected. *Id.* The issue that is reviewable on appeal is the trial court's rejection of Noling's application. *Id.* The statute specifically provides, "[N]o determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an offender or regarding postconviction DNA testing under those provisions is reviewable by or appealable to any court." *Id.*

Noling does not gain from his participation in these statutes, "[A]ny constitutional right to challenge, or, except as provided in division (A)(8) of this section, any right to any review or appeal of, the manner in which those provisions are

carried out." R.C. 2953.72(A)(9). Moreover, Noling's present situation on appeal is expressly stated among the possible phases of participation in subsection (A)(9), "[A]pplying for DNA testing and being rejected," (ring boxes and shell casings) and "[H]aving DNA testing conducted and receiving unfavorable results" (cigarette butt). *Id.*

On June 27, 2014, the trial court found, "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." (T.d. 451). Although Noling raised four separate assignments of error on appeal, only his second assignment of error relates to the issue an appellate court can review, the trial court's finding that, "[T]he amended application cannot be accepted and is therefore dismissed." (T.d. 451).

Noling's other assigned errors challenged: 1) the testing authority selection, 2) access to additional BCI data and 3) submission of evidence to the NIBIN database. These assignments of error all deal with determinations otherwise made by the trial court in the exercise of its discretion regarding postconviction DNA testing under those provisions they are not, "[R]eviewable by or appealable to any court." R.C. 2953.72(A)(8). Accordingly, Noling's assignments of error will be addressed out of order, beginning with his second assignment of error, the only error that raised an issue proper for review under the Revised Code sections governing postconviction DNA testing.

## RESPONSE TO NOLING'S SECOND ASSIGNMENT OF ERROR

**The trial court's decision to not accept Noling's amended application for failure to satisfy R.C. 2953.74(C)(2)(c), was proper because it was based on the testing authority's determination that the items were contaminated to the extent that they had become scientifically unsuitable for testing.**

### ISSUE PRESENTED FOR REVIEW AND ARGUMENT

Does the clear and unambiguous language of R.C. 2953.74(C)(2)(c), direct the testing authority to make a determination regarding the condition of the sample rather than how to make that determination?

On June 26, 2014, BCI found the shell casing and ring boxes were "[C]ontaminated to the extent that they are scientifically unsuitable for testing." (T.d. 450). The trial court relied on those findings and found, "[T]hat 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." (T.d. 451). In his second assignment of error, Noling argued that the trial court erred in rejecting his amended application on these grounds.

Specifically, Noling challenged BCI's June 26, 2014, findings that the shell casings and ring boxes were contaminated to the extent that they have become scientifically unsuitable for testing under R.C. 2953.74(C)(2)(c). In reliance on Dr. Staub's testimony and opinion, Noling argued the testing authority's statutory determination whether an item has been contaminated is dependant on the scientific processes of extraction, quantification and amplification of the submitted items. In other words, a DNA test must be performed to determine whether the submitted items contain biological material, "scientifically suitable" for postconviction DNA testing.

As Noling believed the statute required the testing authority to perform the scientific processes of extraction, quantification and amplification of the submitted items before making a finding under R.C. 2953.74(C)(2)(c), he faulted BCI because these processes were not conducted by BCI in relation to the June 26, 2014, findings. Moreover, he argued the trial court's reliance on BCI's June 26, 2014, findings to reject his amended application was error.

#### Analysis

On appeal, Noling asserted that R.C. 2953.74(C)(2)(c), "[A]sks the testing authority for a scientific determination." (Noling's Brief, pp 15). Without finding the statutory language was unclear or ambiguous, Noling offered an interpretation of the statute rooted in the word "scientific," a term contained in the statutory language of R.C. 2953.74(C)(2)(c). Noling provided a definition for the term and argued that the legislature's use of the word in the statute, "[R]equires a scientific determination to be made by the testing authority." (Noling's Brief, pp. 15). The scientific determination Noling sought would include the formulation and the testing of a hypothesis. *Id.*

Noling invites this Court to adopt a construction of the statute not intended by the legislature. As directed by *Buehler*, "[I]n cases of statutory construction 'our paramount concern is the legislative intent in enacting the statute. In determining this intent, we first review the statutory language, reading words and phrases in context and construing them according to the rules of grammar and common usage.'" *Buehler* at ¶ 29.

At issue is the language of 2953.74(C)(2)(c), which provides:

The testing authority determines all of the following pursuant to section 2953.76 of the Revised Code regarding the parent sample of the biological material described in division (C)(1) of this section \* \* \*

(c) 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. R.C. 2953.74(C)(2)(c).

The core of the language in R.C. 2953.74(C)(2)(c), without the descriptive adjectives, adverbs and prepositional phrases is, "The authority determines the sample has not degraded or been contaminated." The prepositional phrase, "[T]o the extent that it has become scientifically unsuitable for testing," modifies the verbs "degraded" and "contaminated" and its purpose is to describe how the samples could be contaminated. How the samples could be contaminated is that the samples could have become "[S]cientifically unsuitable for testing." The word "scientifically" is an adverb describing the adjective "unsuitable," and together they describe in what way the samples could be unsuitable, meaning that they would not be suitable to be scientifically studied.

Nowhere in this statutory language does it state how the determination is to be made as to whether the samples are scientifically suitable or not. Contrary to Noling's interpretation of the statute, the word "scientifically" does not modify the verb "determine." Moreover, there is no reference at all to a "scientific determination," as Noling proposed. Rather, the statutory language only indicates that regardless of how the testing authority's determination is made, its purpose is to determine whether the sample is suitable for testing.

Contrary to Noling's interpretation of the statute, the plain language of R.C. 2953.74(C)(2)(c), is clear and unambiguous. The words and phrases of the statute read according to the rules of grammar direct the testing authority to make a determination, without stating how that determination must be accomplished.

On May 2, 2014, the trial court ordered the Sheriff to convey the ring boxes and shell casings to the testing authority, BCI, "[S]o the Court can determine whether to accept the Defendant's amended application for DNA testing." (T.d. 442). That order specifically sought findings regarding the quantity and quality of the parent sample of biological material found at the crime scene, "Whether the parent sample has been degraded or contaminated to the extent that it has become scientifically unsuitable for testing." (T.d. 442). The court ordered that no DNA sample was to be consumed, BCI followed the order and issued its findings. (T.d. 450).

The evidence before the court was that sterile technique procedures currently followed to minimize low level contamination were not followed in 1990 by the investigators and analysts handling the items in this case. (T.d. 450; 393). A visual examination of the items revealed, "[C]ase information had been written on the small surface area on the individual casings with a presumed non-sterile pen resulting in a potential source of common DNA contamination on multiple surfaces." (T.d. 450). Further, "[T]he ring boxes are packaged in a sealed plastic bag in contact with each other. These touch DNA samples were processed previously by latent print and firearms disciplines in a manner that would not minimize contamination." *Id.* Specifically, the latent print section at BCI performed superglue fuming and dusting, "[W]ith non-sterile powder and brushes." *Id.* Additionally, "Non-sterile cotton gloves

would have been used to place the casings and ring boxes into the chamber prior to superglue adhesion which is another source of potential contamination that would have been 'preserved' across samples." *Id.* Also, non-sterile clay was used to hold the items in place for microscopic examination by the firearms section. *Id.*

As the trial court's May 2, 2014, order was an application of the clear and unambiguous language of 2953.74(C)(2)(c), and the testing authority followed the trial court's order and issued findings accordingly, the trial court's decision to not accept Noling's amended application based on those findings was proper. The trial court did not abuse its discretion in determining that Noling's application did not satisfy the acceptance criteria of R.C. 2953.74(C)(2)(c), or that Noling's application should not be accepted. R.C. 2953.72(A)(8). His second assignment of error is without merit and should be overruled.

Although Noling's remaining assignments of error do not present issues, "[R]eviewable by or appealable to any court," R.C. 2953.72(A)(8), in the interests of justice, the state submits the following responses to his remaining claims.

#### RESPONSE TO NOLING'S FIRST ASSIGNMENT OF ERROR

**The plain language of the Revised Code sections governing applications for postconviction DNA testing prohibit the subsequent challenge to or appeal of the approval, designation, selection or use of a testing authority.**

#### ISSUES PRESENTED FOR REVIEW AND ARGUMENT

First Issue: Did Noling lack statutory authority to challenge the trial court's December 19, 2013, selection of BCI as the testing authority?

Second Issue: Without a journal entry accepting Noling's amended application for postconviction DNA testing, did he ever possess statutory authority to challenge the trial court's selection of BCI as the testing authority?

Third Issue: Does the plain language of the Revised Code prohibit Noling's subsequent challenge to and present appeal of the trial court's December 19, 2013, selection of BCI as the testing authority?

Revised Code Sections

Among the criteria that must apply before a trial court may accept an eligible offender's application is 2953.74(C)(2)(c). This section provides:

The testing authority determines all of the following pursuant to section 2953.76 of the Revised Code regarding the parent sample of the biological material described in division (C)(1) of this section \* \* \*

(c) 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. R.C. 2953.74(C)(2)(c).

Testing authority is defined as, "[A] laboratory at which DNA testing will be conducted under sections 2953.71 to 2953.81 of the Revised Code." R.C. 2953.71(R). The statute defines biological material as, "[A]ny product of a human containing DNA," and parent sample as, "[T]he biological material first obtained from a crime scene or a victim of an offense for which an offender is an eligible offender, and from which a sample will be presently taken to do a DNA comparison to the DNA of the subject offender under sections 2953.71 to 2953.81 of the Revised Code." R.C. 2953.71(B), (M).

The Attorney General approves or designates testing authorities that may be selected and used to conduct DNA testing pursuant to R.C. 2953.80's criteria. R.C. 2953.78(C). A trial court selects a testing authority from the Attorney General's list of approved and designated testing authorities. R.C. 2953.78(A).

R.C. 2953.78(B), provides after a trial court accepts an application for DNA testing, the eligible offender may object to the selection of the testing authority:

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).

The approval, designation, selection or use of a testing authority may not be challenged or appealed unless an application has been accepted by the trial court:

The attorney general's approval or designation of testing authorities under division (C) of this section, and the selection and use of any approved and designated testing authority, do 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).

Subject to the appeal described in R.C. 2953.72(A)(8), the court of common pleas has sole discretion whether an eligible offender's application for DNA testing satisfies the R.C. 2953.74(C)(2)(c), acceptance criteria. R.C. 2953.72(A)(4), (8).

#### Views of the Parties

Noling initially challenged the trial court's December 19, 2013, order for failing to designate BCI as the testing authority. (T.d. 423). Specifically arguing that the trial court's, "[F]ailure to identify a specific lab as the 'testing authority'" required an additional hearing regarding the selection issue. (T.d. 423). However, three months later, Noling's position changed:

THE COURT: If she's formally objecting to B.C.I. doing the testing, or just the determination of whether there's anything to test, - -

MS. WOOD: Yeah.  
THE COURT: - - then I think you need to formally file a written objection to that, because I believe I have designated them as the official testing authority already in the December order.  
MS. WOOD: Yeah, that's how I read that order. (March T.p. 131).

Under the authority of R.C. 2953.78(B), Noling now objected to the trial court's December 19, 2013, selection of BCI as the testing authority and presented testimony from a DNA expert, Dr. Staub. (March T.p. 24, 31-123). Noling's final position is that Orchid Cellmark's advanced DNA-related technology warranted a selection of Cellmark instead of BCI as the testing authority in the trial court proceedings.

The state responded that Noling's December 20, 2013, objection under R.C. 2953.78(B), was premature. (T.d. 435). The plain language of R.C. 2953.78(B), required the trial court to have first accepted Noling's DNA application before Noling could raise an objection to the selection of the testing authority. R.C. 2953.78(A) and (B). "A court of record speaks only through its journal and not by oral pronouncement." *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953), paragraph one of the syllabus. Despite the trial court's statements at the March 12, 2014, hearing, absent a journal entry where the trial court accepted Noling's application, Noling lacked statutory authority to challenge the selection of the testing authority in December and continued to lack authority to challenge the selection at the March 12, 2014, hearing.

#### Analysis

The DNA statutes only allowed the trial court to accept Noling's amended DNA application if all the criteria listed in R.C. 2953.74(C)(1)-(6), were satisfied. On December 19, 2013, the trial court was in the process of gathering information from

the testing authority to aid in its determination whether to accept or reject Noling's amended DNA application. The trial court relied on R.C. 2953.76, and found the state and BCI, "[S]hall prepare findings regarding the quantity and quality of the parent sample of biological material, found at the crime scene in this case." (T.d. 416).

Mirroring the language of the statute, the trial court ordered:

The 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.

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 shall file a written report with the Court after examining State's Exhibits 2, 3, 4, 5, 6, 7, 13, 14, 16, and 17.  
*Id.*

Rather than wait for the testing authority to provide the trial court with the information requested on December 19, 2013, Noling challenged the December 19, 2013, order. (T.d. 417, 420, 423). The plain language of R.C. 2953.78(D), prohibited this challenge as it does, "[N]ot afford an offender any right to subsequently challenge the approval, designation, selection or use."

In March, Noling flipped his position in an attempt to use the offender's objection provided in R.C. 2953.78(B). However, without a journal entry first accepting his amended DNA application, the plain language of R.C. 2953.78(B), failed to provide the statutory authority Noling was looking for to challenge the trial court's selection of BCI as the testing authority. Specifically, division (A), required, "[I]f the application is *accepted* and DNA is to be performed, the court shall select the testing authority to be used for the testing" and division (B), required if the offender, "[O]bjects to the use of

the selected testing authority, the court *shall rescind its prior acceptance of the application for DNA testing.* (Emphasis added), R.C. 2953.78(A), (B). Absent a journal entry first accepting Noling's application, meaning all of the items listed in R.C. 2953.74(C)(1)–(6), had been satisfied, there was no "prior acceptance" for the trial court to "rescind." R.C. 2953.78(B).

R.C. 2953.78(A), (B) and (D), are clear and unambiguous. *Wingate*, 60 Ohio St.2d at 58. Further inquiry into legislative intent of the sections of this statute was not required. *Id.* Here, the trial court applied the statutes as written and properly ordered the transport of the shell casings and rings boxes to BCI, allowing the testing authority to carry out its statutory determination. (T.d. 438); *R.W. Sidley, Inc. v. Limbach*, 66 Ohio St.3d at 257.

As this assignment of error sought review of trial court's selection of BCI as the testing authority rather than the trial court's decision that Noling's, "[A]mended application cannot be accepted and is therefore dismissed," (T.d. 451), Noling failed to present an issue, "[R]eviewable by or appealable to any court." R.C. 2953.72(A)(8). Moreover, he presented an issue expressly prohibited by the plain language of the statute, "[A]n offender may not appeal to any court the approval, designation, selection or use of a testing authority." R.C. 2953.78(D). Accordingly, Noling's first assignment of error is without merit and should be overruled.

#### RESPONSE TO NOLING'S THIRD ASSIGNMENT OF ERROR

**An error regarding a request for additional data from the testing authority is a determination otherwise made by the trial court in the exercise of its discretion regarding postconviction DNA testing under R.C. 2953.71 to 2953.81, that is not, "[R]eviewable by or appealable to any court." R.C. 2953.72(A)(8).**

### Revised Code Sections

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. *Id.* The statute further provides that the results of the testing are public record that either the state or offender may enter in any proceeding. R.C. 2953.81(B), (F). The testing authority provides the results to the court where the application is pending and, "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." R.C. 2953.81(C), (E).

### View of the Parties

The state agreed to DNA testing the cigarette butt and uploading into CODIS. 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 courts on March 11, 2014. (T.d. 436).

Upon receipt of the test results from the DNA testing of the cigarette butt, Noling sought additional materials from the testing authority. (T.d. 438). Without any legal citations, Noling asserted that DNA test results, "[N]ecessarily included the resulting DNA profile obtained from DNA testing, documents demonstrating how that profile was obtained, and reports containing information about the quantity and quality

of DNA tested, and how the lab conducted its evaluation and testing of the evidence.” (T.d. 438).

The state responded that Noling lacked statutory authority to request more complete DNA test results regarding the cigarette butt. (T.d. 441). Noling received what he was entitled to, “[A] copy of the results of the testing,” pursuant to R.C. 2953.81(C) and (E).

#### Analysis

Results is a term used in the postconviction DNA testing statutes that is not defined in the Revised Code. However, “[A] legislative body need not define every word it uses in an enactment.” *State v. Dorso*, 4 Ohio St.3d 60, 62, 446 N.E.2d 449 (1983). Any term left undefined by statute is, “[T]o be accorded its common, everyday meaning. \* \* \* Words in common use will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them.” *Id.* The ordinary definition of results is, “[T]hat which results, outcome, consequence, effect.” Webster’s Encyclopedic Unabridged Dictionary (2 Ed. 1996) 1223.

On March 11, 2014, “[A] copy of the results of the testing,” from the cigarette butt was filed with the trial court. (T.d. 436). This filing included a March 4, 2014, letter from the Ohio BCI DNA Technical Leader and a February 10, 2014, BCI laboratory report. (T.d. 436). The record revealed copies were provided to the prosecutor and Noling’s counsel. The letter stated the cigarette butt had been tested and the DNA profile searched at all levels in CODIS without a hit. The state CODIS administrator confirmed that the DNA profile for Daniel Wilson was in the database and verified his

identity with the thumbprint collection card of Mr. Wilson. Additionally, the sample was retested with the same DNA profile result. (T.d. 436).

The February 10, 2014, BCI laboratory report contained three sections titled as follows: 1) Submitted on January 09, 2014 by Ev. Tech. David Kennedy, 2) Results and 3) Remarks. (T.d. 436). The Results section stated:

DNA profiling was performed using the polymerase chain reaction at the short tandem repeat loci D8S1179, D21S11, D7S820, CSF1PO, D3S1358, TH01, D13S317, D16S539, D2S1338, D19S433, vWA, TPOX, D18S51, Amelogenin, D5S818, and FGA on a sample from Item 1. [Clear bag containing envelope containing cigarette butt (State's Exhibit #1); found to contain cigarette butt and tube containing cutting]

The DNA from the cutting from the cigarette butt (Item 1.1.1) is from an unknown male. (T.d. 436).

The Remarks section provided:

Additional samples may be obtained from Item 1 should independent analysis be requested. All remaining evidence will be returned to the submitting agency.

The DNA profile has been entered into the CODIS database. No investigative information has been obtained as of this date. If investigative information becomes available, your agency will be notified. DNA comparisons can be made if reference standards consisting of two oral swabs from Bernhardt Hartig, Tyrone Noling, and any individuals for elimination are submitted. (T.d. 436).

Pre-trial DNA testing of the cigarette butt had already excluded Noling and his three co-defendants as sources for the biological material left on the cigarette butt. Noling had hoped that postconviction DNA test results would have included Dan Wilson as the source of the DNA on the cigarette butt. They did not. (T.d. 436).

The DNA statutes contemplate Noling's current situation of, "[H]aving DNA testing conducted and receiving unfavorable results." R.C. 2953.72(A)(9). The plain

language of the Revised Code does not provide Noling access to anything but the results of DNA testing because as an eligible offender who received unfavorable results from a DNA test, he may not scrutinize, review, or analyze BCI's data for purposes of challenge or independent analysis. No collateral attack of BCI's February 10, 2014, test results is permitted by the statute. R.C. 2953.72(A)(9).

BCI provided, "[A] copy of the results of the testing to," the trial court, the state and the offender in this case. Noling was entitled to nothing more under the statute. Voluntary disclosure of additional material in unrelated proceedings does not establish a basis for compelling the testing authority to provide more than required under the statute in these proceedings. As the test results were provided as required by statute and Noling's request for further material was without statutory authority, the trial court properly denied his request. (T.d. 452).

This assignment of error sought review of trial court's denial of access to supplemental data from BCI regarding the cigarette butt test results rather than the trial court's decision that Noling's, "[A]mended application cannot be accepted and is therefore dismissed," (T.d. 451). Therefore, Noling failed to present an issue, "[R]eviewable by or appealable to any court." R.C. 2953.72(A)(8). Noling's third assignment of error is without merit and should be overruled.

#### RESPONSE TO NOLING'S FOURTH ASSIGNMENT OF ERROR

**An error regarding the submission of evidence to the NIBIN database is a determination otherwise made by the trial court in the exercise of its discretion regarding postconviction DNA testing under R.C. 2953.71 to 2953.81, that is not, "[R]eviewable by or appealable to any court." R.C. 2953.72(A)(8).**

On November 25, 2013, the trial court granted Noling's motion to amend his application for postconviction DNA testing to, "[I]nclude 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 [Noling's] motion." (T.d. 391). The court also found, "[T]hat there is no Ohio statutory procedure to submit the shell casings to NIBIN for comparison; therefore, the Defendant's motion is overruled." (T.d. 392).

Noling's position is that the lack of a specific statute regarding the NIBIN database does not bar the trial court from considering his request or ordering a comparison of the evidence in the database. He hypothesized that a NIBIN search could produce a match to a weapon and looking at individuals who also used that weapon could lead to an individual who might potentially be able to be linked to the murders in this case. This would be evidence that Noling could then offer to the trial court to consider in its determination whether DNA testing of the shell casing and ring boxes would be outcome determinative under R.C. 2953.74(D).

It is the state's position that Noling sought postconviction DNA testing of the cigarette butt under the statutory scheme provided in R.C. 2953.71 to 2953.81. Noling agreed that the criteria provided in R.C. 2953.74, would be how the trial court determined whether to accept or reject his application. R.C. 2953.72(A)(4). Participation in that statutory process neither created any constitutional rights nor obligated the trial court to order DNA testing. R.C. 2953.72(A)(8). Although the trial court is required to consider all available, admissible evidence related to Noling's case in determining whether the "outcome determinative," R.C. 2953.74(B)(1) and (2), criteria has been satisfied, the statute does not require the court to create new

evidence. Noling's request to submit evidence to the NIBIN database was a request seeking to create evidence for the trial court's R.C. 2953.74(D), consideration. As the statutes governing the postconviction DNA testing procedures do not provide for evidence submission to the NIBIN database, the trial court properly denied this request.

On appeal, Noling repeatedly cited *State v. Biggs*, 5th Dist. No. 2013CA00009, 2013-Ohio-3333, as support for this assignment of error. In *Biggs*, the Ohio Innocence Project moved the trial court to release biological samples to assist the group in evaluating Biggs' case for possible postconviction proceedings. No petition for postconviction proceedings was pending and the period for filing a timely petition had long since expired. *Biggs*, 2013-Ohio-3333, ¶ 11. The trial court denied the motion and Biggs appealed.

The Fifth District Court of Appeals affirmed the trial court's decision refusing to release the biological samples. *Id.* at ¶ 23. The Appellate Court reasoned that Biggs presented no evidence of any new definitive tests to support re-submission of the biological samples to his newly discovered experts. *Id.* at ¶ 20. Rather than offer support, *Biggs* reaffirms the state's position that postconviction DNA testing statutes provide a narrow remedy to eligible offenders. *Id.* at ¶ 22.

As this assignment of error sought review of trial court's decision denying submission of evidence to NIBIN for comparison rather than the trial court's decision that Noling's, "[A]mended application cannot be accepted and is therefore dismissed," (T.d. 451), Noling has failed to present an issue, "[R]eviewable by or appealable to

any court." R.C. 2953.72(A)(8). Accordingly, Noling's fourth assignment of error is without merit and should be overruled.

**CONCLUSION**

For the foregoing reasons, this Court should overruled Noling's four assignments of error and affirm the judgment of the trial court.

Respectfully submitted,

VICTOR V. VIGLIUCCI (0012579)  
Portage County Prosecuting Attorney



---

PAMELA J. HOLDER (0072427)  
Assistant Prosecuting Attorney  
Attorney for the State of Ohio  
241 South Chestnut Street  
Ravenna, Ohio 44266  
(330) 297-3850 (phone)  
(330) 297-4594 (fax)  
[pholder@portageco.com](mailto:pholder@portageco.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief of the State of Ohio has been sent by regular U.S. mail to Carrie Wood at 250 East Brad Street, Suite 1400, Columbus, Ohio 43215, Mark Godsey at University of Cincinnati College of Law, Clifton Avenue at Calhoun Street, P.O. Box 210040, Cincinnati, Ohio 45221-0040 and Mike DeWine, Ohio Attorney General at 150 East Gay Street, 16th Floor, Columbus, Ohio 43215 on this 3<sup>rd</sup> day of March 2015.



---

PAMELA J. HOLDER



IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO

**FILED  
COURT OF APPEALS**

**APR 01 2015**

LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

State of Ohio, : Case No. 2014-PA-045  
Plaintiff-Appellee, : Trial Court Case No. 95 CR 220  
vs. : Regular calendar  
Tyrone Noling, :  
Defendant-Appellant. : **This is a death penalty case.**

---

**ON APPEAL FROM THE COURT OF COMMON PLEAS  
PORTAGE COUNTY, OHIO**

---

**REPLY BRIEF OF TYRONE NOLING**

---

**ORAL ARGUMENT REQUESTED**

---

PORTAGE COUNTY PROSECUTOR'S

VICTOR VIGLIUCCI (0012579)  
Prosecutor

PAMELA J. HOLDER (0072427)  
Assistant Prosecutor  
241 South Chestnut Street  
Ravenna, Ohio 44266  
(330) 297-3850 / (330) 297-3856 (Fax)  
Counsel for State of Ohio

OFFICE OF THE OHIO PUBLIC DEFENDER

CARRIE WOOD (0087091)  
Assistant State Public Defender  
(COUNSEL OF RECORD)  
250 East Broad Street – Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394 / (614) 752-5167 (Fax)  
carrie.wood@opd.ohio.gov

and

Mark Godsey (0074484)  
Ohio Innocence Project  
University of Cincinnati College of Law  
Clifton Ave. at Calhoun St.  
PO Box 210040  
Cincinnati, Ohio 45221 – 0040  
(513) 556-0752 / (513) 556-1236 (Fax)  
Counsel for Tyrone Noling

**EXHIBIT**

E

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

	<u>Page No.</u>
STATEMENT OF THE CASE AND FACTS .....	1
ARGUMENT .....	1

**ASSIGNMENT OF ERROR I**

**The trial court erred in its selection of a testing authority pursuant to Ohio Revised Code 2953.78(A) when it failed to 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, and the record fails to provide support for the trial court’s selection of that testing authority. R.C. 2953.71(R), 2953.74(C)(2), 2953.76(A) and (B), 2953.78(A) and (C). Journal Entry, May 2, 2014.....**1

**Issues Presented for Review:**

*If there is an objection to the trial court’s selection of the testing authority under R.C. 2953.78(A), does the trial court err when it fails to articulate the reasons for its selection of a particular testing authority? .....*1

*In a case where the limited quantity of DNA requires specialized and advanced DNA testing capabilities not available at all DNA testing facilities, does the trial court err when it designates a testing authority incapable of performing the necessary specialized and advanced DNA testing when a testing authority with such capacity is available at no cost to the state of Ohio? .....*1

**Authorities:**

<i>DA’s Office v. Osborne</i> , 557 U.S. 52, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009) .....	6
<i>Geiger v. Geiger</i> , 117 Ohio St. 451, 160 N.E. 28 (1927) .....	3
<i>Pack v. Cleveland</i> , 1 Ohio St.3d 129, 438 N.E.2d 434 (1982) .....	3
<i>State v. Ayers</i> , 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654 (8th Dist.).....	4
<i>State v. Ayers</i> , 8th Dist. Cuyahoga Nos. CA-10-95606 and CA-10-95513 .....	4,5
<i>State v. Bickford</i> , 28 N. D., 36, 147 N. W., 407, Ann. Cas., 1916D, 140 (1913) .....	3
<i>State v. Cordell</i> , 2d Dist. Greene No. 2010 CA 19, 2011-Ohio-1735 .....	6
<i>State v. Danison</i> , 105 Ohio St.3d 127, 2005-Ohio-781, 823 N.E.2d 444 .....	2
<i>State v. Emerick</i> , 2d Dist. Montgomery No. 2011-Ohio-5543 .....	6
<i>State v. Hochhausler</i> , 76 Ohio St.3d 455, 668 N.E.2d 457 (1996).....	2

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

Page No.

**Authorities: (cont'd)**

*State v. Montgomery*, 8th Dist. Cuyahoga No. 97143, 2012-Ohio-1640.....3  
*State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095.....6  
*State v. Roberts*, 134 Ohio St.3d 459, 2012-Ohio-5684, 983 N.E.2d 334 .....5  
*State v. Roberts*, 5th Dist. Guernsey No. 10CA000047, 2011-Ohio-4969 .....5  
*State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, 864 N.E.2d 630.....2  
Section 1, Article IV, Ohio Constitution .....2  
Section 3, Article IV, Ohio Constitution .....2  
U.S. Const. Art. VI, C1 2.....6  
R.C. 1.47 .....3  
R.C. 2933.82 .....5,6  
R.C. 2953.71 .....1,3  
R.C. 2953.72 .....1,2,3,5,6  
R.C. 2953.74 .....1  
R.C. 2953.73 .....3  
R.C. 2953.76 .....1  
R.C. 2953.78 .....1  
Former R.C. 4511.191 .....2

**ASSIGNMENT OF ERROR II**

**The trial court erred when it relied a report from the testing authority where the testing authority purported “scientific analysis” was based solely on a visual inspection of the evidence, when 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). 2953.74(C)(2).Journal Entry, May 2, 2014; Journal Entry, June 27, 2014 .....7**

**Issue Presented for Review:**

*When determinations of quality and quantity of biological material under R.C. 2953.74(C)(2)(a), (b), and (c) requires DNA testing, does the trial court err when it relies on determinations based solely on a “visual inspection” of the evidence and conclusory allegations about evidence handling? .....7*

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

Page No.

**Authorities:**

<i>State v. Reynolds</i> , 186 Ohio App.3d 1, 2009-Ohio-5532, 926 N.E.2d 213 (2d Dist).....	7,8
R.C. 2953.74 .....	7,8

**ASSIGNMENT OF ERROR III**

<b>When the identity of the contributors to the DNA profile is at issue in postconviction DNA testing, the trial court errs in denying disclosure of test results, including but not limited to the DNA profile(s) itself and the data that supports any conclusions in the report of the testing authority. R.C. 2953.81; 2953.83; Crim. R. 16; <i>Dolan v. United States Postal Serv.</i>, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006); <i>State v. Noling</i>, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095; <i>Noling’s Motion for Complete Copy of DNA Test Results</i>, March 26, 2014; <i>Journal Entry</i>, June 27, 2014. ....</b>	<b>8,9</b>
--	------------

**Issues Presented for Review:**

<i>When the eligible offender requests postconviction DNA testing, and that testing is granted, does the trial court err when it only permits the offender to have a copy of the testing authorities conclusions while preventing his review of the complete test results? .....</i>	<i>9</i>
<i>When the identity of the contributors to the DNA profile is at issue, does the trial court err in denying the eligible offender petitioning for DNA testing, the resulting DNA profile and the data that demonstrates how the testing authority generated that profile .....</i>	<i>9</i>

**Authorities:**

<i>Dolan v. United States Postal Serv.</i> , 546 U.S. 481, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006).....	8,9
<i>State v. Noling</i> , 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095.....	9
R.C. 2953.72 .....	9
R.C. 2953.81 .....	8,9
R.C. 2953.83 .....	8
Crim.R. 16.....	8

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

Page No.

**ASSIGNMENT OF ERROR IV**

The trial court erred when it held that it did not have authority to grant access to non-DNA, postconviction forensic testing of shell casings and access to the related database. R.C. 2953.84; *State v. Biggs*, 5th Dist. Stark No. 2013CA00009, 2013-Ohio-3333; Noling’s Motion to Amend His Application for Postconviction DNA Testing, Oct. 4, 2013; Noling’s Reply to State’s Response to Noling’s Motion to Amend His Application for Postconviction DNA Testing, Nov. 14, 2013; Journal Entry, Nov. 25, 2013; Noling’s Amended Application for DNA Testing, Dec. 4, 2013. ....9

**Issue Presented for Review:**

*When ballistics comparison and access the ballistics database (NIBIN) would contribute to an outcome determinative result, does the trial court err in denying a subject offender’s request when case law supports access to such testing but there is not a statute directly permitting the trial court to order such testing and database access? .....9*

**Authorities:**

*State v. Biggs*, 5th Dist. Stark No. 2013CA00009, 2013-Ohio-3333 .....9  
R.C. 2953.72 .....10  
R.C. 2953.84 .....9

**CONCLUSION** .....10

**CERTIFICATE OF SERVICE** .....11

**APPENDIX:**

*State of Ohio v. David Ayers*, Case No. CA-10-095606, Cuyahoga County Court of Appeals, Motion to Dismiss Appeal (Aug. 30, 2010) ..... A-1

*State of Ohio v. David Ayers*, Case Nos. CA-10-095513 & CA-10-095606, Cuyahoga County Court of Appeals, Opposition to Motions to Dismiss (Sept. 7, 2010)..... A-8

*State of Ohio v. David Ayers*, CA-10-095513 & CA-10-095606, Cuyahoga County Court of Appeals, Journal Entry (Sept. 22, 2010)..... A-19

**TABLE OF CONTENTS  
AND ASSIGNMENTS OF ERROR**

Page No.

**APPENDIX:**

*State of Ohio v. David Ayers*, CA-10-095513 & CA-10-095606, Cuyahoga County Court of Appeals, Journal Entry (Sept. 22, 2010)..... A-20

*State of Ohio v. David Ayers*, CR-00-388738-ZA, Cuyahoga County Common Pleas Court, Notice of Appellate Decision that Deprives this Court of Jurisdiction to Order DNA Testing until Appellate Issues are Resolved (Sept. 24, 2010)..... A-21

*State of Ohio v. David Ayers*, CR-00-388738-ZA, Cuyahoga County Common Pleas Court, Notice of Appellate Decision that Deprives this Court of Jurisdiction to Order DNA Testing until Appellate Issues are Resolved, and Request for Hearing, and Request for Immediate Notice of any Order Issued by this Court Requiring DNA Testing of any Item in this Case (Sept. 27, 2010)..... A-25

## STATEMENT OF THE CASE AND FACTS

Tyrone Noling relies upon and incorporates the Statement of the Case and Facts contained in his brief.

## ARGUMENT

### ASSIGNMENT OF ERROR I

**The trial court erred in its selection of a testing authority pursuant to Ohio Revised Code 2953.78(A) when it failed to 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, and the record fails to provide support for the trial court's selection of that testing authority. R.C. 2953.71(R), 2953.74(C)(2), 2953.76(A) and (B), 2953.78(A) and (C). Journal Entry, May 2, 2014.**

#### Issues Presented for Review

*If there is an objection to the trial court's selection of the testing authority under R.C. 2953.78(A), does the trial court err when it fails to articulate the reasons for its selection of a particular testing authority?*

*In a case where the limited quantity of DNA requires specialized and advanced DNA testing capabilities not available at all DNA testing facilities, does the trial court err when it designates a testing authority incapable of performing the necessary specialized and advanced DNA testing when a testing authority with such capacity is available at no cost to the state of Ohio?*

The State asserts that this Court does not have the authority to review the trial court's decisions leading up to the "rejection" of a portion of Noling's Amended DNA Application. State's Merit Brief, pp. 9-12, 22, 26, 28-9. The State does not argue that Noling lacks a final appealable order in this case. The State argues instead that through R.C. 2953.72(A)(8), the legislature has divested this Court of its jurisdiction to review issues that are a part of the record. *Id.* This interpretation of R.C. 2953.72(A)(8) violates the doctrine of separation of powers.

#### **A. The State's interpretation of R.C. 2953.72(A)(8) violates separation of powers**

"Although the Ohio Constitution does not contain explicit language establishing the doctrine of separation of powers, it is inherent in the constitutional framework of government

defining the scope of authority conferred upon the three separate branches of government.” *State v. Sterling*, 113 Ohio St.3d 255, 259, 2007-Ohio-1790, 864 N.E.2d 630.

In *State v. Hochhausler*, 76 Ohio St.3d 455, 668 N.E.2d 457 (1996), the Ohio Supreme Court addressed the constitutionality of former R.C. 4511.191(H)(1). At the time, R.C. 4511.191(H)(1) stated that, after a driver received an administrative license suspension following a D.U.I. violation, no court had jurisdiction to grant a stay of the license suspension and that any order issued purporting to grant a stay “shall not be given administrative effect.” *Hochhausler* at 463; 145 Ohio Laws, Part I, 547.

In *Hochhausler*, the Supreme Court held:

The legislative branch has no right to limit the inherent powers of the judicial branch of the government. *Hale v. State* (1896), 55 Ohio St. 210, 212-213, 45 N.E. 199, 200. Inherent within a court’s jurisdiction, and essential to the orderly and efficient administration of justice, is the power to grant or deny stays. See *Landis v. N. Am. Co.* (1936), 299 U.S. 248, 254, 57 S.Ct. 163, 166, 81 L.Ed. 153, 158; *State v. Smith* (1989), 42 Ohio St.3d 60, 61, 537 N.E.2d 198, 200. To the extent that R.C. 4511.191(H) deprives courts of their ability to grant a stay of an administrative license suspension, it improperly interferes with the exercise of a court’s judicial functions. Thus, the part of R.C. 4511.191(H)(1) that prevents “any court” from granting a stay violates the doctrine of separation of powers and is unconstitutional.

*Hochhausler* at 463-464.

Also inherent within the jurisdiction of an appellate court is the authority to review the proceedings below that led to a final, appealable order. Sections 1 and 3(B)(2), Article IV of the Ohio Constitution; *see generally*, *State v. Danison*, 105 Ohio St.3d 127, 2005-Ohio-781, 823 N.E.2d 444. The State’s interpretation of R.C. 2953.72(A)(8) permits the legislature to divest this Court of jurisdiction to review those proceedings that lead to the final, appealable order. Like in *Hochhausler*, when the legislature deprives courts of their inherent power to review the proceedings that lead to the final appealable order, it improperly interferes with the court’s judicial functions. *Hochhausler* at 463-464. Therefore, under the State’s interpretation, R.C.

2953.72(A)(8) violates the separation-of-powers doctrine. And, if this Court agrees with the State's reading of the statute, the appropriate remedy is for this Court to strike the "reviewable by" language from R.C. 2953.72(A)(8). *Geiger v. Geiger*, 117 Ohio St. 451, 466, 160 N.E. 28 (1927) (citing to *State v. Bickford*, 28 N. D., 36, 147 N. W., 407, Ann. Cas., 1916D, 140 (1913) and explaining the "test of inseparability").

**B. A Constitutional reading of R.C. 2953.72(A)(8) provides this Court with jurisdiction**

However, the State actually misconstrues R.C. 2953.72(A)(8). Statutory enactments of the General Assembly are to be accorded a strong presumption of constitutionality, and a constitutional challenge must establish their unconstitutionality beyond a reasonable doubt. *Pack v. Cleveland*, 1 Ohio St.3d 129, 134, 438 N.E.2d 434 (1982); R.C. 1.47. Here, the language (and intent of the legislature) in R.C. 2953.72(A)(8) may be read in a manner that comports with the Ohio Constitution and does not interfere with this Court's ability to review the issues on appeal in the instant case.

The Eighth District Court of Appeals previously evaluated R.C. 2953.72(A)(8), and found that its provisions determined only when a final appealable order existed, and what parties could then file a notice of appeal. *State v. Montgomery*, 8th Dist. Cuyahoga No. 97143, 2012-Ohio-1640. In *Montgomery*, the Eighth District considered the State's appeal from the judgment of the trial court granting in part, and denying in part, Montgomery's motion to conduct his own search for items sought for biological testing, and denied the State's objections to the search. *Id.* at ¶ 1. Specifically, the court of appeals looked to answer the question of whether the State could appeal the trial court's decision. *Id.* at ¶ 10. As this was an issue of first impression, the court of appeals reviewed R.C. 2953.72(A)(8) in conjunction with related sections of the Ohio Revised Code. The court of appeals held that, reading of R.C. 2953.73 with R.C. 2953.71 and R.C. 2953.72(A)(8), "[t]he plain meaning of these statutes is that only a defendant whose application

for DNA testing has been rejected is permitted to appeal.” *Id.* at ¶ 14-15. In other words, the plain meaning of the statute simply states when an appeal may take place. *Id.* It does not affect the scope of review on appeal.

The Eighth District has also addressed the question of whether a court of appeals had jurisdiction over an appeal in which the trial court granted in part and denied the defendant’s request for postconviction DNA testing. *State v. Ayers*, 8th Dist. Cuyahoga Nos. CA-10-95606 and CA-10-95513. In *Ayers*, the trial court granted the testing of pubic hairs that were collected at the crime scene; yet refused to permit testing of the rape kit or a bloody towel.<sup>1</sup> Motion to Dismiss Appeal, Aug. 26, 2010, *State v. Ayers*, 8th Dist. Cuyahoga Nos. CA-10-95606 and CA-10-95513. In addition, the trial court refused to order a search for all of the evidence (biological material) that had been collected in the case (including the rape kit and the towel). *Id.*

Despite a partial grant of DNA testing, Ayers appealed. Notice of Appeal, Aug. 5, 2010, *State v. Ayers*, 8th Dist. Cuyahoga No. CA-10-95513; Notice of Appeal, Aug. 25, 2010, *State v. Ayers*, 8th Dist. Cuyahoga No. CA-10-95606. The State moved to dismiss the appeals for lack of a final appealable order. Motion to Dismiss Appeal, Aug. 26, 2010, *State v. Ayers*, 8th Dist. Cuyahoga Nos. CA-10-95606 and CA-10-95513. The State argued that Ayers did not have a final appealable order because the trial court’s order did not affect a substantial right. *Id.* Ironically, the State argued that Ayers should have moved to amend his DNA Application to include the additional items that the trial court refused to test. *Id.* Ayers argued that the failure of the prosecutor to perform a search would foreclose enforcement of the statutory requirement that the prosecutor perform a search. Opposition to Motions to Dismiss, Sept. 7, 2010, *State v.*

---

<sup>1</sup> The Eighth District had previously held that postconviction DNA testing could be outcome determinative and remanded the case back to the trial court. *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654 (8th Dist.).

*Ayers*, 8th Dist. Cuyahoga Nos. CA-10-95606 and CA-10-95513. *Ayers* also noted that because testing would likely consume all the evidence, he might only have one opportunity to select the type of test to be performed. *Id.* And that determination depended—in part—on the known universe of evidence to be tested. *Id.*

The Eighth District denied the State's motion to dismiss. Motion by Appellee to Dismiss Appeal is Denied, Sept. 22, 2010, *State v. Ayers*, 8th Dist. Cuyahoga Nos. CA-10-95606 and CA-10-95513. In short, the court of appeals ruled that it had jurisdiction to review decisions of the trial court during proceedings concerning postconviction DNA testing that impacted the substantial rights of the defendant.

Finally, reading R.C. 2953.72(A)(8) to permit reviewing courts to analyze the proceedings that lead to the final appealable order is consistent with the recent holding of the Ohio Supreme Court in *State v. Roberts*, 134 Ohio St.3d 459, 2012-Ohio-5684, 983 N.E.2d 334. In *Roberts*, the defendant filed a pro-se motion in the trial court to order the preservation and listing of evidence. *Id.* at ¶ 3. *Roberts* filed the request so that he could retain an expert to conduct “touch DNA” analysis. *Id.* The trial court denied *Roberts*'s motion. *Id.* at ¶ 4. *Roberts* appealed to the Fifth District Court of Appeals; and, in his single assignment of error, argued that the trial court erred as a matter of law in denying his motion to order the preservation and listing of evidence in violation of R.C. 2933.82. *State v. Roberts*, 5th Dist. Guernsey No. 10CA000047, 2011-Ohio-4969, ¶ 5. The court of appeals ruled that because the applicable statute, R.C. 2933.82, did not become effective until almost thirteen years after *Roberts*'s conviction, and since the legislature did not give an express, clear provision for the statute's retroactive application, the obligation created by the statute applied prospectively only. *Id.* The Ohio Supreme Court accepted jurisdiction and reversed the Fifth District's decision, holding that

“[t]he obligation to preserve and catalog criminal offense-related biological evidence imposed upon certain government entities by R.C. 2933.82 applie[d] to evidence in the possession of those entities at the time of the statute’s effective date.” *Roberts* at syllabus.

The Ohio Supreme Court has held that subject matter jurisdiction cannot be waived and a court may raise the issue sua sponte. *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 10. However, if the Ohio Supreme Court followed the State’s rigid reading of R.C. 2953.72(A)(8), it would have raised the issue of its jurisdiction sua sponte and dismissed the appeal in *Roberts*. See also *State v. Cordell*, 2d Dist. Greene No. 2010 CA 19, 2011-Ohio-1735 (reversing trial court’s determination of whether the inmate was an eligible offender under R.C. 2953.72(C)); *State v. Emerick*, 2d Dist. Montgomery No. 2011-Ohio-5543 (finding that the trial court must order a search for evidence).

Finally, in demonstrating innocence with new evidence under state law, the due process clause of the U.S. Constitution is implicated. *DA's Office v. Osborne*, 557 U.S. 52, 69, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). A state statute cannot circumvent the United States Constitution. U.S. Const. Art. VI, Cl 2; *contra* R.C. 2953.72(A)(9). Although States are afforded great flexibility in crafting their postconviction procedures, a federal court may “upset a State’s post-conviction relief procedures [...] when they are fundamentally inadequate to vindicate the substantive rights provided.” *Osborne*, 557 U.S. at 69. In the instant case, denial of appellate review would deprive Noling of the results of DNA testing, the right to a testing authority with the appropriate technology to make the scientific determinations in his case, and the same access to the courts for a ballistics comparison as in other Ohio counties. Without appropriate appellate review in the instant case, the legislative restriction on this Court’s scope of review opens the door to federal court review. Ohio Rev. Code 2953.72(A)(9) indicates that the legislature

intended just the opposite: To keep the federal courts from intervening in how Ohio carries out its postconviction DNA testing statute.

## ASSIGNMENT OF ERROR II

**The trial court erred when it relied a report from the testing authority where the testing authority purported “scientific analysis” was based solely on a visual inspection of the evidence, when 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). 2953.74(C)(2). Journal Entry, May 2, 2014; Journal Entry, June 27, 2014.**

### Issue Presented for Review

*When determinations of quality and quantity of biological material under R.C. 2953.74(C)(2)(a), (b), and (c) requires DNA testing, does the trial court err when it relies on determinations based solely on a “visual inspection” of the evidence and conclusory allegations about evidence handling?*

The State argues that no scientific testing need to be performed in order for the testing authority to determine whether, with current technology, the parent sample is “scientifically suitable for testing.” State’s Merit Brief, 13-17. However, this interpretation simply asks the testing authority to speculate on the suitability of the sample. A testing authority, unlike the court or the attorneys in the case, has the technology to test and assess the evidence in order to advise the court whether science is able to produce a result. In *Reynolds*, the applicant sought DNA testing of the following items: 1) a hooded jacket allegedly worn by the perpetrator of the felonious assault; 2) blood samples taken from the interior of the victim’s vehicle; 3) fingerprints left in the victim’s vehicle for the presence of skin cells containing DNA; 4) the knife that was used by the perpetrator of the felonious assault; and 5) the victim’s purse. *State v. Reynolds*, 186 Ohio App.3d 1, 2009-Ohio-5532, 926 N.E.2d 315 (2d Dist.), ¶ 10. The trial court denied the request, holding that the testing authority would be unable to obtain a DNA result from the evidence taken from the crime scene. *Reynolds* at ¶ 21. Specifically, the trial court speculated

that, because the purse and the jacket had been exposed to the elements for several months before it was collected, those items were unsuitable for testing. *Id.* The trial court further speculated that the DNA in fingerprints would have been removed or contaminated by the police. *Id.* The Second District reversed the trial court's ruling on the basis that the testing authority should have been the party to decide whether the parent sample of the biological evidence collected was of sufficient quantity and in suitable scientific condition to be submitted for testing, not the trial court. *Id.* at ¶ 22.

In the instant case, BCI engaged in the same speculation as the trial court did in *Reynolds*. Here, the trial court barred the testing authority from consuming the sample—which prevented BCI from performing any testing. Order, May 2, 2014; compare Laboratory Report, June 26, 2014 with March Hrg., T.p. 53-56, 119-120, 128-129. The reason that the statute places the scientific suitability determinations in the hands of the testing authority is to remove speculation and permit a determination based on science. Even the trial court noted that, with BCI's testing procedures, BCI would have to perform DNA testing to accurately determine the quantity of DNA in the sample. March Hrg., T.p. 5-6, 8-9, 132. However, the trial court rendered its decision to reject Noling's Amended DNA Application based on no more information than what the trial court relied upon in *Reynolds*. Under R.C. 2953.74(C)(2)(c), the testing authority, with its technology and testing capabilities, must perform scientific testing in order to confirm or disprove a hypothesis of contamination. Thus, the trial court's reliance on a visual inspection and no review of chain of custody of the evidence at issue was in error.

### ASSIGNMENT OF ERROR III

**When the identity of the contributors to the DNA profile is at issue in postconviction DNA testing, the trial court errs in denying disclosure of test results, including but not limited to the DNA profile(s) itself and the data that supports any conclusions in the report of the testing authority. R.C. 2953.81; 2953.83; Crim. R. 16; *Dolan v. United States Postal Serv.*,**

546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006); *State v. Noling*, 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095; Noling's Motion for Complete Copy of DNA Test Results, March 26, 2014; Journal Entry, June 27, 2014.

#### Issues Presented for Review

*When the eligible offender requests postconviction DNA testing, and that testing is granted, does the trial court err when it only permits the offender to have a copy of the testing authorities conclusions while preventing his review of the complete test results?*

*When the identity of the contributors to the DNA profile is at issue, does the trial court err in denying the eligible offender petitioning for DNA testing, the resulting DNA profile and the data that demonstrates how the testing authority generated that profile?*

Again, the State argues that R.C. 2953.72(A)(8) applies here, and bars this Court from reviewing this issue. First, R.C. 2953.72(A)(8), by its plain language, only applies to "determinations \*\*\* made by the court of common pleas in the exercise of its discretion\*\*\*." Here, the provision at issue does not provide for the exercise of discretion but rather requires that the trial court disclose the results of the testing. R.C. 2953.81. In the case sub judice, the trial court failed to abide by the mandates of R.C. 2953.81. Therefore, R.C. 2953.72(A)(8) does not apply. Furthermore, this provision does not limit this Court's jurisdiction in the manner argued by the State. *See pp. 1-7, supra.*

#### ASSIGNMENT OF ERROR IV

**The trial court erred when it held that it did not have authority to grant access to non-DNA, postconviction forensic testing of shell casings and access to the related database. R.C. 2953.84; *State v. Biggs*, 5th Dist. Stark No. 2013CA00009, 2013-Ohio-3333; Noling's Motion to Amend His Application for Postconviction DNA Testing, Oct. 4, 2013; Noling's Reply to State's Response to Noling's Motion to Amend His Application for Postconviction DNA Testing, Nov. 14, 2013; Journal Entry, Nov. 25, 2013; Noling's Amended Application for DNA Testing, Dec. 4, 2013.**

#### Issue Presented for Review

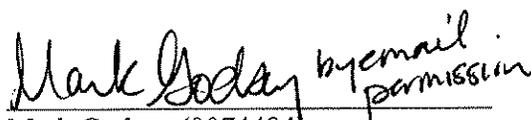
*When ballistics comparison and access the ballistics database (NIBIN) would contribute to an outcome determinative result, does the trial court err in denying a subject offender's? request when case law supports access to such testing but there is not a statute directly permitting the trial court to order such testing and database access?*

Finally, the State argues that R.C. 2953.72(A)(8) applies here, and bars this Court from reviewing this issue. Here, the trial court denied Noling's request to submit the shell casings to NIBIN because there was no Ohio statute permitting for such submissions. In other words, the trial court's decision was not made under Ohio's DNA testing statute. Therefore, R.C. 2953.72(A)(8) does not apply. Alternatively, this provision does not limit this Court's jurisdiction in the manner argued by the State. *See pp. 1-7, supra.*

### CONCLUSION

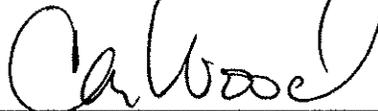
This Court should reverse the decision of the trial court, and remand for appropriate findings and selection of the testing authority for this case, direction that the testing authority utilize both testing and chain of custody to properly evaluate quantity and quality of the biological material on the shell casings and ring boxes, direct the trial court to order BCI to provide Noling with complete results of all testing and evaluation, and, finally, direct the trial court to consider the impact of submission of the shell casings to the ballistics database and issue any appropriate order for submission of the shell casings to NIBIN.

Respectfully submitted,

 *by email permission*

Mark Godsey (0074484)  
Ohio Innocence Project  
University of Cincinnati College of Law  
Clifton Ave. at Calhoun St.  
PO Box 210040  
Cincinnati, OH 45221 - 0040  
(513) 556-0752  
(513) 556-1236 - fax  
Counsel for Tyrone Noling

Office of the Ohio Public Defender



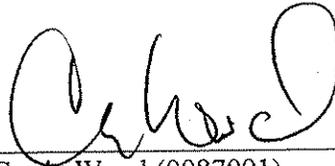
Carrie Wood - 0087091  
Assistant State Public Defender

250 E. Broad Street, Suite 1400  
Columbus, Ohio 43215  
Voice: (614) 466-5394  
Facsimile: (614) 752-5167  
Email: [carrie.wood@opd.ohio.gov](mailto:carrie.wood@opd.ohio.gov)  
Co-counsel for Tyrone Noling

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was 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, 16<sup>th</sup> Floor, Columbus, Ohio 43215 on this the 30th day of March 2015.

I hereby certify that a true copy of the foregoing was forwarded by first class U.S. mail, per the "mailbox rule," to the Clerk of Courts for the Portage County Court of Appeals, Portage County Courthouse, 203 W. Main Street, Ravenna, Ohio 44266 on this the 30th day of March 2015.



---

Carrie Wood (0087091)  
Assistant Public Defender

Counsel for Tyrone Noling

#438867

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
PORTAGE COUNTY, OHIO

State of Ohio,	:	Case No. 2014-PA-045
Plaintiff-Appellee,	:	Trial Court Case No. 95 CR 220
vs.	:	Regular calendar
Tyrone Noling,	:	
Defendant-Appellant.	:	<b>This is a death penalty case.</b>

---

ON APPEAL FROM THE COURT OF COMMON PLEAS  
PORTAGE COUNTY, OHIO

---

APPENDIX TO  
REPLY BRIEF OF TYRONE NOLING

---

MTI  
~~(let)~~ sm

Case: 95606  
437053

IN THE  
EIGHTH JUDICIAL DISTRICT  
CUYAHOGA COUNTY  
OHIO

NO. 95606

STATE OF OHIO )  
Plaintiff-Appellee )  
-vs- ) CASE NO. CR 388738  
DAVID AYERS )  
Defendant-Appellant )

---

MOTION TO DISMISS APPEAL

---

Counsel for Plaintiff-Appellee

**WILLIAM D. MASON**  
CUYAHOGA COUNTY PROSECUTOR

✓  
**MARY McGRATH (#0041381)**  
Assistant Prosecuting Attorney  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7872

Counsel for Defendant-Appellant

**CHRISTIAN GROSTIC**  
200 Public Square  
Suite 3740  
Cleveland, Ohio 44114  
(216) 696-6700



IN THE COURT OF APPEALS  
EIGHTH JUDICIAL DISTRICT OF OHIO  
CUYAHOGA COUNTY

CA 95606

STATE OF OHIO )

Plaintiff-Appellee )

-vs- )

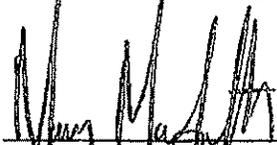
DAVID AYERS )

Defendant-Appellant )

Now comes Cuyahoga County Prosecutor William D. Mason, by and through his undersigned assistant, on behalf of Appellee State of Ohio, and respectfully moves this Honorable Court to dismiss this appeal because the Orders appealed from are not final appealable orders as required by law, and one of the Orders has been rendered moot, as more fully discussed in the Brief attached hereto and incorporated herewith.

Respectfully submitted,

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR



MARY McGRATH (#0041381)  
Assistant Prosecuting Attorney  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7872

**BRIEF**

Appellee State of Ohio (the "State") respectfully moves this Honorable Court to dismiss this appeal for lack of a final appealable order, as the orders appealed from do not affect a substantial right in a special proceeding as required by R.C. 2505.02(B)(2). Additionally, one of the Orders has been rendered moot, as a superseding Order has been entered.

Appellant David Ayers ("Ayers") appeals from two Orders relating to his Application for DNA Testing by which he seeks DNA testing of fingernail scrapings, hairs and pubic hairs. This Court reversed the trial court's order denying Ayers' Application for DNA Testing and remanded the matter to the trial court. *State v. Ayers*, 185 Ohio App.3d 168, 923 N.E.2d 654. As such, Ayers' Application is now pending before the trial court. Ayers appealed from the following Orders:

- 1) Journal Entry of August 19, 2010 in which the trial court adopted the State's Proposed Order designating DNA Diagnostic Center ("DDC") as the testing authority and ordered DDC to examine the biological material and prepare a report, and
- 2) Journal entry of August 20, 2010, in which the trial court denied Ayers' Motion to Require the Prosecuting Attorney to submit a complete report regarding all biological material collected from the crime scene or victim.

R.C. 2505.02 defines a "final order" as follows:

**2505.02 Final order**

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

R.C. 2505.02(A)(1),(2) and (B)(2).

As stated above, a special proceeding is an action or proceeding that is specially created by statute and that was not denoted as an action at law or a suit in equity prior to 1853. The provisions for post-conviction DNA testing were specially created by statute in 2003. As such, the trial court's Order must affect a substantial right in order to constitute a final appealable order. "An order which affects a substantial right is perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future. *Id.* at ¶ 19, citing *Bell v. Mt. Sinai Med. Ctr.* (1993), 67 Ohio St.3d 60, 63." *Dywidag Sys. Internatl., USA, Inc. v. Ohio Dept. of Transp.*, Franklin App. No. 10AP-270, 2010-Ohio-3211 at 14.

It is clear, from those decisions and the opinion of Justice Leach in *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 285, that the entire concept of 'final orders' is based upon the rationale that the court making an order which is not final is thereby retaining jurisdiction for further proceedings. A final order, therefore, is one disposing of the whole case or some separate and distinct branch thereof.

*Lantsberry v. Tilley Lamp Co.* (1971), 27 Ohio St.2d 303, at 306, 272 N.E.2d 127, 56 O.O.2d 179.

Initially, it should be noted that the Order of August 19, 2010 has been rendered moot, as it has been superseded by the trial court's Journal Entry of August 26, 2010, granting the State's Motion to Substitute the Cuyahoga County Coroner's Office as the testing authority. On August 26, 2010, the trial court entered an Order designating the Coroner's Office as the testing authority and ordered the Coroner's Office to examine the

biological material and prepare a report. As such, the Journal Entry of August 19, 2010 that Ayers has appealed from is moot, and Ayers' appeal from this Order should be dismissed.

The trial court's Orders do not affect a substantial right. Neither Order disposes of the entire case or a separate branch thereof. The trial court has retained jurisdiction over the matter remanded to it by this Court – Ayers' Application for DNA Testing – and is in compliance with the order of remand by ordering the Coroner's Office to examine the biological material sought for testing and recommend further action, pursuant to R.C. 2953.76.

Further, the trial court's Orders do not foreclose relief in the future. R.C. 2953.72(A) requires that "Any eligible offender who wishes to request DNA testing . . . shall submit an application for the testing to the court of common pleas. . . on a form prescribed by the attorney general for this purpose." In his Application, Ayers requested testing of the fingernail scrapings, hairs and pubic hairs. Ayers sought to have the trial court order DNA testing of items Ayers had knowledge of prior to his 2000 trial, but for which he has never requested DNA testing. Ayers was free to include the items he now seeks to have DNA tested in either of his two Applications for DNA Testing, but did not do so. Ayers had the remedy of moving to amend his Application or filing an Application for DNA Testing to request DNA testing of additional items, but did not to do so.

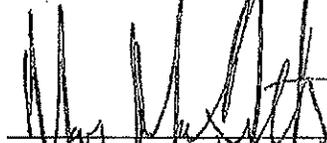
R.C. 2953.71 through R.C. 2953.81 control the procedures to obtain and proceed with DNA testing. Denial of Ayers' Motion does not foreclose Ayers' opportunity to seek DNA testing of additional items in compliance with the requirements of the DNA statutes.

**CONCLUSION**

Based on the foregoing, the State of Ohio respectfully requests that this Honorable Court dismiss this appeal because the Orders appealed from are not final appealable orders. Further, the Order of August 19, 2010 has been rendered moot, as it has been superseded by the trial court's Journal Entry of August 26, 2010, granting the State's Motion to Substitute the Cuyahoga County Coroner's Office as the testing authority, and the trial court's entry of an Order designating the Coroner's Office as the testing authority. As such, the Journal Entry of August 19, 2010 that Ayers has appealed from is moot, and Ayers' appeal from this Order should be dismissed.

Respectfully submitted,

**WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR**

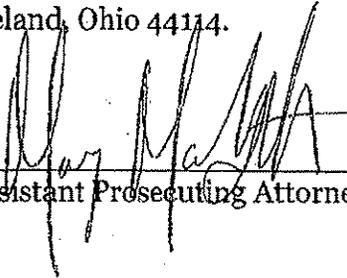


---

**MARY McGRATH (#0041381)**  
Assistant Prosecuting Attorney  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7872

**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion to Dismiss Appeal has been sent by regular U.S. Mail this 30<sup>th</sup> day of August, 2010, to Christian Grostic, attorney for Appellant David Ayers, 200 Public Square, Suite 3740, Cleveland, Ohio 44114.

  
\_\_\_\_\_  
Assistant Prosecuting Attorney

Case: 95513

436922

(L5) opp  
cm

IN TI  
EIGH

STATE OF OHIO

Plaintiff-Appellee

vs.

DAVID AYERS

Defendant-Appellant

CASE NOS. CA-10-095513 &  
CA-10-095606

OPPOSITION TO MOTIONS  
TO DISMISS

FILED  
COURT OF APPEALS  
SEP 07 2010  
GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY, OHIO

The State's motions to dismiss Mr. Ayers's appeals rest on a fundamental misunderstanding of the nature of DNA testing. Different types of DNA testing are available, but all DNA testing risks consuming the material tested. A later appeal in this matter, after testing of some items is underway or has been completed, would be insufficient to protect Mr. Ayers's substantial rights. He cannot later seek to have different testing performed on that same material if it is consumed by the earlier testing, and cannot adequately pursue appropriate testing without knowing what evidence is available to be tested.

**Background**

On February 27, 2008, Mr. Ayers filed an application for DNA testing, noting that a number of different items and biological samples were collected at the crime scene and specifically listing certain pieces of evidence he confirmed had been retained by the Cuyahoga County Coroner's Office. He specifically requested that "a search be performed to uncover any DNA from this case, either known or previously unknown by him." On March 24, 2008, the trial court denied his application. Mr. Ayers appealed, and this Court reversed, concluding that DNA testing could be outcome determinative

A10095513

64911571



CA10095606

64911572



ORIGINAL

and that the trial court abused its discretion in denying his application. *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, ¶ 44, appeal denied, *State v. Ayers*, 2010-Ohio-0323.

During a status conference after remand, the trial court indicated that it would only permit testing of the specific items Mr. Ayers listed in his application, and not any other biological material collected at the crime scene that may have been retained. Mr. Ayers filed a motion to include all biological and potentially biological materials in the order for testing. The motion also included a request to require the prosecuting attorney to search for and submit a complete report of such materials, in accordance with R.C. 2953.75. The trial court denied the motion on July 21, 2010.

On August 5, 2010, Mr. Ayers filed a notice of appeal of the trial court's July 21, 2010 order, creating CA-10-095513.

On August 10, 2010, the trial court entered a journal entry stating that the July 21, 2010 order was not final and appealable, and the case was not stayed. The trial court requested that the parties submit proposed orders for testing specific items.

On August 4, 2010 and August 10, 2010, the prosecutor submitted a "chain of custody" report and supplemental report. However, reflecting the trial court's limitations on testing, the prosecutor's reports listed only specific items, and did not list all material collected and retained. On August 16, 2010, Mr. Ayers filed a motion to require the prosecuting attorney to submit a complete report, in accordance with the statute. On August 16, 2010, Mr. Ayers and the State submitted proposed orders for testing pursuant to the trial court's request and in consideration of the trial court's ruling on July 21, 2010.

On August 17, 2010, the trial court adopted the state's proposed order, submitting only certain specific items to be analyzed to determine what testing may be performed.

On August 19, 2010, the trial court denied Mr. Ayers's motion to require the prosecuting attorney to submit a complete report of biological material collected and retained.

On August 24, 2010, Mr. Ayers filed a notice of appeal of the trial court's August 17, 2010 and August 19, 2010 orders, creating CA-10-095606. In his notice of appeal, Mr. Ayers noted that, to the extent the trial court's July 21, 2010 order denying testing of all biological material was not a final order, it was rendered final by the August 17, 2010 and August 19, 2010 orders and was also being appealed.

Because the appeals in CA-10-095513 and CA-10-095606 present overlapping issues, Mr. Ayers filed a motion to consolidate the appeals on August 26, 2010.

#### Argument

An order is a final appealable order if it "affects a substantial right made in a special proceeding." R.C. 2505.02(B)(2). There is no dispute that an application for post-conviction DNA testing is a "special proceeding." *See* Mot. to Dismiss at 2 (CA-10-095513); Mot. to Dismiss at 2 (CA-10-095606). Accordingly, the trial court's orders are final appealable orders if they "affect a substantial right." They do.

"Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). Two substantial rights have been denied by the trial court: (1) Mr. Ayers's right to require the prosecuting attorney to search and provide a report of biological material collected and retained, R.C. 2953.75; and (2) Mr. Ayers's right to testing of all biological material collected and retained, R.C. 2953.74.

**I. The Trial Court's Orders Affect Substantial Rights Because, If Not Immediately Appealable, They Foreclose Appropriate Relief in the Future**

An order affects a substantial right if it is one “that if not immediately appealable, would foreclose appropriate relief in the future.” *Southside Community Dev. Corp. v. Levin*, 116 Ohio St.3d 1209, 2007—Ohio—6665, 878 N.E.2d 1048, ¶7 (internal quotation marks omitted). The orders at issue here would foreclose appropriate future relief. Because DNA testing often consumes the material tested, Mr. Ayers and the testing authority may have only one chance to test certain pieces of evidence and will have to choose which type of DNA testing to seek. Without knowing what evidence is available to be tested in the future, Ayers and, more significantly, the testing authority, would be forced to make that choice blindly. A later appeal in this matter, after testing of some items is underway or has been completed, would be insufficient to protect Mr. Ayers's substantial rights. He cannot later seek to have different testing performed on that same material if it is consumed by the earlier testing.

By its nature, DNA testing often consumes the material tested, and no further testing is possible on the tested material. Because a piece of evidence may have only a small amount of testable biological material, it is not necessarily possible to test each piece of evidence more than once. Where, like here, hair roots, fingernail scrapings, or other small pieces of evidence are to be tested, it is nearly certain that some pieces of evidence will not be able to be tested more than once.

There are different types of potential DNA testing, each with its own advantages and disadvantages. Strategic choices have to be made, depending on the nature of the evidence to be tested. For example, STR testing yields results that can be run through

CODIS, a database containing DNA profiles of known felons. Thus, through CODIS, STR testing can establish the identity of the person who left the biological material tested.

Y-STR testing is much more sensitive than STR testing, where, as presumably is the case here, mixed biological material is left by a male attacker and a female victim. *See State v. Reynolds*, 186 Ohio App.3d 1, 2009—Ohio—5532, 926 N.E.2d 315, ¶17; Exhibit A to Ayers's Memorandum in Support of Application for Post-Conviction DNA Testing. However, Y-STR testing yields results that cannot be run through CODIS. Y-STR testing of multiple pieces of biological evidence—say fingernail scrapings and a bloody towel, all potentially testable in this case—can demonstrate the presence of an unknown third-party assailant through the process of “anchoring” (redundancy of the same DNA profile on multiple items). Such a result would point to a new suspect and satisfy the outcome-determinative test. *See State v. Emerick*, 170 Ohio App.3d 647, 2007—Ohio—1334, 868 N.E.2d 742, ¶25.

Consider two hypothetical scenarios, closely tracking the choices the trial court's orders force Mr. Ayers to make. In Scenario A, the only items that are available for testing are the extracts of the pubic hair roots and the fingernail scrapings, reflecting the limitations of the trial court's orders. In Scenario B, these same items are available for testing, but additional items are also available, such as the rape kit swabs and the bloody towel. In Scenario B, the most likely choice for testing would be Y-STR testing on all items. Y-STR testing is the most sensitive form of testing, and is most likely to identify a male profile that might be present on, for example, the rape kit swabs and the fingernails, where female DNA is also present and likely to overwhelm the male DNA were STR

testing to be used. If a male DNA profile were found across multiple items of evidence (such as the hair root, the fingernail scrapings and the rape kit swabs or bloody towel), and this male profile does not belong to Mr. Ayers, then the results would demonstrate that someone else likely committed this crime. *See Emerick, 2007-Ohio-742, ¶ 25.*<sup>1</sup>

On the other hand, in Scenario A (where only fingernail scrapings and hairs are tested), a reasonable strategy might be to instead perform STR testing on the items, with a hope for a CODIS match to the true perpetrator. Under Y-STR testing, sufficient redundancy might not exist to exonerate Mr. Ayers if an unknown profile is found, particularly if testing of one or more items is inconclusive. Because the chances of finding a helpful redundancy are reduced, the better strategy in such a case might be to use STR and attempt to find a CODIS match to the true perpetrator, which would provide a stronger argument for relief under the circumstances.

The trial court has approved testing only of the hairs and the fingernail scrapings. Mr. Ayers is now in the position of choosing a testing strategy (either STR or Y-STR), without knowing if his request to test additional items (the rape kit swabs, the bloody towel, and any other evidence) will ever be granted. Mr. Ayers could blindly choose Y-STR testing on the hair root and fingernail scrapings, only to find out a year from now that testing on the additional items is denied by all levels of appellate court. It may then be too late to change testing strategies, as the samples may be consumed, leaving him without the option to re-test the same items with STR testing to place the profiles into CODIS.

---

<sup>1</sup> After Y-STR testing is performed and this result achieved, it would be possible to attempt STR testing on items where Y-STR testing from the first round of testing revealed a rich source of the perpetrator's DNA. The hope would be to obtain an STR profile for uploading into the CODIS database (with the goal that the true perpetrator could be identified, and Ayers' claim for relief strengthened even more).

Or, alternatively, Mr. Ayers could blindly choose STR testing of the hair roots and the fingernails. If he is not fortunate enough to obtain a CODIS match to the DNA profile found on these items, later appellate relief granting him the right to test the rape kit swabs, bloody towel, and any other evidence would be insufficient to protect his rights. Although Mr. Ayers would likely then desire Y-STR testing on the hair root and the fingernail scrapings (so that he could attempt to obtain an outcome-determinative result through an anchoring redundancy across multiple items), the samples may be consumed.

Thus, the trial court's orders affect Mr. Ayers's substantial rights. A later appeal will be inadequate to provide Mr. Ayers relief. *Cf. In re Estate of Riley*, 165 Ohio App.3d 471, 2006—Ohio—956, 847 N.E.2d 22, ¶11 (probate order striking surviving spouse's election immediately appealable although appealed before conclusion of estate administration because spouse could be prevented from taking decedent's property in kind if it is later sold); *Oatey v. Oatey* (8th Dist. 1992), 83 Ohio App.3d 251, 261-62, 614 N.E.2d 1054 (order requiring liquidation of property to create fund for possible legal fees immediately appealable); 4 Ohio Jurisprudence 3d, Appellate Review, Section 44 (listing an order requiring a plaintiff to elect which of two defendants to proceed against as an example of an order affecting a substantial right).

The State argues that Mr. Ayers could also seek relief via a motion to amend his Application for DNA Testing or by filing a new request for DNA Testing of other specific items. *See* Mot. to Dismiss at 3 (CA-10-095513); Mot. to Dismiss at 3 (CA-10-095606). The State is wrong. Mr. Ayers has sought not only additional testing of evidence known to him, but a report and testing of any evidence containing biological

material, including evidence not known to him. The statute requires the prosecuting attorney to “use reasonable diligence to determine whether biological material was collected from the crime scene or victim” and “whether the parent sample of that biological material still exists,” without limiting that biological material to only those items listed for testing or only those items known to the defendant. R.C. 2953.75(A). The statute requires the prosecuting attorney to rely on “all relevant sources” in its search for biological material, listing five specific agencies and law enforcement authorities as well as “[a]ll other reasonable sources.” R.C. 2953.75(A)(1) – (6). The trial court’s orders denied Mr. Ayers these rights, and an appeal is his only possible avenue for discovering what biological material exists and can be tested.

## **II. The Trial Court’s Orders Were Appealable.**

Mr. Ayers filed a motion to include all biological and potentially biological materials in the order for testing. The motion also included a request to require the prosecuting attorney to search for and submit a complete report of such materials, in accordance with R.C. 2953.75. The trial court denied the motion on July 21, 2010.

On August 5, 2010, Mr. Ayers filed a notice of appeal of the trial court’s July 21, 2010 order, creating CA-10-095513. As explained above, the trial court’s July 21, 2010 order was an order affecting a substantial right in a special proceeding. Accordingly, the State’s motion to dismiss should be denied.

However, on August 10, 2010, the trial court entered a journal entry stating that the July 21, 2010 order was not final and appealable, and the case was not stayed. The trial court requested that the parties submit proposed orders for testing specific items. On August 17, 2010, the trial court adopted the state’s proposed order, submitting only

certain specific items to be analyzed to determine what testing may be performed. On August 19, 2010, the trial court denied Mr. Ayers's new motion to require the prosecuting attorney to submit a complete report of biological material collected and retained.

On August 24, 2010, Mr. Ayers filed a notice of appeal of the trial court's August 17, 2010 and August 19, 2010 orders, creating CA-10-095606. Even if the trial court's July 21, 2010 order were not a final order, the August 17, 2010 and August 19, 2010 orders affected substantial rights in a special proceeding and are appealable. Pursuant to those orders, certain evidence has now been submitted for analysis to determine what testing may be performed. No additional evidence will be submitted for analysis, and Mr. Ayers will not even be told what evidence exists before testing is ordered. As explained above, appealing after testing is underway is inadequate to provide full relief. The State's motion to dismiss should be denied.

**III. The Appeal in CA-10-095606 is Not Moot Because the Trial Court Amended its August 17, 2010 Order After the Notice of Appeal Was Filed.**

The State argues that the trial court's August 17, 2010 order has been rendered moot because it was superseded by an amendment to the order entered August 26, 2010. The State is wrong.

When a proper notice of appeal is filed, it confers jurisdiction on this Court and "divests the trial court of its control over the aspects of the case involved in the appeal." 4 Ohio Jurisprudence 3d, Appellate Review, Section 252. The Notice of Appeal was filed August 25, 2010. The trial court noted its receipt of the Notice of Appeal in a journal entry entered later that same day, at 2:02 pm. See Docket, CR-00-388738 (Attached). The trial court did not amend its August 17, 2010 order until still later, at

2:37 pm. *Id.* The actions of the trial court after the Notice of Appeal was filed cannot divest this court of jurisdiction.

**Conclusion**

Mr. Ayers cannot later seek to have different testing performed on material already tested if it is consumed by the earlier testing, and cannot adequately pursue appropriate testing without knowing what evidence is available to be tested. A later appeal in this matter, after testing of some items is underway or has been completed, would be insufficient to protect Mr. Ayers's substantial rights. The trial court's orders affects Mr. Ayers substantial rights in this special proceeding, and the State's motion to dismiss should be denied.

Respectfully submitted,



✓ Christian J. Grostic (0084734)  
Kushner & Hamed Co., LPA  
200 Public Square, Suite 3740  
Cleveland, Ohio 44114  
Phone: (216) 696-6700  
Facsimile: (216) 696-6772  
/ [cgrostic@khlpa.com](mailto:cgrostic@khlpa.com)

✓ Carrie Wood (admitted pro hac vice)  
✓ Mark Godsey (00744840)  
Director, Ohio Innocence Project  
University of Cincinnati College of Law  
P.O. Box 210040  
Cincinnati, Ohio 45221-0040  
Phone: (513) 556-4276  
Facsimile: (513) 556-1236

*Attorneys for David Ayers*

**CERTIFICATE OF SERVICE**

A copy of the foregoing *Opposition to Motions to Dismiss* was served via regular

U.S. mail this 7th day of September, 2010, upon the following:

David Ayers  
# A398205  
Chillicothe Correctional Institution  
P. O. Box 5500  
Chillicothe, OH 45601

Richard Cordray  
Ohio Attorney General  
DNA Testing Unit  
150 East Gay Street, 16<sup>th</sup> Floor  
Columbus, OH 43215

Mary McGrath  
Cuyahoga County Prosecutor's Office  
Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH 44113

Carrie Wood  
Mark Godsey  
The Ohio Innocence Project  
University of Cincinnati College of Law  
P.O. Box 210040  
Cincinnati, OH 45221

  
\_\_\_\_\_  
*Attorney for David Ayers*

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee	COA NO. 95513 95606	LOWER COURT NO. CP CR-388738 CP CR-388738
----------	---------------------------	---

COMMON PLEAS COURT

-vs-

DAVID AYERS

Appellant	MOTION NO. 436922
-----------	-------------------

Date 09/22/10

---

Journal Entry

---

MOTION BY APPELLEE TO DISMISS APPEAL IS DENIED.

COPIES MAILED TO COUNSEL FOR  
ALL PARTIES TO BE FILED  
ON 09/22/10 10:00 AM

Judge CHRISTINE T. MCMONAGLE, Concur

*MB*  
*L. Jones*  
Presiding Judge LARRY A. JONES

CA10095513  
65168981



VOL 0713 BB0245

A - 19

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.  
96606  
95513

LOWER COURT NO.  
CP CR-388738  
CP CR-388738

-vs-

COMMON PLEAS COURT

DAVID AYERS

Appellant

MOTION NO. 437053

Date 09/22/10

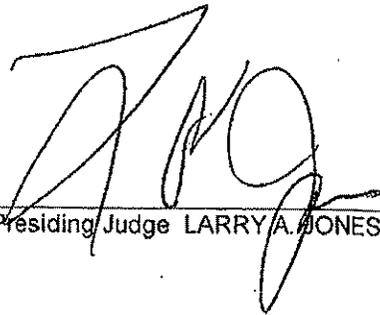
---

Journal Entry

---

MOTION BY APPELLEE TO DISMISS APPEAL IS DENIED.

Judge CHRISTINE T. MCMONAGLE, Concur

  
  
Presiding Judge LARRY A. JONES



VOL 0713 - 2010 - 249





explanations as to why this new development deprives this Court of jurisdiction to order DNA testing at this time. Counsel for Mr. Ayers submits this abbreviated Notice at this time, however, merely to provide the Court with notice of the Eighth District's decisions as soon as possible.

Respectfully submitted,

*Mark Godsey / by CJG*

Mark Godsey (00744840)  
Director, Ohio Innocence Project  
Carrie Wood (admitted *pro hac vice*)  
University of Cincinnati College of Law  
P.O. Box 210040  
Cincinnati, Ohio 45221-0040  
Phone: (513) 556-4276  
Facsimile: (513) 556-1236

Christian J. Grostic (0084734)  
Kushner & Hamed Co., LPA  
200 Public Square, Suite 3740  
Cleveland, Ohio 44114  
Phone: (216) 696-6700  
Facsimile: (216) 696-6772  
[cgrostitic@khlpa.com](mailto:cgrostitic@khlpa.com)

*Attorneys for David Ayers*

**CERTIFICATE OF SERVICE**

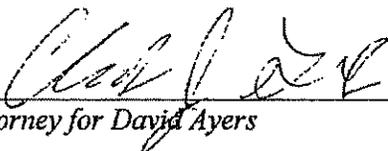
A copy of the foregoing *Notice* was served via regular U.S. mail this 24th day of September, 2010, upon the following:

David Ayers  
# A398205  
Chillicothe Correctional Institution  
P. O. Box 5500  
Chillicothe, OH 45601

Richard Cordray  
Ohio Attorney General  
DNA Testing Unit  
150 East Gay Street, 16<sup>th</sup> Floor  
Columbus, OH 43215

Mary McGrath  
Cuyahoga County Prosecutor's Office  
Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH 44113

Mark Godsey  
The Ohio Innocence Project  
University of Cincinnati College of Law  
P.O. Box 210040  
Cincinnati, OH 45221

  
\_\_\_\_\_  
*Attorney for David Ayers*

**Case No: 95513**

STATE OF OHIO VS. DAVID  
AYERS

MOTION BY APPELLEE TO  
DISMISS APPEAL IS DENIED.

MCMONAGLE, C., J., CONCUR  
JONES, L., P.J.



**TO:**

CHRISTIAN J. GROSTIC  
KUSHNER & HAMED CO., LPA  
200 PUBLIC SQUARE  
SUITE 3740  
CLEVELAND, OH 44114

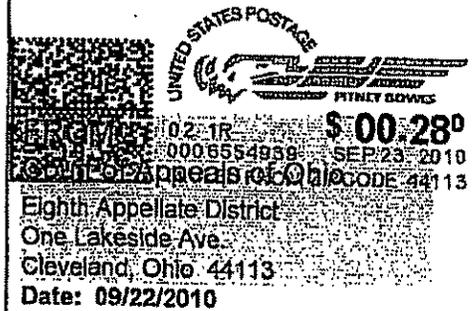


**Case No: 95606**

STATE OF OHIO VS. DAVID  
AYERS

MOTION BY APPELLEE TO  
DISMISS APPEAL IS DENIED.

MCMONAGLE, C., J., CONCUR  
JONES, L., P.J.



**TO:**

CHRISTIAN J. GROSTIC  
KUSHNER & HAMED CO., LPA  
200 PUBLIC SQUARE  
SUITE 3740  
CLEVELAND, OH 44114



FILED  
CRIMINAL DIVISION  
**THE COMMON PLEAS COURT**  
**CUYAHOGA COUNTY, OHIO**



2010 SEP 27 P 12:07

**STATE OF OHIO,**  
JESSIE E. FUERST  
CLERK OF COURTS  
**Plaintiff,** CUYAHOGA COUNTY

**CASE NO. CR-00-388738-ZA**

**Judge Nancy Margaret Russo**

vs.

**DAVID AYERS,**

**Defendant.**

CR00388738-ZA 65232923



---

**NOTICE OF APPELLATE DECISION THAT DEPRIVES  
THIS COURT OF JURISDICTION TO ORDER DNA TESTING  
UNTIL APPELLATE ISSUES ARE RESOLVED, AND REQUEST FOR  
HEARING, AND REQUEST FOR IMMEDIATE NOTICE OF ANY ORDER ISSUED  
BY THIS COURT REQUIRING DNA TESTING OF ANY ITEM IN THIS CASE**

---

On February 27, 2008, Mr. Ayers filed an application for DNA testing with this Court, noting that a number of different items and biological samples were collected at the crime scene and specifically listing certain pieces of evidence he confirmed had been retained by the Cuyahoga County Coroner's Office. He specifically requested that "a search be performed to uncover any DNA from this case, either known or previously unknown by him." On March 24, 2008, this Court denied his application. Mr. Ayers appealed, and the Eighth District Court of Appeals reversed, concluding that DNA testing could be outcome determinative and that this court abused its discretion in denying his application. *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, ¶ 44, *appeal denied*, *State v. Ayers*, 2010-Ohio-0323.

After the Eighth District reversed and remanded the case back to this Court for DNA testing, the parties vigorously disputed the scope of that Eighth District decision. The State has taken the position that Ayers is entitled to DNA test only those limited items that were listed in

his initial application for DNA testing, despite the fact that neither the Eighth District's decision in this case, the DNA testing statute in question, or Ohio case law interpreting that statute contain any such limitation. Counsel for Ayers, on the other hand, has taken the position that the Eighth District's decision merely provided examples of some types of testing that would be outcome determinative, and implicitly authorized all DNA tests consistent with the spirit and rationale of its decision. Ayers also took the position that, now that DNA testing has been ordered by the Eighth District, the prosecutor should be required to search for and submit a complete report of items from the crime scene that could conceivably be subjected to DNA testing, in accordance with R.C. 2953.75. Once that process is completed, and the universe of items to test is known to all parties, an appropriate DNA testing plan can be created and put into action.

Through multiple status conferences and teleconferences, this Court has consistently agreed with the State's interpretation that the prosecutor is not required to search for items and issue a report, and that Ayers is entitled to DNA testing only on the items listed in his initial application for DNA testing. Over defense counsel's strenuous objections, this Court has moved forward with commencing the testing process for the items listed in Ayers' initial application, namely the hairs and the fingernail scrapings. Most recently, this Court indicated during a teleconference on Thursday, September 23, 2010, that it intended to order the testing and complete consumption of the fleshy root of a pubic hair found in the victim's mouth, identified in the Cuyahoga County Coroner's email report as Item #3.<sup>1</sup>

Ayers has been put in an extremely difficult position by this Court's interpretation of the Eighth District decision, and by this Court's stated intent to order, at this premature time, the testing and consumption of Item #3. Indeed, it is crucial to understand that, as a matter of

---

<sup>1</sup> The email in question was received by this Court on September 21, 2010 at 9:03 a.m., and was forwarded to the prosecutor for the State that same day.

strategy, the appropriate DNA plan in this case would be to first test the rape kit swabs with Y-STR testing techniques. If any of these swabs showed a male profile that did *not* match Ayers, then additional items (such as the bloody towel, the fingernail scrapings and the roots of any hairs) should be subjected to Y-STR testing to demonstrate the presence of another male (the true perpetrator) across multiple items of pivotal crime scene evidence. If such a result were obtained, it would be exonerative of David Ayers. See *State v. Emerick*, 170 Ohio App.3d 647, 2007—Ohio—1334, 868 N.E.2d 742, ¶25. At that point, the item or items that demonstrated the highest presence of the true perpetrator's DNA could be STR tested, with the hope that the STR profile could be put in the CODIS database so that the true culprit could be brought to justice.

If Y-STR testing of the rape kit swabs, on the other hand, fails to identify male DNA, the appropriate strategy at that time would be for Ayers to Y-STR test sections of the bloody towel, the fingernail scrapings, and any other currently undisclosed items from the crime scene, in an attempt to find an unknown male profile on the remaining most probative pieces of evidence. If an unknown male profile were developed from testing these items, then a decision would have to be made as to whether the hair root (identified as Item #3 in the Coroner's email report) would be subjected to Y-STR testing in an attempt to match to the Y-STR profiles already found on the other items (thus creating an "anchoring" redundancy), or subjected to STR testing in an attempt to identify the true culprit through a CODIS database match to a known felon.

Finally, if Y-STR testing failed to identify any male DNA on the rape kit swabs, bloody towel, fingernail scrapings or other currently undisclosed items from the crime scene, then Ayers' best strategy would be to employ STR testing of the hair root identified as Item #3, with the hope that this test result matches to a known felon in the CODIS database.

In other words, as these various scenarios illustrate, conceiving a proper DNA testing plan in a case like this requires: (1) knowing up front all items from the crime scene that could possibly be subjected to DNA testing, and (2) making strategic choices both as to the *order* of items to be tested and the *type* of DNA testing that should be conducted on each piece of evidence on a step-by-step basis.

After remand, the position taken by the State and this Court undermined Ayers' ability to move forward with a properly conceived DNA testing plan. Because this Court's position on remand risked eviscerating Ayers' ability to prove his innocence, and Ayers needed to protect his rights accordingly, Ayers began appealing this Court's orders. As set forth below, because the Eighth District has now accepted appellate jurisdiction over matters that will resolve this dispute, this Court's action of ordering testing and consumption of Item #3 at this time would be inconsistent with the Eighth District's exercise of jurisdiction. Accordingly, this Court is now without jurisdiction to order testing of Item #3 until the Eighth District resolves outstanding issues as to which items may ultimately be tested in this case.<sup>2</sup> See *State ex rel. Sullivan v. Ramsey*, 922 N.E.2d 214, 217, 124 Ohio St.3d 355, 358, 2010-Ohio-252, 252 (Ohio Feb. 03, 2010) ("We have consistently held that once an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment."); *State ex rel. Blanchard Valley Health Assn. v. Bates*, 858 N.E.2d 406, 409, 112 Ohio St.3d 146, 148, 2006-Ohio-6520, 6520 (Ohio Dec. 27, 2006) (same); *Coleman v. East Cleveland City School Dist. Bd. of Educ.*, 2004 WL 2977610, \*3, 2004-Ohio-7019, 7019 (Ohio App. 8 Dist., Dec 23, 2004) (same)

---

<sup>2</sup> There is another unrelated problem with ordering testing of Item #3 at this time pursuant to the Coroner's email report. The report states that the Coroner's Office would use the Promega PP16HS amplification method on Item #3. However, defense counsel has not had the opportunity to explore whether other options at another lab would provide a greater opportunity to obtain a DNA profile from such a small amount of biological material. Indeed, it is defense counsel's belief that commercial laboratories, such as Orchid-Cellmark or DDC, would have more advanced methods to amplify the material and purify it prior to testing. Furthermore, it may be the case that mini-STR testing, a cutting edge method of DNA testing apparently not performed by the Coroner's Office, might offer the greatest chance of deriving an STR profile from this material. Ayers expressly requests a hearing on this precise issue before moving forward with any testing in this case.

### Discussion

During a status conference after remand, this Court indicated that it would only permit testing of the specific items Mr. Ayers listed in his application, and not any other biological material collected at the crime scene that may have been retained. Mr. Ayers then filed a motion to include all biological material in the order for testing. The motion also included a request to require the prosecuting attorney to search for and submit a complete report of such materials, in accordance with R.C. 2953.75. This Court denied the motion on July 21, 2010.

On August 5, 2010, Mr. Ayers filed a notice of appeal of this Court's July 21, 2010 order, creating CA-10-095513 in the court of appeals.

On August 10, 2010, this Court entered a journal entry stating that the July 21, 2010 order was not final and appealable, and the case was not stayed. The Court requested that the parties submit proposed orders for testing specific items.

On August 4, 2010 and August 10, 2010, the prosecutor submitted a "chain of custody" report and supplemental report. However, reflecting the Court's limitations on testing, the prosecutor's reports listed only specific items, and did not list all material collected and retained. On August 16, 2010, Mr. Ayers filed a motion to require the prosecuting attorney to submit a complete report, in accordance with the statute. On August 16, 2010, Mr. Ayers and the State submitted proposed orders for testing pursuant to the Court's request and in consideration of the Court's ruling on July 21, 2010.

On August 17, 2010, this Court adopted the State's proposed order, submitting only certain specific items to be analyzed to determine what testing may be performed. On August

19, 2010, this Court denied Mr. Ayers's motion to require the prosecuting attorney to submit a complete report of biological material collected and retained.

On August 24, 2010, Mr. Ayers filed a notice of appeal of this Court's August 17, 2010 and August 19, 2010 orders, creating CA-10-095606. In his notice of appeal, Mr. Ayers noted that, to the extent the trial court's July 21, 2010 order denying testing of all biological material was not a final order, it was rendered final by the August 17, 2010 and August 19, 2010 orders and was also being appealed.

Because the appeals in CA-10-095513 and CA-10-095606 presented overlapping issues, Mr. Ayers filed a motion to consolidate the appeals on August 26, 2010.

On September 21, 2010, the Cuyahoga County Coroner issued an email report indicating that STR testing could go forward on Item #3, the root of a hair found in the victim's mouth. The report stated that only one DNA test could be performed on the hair root, and that such a test would consume the entire sample. Defense counsel requested a conference call at that time to discuss with the Court the reasons why testing of Item #3 should not go forward until his appeals are resolved. The conference call was held on September 23, 2010, at which time the Court indicated that it planned to immediately order the testing and consumption of Item #3 despite the pending appeals.

On September 24, 2010, defense counsel learned that the Eighth District Court of Appeals had denied the prosecution's attempt to dismiss Ayers' appeals. The prosecution had previously moved to dismiss the appeals on the theory that Ayers was attempting to appeal orders that were not final appealable orders. Now that the Eighth District has denied the prosecution's motion to dismiss, the appellate court will now be deciding the following issues on appeal:

**ISSUE I:**

*WHETHER THE TRIAL COURT ERRED IN FAILING TO ORDER THE STATE TO PREPARE AND FILE A COMPLETE EVIDENCE REPORT AS REQUIRED BY OHIO REVISED CODE 2953.75?*

**ISSUE II:**

*WHETHER THE TRIAL COURT ERRED IN BARRING DNA TESTING FOR ITEMS NOT SPECIFICALLY MENTIONED IN THE COURT OF APPEALS' DECISION REVERSING THE TRIAL COURT'S PREVIOUS DENIAL OF DNA TESTING?*

Ayers, in his response to the prosecution's motion to dismiss the appeals, detailed in his brief to the Eighth District the reasons why it was so crucial to obtain resolution on both appellate issues before *any* testing in this case moved forward. Indeed, it was precisely because of the fact that testing now—in the manner proposed by the State and this Court--would eviscerate Mr. Ayers' substantial rights, that Ayers was able to convince the Eighth District to deny the State's motion to dismiss and take up the disputed issues at this time. Ayers argued to the appellate court as follows:

The orders at issue here would foreclose appropriate future relief. Because DNA testing often consumes the material tested, Mr. Ayers and the testing authority may have only one chance to test certain pieces of evidence and will have to choose which type of DNA testing to seek. Without knowing what evidence is available to be tested in the future, Ayers and, more significantly, the testing authority, would be forced to make that choice blindly. A later appeal in this matter, after testing of some items is underway or has been completed, would be insufficient to protect Mr. Ayers's substantial rights. He cannot later seek to have different testing performed on that same material if it is consumed by the earlier testing.

By its nature, DNA testing often consumes the material tested, and no further testing is possible on the tested material. Because a piece of evidence may have only a small amount of testable biological material, it is not necessarily possible to test each piece of evidence more than once. Where, like here, hair roots, fingernail scrapings, or other small pieces of evidence are to be tested, it is nearly certain that some pieces of evidence will not be able to be tested more than once.

There are different types of potential DNA testing, each with its own advantages and disadvantages. Strategic choices have to be made, depending on the nature of the evidence to be tested. For example, STR testing yields results that can be run through CODIS, a database containing DNA profiles of known felons. Thus, through CODIS, STR testing can establish the identity of the person who left the biological material tested.

Y-STR testing is much more sensitive than STR testing, where, as presumably is the case here, mixed biological material is left by a male attacker and a female victim. See *State v. Reynolds*, 186 Ohio App.3d 1, 2009—Ohio—5532, 926 N.E.2d 315, ¶17; Exhibit A to Ayers's Memorandum in Support of Application for Post-Conviction DNA Testing. However, Y-STR testing yields results that cannot be run through CODIS. Y-STR testing of multiple pieces of biological evidence—say fingernail scrapings and a bloody towel, all potentially testable in this case—can demonstrate the presence of an unknown third-party assailant through the process of “anchoring” (redundancy of the same DNA profile on multiple items). Such a result would point to a new suspect and satisfy the outcome-determinative test. See *State v. Emerick*, 170 Ohio App.3d 647, 2007—Ohio—1334, 868 N.E.2d 742, ¶25.

Consider two hypothetical scenarios, closely tracking the choices the trial court's orders force Mr. Ayers to make. In Scenario A, the only items that are available for testing are the extracts of the pubic hair roots and the fingernail scrapings, reflecting the limitations of the trial court's orders. In Scenario B, these same items are available for testing, but additional items are also available, such as the rape kit swabs and the bloody towel. In Scenario B, the most likely choice for testing would be Y-STR testing on all items. Y-STR testing is the most sensitive form of testing, and is most likely to identify a male profile that might be present on, for example, the rape kit swabs and the fingernails, where female DNA is also present and likely to overwhelm the male DNA were STR testing to be used. If a male DNA profile were found across multiple items of evidence (such as the hair root, the fingernail scrapings and the rape kit swabs or bloody towel), and this male profile does not belong to Mr. Ayers, then the results would demonstrate that someone else likely committed this crime. See *Emerick*, 2007-Ohio-742, ¶ 25.<sup>3</sup>

On the other hand, in Scenario A (where only fingernail scrapings and hairs are tested), a reasonable strategy might be to instead perform STR testing on the items, with a hope for a CODIS match to the true perpetrator. Under Y-STR testing, sufficient redundancy might not exist to exonerate Mr. Ayers if an unknown profile is found, particularly if testing of one or more items is inconclusive. Because the chances of finding a helpful redundancy are reduced,

<sup>3</sup> After Y-STR testing is performed and this result achieved, it would be possible to attempt STR testing on items where Y-STR testing from the first round of testing revealed a rich source of the perpetrator's DNA. The hope would be to obtain an STR profile for uploading into the CODIS database (with the goal that the true perpetrator could be identified, and Ayers' claim for relief strengthened even more).

the better strategy in such a case might be to use STR and attempt to find a CODIS match to the true perpetrator, which would provide a stronger argument for relief under the circumstances.

The trial court has approved testing only of the hairs and the fingernail scrapings. Mr. Ayers is now in the position of choosing a testing strategy (either STR or Y-STR), without knowing if his request to test additional items (the rape kit swabs, the bloody towel, and any other evidence) will ever be granted. Mr. Ayers could blindly choose Y-STR testing on the hair root and fingernail scrapings, only to find out a year from now that testing on the additional items is denied by all levels of appellate court. It may then be too late to change testing strategies, as the samples may be consumed, leaving him without the option to re-test the same items with STR testing to place the profiles into CODIS.

Or, alternatively, Mr. Ayers could blindly choose STR testing of the hair roots and the fingernails. If he is not fortunate enough to obtain a CODIS match to the DNA profile found on these items, later appellate relief granting him the right to test the rape kit swabs, bloody towel, and any other evidence would be insufficient to protect his rights. Although Mr. Ayers would likely then desire Y-STR testing on the hair root and the fingernail scrapings (so that he could attempt to obtain an outcome-determinative result through an anchoring redundancy across multiple items), the samples may be consumed.

Thus, the trial court's orders affect Mr. Ayers's substantial rights. A later appeal will be inadequate to provide Mr. Ayers relief. *Cf. In re Estate of Riley*, 165 Ohio App.3d 471, 2006—Ohio—956, 847 N.E.2d 22, ¶11 (probate order striking surviving spouse's election immediately appealable although appealed before conclusion of estate administration because spouse could be prevented from taking decedent's property in kind if it is later sold); *Oatey v. Oatey* (8th Dist. 1992), 83 Ohio App.3d 251, 261-62, 614 N.E.2d 1054 (order requiring liquidation of property to create fund for possible legal fees immediately appealable); 4 Ohio Jurisprudence 3d, Appellate Review, Section 44 (listing an order requiring a plaintiff to elect which of two defendants to proceed against as an example of an order affecting a substantial right).

Thus, the Eighth District's rejection of the State's motion to dismiss acknowledges that DNA testing cannot go forward until the issues raised by Ayers in his appeals are resolved. Indeed, in rejecting the State's motion to dismiss, the Eighth District implicitly accepted Ayer's argument that his "substantial rights" will be affected if testing goes forward in the manner that this Court and the State have currently pursued. The Eighth District also implicitly agreed that,

without an appeal at this time to correct the position taken by the State and this Court upon remand, a later appeal will be unable to provide Mr. Ayers with relief because the DNA samples (like Item #3) will be consumed and gone forever.

### CONCLUSION

Mr. Ayers respectfully asserts that DNA testing and consuming Item #3, as the Court indicated it intends to order, could end up being an irreversible blunder. Such a move would serve no one. If testing eventually clears Mr. Ayers despite this potential blunder, and the State wishes to pursue a new suspect at that time, the State will likely rue the day that such a decision was made.<sup>4</sup>

Mr. Ayers also asserts that this Court does not have jurisdiction to order testing at this point. *See State ex rel. Sullivan v. Ramsey*, 922 N.E.2d 214, 217, 124 Ohio St.3d 355, 358, 2010-Ohio-252, 252 (Ohio Feb 03, 2010) (“We have consistently held that once an appeal is perfected, the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court’s jurisdiction to reverse, modify, or affirm the judgment.”); *State ex rel. Blanchard Valley Health Assn. v. Bates*, 858 N.E.2d 406, 409, 112 Ohio St.3d 146, 148, 2006-Ohio-6520, 6520 (Ohio Dec. 27, 2006) (same); *Coleman v. East Cleveland City School Dist. Bd. of Educ.*, 2004 WL 2977610, \*3, 2004-Ohio-7019, 7019 (Ohio App. 8 Dist., Dec. 23, 2004) (same).

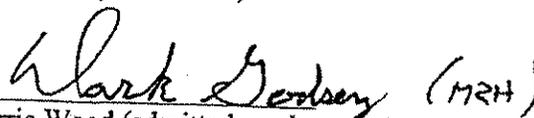
Mr. Ayers further respectfully requests a hearing to explain all these points in greater detail, and to put on expert testimony if necessary. Mr. Ayers also expressly requests a hearing on the issue discussed in footnote 2. Finally, Mr. Ayers requests immediate notice to his counsel

---

<sup>4</sup> To be sure, the smartest strategy for the State at this point would be to Y-STR test as many items from the crime scene as possible. If an unknown male’s DNA profile appears across multiple pieces of probative evidence, then the existence of a new suspect has been discovered. The first round of Y-STR testing would serve an additional purpose as well, as it would identify the item that has the richest source of the perpetrator’s DNA. That item could then be subjected to STR testing and placed in the CODIS database to hopefully identify the true perpetrator. Such a strategy would serve to build the strongest case against the true perpetrator. If the Court moves forward with STR testing on item #3 at this point, this option will be forever lost.

if this Court orders testing of any item in this case. If such an order is issued, Mr. Ayers will move for an immediate stay in this Court, and will pursue his remedies regarding such a stay (or a writ of prohibition) in other courts as necessary to protect his rights.

Respectfully submitted,

 (MRH)

Carrie Wood (admitted pro hac vice)  
Mark Godsey (00744840)  
Director, Ohio Innocence Project  
University of Cincinnati College of Law  
P.O. Box 210040  
Cincinnati, Ohio 45221-0040  
Phone: (513) 556-4276  
Facsimile: (513) 556-1236

Christian J. Grostic (0084734)  
Kushner & Hamed Co., LPA  
200 Public Square, Suite 3740  
Cleveland, Ohio 44114  
Phone: (216) 696-6700  
Facsimile: (216) 696-6772  
[cgrostitic@khlpa.com](mailto:cgrostitic@khlpa.com)

*Attorneys for David Ayers*

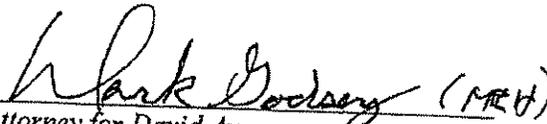
**CERTIFICATE OF SERVICE**

A copy of the foregoing Notice was served via regular U.S. mail this 27th day of September, 2010, upon the following:

David Ayers  
# A398205  
Chillicothe Correctional Institution  
P. O. Box 5500  
Chillicothe, OH 45601

Richard Cordray  
Ohio Attorney General  
DNA Testing Unit  
150 East Gay Street, 16<sup>th</sup> Floor  
Columbus, OH 43215

Mary McGrath  
Cuyahoga County Prosecutor's Office  
Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, OH 44113

  
*Mark Godsey (MREH)*  
Attorney for David Ayers

STATE OF OHIO )  
COUNTY OF PORTAGE )

) SS.  
)

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

STATE OF OHIO,  
Plaintiff-Appellee,  
- vs -

MAGISTRATE'S ORDER  
CASE NO. 2014-P-0045

FILED  
COURT OF APPEALS

TYRONE LEE NOLING,

MAY 20 2015

Defendant-Appellant LINDA K FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

**NOTICE OF ORAL ARGUMENT**

July 8, 2015, at 10:00 a.m.

Eleventh District Court of Appeals

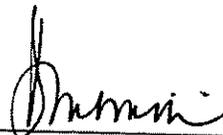
111 High Street, N.E.

Warren, Ohio 44481

It is mandatory that you appear fifteen (15) minutes prior to the scheduled hearing time. Please note that oral argument is limited to fifteen (15) minutes per side or a total of thirty (30) minutes per case.

Pursuant to Loc.R. 21(C), any motion for continuance of the oral argument must be filed within ten (10) days from the date of this judgment entry. Any questions regarding this notice shall be e-mailed to [schedulingnotices@11thappealohio.us](mailto:schedulingnotices@11thappealohio.us).

The time of your oral argument is subject to change and should be viewed periodically on our court's website.



MAGISTRATE SHIBANI SHETH-MASSACCI

