

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. : **THIS IS A CAPITAL CASE.**

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

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IN THE SUPREME COURT OF OHIO

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

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

Appellant Tyrone Noling previously provided 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. Mr. Noling also notified this Court that briefing had been completed and the case was set for oral argument. Mr. Noling now notifies this Court that, on June 1, 2015, the Portage County Court of Appeals requested that Mr. Noling explain why his appeal should not be dismissed for lack of jurisdiction. (Exhibit A). On June 10, 2015, Mr. Noling filed his response to the order to show cause. (Exhibit B). On June 22, 2015, the Portage County Court of Appeals issued an opinion dismissing Mr. Noling’s appeal. (Attached as Exhibit C). In its opinion, the court of appeals wrote that “Appellant filed no response.” *Id.* Mr. Noling filed a motion to strike requesting that the Portage County Court of Appeals re-issue its memorandum opinion without this sentence; as Mr. Noling did file a timely response. (Attached as Exhibit D).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Appellant Tyrone Noling's Notice of Filings in the Portage County Court of Appeals and Scheduled Oral Argument** 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, 16th Floor, Columbus, Ohio 43215 on this the 9th day of July, 2015.

/s/: *Carrie Wood*

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Assistant Public Defender

Co-Counsel for Tyrone Noling

#445997

STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,

JUDGMENT ENTRY

Plaintiff-Appellee,

- vs -

TYRONE LEE NOLING,

Defendant-Appellant.

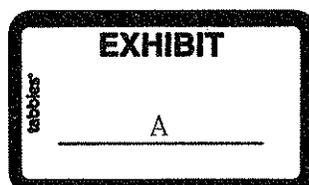
FILED CASE NO. 2014-P-0045
COURT OF APPEALS

JUN 01 2015

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

This matter is before this court upon the timely notice of appeal filed by appellant, Tyrone Lee Noling, on July 24, 2014. Appellant appeals a June 27, 2014 judgment entry of the Portage County Court of Common Pleas, rejecting his amended application for DNA testing for failure to comply with R.C. 2953.74(C)(2)(c). Appellant also seeks review of the trial court's June 27, 2014 judgment denying his motion for a copy of complete DNA test results. Although briefing has been completed and the matter is currently set for hearing, this court, in the course of reviewing the relevant law, has determined there is an issue regarding whether this court has jurisdiction to hear the underlying appeal.

With respect to the first issue, R.C. 2953.73 governs the preliminary procedures for submitting an application for DNA testing; a trial court's determination as to whether it will accept or reject an application; and the manner in which an applicant may seek review on appeal of a court's rejection. R.C. 2953.73(E) provides:



(E) A judgment and order of a court under division (D) of this section [setting forth the procedures for determining whether to accept or reject an application] is appealable only as provided in this division. If an eligible offender submits an application for DNA testing under section 2953.73 of the Revised Code and the court of common pleas rejects the application under division (D) of this section, one of the following applies:

(1) If the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, the offender may seek leave of the supreme court to appeal the rejection to the supreme court. Courts of appeals do not have jurisdiction to review any rejection if the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing.

(2) If the offender was not sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, the rejection is a final appealable order, and the offender may appeal it to the court of appeals of the district in which is located that court of common pleas.

Appellant was sentenced to death. R.C. 2953.73(E)(1) specifically states that such an appellant may *only* seek review of a trial court's rejection of DNA testing to the Supreme Court of Ohio. Moreover, even though the state has not moved to dismiss this appeal, its brief indicates appellant sought leave from the

Supreme Court to appeal the very same judgment and the matter is currently pending, waiting on a ruling.

Furthermore, regarding the court's order denying appellant's motion for complete copy of the DNA test results, R.C. 2953.72 provides that any potential applicant for DNA testing make various written statutory "acknowledgments" in a form prescribed by the Attorney General. One such acknowledgment, set forth under R.C. 2953.72(A)(8) provides:

That the acknowledgment memorializes the provisions of sections 2953.71 to 2953.81 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[.]* (Emphasis added.)

Furthermore, R.C. 2953.72(A)(9) provides:

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[.]* (Emphasis added.)

The foregoing subsections further demonstrate the lower court's rejection is subject to review only by obtaining leave of the Ohio Supreme Court. They further indicate, however, that a party is precluded from seeking review of any ancillary exercise of a trial court's discretion in the course of proceedings relating to an application for DNA testing.

It is therefore ordered, sua sponte, that within 15 days from the date of this judgment entry appellant shall show cause why this appeal should not be dismissed for lack of jurisdiction.

It is further ordered that any submission made in response to this judgment entry shall not exceed ten pages in length, exclusive of the table of contents and appendices, if any.

It is further ordered that failure to respond to this judgment entry may result in the dismissal of this appeal on the court's own motion for failure to prosecute without further notice.


JUDGE CYNTHIA WESTCOTT RICE

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

FILED
COURT OF APPEALS

JUN 10 2015

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.**

LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

RESPONSE TO ORDER TO SHOW CAUSE

On January 4, 2010, this Court requested that Mr. Noling explain why his appeal should not be dismissed for lack of jurisdiction. (June 1, 2015 Show Cause Order). Because R.C. 2953.73(E)(1) is unconstitutional and therefore void, this subsection of the statute cannot bar Mr. Noling's appeal to this Court. In other words, R.C. 2953.73(E)(1) is unconstitutional and, therefore, this Court has jurisdiction to review the appeal.¹ Further support for this motion is set forth in the attached memorandum.

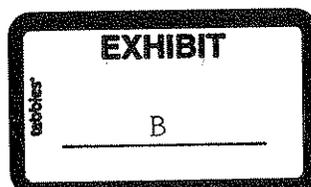
Respectfully submitted,

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¹ Although Noling asserts that R.C. 2953.73(E)(1) is unconstitutional, and files this Motion in support of such proposition, Noling has also filed Memorandum in Support of Jurisdiction in the Ohio Supreme Court in satisfaction of the current requirements of R.C. 2953.73(E)(1). Case No. 2014-1377.



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MEMORANDUM IN SUPPORT

I. Introduction

Noling acknowledges that the Ohio Supreme Court has previously stated that R.C. 2953.73(E)(1) was constitutional, even though it conferred exclusive jurisdiction upon the Ohio Supreme Court to consider Noling's appeal. *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 8. 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 ¶¶ 11-27.² However, the majority noted that the Constitutional questions of whether R.C. 2953.73(E)(1) violated 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

² It should also 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.

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.

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

Id. at ¶¶ 60-63.

As both the State and Noling noted in the briefing to 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.

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, R.C. 2953.73(E)(1) discriminates between capital and non-capital criminal defendants. 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) only provides capital defendants with the ability to seek leave of the Supreme Court, from the denial of their DNA applications, to settle questions arising under the constitutions of the United States or the State of Ohio or questions of great general or public interest. The Ohio Supreme Court may deny jurisdiction to hear Mr. Noling's appeal, thus totally denying him any appeal of his DNA application.

Indeed, similarly-situated defendants, all challenging their conviction through the same mechanism, and all claiming their innocence, are not similarly treated. The Supreme Court of the United States stated that “[a]lthough the Federal Constitution guarantees no right to appellate review, once a State affords that right, the State may not ‘bolt the 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, 76 S.Ct. 585, 100 L. Ed. 891 (1956). The Court continued “. . . it is now fundamental that, once established, these avenues [of appellate review] must be kept free of

unreasoned distinctions that can only impede open and equal access to the courts.” *Id.* at 111, citing *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966).

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

The Supreme Court has repeatedly held that States cannot deny indigent defendants the right to an appeal, when that same right is afforded to more affluent appellants. *See, e.g., 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 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 through 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—and thus permitted a review by the district’s court of appeals—

were originally indicted with death penalty specifications.³ 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.

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 the classification. *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966). Nothing in the entirety of R.C. 2953.71, et. seq., or R.C. 2953.73(E)(1), meets this standard.⁴ 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 a direct appeal of his DNA application was to follow in Issue One's⁵ footsteps. The State's rationale for the passage of Issue One concerned eliminating an execution delay. However, Issue One eliminated the capital offender's direct appeal of right to the court of appeals, but provided a **mandatory** appeal to the Ohio Supreme Court. Revised Code 2953.73(E)(1) eliminates the capital offender's direct appeal to the court of appeals, and provides a **discretionary** appeal to the Ohio Supreme Court. In other words, R.C. 2953.73(E)(1) does not follow Issue One. More

³ Some examples are: David Ayers, convicted by a jury of aggravated murder, aggravated robbery, and aggravated burglary, and sentenced to 20 years-life; and, Robert Caulley, convicted of a double murder and originally indicted with death, but found guilty of murder and voluntary manslaughter and sentenced to 15 years-life.

⁴ This Court should engage in strict scrutiny in assessing the equal protection violation since the challenge implicates a fundamental right, i.e., the right of access to the court. *See 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.

⁵ *State v. Smith*, 80 Ohio St. 3d 89, 95-97, 684 N.E.2d 668 (1997).

importantly, the desire to eliminate a delay cannot overcome Mr. Noling's constitutional rights. There is no justification that would pass muster for removing appellate review for capital defendants where an application for DNA testing has been denied.

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 2953.73(E)(1)(a) grants non-capital defendants greater avenues for relief and review than that granted to 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), greater 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:

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 enacted Senate Bill 11 ("SB11"), Senate Bill 262 ("SB262"), and Senate Bill 77 ("SB77") in order to offer an avenue of relief for individuals who were

wrongfully convicted.⁶ Concerns 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.

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, and was denied, 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 cruel and unusual per se, it has been found to violate the Eighth Amendment in its application. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The litmus test for constitutionality is that the death penalty not be imposed arbitrarily or capriciously. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

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,

⁶ Indeed, three Ohioans have been exonerated as a result of DNA testing granted under Senate Bill 11. Donte Booker, Michael Green, and Clarence Elkins. Three Ohioans have been exonerated based on DNA testing granted under SB 262: Raymond Towler, Robert McClendon, and David Ayers. *See* fn. 7, Noling's Motion to Determine Constitutionality of R.C. 2953.73(E)(1), July 31, 2014; *State v. Dewey Jones*, Summit C.P. No. CR-1994-06-1409 C, Indictment dismissed, Entry, Jan. 31, 2014.

or irrationally. *Parker v. Dugger*, 498 U.S. 308, 321, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). 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 v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

The Ohio General Assembly enacted SB11, SB262, and SB77 in recognition of the fact that there are innocent people wrongfully incarcerated who could be exonerated by advanced DNA technology. If an inmate is able to establish his or her innocence by exclusion DNA test results, that inmate should be granted relief.⁷ 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 district courts of appeal from the review process of capital cases increases the risk of arbitrary and 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. 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 R.C. 2953.71, et. seq. is to prove the innocence of convicted criminals through advanced DNA technology. Mr. Noling will be denied

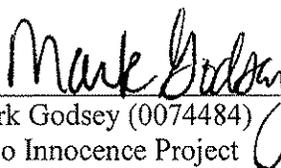
⁷ Consider *State v. Elkins*, CR. 1998-06-1415, Summit County. Pursuant to R.C.2953.73(C), Ohio Attorney General Jim Petro filed a response in support of Mr. Elkins' DNA application, arguing that "in light of the newly available evidence, [DNA test results] no reasonable fact finder would find Elkins guilty beyond a reasonable doubt." *Attorney General Jim Petro's Response to Clarence Elkins Application for DNA testing*, at 12.

appellate review 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

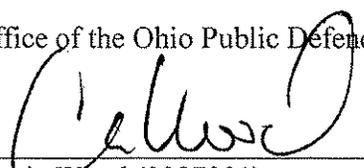
Mr. Noling has demonstrated that R.C. 2953.73(E)(1) is facially unconstitutional. Therefore, this Court should proceed as if the "offending subsection of the statute were excised therefrom," *State v. Sterling*, 11th Dist. Ashtabula No. 2003-A-0135, 2005-Ohio-6081, ¶ 43, and determine that it has jurisdiction to hear this appeal.

Respectfully submitted,


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consent
6/15/15*

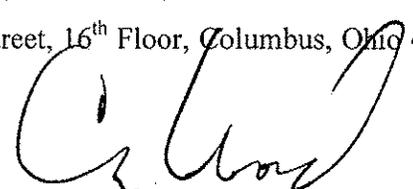
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Co-counsel for Tyrone Noling

Certificate of Service

I hereby certify that a true copy of the foregoing *RESPONSE TO ORDER TO SHOW CAUSE* 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, 16th Floor, Columbus, Ohio 43215 on this the 9th day of June 2015.


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IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
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FILED
COURT OF APPEALS

JUN 22 2015

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

STATE OF OHIO, : MEMORANDUM OPINION
Plaintiff-Appellee, :
- vs - : CASE NO. 2014-P-0045
TYRONE LEE NOLING, :
Defendant-Appellant. :

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 95 CR 0220.

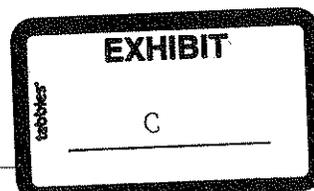
Judgment: Appeal dismissed.

Victor V. Viglucci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Carrie E. Wood, Assistant Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215 and *Mark Godsey*, Ohio Innocence Project, University of Cincinnati, P.O. Box 210040, Cincinnati, OH 45221 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This matter is before the court upon the timely notice of appeal filed by appellant, Tyrone Lee Noling, on July 24, 2014. Appellant appeals a June 27, 2014 judgment entry of the Portage County Court of Common Pleas, rejecting his amended application for DNA testing for failure to comply with R.C. 2953.74(C)(2)(c). Appellant also seeks review of the trial court's June 27, 2014 judgment denying his motion for a copy of complete DNA test results. This court, in the course of reviewing the relevant



law, determined there was an issue regarding whether this court has jurisdiction to hear the underlying appeal. An order to show cause was issued as to why the underlying matter should not be dismissed for want of jurisdiction. Appellant filed no response. After thorough consideration of the jurisdictional issue, we conclude this court lacks subject matter jurisdiction over this appeal because, statutorily, appellate review of the underlying judgments rest exclusively with the Ohio Supreme Court. Appellant has, in fact, sought appellate review with the Supreme Court and the matter is currently pending. For the reasons that follow, we therefore dismiss this appeal sua sponte.

{¶2} With respect to the judgment rejecting appellant's application, R.C. 2953.73 governs the preliminary procedures for submitting an application for DNA testing; a trial court's determination as to whether it will accept or reject an application; and the manner in which an applicant may seek review on appeal of a court's rejection. R.C. 2953.73(E) provides:

{¶3} (E) A judgment and order of a court under division (D) of this section [setting forth the procedures for determining whether to accept or reject an application] is appealable only as provided in this division. If an eligible offender submits an application for DNA testing under section 2953.73 of the Revised Code and the court of common pleas rejects the application under division (D) of this section, one of the following applies:

{¶4} (1) If the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, *the offender may seek leave of the supreme court to appeal the rejection to the supreme court. Courts of appeals do not have*

jurisdiction to review any rejection if the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing.

{¶5} (2) If the offender was not sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, the rejection is a final appealable order, and the offender may appeal it to the court of appeals of the district in which is located that court of common pleas. (Emphasis added.)

{¶6} Appellant was sentenced to death. R.C. 2953.73(E)(1) specifically states that such an appellant may *only* seek review of a trial court's rejection of DNA testing to the Supreme Court of Ohio. Indeed, the Supreme Court, in a recent case to which appellant was an appealing party, highlighted the exclusivity of its appellate jurisdiction relating to the rejection of DNA-testing applications in capital cases. To wit, in *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, observed:

{¶7} [T]he 1994 amendment to Article IV, Section 2(B)(2)(c) of the Ohio Constitution granted this court jurisdiction over the direct appeal of cases in which the death penalty is imposed. Thus, the General Assembly's provision in R.C. 2953.73(E)(1) that we have direct appellate review of the denial of an application for postconviction DNA testing in cases where the offender was sentenced to death is within the constitutionally defined jurisdiction of this court. Nor is there a problem with *the statute's exclusive grant of authority in such cases to review DNA-testing applications*. Because courts of appeals have such jurisdiction only "as may be provided by law,"

the General Assembly may limit that jurisdiction in cases in which the death penalty is imposed. The General Assembly acted within its authority when it limited a courts of appeals' review to the denial of DNA-testing applications in cases in which the death penalty was not imposed. We therefore hold that R.C. 2953.73(E)(1) is constitutional. (Emphasis added.) *Noling, supra*, at ¶27.

{¶8} We recognize that the court's conclusion upholding the constitutionality of R.C. 2953.73(E)(1) *did not* address potential due process or equal protection problems. We also point out that, subsequent to filing his notice of appeal in this case, appellant filed a "Motion to Determine the Constitutionality of R.C. 2953.73(E)(1)." In that motion, appellant argued the statutory section is unconstitutional because it violates the equal protection and due process clauses of the United States Constitution. The judgments on appeal, however, neither spoke to the issues raised in the motion nor does the record indicate the matter was ever raised before the trial court. In effect, therefore, the pleading was an "original motion," raising issues for the first time before this court that were never subject to litigation, let alone adjudication, in the trial court.

{¶9} We acknowledge that the waiver doctrine is discretionary and an appellate court may review constitutional issues not raised in the trial court for plain error. See *In re M.D.*, 38 Ohio St.3d 149 (1988), syllabus. Nevertheless, appellant's motion was filed pursuant to an appeal over which this court lacks statutory jurisdiction. We are aware of no authority or procedure that permits a party to, by virtue of filing a motion, vest original jurisdiction in an appellate court for purposes of resolving a unique constitutional question. To the extent this court lacks jurisdiction to address the merits of the judgment rejecting his DNA application, appellant has similarly failed to invoke *our*

jurisdiction to analyze the constitutionality of R.C. 2953.73(E)(1) under the doctrine of plain error.

{¶10} Both parties appear to acknowledge the underlying jurisdictional problem. Appellant concedes, in his motion challenging the constitutionality of R.C. 2953.73(E)(1), that he has filed a memorandum in support of jurisdiction with the Supreme Court; moreover, even though the state did not move to dismiss the instant appeal, its brief also recognizes appellant sought leave from the Supreme Court to appeal the very same judgment. And a review of the Supreme Court's docket reveals the matter is currently pending, awaiting decision. Appellant has accordingly pursued the proper statutory channels for obtaining review in the Supreme Court of Ohio. In light of the foregoing considerations, we hold this court is without subject matter jurisdiction to review the trial court's judgment rejecting his application for DNA testing.

{¶11} Further, as discussed at the outset of this opinion, appellant also appeals the trial court's order denying appellant's motion for a complete copy of the DNA test results. With respect to this issue, R.C. 2953.72 provides that any potential applicant for DNA testing must make various written statutory "acknowledgments" in a form prescribed by the Attorney General. One such acknowledgment, set forth under R.C. 2953.72(A)(8) provides:

{¶12} That the acknowledgment memorializes the provisions of sections 2953.71 to 2953.81 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[.]* (Emphasis added.)

{¶13} Furthermore, R.C. 2953.72(A)(9) provides:

{¶14} 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[.]* (Emphasis added.)

{¶15} The foregoing subsections provide additional foundation for our conclusion that this court lacks jurisdiction to review the lower court's rejection of appellant's application. They further indicate that a party is precluded from seeking review of any ancillary exercise of a trial court's discretion in the course of proceedings relating to an application for DNA testing, e.g., the denial of a motion for a complete copy of DNA test results. To the extent, however, any such issue is subject to appellate review in a death penalty case, we conclude that R.C. 2953.73(E)(1) confers specific subject matter jurisdiction with the Supreme Court of Ohio. We therefore hold this court additionally lacks jurisdiction to review the trial court's denial of appellant's request for a complete copy of the DNA test results.

{¶16} For the reasons discussed in this memorandum opinion, the instant appeal is sua sponte dismissed.

DIANE V. GRENDALL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.

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

FILED
COURT OF APPEALS

TYRONE LEE NOLING,

JUN 22 2015

Defendant-Appellant.

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

For the reasons discussed in the memorandum opinion, the instant appeal is sua sponte dismissed.

Costs to be taxed against appellant.

All pending motions are hereby overruled as moot.


JUDGE CYNTHIA WESTCOTT RICE

FOR THE COURT

FILED
COURT OF APPEALS

JUN 26 2015

LINDA K FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

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

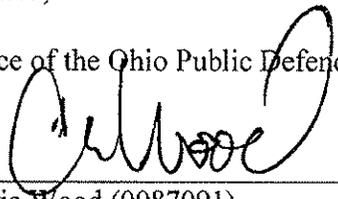
State of Ohio,	:	Case No. 2014 PA 00045
Plaintiff-Appellee,	:	Trial Court Case No. 95 CR 220
vs.	:	
	:	Regular calendar
Tyrone Noling,	:	
Defendant-Appellant.	:	This is a death penalty case.

MOTION TO STRIKE

On June 1, 2015, this Court requested that Mr. Noling explain why his appeal should not be dismissed for lack of jurisdiction. (June 1, 2015 Show Cause Order). This Court stated that Mr. Noling had 15 days from the date of the order to respond. Thus, his response was due on or before June 16, 2015. On June 10, 2015, Mr. Noling filed his response to the order to show cause. On June 22, 2015, this Court issued an opinion dismissing Mr. Noling's appeal. Memorandum Opinion, June 22, 2015. In its opinion, this Court wrote that "Appellant filed no response." *Id.* Mr. Noling requests that this Court re-issue its memorandum opinion without this sentence as Mr. Noling did file a response.

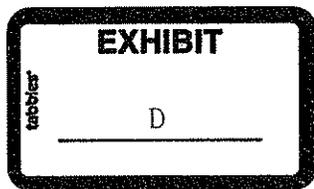
Respectfully submitted,

Office of the Ohio Public Defender



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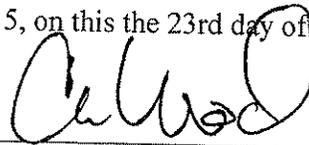
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Motion to Strike* 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, 16th Floor, Columbus, Ohio 43215, on this the 23rd day of June, 2015.



Carrie Wood (0087091)
Assistant State Public Defender

Co-Counsel for Tyrone Noling